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A PERRY, PERRY POOR POLICY PROMOTING PREJUDICE REBUKED
BY THE REALITY OF THE ROMER RULING:
THOMASSON V. PERRY

I. INTRODUCTION

The concept of banning homosexuals from the military is not a novel one.¹ The policy that exists today is very similar to the unwritten policy that the U.S. armed forces have used for decades.² Since the imposition of the policy, the military and Congress have revised it from one that expressly prohibited sodomy to one that prohibits homosexuals from participating in military service, which is the current policy located in the newly enacted Policy Regarding Homosexuality in the Armed Services ("1993 Act").³

The United States Court of Appeals for the Fourth Circuit addressed the issue of homosexuals in the military in the context of the Equal Protection Clause in *Thomasson v. Perry*.⁴ In response to a newly enacted 1993 Act, the Department of Defense (DOD) implemented a revised directive ("1993 DOD Directive").⁵ Just one day after the military issued the 1993 DOD Directive, Lieutenant Paul G. Thomasson wrote and delivered a letter to four Admirals that stated, "I am gay."⁶ The Navy immediately initiated discharge proceedings.⁷ The Naval Board of Inquiry proceeded on the basis that Thomasson's statement, in and of itself constituted "homo-

1. See Alan N. Yount, Comment, *Don't Ask, Don't Tell: The Same Old Policy in a New Uniform* 12 J. CONTEMP. HEALTH L. POL'Y 215, 216 (1995) ("As early as 1778, the United States military was discharging servicemen on the basis of homosexuality.") For a discussion of the history of the ban on homosexuals in the military, see *infra* notes 36-49 and accompanying text.

2. See Yount, *supra* note 1, at 217 ("The 'Don't ask, Don't tell' policy differs little from the old policy.") For a discussion of the differences between the former unwritten policy and the current law and directives, see *infra* notes 36-66 and accompanying text.

3. 10 U.S.C. § 654 (1994) (prohibiting service by those members who "engage in, attempted to engage in, or solicited another to engage in a homosexual act" or who stated that they were homosexual).

4. 80 F.3d 915 (4th Cir.) (en banc), *cert. denied*, 117 S. Ct. 358 (1996).

5. See *id.* at 920 (requiring release from military service if officer has engaged in homosexual activity, has married or attempted to marry individual of same sex or has made statement indicating inclination to engage in homosexual activity).

6. See *id.* (maintaining that statement of one's homosexuality demonstrates one's propensity to engage in homosexual acts, which, according to DOD Directive, demands release from military service); see also *Thomasson v. Perry*, 895 F. Supp. 820, 823 (E.D. Va. 1995) (indicating that homosexuality was "more deeply rooted than all societal, religious, parental, or peer pressures can effect [sic]"), *aff'd en banc*, 80 F.3d 915 (4th Cir.), and *cert. denied*, 117 S. Ct. 358 (1996).

7. See Appellant's Brief at 8, *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996) (No. 95-2185). Within ten weeks the Navy's Board of Inquiry convened to hear Thomasson's case. See *id.* The Navy noted Thomasson's "enviable" service record

sexual conduct” under the 1993 Act and the revised 1993 DOD Directive.⁸ Specifically, the Board held that this statement gave rise to the presumption that Thomasson had a propensity or intent to engage in homosexual conduct.⁹ Thomasson surprisingly refused to rebut the presumption stating that he would “not go further in degrading [him]self by disproving a charge about sexual conduct that no one has made.”¹⁰ Consequently, two Naval boards unanimously agreed to discharge Thomasson.¹¹ By all reports, Thomasson served a distinguished career in the U.S. Navy for ten years.¹² On February 27, 1995, Thomasson filed an action seeking a permanent injunction and declaratory relief preventing the Navy from discharging him from active duty.¹³ Although the district court initially

and also acknowledged that the Board had no evidence that Thomasson ever engaged in “homosexual acts.” *Thomasson*, 895 F. Supp. at 823.

8. See Appellant’s Brief at 8, *Thomasson* (No. 95-2185) (equating Thomasson’s status as homosexual with prohibited conduct).

9. See *Thomasson*, 80 F.3d at 921 (holding that Thomasson had not adequately rebutted presumption that declaration of his homosexuality evidenced intent to engage in homosexual conduct). During the two-day hearing before the Board of Inquiry, Thomasson presented an expert who testified on the nature and meaning of the military policy, written and live testimony from fifteen witnesses who had worked with him during his ten-year career in the Navy and evidence of his service record. See *Thomasson*, 895 F. Supp. at 823.

10. *Thomasson*, 895 F. Supp. at 823, also explained why he wrote the letter. See *id.* First, as a matter of principle, he felt obligated to inform those he worked with about his sexual orientation. See Appellant’s Brief at 9, *Thomasson* (No. 95-2185). Second, because of his rank, record and conduct, he felt he was in a good position to dispel false stereotypes about homosexuals. See *id.*

11. See *Thomasson*, 80 F.3d at 921. The Board added that the statement “I am gay” gave rise to the presumption that Thomasson had a propensity or intent to engage in homosexual acts. See *id.* Because Thomasson failed to rebut the presumption, the court stated that the 1993 Act mandated his discharge. See *id.* After two hours of deliberation, the Board unanimously recommended Thomasson’s honorable discharge. See *id.* Later, a three-member board of review unanimously upheld the Board of Inquiry’s decision, and the Chief of Navy Personnel signed Thomasson’s discharge orders effective February 1995. See *id.*

12. See *id.* at 920. During this time, Thomasson consistently received the highest possible performance ratings as he worked under high-ranking military officers. Appellant’s Brief at 6, *Thomasson* (No. 95-2185). During his career, Thomasson worked as an intern for former Chairman of the Joint Chiefs of Staff, General Colin Powell. See *id.* at 6 n.5. He also served under five Navy admirals, an Air Force brigadier general and an Army lieutenant general. See *id.*

During his service, the military praised Thomasson as “a true ‘front runner’ who should be groomed for the most senior leadership in tomorrow’s Navy.” *Thomasson*, 80 F.3d at 920 (reciting evaluation of Rear Admiral Lee F. Gunn, senior Naval officer in charge of implementing Navy’s “don’t ask, don’t tell” policy). Other evaluations, even after Thomasson announced he was gay, stated that Thomasson “should be a first choice for Lieutenant Commander” and that Thomasson “[c]ommands the respect of his subordinates and seniors alike through honesty, integrity, and forthright communication.” Appellant’s Brief at 7, *Thomasson* (No. 95-2185).

13. See Appellant’s Brief at 10, *Thomasson* (No. 95-2185). The district court preliminarily enjoined the Navy from discharging Thomasson until the claims were resolved and the court issued a final order. See *id.*

granted a preliminary injunction, it ultimately granted the government's motion for summary judgment.¹⁴

Thomasson subsequently appealed the decision to the Fourth Circuit, where a panel voted to hear the case en banc.¹⁵ Thomasson alleged that the 1993 Act and the 1993 DOD Directive were unconstitutional, both facially and as applied.¹⁶ He argued that they contravened his Fifth Amendment guarantee of equal protection because the policies mandated his discharge solely on the basis of his status as a homosexual.¹⁷

This Note discusses the legal evolution of equal protection law and how the recent United States Supreme Court decision in *Romer v. Evans*¹⁸ affects the legality of the 1993 Act, which codifies the policy regarding military service of homosexuals.¹⁹ As background, Part II chronicles the evolution of the military ban against homosexuals, the Equal Protection

14. *See id.* The district court held that the 1993 Act and the 1993 DOD Directive did not violate the Equal Protection Clause of the Fifth Amendment. *See id.* The court reviewed Thomasson's equal protection challenge under a rational basis standard of review. *See Thomasson*, 895 F. Supp. at 827. Thomasson's challenge failed because the court determined that the "don't ask, don't tell" policy served a legitimate government purpose and that implementing the policy rationally furthered this governmental interest. *See id.* at 828. The Government claimed that the presence of homosexuals in the military undermines unit cohesion and jeopardizes military readiness. *See id.* Infringing on the privacy concerns of other service members, whom the military requires to live in close quarters, presents unnecessary sexual tension within a unit. *See id.* at 829.

15. *See Thomasson*, 80 F.3d at 921 (hearing oral argument in September 1995).

16. *See* Appellant's Brief at 13, *Thomasson* (No. 95-2185) (challenging 1993 Act and DOD Directive as unconstitutional under First and Fifth Amendments).

17. *See id.* In addition to Thomasson's equal protection claim, he argued that the 1993 DOD Directive violated the First Amendment Freedom of Speech Clause, both facially and as applied to him, because the 1993 DOD Directive operated to suppress speech on the basis of its content. *Thomasson*, 80 F.3d at 931-34. Thomasson also asserted that the 1993 Act targeted speech declaring one's homosexuality and, therefore, because the 1993 Act suppressed a specific category of speech, the 1993 Act must be examined on a compelling governmental interest standard. *See id.* at 931. The court first held that the 1993 Act did not target speech, but targeted conduct. *See id.* Hence, the use of speech as evidence of prohibited conduct was permissible and constitutional. *See id.* Second, the court stated that the 1993 Act did not distinguish between declared and undeclared homosexuals, but rather it distinguished service members on the basis of their conduct. *See id.* The declaration of homosexuality acts as evidence of one's propensity to engage in homosexual conduct. *See id.* at 932. "[S]ervice members who have never spoken about their sexual orientation are still subject to separation if they are found to have engaged or attempted to engage in homosexual acts." *Id.* (citing Policy Concerning Homosexuality in the Armed Forces, 10 U.S.C. § 654(b)(1) (1994)). Third, the court stated that service members have never had the same constitutional freedom of speech possessed by the civilian population. *See id.* at 933. The Supreme Court has asserted that "[s]peech that is protected in the civil population may . . . undermine the effectiveness of response to command." *Id.* (citations omitted) (quoting *Brown v. Glines*, 444 U.S. 348, 354 (1980)).

18. 116 S. Ct. 1620 (1996).

19. For a discussion of the evolution of the military ban against homosexuals in light of the Equal Protection Clause, see *infra* notes 97-239 and accompanying text.

Clause and relevant case law. Part II first details the history of the ban on homosexuals in the Armed Forces.²⁰ Next, Part II discusses the recent changes in the military policy towards homosexuals.²¹ Part II also presents the strict scrutiny, heightened scrutiny and rational basis tests that the Supreme Court has utilized in past equal protection challenges.²² Finally, Part II describes how various lower courts have struggled to explicate the constitutionality of the military policies banning homosexuals from military service.²³ Part III discusses the facts and analysis of the recent Supreme Court decision in *Romer*.²⁴ Next, Part IV narrates the Fourth Circuit's opinion in *Thomasson* and also emphasizes the differences between the majority opinion and the dissenting opinion.²⁵ Part V explores the effect of the *Romer* decision on a case challenging the constitutionality of the 1993 Act banning homosexuals from military service.²⁶ Specifically, Part V discusses the effect *Romer* has on the principles delineated in *Bowers v. Hardwick*.²⁷ Next, Part V asserts that the 1993 Act is unconstitutional under the heightened standards established in *Romer* because the government irrationally based the policy on prejudice, and therefore, the policy serves no legitimate governmental purpose.²⁸ Additionally, Part V discusses the appropriate level of deference that federal courts should give Congress in making military decisions when equal protection issues arise.²⁹ Finally, Part VI concludes that it is likely that the conflicting precedent among the circuits before the *Romer* decision will force the U.S. Supreme Court to address the constitutionality of the 1993 Act and specu-

20. For a discussion of the history of the ban on homosexuals in the Armed Forces, see *infra* notes 36-49 and accompanying text.

21. For a discussion of the recent enactment of the Policy Concerning Homosexuals in the Armed Forces, see *infra* notes 50-66 and accompanying text.

22. For a discussion of the standards used in Equal Protection Clause challenges, see *infra* notes 67-96 and accompanying text.

23. For a discussion of the lower court decisions that have addressed constitutional challenges to the ban on homosexuals in the military, see *infra* notes 97-116 and accompanying text.

24. For a discussion of the facts, holding and analysis of *Romer*, see *infra* notes 117-33 and accompanying text.

25. For a discussion of the majority and dissenting opinions in *Thomasson*, see *infra* notes 134-73 and accompanying text.

26. For a discussion of the *Romer* decision, as well as the projected effect the case will have on future causes of action questioning the constitutionality of the homosexual ban, see *infra* notes 174-212 and accompanying text.

27. 478 U.S. 186 (1986). For a discussion of *Romer's* effect on *Bowers*, see *infra* notes 174-93 and accompanying text.

28. For a critical discussion of the standard that courts should apply in future challenges to the 1993 Act under the Equal Protection Clause, see *infra* notes 194-212 and accompanying text.

29. For a discussion of the appropriate level of deference the courts should grant to Congress's findings, see *infra* notes 213-37 and accompanying text.

lates to what extent the Court will adopt the *Romer* standard in light of the deference that courts grant to Congress in making military policy.³⁰

II. BACKGROUND

The Equal Protection Clause is a crucial constitutional weapon wielded against discriminatory laws.³¹ The Supreme Court has delineated tests that define the range of constitutional protection a statute deserves when a person challenges it on equal protection grounds.³² Because of a lack of guidance from the Supreme Court, the lower courts applying these standards have used varying levels of the rational basis standard to decide equal protection challenges regarding the military policy on homosexuals.³³ In 1996, however, the Supreme Court, finally granted certiorari to hear an Equal Protection Clause challenge by a homosexual.³⁴ In doing so, the Court applied a heightened rational basis standard, thereby providing the lower courts with guidance when addressing the constitutionality of the military policy.³⁵

30. See *Cammermeyer v. Perry*, 97 F.3d 1235, 1239 (9th Cir. 1996) (affirming that discharge based solely on status is unconstitutional); *Able v. United States*, 88 F.3d 1280, 1296 (2d Cir. 1996) (finding military policy permitting separation from service based on statements impugning homosexuality to be permissible); *Meinhold v. United States Dep't of Defense*, 34 F.3d 1469, 1479 (9th Cir. 1994) (holding that discharge based solely on "statement prong" was unconstitutional). *But see Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir.) (en banc) (holding that 1993 Act is constitutional), *cert. denied*, 117 S. Ct. 358 (1996); *Steffan v. Perry*, 41 F.3d 677, 698 (D.C. Cir. 1994) (en banc) (holding that "statement prong" was permissible). For a discussion regarding the likely future of the 1993 Act, see *infra* notes 238-39 and accompanying text.

31. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 570 (4th ed. 1991) ("The government can classify persons or 'draw lines' in according benefits and burdens but in the creation of laws or applications of them allocations cannot be based on impermissible criteria or arbitrarily used to burden a group of individuals."); see also *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 270 (1977) (upholding zoning ordinance challenged on basis of racial discrimination because purpose and effect of law was not to exclude racial minority from residential neighborhood); *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (determining law that eliminated use of wooden buildings for hand laundries constituted impermissible racial classification).

32. For a discussion of the equal protection standard of review tests, see *infra* notes 67-96 and accompanying text.

33. For a discussion of lower court cases analyzing the military policy under a rational basis standard, see *infra* notes 97-116 and accompanying text.

34. See *Romer v. Evans*, 116 S. Ct. 1620, 1622 (1996) (accepting premise that homosexual discrimination claims were never addressed under Equal Protection Clause).

35. See *id.* For a discussion of the *Romer* case and the Court's application of the rational basis standard, see *infra* notes 117-27 and accompanying text.

A. *History of the Ban on Homosexuals in the Military*

The 1916 Articles of War was the first military document that prohibited assault with the intent to commit sodomy.³⁶ In 1920, the United States military revised the Articles of War to make sodomy an offense in and of itself.³⁷ Then, in the latter part of World War II, the military again revised its policy replacing the term “sodomist” with “homosexual.”³⁸ This was the first step toward a prohibition from participation in the military based solely on sexual orientation.³⁹

Because of inconsistent treatment of homosexuals in the military, the DOD issued a statement on October 11, 1949 that read: “Homosexual personnel, irrespective of sex, should not be permitted to serve in any branch of the Armed Services in any capacity, and prompt separation of known homosexuals from the Armed Forces be made.”⁴⁰ Ten years later, the DOD penned its first directive regarding administrative discharges for homosexual acts.⁴¹ The 1959 DOD Directive stated that “sexual perversion,” defined to include homosexual conduct and sodomy, deemed a service member unfit and, thus, was grounds for discharge.⁴²

36. See Articles of War of 1916, art. 93, 39 Stat. 650 (1916) (“Any person subject to military law who commits . . . assault with intent to do bodily harm, shall be punished as a court-martial may direct.”).

37. See SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT, A NATIONAL DEFENSE RESEARCH INSTITUTE STUDY 4 (1993) [hereinafter RAND REPORT] (citing Jeffrey S. Davis, *Military Policy Towards Homosexuals: Scientific, Historical and Legal Perspectives*, 131 MIL. L. REV. 73 (1991)). The Articles of War also expanded the definition of sodomy from anal penetration of a man or woman by a man to include oral copulation. See *id.* During World War II, the military administratively removed sodomists from service, while reserving a court martial for those sodomists who used force, who engaged in sexual acts with minors or whose partners were unable to consent due to impairment. See *id.* at 5.

38. See *id.* (noting that there were 24 revisions of policies regarding homosexuals within Army alone during World War II). There were several reasons for so many changes. See *id.* First, the branches of the military varied widely in their treatment of homosexuals. See *id.* Second, psychiatrists began developing “tests” to identify homosexuals, who at that time were considered to have a mental illness. See *id.* Third, the military determined that homosexuality could be a basis for denying entry into the service. See *id.*

39. See *id.* at 5-6 (stating that beginning of military restriction on homosexual service, even when no homosexual activity occurred, was based on widespread belief that those with “homosexual personality” are readily identifiable and military should bar such individuals at recruitment stage or separate upon discovery).

40. *Id.* at 6.

41. See Enlisted Administrative Separations, Department of Defense Directive 1332.14(H)(a) (1959) (codified as amended at 32 C.F.R. pt. 41, app. at 92 (1997)) (“Homosexual conduct of statement alleging one’s homosexuality is grounds for separation from service.”).

42. See RAND REPORT, *supra* note 37, at 7 (noting that military revised its directives in 1965 and permitted legal counsel for homosexual personnel who faced separation and were presenting their case before discharge board). In 1975, the military again revised its directives to state that “homosexual acts or other aberrant sexual tendencies” constituted conduct which was unsuitable for military service. See *id.*

Notwithstanding the antihomosexual military policy, during both World War II and the Korean War, the DOD re-enlisted discharged homosexual soldiers, who had not violated any code of conduct, for combat purposes.⁴³

In 1982, the military again revised its policy on homosexuality.⁴⁴ For the first time, the military officially stated, “[h]omosexuality is incompatible with military service.”⁴⁵ The 1982 DOD Directive required mandatory separation if a “member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act.”⁴⁶ The military also mandated discharge for service members who merely stated that they were

43. See RANDY SHILTS, CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE U.S. MILITARY, VIETNAM TO THE PERSIAN GULF 64-70 (1993) (“The military’s own statistics offer the most compelling evidence that the exigencies of wartime overrode the military’s usual antipathy for those with nonconforming sexual orientations.”). Between 1963 and 1966, prior to the heightened need for manpower, the Navy discharged approximately 1700 enlisted members in each year because of their homosexuality. See *id.* At the peak of the Vietnam buildup, however, the military discharged only 643 homosexuals. See *id.*

44. See RAND REPORT, *supra* note 37, at 7 (noting “incompatibility” language finally codifies unwritten policy). At the end of his term, President Jimmy Carter wrote a memorandum to Assistant Secretary of Defense Graham Clayton requesting that Clayton revise the policy to rid the inconsistent application of standards and procedures used against homosexual service members. Enlisted Administrative Separations, Department of Defense Directive 1332.14(H), 47 Fed. Reg. 10,162 (1982) (codified as amended at 32 C.F.R. pt. 41, app. at 87 (1997)). The DOD also instituted Directive 1332.30, which applied the policy regarding homosexuals in the military to commissioned officers. Separation of Regular Commissioned Officers, Department of Defense Directive 1332.30 (Mar. 2, 1982).

45. Enlisted Administrative Separations, 47 Fed. Reg. at 10,162. The 1982 DOD Directive further stated that:

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

Id. The 1982 DOD Directive also included several definitions:

(1) Homosexual means a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts; (2) Bisexual means a person who engages in, desires to engage in, or intends to engage in homosexual and heterosexual acts; (3) A homosexual act means bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires.

Id.

46. *Id.* The text of the 1982 DOD Directive regarding grounds for separation stated:

(C) A member shall be separated under this section if, but only if, one or more of the following approved findings is made:

homosexual or bisexual.⁴⁷ Additionally, the 1982 DOD Directive mandated discharge for service members who married or attempted to marry someone of the same sex.⁴⁸ This resulted in a complete ban of homosexuals from serving in the military.⁴⁹

B. *Implementation of President Clinton's "Don't Ask, Don't Tell, Don't Pursue" Policy*

On September 29, 1992, then presidential candidate Bill Clinton stated that he supported a "repeal of the ban on gays and lesbians serving

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- (1) The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are approved further findings that: (a) Such conduct is a departure from the member's usual and customary behavior; (b) Such conduct under all the circumstances is unlikely to recur; (c) Such conduct was not accomplished by use of force, coercion, or intimidation by the member during a period of military service; (d) Under the particular circumstances of the case, the member's continued presence in the Service is consistent with the interest of proper discipline, good order, and morale; and (e) The member does not desire to engage in or intend to engage in homosexual acts.
 - (2) The member has stated that he or she is a homosexual or bisexual unless there is a further finding that the member is not a homosexual or bisexual.
 - (3) The member has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the persons involved) unless there are further findings that the member is not a homosexual or bisexual and that the purpose of the marriage or attempt was the avoidance or termination of military service.

Id. 1332.14(H)(1)(C).

47. See *id.* 1332.14(H)(1)(C)(2) (noting introduction of statement prong). This prong has been the basis for the majority of challenges to the validity of the 1993 DOD Directive and the 1993 Act. For a further discussion of cases deciding the validity of the military policy regarding homosexuals, see generally *Able v. United States*, 88 F.3d 1280 (2d Cir. 1996); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir.) (en banc), cert. denied, 117 S. Ct. 358 (1996); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc); *Meinhold v. United States Dep't of Defense*, 34 F.3d 1469 (9th Cir. 1994); *Watson v. Perry*, 918 F. Supp. 1403 (W.D. Wash. 1996), *rev'd sub nom.*, *Holmes v. California Army Nat'l Guard*, 124 F.3d 1126 (9th Cir. 1997); *Selland v. Perry*, 905 F. Supp. 260 (D. Md. 1995), *aff'd*, 100 F.3d 950 (4th Cir. 1996), and cert. denied *sub nom.*, *Selland v. Cohen*, 117 S. Ct. 1691 (1997); *Cammermeyer v. Aspin*, 850 F. Supp. 910 (W.D. Wash. 1994), *appeal dismissed and remanded sub nom.*, *Cammermeyer v. Perry*, 97 F.3d 1126 (9th Cir. 1996); *Dahl v. Secretary of the United States Navy*, 830 F. Supp. 1319 (E.D. Cal. 1993).

48. See *Enlisted Administrative Separations*, 47 Fed. Reg. at 10,162 (3) (noting that marrying someone of same sex was and is illegal in all 50 states). For the full text of DOD Directive 1332.14, see *supra* notes 45-46.

49. See Melissa Wells-Petry, *Sneaking a Wink at Homosexuals? Three Case Studies on Policies Concerning Homosexuality in the United States Armed Forces*, 64 UMKC L. Rev. 1, 5 (1995) (noting that any litigation challenging constitutionality of 1981 homosexual exclusion policy resulted in unanimously upholding provision).

in the United States armed forces."⁵⁰ Not only did this statement garner the voting support of the homosexual community for Clinton, it was also the impetus for ten months of congressional debates, hearings and amendments on the subject of homosexual service in the military.⁵¹

After taking office in 1993, President Clinton announced an interim policy on gays in the military.⁵² First, the policy prohibited recruiting officers from inquiring into the sexual orientation of recruits.⁵³ Second, it required the military to remove homosexuals who had not engaged in homosexual acts, but who were in the process of separation proceedings from active duty and placed such homosexuals into the standby reserves on a nonpaying status.⁵⁴ President Clinton simultaneously ordered Secre-

50. Associated Press, *Chronology on Gays in the Military* (visited Feb. 16, 1998) <http://www.fc.net/~zarathus/discrim/gays_in_military.txt> ("Asked during the presidential campaign whether homosexuals should be allowed to serve in the military, Bill Clinton, says, 'Yes. I support repeal of the ban on gays and lesbians serving in the United States armed forces.'").

51. See Policy Concerning Homosexuality in the Armed Forces, 10 U.S.C. § 654 (1994) (stating that there is no constitutional right to serve in armed forces and that Congress retains full discretion to establish guidelines and qualifications for military service such as long standing prohibition against homosexual conduct); *Policy Concerning Homosexuality in the Armed Forces, 1993: Hearings Before the Senate Comm. on Armed Services*, 103d Cong. 261 (1993) [hereinafter *Senate Hearings on Military Policy Concerning Homosexuality*] (presenting psychiatric research confirming that unit cohesiveness is paramount in military readiness, effectiveness and organization); *Policy Implications of Lifting the Ban on Homosexuals in the Military, 1993: Hearings Before the House Comm. on Armed Services*, 103d Cong. 594-97 (1993) (statement of General Schwarzkopf) ("[I]n my years of military service I have experienced the fact that the introduction of an open homosexual into a small unit immediately polarizes that unit and destroys the very bonding that is so important for the unit's survival in time of war."); *Assessment of the Plan to Lift the Ban on Homosexuals, 1993: Hearings Before the Subcomm. on Military Forces and Personnel of the House Comm. on Armed Services*, 103d Cong. 4-5 (1993) [hereinafter *House Hearings on Assessment of Plan to Lift Ban on Homosexuals*] (concluding that new "don't ask, don't tell" policy allows individuals to engage in military service regardless of sexual orientation so long as homosexual status is not communicated); NAT'L DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1994, S. REP. NO. 103-112 (1993) (discussing need for prohibition of homosexuals and providing evidence of congressional prejudices against homosexuals); NAT'L DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1994, H.R. REP. NO. 103-200 (1993) (stating that prohibition against homosexual conduct is long standing and necessary element of military law).

52. See Associated Press, *supra* note 50 (stating that Clinton issued "don't ask, don't tell" policy on July 19, 1993 and dubbed it "an honorable compromise").

53. See *House Hearings on Assessment of Plan to Lift Ban on Homosexuals, supra* note 51, at 10 (statement of Les Aspin, Secretary of Defense) (explaining that potential recruits will no longer be asked or required to reveal whether they are homosexual, although they will, however, be informed of military's policy regarding service by homosexuals). Prior to this point, questions regarding a new recruit's homosexuality were routine and acted as a bar to enlistment. See RAND REPORT, *supra* note 37, at 5.

54. See *House Hearings on Assessment of Plan to Lift Ban on Homosexuals, supra* note 51, at 10 (statement of Les Aspin, Secretary of Defense) (stating that President Clinton enacted nonpaying status as temporary solution pending further reports on effect of homosexual enlistment in military).

tary of Defense Les Aspin to study the issue and draft an appropriate policy.⁵⁵ On July 19, 1993, President Clinton announced his compromise policy, coined “don’t ask, don’t tell, don’t pursue,” which allowed homosexuals to serve in the Armed Services as long as they kept their homosexuality a secret.⁵⁶

On September 9, 1993, however, the Senate passed the Policy Concerning Homosexuality in the Armed Forces, calling homosexuality an “unacceptable risk” to military morale.⁵⁷ On September 28, 1993, the House passed the same legislation.⁵⁸ A few days later, President Clinton, seemingly in retreat from his “don’t ask, don’t tell” policy, signed the bill into law.⁵⁹

55. *See id.* The interim policy would be effective until July 15, 1993, the date that the President requested a draft of an executive order from Secretary Aspin reflecting his findings on the policy. *See id.* at 267-68. Prior to enactment of the 1993 Act, the Senate debated and unanimously adopted an amendment to the Family and Medical Leave Act, 5 U.S.C. §§ 6381-6387 (1994), ordering a comprehensive review of the current military policy by the Secretary of Defense. *See House Hearings on Assessment of Plan to Lift Ban on Homosexuals, supra* note 51 at 267-68. The Senate also presented an amendment that would freeze existing military policy, but the amendment was rejected. *See id.* at 268. The approved amendment stated that the findings of the Secretary should be presented to the Senate no later than July 15, 1993. *See id.* Additionally, the Senate agreed to conduct their own hearings on the interim policy. *See id.*

56. *See Remarks Announcing the New Policy on Homosexuals in the Military*, PUB. PAPERS 1109 (July 19, 1993) (announcing Clinton’s short-lived policy furthering rights of homosexuals in military); Associated Press, *supra* note 50 (same).

57. *See Policy Concerning Homosexuality in the Armed Forces*, 10 U.S.C. § 654 (1994) (passing legislation with intent to discourage homosexuals from enlisting in armed forces). The approved bill permitted future Secretaries of Defense to reinstate the recruitment procedure that asked about the sexual orientation of recruits. *See id.*

58. *See Associated Press, supra* note 50 (noting that Clinton signed legislation within days).

59. *See* 10 U.S.C. § 654. Section 654 states:

(a) Findings. Congress makes the following findings: (1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces. (2) There is no constitutional right to serve in the armed forces. (3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces. (4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise. (5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense. (6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion. (7) One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members. (8) Military life is fundamentally different from civilian life . . . [and it] is characterized by its own laws, rules, customs, and traditions, including

In response, the DOD again revised its directive, although the revision was more progressive than the newly enacted legislation.⁶⁰ While the amended 1993 DOD Directive states that homosexuality is no longer a bar

numerous restrictions on personal behavior, that would not be acceptable in civilian society. (9) The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces. (10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty. (11) The pervasive application of the standards of conduct is necessary because members of the armed forces must be ready at all times for worldwide deployment to a combat environment. (12) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy. (13) The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service. (14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability. (15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability. (b) Policy. A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations: (1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that—(A) such conduct is a departure from the member's usual and customary behavior; (B) such conduct, under all circumstances, is unlikely to recur; (C) such conduct was not accomplished by use of force, coercion, or intimidation; (D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and (E) the member does not have a propensity or intent to engage in homosexual acts. (2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. (3) That the member has married or attempted to marry a person known to be of the same biological sex.

Id.

60. See Enlisted Administrative Separations, Department of Defense Directive 1332.14 (Dec. 21, 1993) (on file with *Villanova Law Review*) (stating that homosex-

to military service and permits discharge only when homosexual conduct has occurred, the 1993 Act is still based on the more prohibitive theme that homosexuality is incompatible with military service.⁶¹ The critical analysis of this Note will be limited, however, solely to the constitutionality of the 1993 Act.⁶²

The legislation's statement prong is the basis for most of the challenges to the 1993 Act.⁶³ The statement prong mandates the discharge of

ual conduct was basis for separation from military). The 1993 DOD Directive states that:

A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts. A member's sexual orientation is considered a personal and private matter, and is not a bar to continued service under this section unless manifested by homosexual conduct in the manner described in paragraph H.1.b.

Id.; see *Philips v. Perry*, 106 F.3d 1420, 1421 (9th Cir. 1997) (stating that orientation is not bar to service).

61. *Compare* Enlisted Administrative Separations, *supra* note 60 ("The Service member shall be . . . given the opportunity to rebut the presumption by presenting evidence demonstrating that he or she does not engage in, attempt to engage in, have a propensity to engage in, or intend to engage in homosexual acts."), with 10 U.S.C. § 654(a)(15) ("The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the higher standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.").

62. See *Thomasson v. Perry*, 80 F.3d 915, 921-31 (4th Cir.) (en banc) (noting that while both 1993 Act and DOD Directive were challenged in *Thomasson*, court limited its opinion to constitutionality of 1993 Act), *cert. denied*, 117 S. Ct. 358 (1996). Because the 1993 Act and the 1982 version of the DOD Directive are virtually identical, however, this Note utilizes decisions regarding the constitutionality of either the 1993 Act or the 1982 DOD Directive. *Compare* Enlisted Administrative Separations, Department of Defense Directive 1332.14, *supra* note 60 (removing express bar to service on basis of sexual orientation but equating statements that demonstrate propensity or likelihood to engage in homosexual acts with homosexual conduct), with Enlisted Administrative Separations, Department of Defense Directive 1332.14, 47 Fed. Reg. 10,162 (1982) (codified as amended at 32 C.F.R. pt. 41, app. at 87 (1997)) ("Homosexuality is incompatible with military service."). Although the 1982 DOD Directive and the 1993 Act are virtually identical, courts have ruled inconsistently on their constitutionality. *Compare* *Meinhold v. United States Dep't of Defense*, 34 F.3d 1469, 1479 (9th Cir. 1994) (holding that discharge based on statement of homosexuality is unconstitutional on equal protection grounds under 1982 DOD Directive), with *Thomasson*, 80 F.3d at 928 (holding that statement prong of 1993 Act is constitutional).

63. See generally *Thomasson*, 80 F.3d at 915-16 (holding that statement prong is not violation of due process rights); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc) (same); *Meinhold*, 34 F.3d at 1469 (stating that it is impermissible to conflate sexual status with military's ban on homosexual conduct); *Watson v. Perry*, 918 F. Supp. 1403 (W.D. Wash.) (same), *aff'd*, 124 F.3d 1126 (9th Cir. 1997); *Selland v. Perry*, 905 F. Supp. 260 (D. Md. 1995), *aff'd*, 100 F.3d 950 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1691 (1997) (upholding 1993 Act as constitutional); *Cammermeyer v. Aspin*, 850 F. Supp. 910 (W.D. Wash. 1994) (stating conduct and status not same, therefore, policy impermissible), *appeal dismissed and remanded sub*

service members who merely state their sexual orientation as either homosexual or bisexual.⁶⁴ Congress and the DOD decided that if a service member states his or her homosexuality, then that statement alone creates a presumption that the service member engages in or has a propensity to engage in homosexual conduct.⁶⁵ Legal challenges to the 1993 Act are based on the theory that the statement prong violates the Equal Protection Clause because the 1993 Act codifies prejudices against homosexuals merely for their sexual status.⁶⁶

C. *The Equal Protection Clause: The Supreme Court Speaks*

The Fifth Amendment states that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.”⁶⁷ Although this text does not include an express Equal Protection Clause, the Supreme Court has interpreted the word “liberty” to encompass the equal protection guarantee.⁶⁸ Combining the standards of this clause and the Equal

nom. Cammermeyer v. Perry, 97 F.3d 1235 (9th Cir. 1996); Dahl v. Secretary of the United States Navy, 830 F. Supp. 1319 (E.D. Cal. 1993) (same).

64. See 10 U.S.C. § 654(b)(2) (requiring discharge where “member has stated that he or she is a homosexual or bisexual, or words to that effect”); Enlisted Administrative Separations, DOD Directive 1332.14(H)(b)(2), *supra* note 60 (stating that member must be separated from military when member states that “he or she is a homosexual or bisexual, or words to that effect, unless there is a further approved finding that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, [or] has a propensity to engage in homosexual acts”).

65. See 10 U.S.C. § 654(a)-(b)(2) (requiring discharge “unless . . . the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts”); Enlisted Administrative Separations, DOD Directive 1332.14(H)(b)(2) *supra* note 60 (maintaining that statement of homosexual orientation “creates a rebuttable presumption that the Service member engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts” which can be rebutted “by presenting evidence demonstrating that he or she does not engage in [the above stated conduct]” and defining propensity to mean “more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts”).

66. See 10 U.S.C. § 654(a)(14) (finding that homosexuality is incompatible with military service). The 1993 Act lists Congress’s findings that homosexual conduct “creates an unacceptable risk” to the morale and discipline that are “the essence of military capability.” *Id.*; see *Romer v. Evans*, 116 S. Ct. 1620, 1628 (1996) (stating that prejudice is irrational basis for legislation); *Philips v. Perry*, 106 F.3d 1420, 1426 (9th Cir. 1997) (agreeing with *Meinhold*’s holding that discharge based on statement of orientation alone is unconstitutional); *Meinhold*, 34 F.3d at 1479 (stating that discharge based on orientation alone violates equal protection); *Cammermeyer*, 850 F. Supp. at 925 (finding “statement prong” unconstitutional because it violates equal protection and substantive due process rights).

67. U.S. CONST. amend. V.

68. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (finding that there is no Fifth Amendment Equal Protection Clause but noting that “discrimination may be so unjustifiable as to be violative of due process”); John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 20 (1992) (“Thus, through the process of judicial construction, the Bill of Rights has become a shield against in-

Protection Clause of the Fourteenth Amendment, the Supreme Court has created multiple tests for determining whether legislation that discriminates against a class is constitutional.⁶⁹ These standards include the strict scrutiny, heightened scrutiny and rational basis standards.⁷⁰

Under the strict scrutiny standard, courts are more likely to declare a law to be unconstitutional than under the other standards.⁷¹ In *Korematsu v. United States*,⁷² the Supreme Court stated that classifications based on race are immediately suspect and, thus, are subject to strict scrutiny.⁷³ The Court elaborated that “courts must subject [legal restrictions which

vidious discrimination by the federal government as well as a shield against the misuse of state power.”); see also *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (per curiam) (“Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.”); *Weinberger v. Wisenfeld*, 420 U.S. 636, 638 n.2 (1975) (stating that “Court’s approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment”); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 32 (1980) (stating that “the Court [has] held . . . that the Due Process Clause of the Fifth Amendment incorporates the Equal Protection Clause of the Fourteenth Amendment”); Kenneth L. Karst, *The Fifth Amendment’s Guarantee of Equal Protection*, 55 N.C. L. REV. 541, 562 (1977) (referring to “[F]ifth [A]mendment’s guarantee of equal protection”). But see Bradford Russell Clark, Note, *Judicial Review of Congressional Section Five Action: The Fallacy of Reverse Incorporation*, 84 COLUM. L. REV. 1969, 1970-75 (1984) (discussing history of “reverse incorporation” and stating it improperly goes beyond context of Fourteenth Amendment).

69. See *Memorial Hosp. v. Maricopa Co.*, 415 U.S. 250, 253 (1974) (“[W]e must first determine what burden of justification the classification created thereby must meet, by looking to the nature of the classification and the individual interests affected.”).

70. See, e.g., *Romer*, 116 S. Ct. at 1628 (redefining rational basis standard in holding that law must bear rational relationship to legitimate government interest in order to be valid under Equal Protection Clause); *Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (defining rational basis standard); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985) (developing stricter rational basis standard); *Craig v. Boren*, 429 U.S. 190, 210 (1976) (defining heightened scrutiny standard); *Korematsu v. United States*, 323 U.S. 214, 223 (1944) (defining strict scrutiny standard).

71. See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-6, at 1000 (2d ed. 1988) (discussing strict scrutiny standard as highest tier of equal protection review); Note, *The Constitutional Status of Sexual Orientation: Homosexuality As a Suspect Classification*, 98 HARV. L. REV. 1285, 1297 n.67 (1985) (arguing that courts should recognize homosexuals as suspect class and subject any discriminatory laws against homosexuals to heightened scrutiny beyond currently applied rational basis test); see also Harris M. Miller II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 810 (1984) (opining that homosexuality meets Court’s criteria for applying heightened scrutiny).

72. 323 U.S. 214 (1944).

73. *Id.* at 216 (signaling that classifications based on race or national origin must be held to higher standard). In *Korematsu*, the Court held that the military policy, which excluded Japanese-Americans from certain designated military areas during World War II, was permissible. See *id.* at 219. The Court held that because of the imperative need to separate disloyal patriots from certain locations on the west coast, the policy served compelling governmental interests and was, therefore, constitutional. See *id.* at 223.

curtail the civil rights of a single racial group] to the most rigid scrutiny."⁷⁴

Moreover, the Court held that the strict scrutiny standard only applies when a statute classifies a suspect class or impinges on one's fundamental rights.⁷⁵ The Supreme Court identified several factors that help to determine whether the class warrants suspect classification, however, none of these factors alone triggers suspectness.⁷⁶ The Court considers whether the group has no ability to effect the political process; has suffered under a history of discrimination; has unique disabilities based on "incorrect stereotypes" of abilities and merit; or has an immutable trait that was beyond the class member's control.⁷⁷ The courts have never labeled homosexuals as a suspect class.⁷⁸

74. *Id.*

75. *See id.* (recognizing that exclusion policy targeted racial group but was justified due to public necessity). In a leading Supreme Court case, Justice Stone announced two instances where strict scrutiny should apply. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938). First, when "prejudice against discrete insular minorities may . . . seriously . . . curtail the operation of those political processes ordinarily to be relied upon to protect minorities," heightened scrutiny shall apply. *See id.* Second, "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny." *Id.*

76. *See Miller, supra* note 71, at 812 (discussing criteria that Court uses to determine proper application of heightened scrutiny standard). Each factor alone is not determinative of whether a specific classification should be reviewed with heightened scrutiny. *See id.* Rather, evaluation on grounds of all four criteria is more dispositive. *See id.* For a discussion of the named criteria, see *infra* note 77 and accompanying text.

77. *See Miller, supra* note 71, at 812; *see also City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441-44 (1985) (asking whether group's defining characteristics relate to ability to contribute or participate in society and whether characteristic of group is beyond individual's control); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (examining whether group is politically powerless); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (asking whether group's defining characteristics are immutable and if group has suffered history of discrimination).

Thomasson argued that the court should apply strict scrutiny to the 1993 Act. "The conclusion that sexual orientation is a suspect classification is inescapable under the five factual considerations that the Supreme Court has articulated over the years to determine whether a particular class constitutes a 'discrete and insular minority.'" Appellant's Brief at 9, *Thomasson v. Perry*, 80 F.3d 915 (4th Cir.) (en banc) (No. 95-2185).

78. *See High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (holding that homosexuality is not suspect classification); *see also Ben-Shalom v. Marsh*, 881 F.2d 454, 465 (7th Cir. 1989) (deciding that homosexual orientation creates presumption of homosexual conduct); *Woodward v. United States*, 871 F.2d 1068, 1074 (Fed. Cir. 1989) (holding that concession of homosexual orientation equaled evidence of homosexual conduct); *Padula v. Webster*, 822 F.2d 97, 102 (D.C. Cir. 1987) (stating Federal Bureau of Investigation regulation could discriminate against homosexual conduct, but not orientation).

Comparatively, the enhanced scrutiny standard is less exacting than strict scrutiny.⁷⁹ In *Craig v. Boren*,⁸⁰ for example, the Supreme Court clarified the intermediate standard as applied to gender discrimination.⁸¹ The *Craig* Court stated that “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”⁸² The *Craig* Court held that the challenged statute did not meet this standard and, thus, was unconstitutional.⁸³

79. See DONALD E. LIVELY ET AL. CONSTITUTIONAL LAW: CASES, HISTORY, AND DIALOGUES 645 (1996) (stating that intermediate scrutiny, unlike strict scrutiny, will not always prove fatal for legislation).

80. 429 U.S. 190 (1976).

81. *Id.* at 199 (reiterating that statutory classifications that distinguish gender are suspect and call into question application of equal protection). In *Craig*, the Court was faced with deciding whether an Oklahoma statute that prohibited the sale of “nonintoxicating” beer (beer with low percentages of alcohol) to females under the age of 18 and males under the age of 21 was unconstitutional. *See id.* at 192. The Court relied on an earlier decision in which it unanimously decided that an Idaho law that gave preferential treatment to male estate administrators was unconstitutional. *See id.* at 197-204 (citing *Reed v. Reed*, 404 U.S. 71, 77 (1971)). The Court in *Craig* held that the Oklahoma statute impermissibly discriminated against males ages 18 to 20 and, therefore, was unconstitutional. *See id.* at 210.

82. *Id.* at 197; *see also* *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982) (creating presumption of invalidity for intentional sex classifications and striking down statute that prohibited male enrollment in state-supported nursing school); *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981) (focusing on “difference in fact” of men and women and upholding all-male draft as constitutional); *Lalli v. Lalli*, 439 U.S. 259, 265 (1978) (subjecting classifications based on illegitimacy to intermediate standard of review).

83. *Craig*, 429 U.S. at 210 (striking down Oklahoma statute as impermissible under Equal Protection Clause). Moreover, the Court has also applied heightened scrutiny to discrimination based on illegitimacy. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988) (“Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.”); *Lalli*, 439 U.S. at 275-76 (creating hybrid of rational basis and strict scrutiny to apply to discrimination based on illegitimacy).

In *Heller v. Doe*,⁸⁴ the Court reiterated its test under the rational basis standard.⁸⁵ This standard required a two-pronged analysis.⁸⁶ First, the *Heller* Court inquired as to whether the challenged classification served a legitimate governmental purpose.⁸⁷ If a legitimate governmental purpose existed, the Court then determined whether the discriminatory classification was rationally related to the legitimate governmental purpose.⁸⁸ In sum, the standard required that the classification be “rationally related to furthering a legitimate government interest.”⁸⁹ When the Court applied

84. 509 U.S. 312 (1993).

85. *Id.* at 320-21 (defining very deferential rational basis standard). In *Heller*, individuals with mental retardation challenged a statute because it included a distinction between individuals with mental illness and individuals with mental retardation. *See id.* at 318. For purposes of involuntary commitment proceedings, those with mental retardation were required to prove by “clear and convincing” evidence that the state should not commit them, while those with mental illness only had to prove their burden “beyond a reasonable doubt.” *See id.* The Court held the statute was constitutional and added that a classification

“must be upheld against [an] equal protection challenge if there is any reasonable conceivable state of facts that could provide a rational basis for the classification.”

A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. “[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.” A statute is presumed constitutional . . . and “the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,” whether or not the basis has a foundation in the record.

Id. at 320-21 (citations omitted) (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, 315 (1993); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

86. *See id.* (defining rational basis standard as requiring that governmental purpose be legitimate and that purpose rationally relate to furthering that purpose). For a discussion of this two-pronged analysis, see *infra* notes 87-90 and accompanying text.

87. *See Heller*, 509 U.S. at 320 (asking whether state’s higher burden on individuals with mental retardation was legitimate); *see also Cammermeyer v. Aspin*, 850 F. Supp. 910, 915 (W.D. Wash. 1994) (stating defendant’s belief and plaintiff’s concession that challenged classification serves legitimate governmental purpose of maintaining readiness and combat effectiveness of military forces), *appeal dismissed and remanded sub nom.*, *Cammermeyer v. Perry*, 97 F.3d 1235 (9th Cir. 1996). In *Cammermeyer*, a service member challenged the constitutionality of the 1982 Directive under the Equal Protection Clause. *See id.* at 912. She argued that while the military may have an interest in preserving unit cohesion, requiring discharge solely on the basis of a service member’s statement of one’s homosexuality was irrational. *See id.* at 915. The United States District Court for the Western District of Washington agreed and granted *Cammermeyer* summary judgment on the issue. *See id.* at 926.

88. *See Heller*, 509 U.S. at 320 (recognizing that achieving legitimate governmental purpose is inevitably accompanied by some inequality); *Cammermeyer*, 850 F. Supp. at 915 (asserting that discriminatory classification was not rationally related to serving legitimate governmental purpose, but rather was prejudicial).

89. *Heller*, 509 U.S. at 320 (“[A] State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification . . .”). The Court in *Heller*, however, did not rest on the state’s assertion that the legislation had a ra-

this standard, it presumed that the legislation in question was valid and required the person challenging the legislation to negate every conceivable basis that could support the legislation.⁹⁰ In *Heller*, the Court found that a legitimate interest in discriminating existed and that the means were rationally related to that interest, thus upholding the statute as constitutional.⁹¹

In *City of Cleburne v. Cleburne Living Center, Inc.*,⁹² the Supreme Court put some teeth into the rational basis test and created a heightened rational basis standard.⁹³ The Court stated that courts should not merely defer to a statute.⁹⁴ Instead, courts should actively review the record to determine whether the justifications for the statute were motivated by prejudice or bias against the regulated class.⁹⁵ If so, the court must invalidate the statute as unconstitutional.⁹⁶

tional basis. See *Dahl v. Secretary of the United States Navy*, 830 F. Supp. 1319, 1326-27 (E.D. Cal. 1993) (noting that Court in *Heller* "closely examined the record to determine whether the defendants' justifications for the legislation at issue in that case were in fact rationally based").

90. See *Heller*, 509 U.S. at 320 (citing *Lehnhausen*, 410 U.S. at 364).

91. See *id.* (giving state wide deference in its determination of legitimate and rational interests). For a discussion of other cases upholding statutes under a rational basis standard, see *Schweiker v. Wilson*, 450 U.S. 221, 230 (1980) (holding that denial of Supplemental Security Income benefits did not violate equal protection); *United States R.R. Bd. v. Fritz*, 449 U.S. 116, 174-75 (1980) (holding that social and economic legislation pertaining to railroad employee benefits was constitutional under Fifth Amendment); *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (upholding requirement of Foreign Service Act of 1980, 22 U.S.C. § 3921 (1994), that requires beneficiaries to retire at age sixty as unconstitutional and violative of Equal Protection Clause); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (declaring that grandfather provision protecting existing pushcart vendors does not violate Equal Protection Clause of Fourteenth Amendment).

92. 473 U.S. 432 (1985).

93. *Id.* at 446 (refusing to give government complete deference). *Cleburne* involved an equal protection challenge to the constitutionality of a city zoning ordinance. See *id.* at 435. The city council denied Cleburne Living Center (CLC), a group home for individuals with mental retardation, a special use permit to operate its facility. See *id.* at 437. CLC filed suit stating that the ordinance, which required a special permit for group homes, was unconstitutional under the Equal Protection Clause because it did not substantially further an important governmental interest. See *id.* The Court held that the legislation violated the Equal Protection Clause even under rational basis analysis. See *id.* at 448.

94. See *id.* at 446 (holding that court has duty to look beyond record when determining whether interest is truly legitimate and rational).

95. See *id.* (stating that courts should determine whether statute that regulates particular classes is valid as general matter).

96. See *id.* at 450 (illustrating case in which court invalidated statute that was motivated by prejudice).

D. *Gays in the Military: The Lower Courts' Struggle*

The Supreme Court did not specifically address homosexuality in an Equal Protection Clause context until the *Romer v. Evans* decision.⁹⁷ Prior to *Romer*, many courts interpreted *Bowers v. Hardwick* as addressing homosexuality within the equal protection context.⁹⁸ The courts have interpreted *Bowers* to mean that there is no fundamental right to engage in

97. See Kathleen M. Sullivan, *Decisions Expand Equal Protection Rights*, NAT'L L.J., July 29, 1996, at C7 (noting that *Romer* is first case in which Supreme Court extended Equal Protection Clause analysis to homosexuals).

98. See *id.* (discussing Court's misplaced reliance on *Bowers* when examining homosexual challenge to military policy); Cass R. Sunstein, *The Supreme Court 1995 Term: Foreward: Leaving Things Undecided*, 110 HARV. L. REV. 4, 68 (1996) (stating that *Bowers* has become known as "one of the most vilified decisions since World War II"); see also *Bowers v. Hardwick*, 478 U.S. 186, 186 (1986) (ruling that homosexuals have no constitutional right to engage in homosexual sodomy).

In *Bowers*, the police arrested Hardwick because he engaged in sodomy, an illegal act under Georgia statute. See *id.* Although the District Attorney decided not to press charges based on the evidence before him, Hardwick filed suit in the federal district court challenging the law as unconstitutional under the Due Process Clause of the Fifth and Fourteenth Amendments. See *id.* The Court held that homosexuals did not have a fundamental right to engage in sodomy, and therefore, laws criminalizing such conduct were constitutional. See *id.* at 196. The Court held that the right to engage in sodomy was not fundamental because it did not fall into either of the two categories that the Court had developed for determining a fundamental right. See *id.* at 191-92.

The Court in *Bowers* stated that the fundamental liberties category included rights that are "implicit in the concept of ordered liberty [such that] neither liberty nor justice would exist if [they] were sacrificed." *Id.* (citing *Palko v. Connecticut*, 302 U.S. 319 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969)). The Court also characterized fundamental liberties as those that are "deeply rooted in this Nation's history and tradition." *Id.* at 192 (citing *Moore v. East Cleveland*, 431 U.S. 494 (1977)). Because the right to commit sodomy fell into neither of these two realms, and because 25 of the states had sodomy laws, the Court decided not to expand fundamental rights to include a homosexual's right to engage in sodomy. See *id.* at 192-94. It remains unclear if and how the Supreme Court will apply *Bowers'* fundamental right analysis in the context of the military's policy on homosexual service members. See Sandy D. Baggett, Note, *Constitutional Law—Suspect Class Status and Equal Access to the Political Process Under the Equal Protection Clause of the Fourteenth Amendment—Laws Precluding Anti-Discrimination Legislation for Homosexuals*, 63 TENN. L. REV. 239, 244 (1995) (asking "whether there is a difference between homosexual conduct and homosexual orientation, and whether [*Bowers*] . . . applies to Equal Protection challenges"); see also *Meinhold v. United States Dep't of Defense*, 34 F.3d 1469, 1479 (9th Cir. 1994) (holding that there is no fundamental right to engage in homosexual sodomy); *Pruitt v. Cheney*, 963 F.2d 1160, 1165 (9th Cir. 1992) (conceding that military can discharge on basis of homosexual conduct); *Falk v. Secretary of the Army*, 870 F.2d 941, 947 (2d Cir. 1989) (holding that conduct-based discharge does not violate Equal Protection Clause); *Hatheway v. Secretary of the Army*, 641 F.2d 1376, 1382-84 (9th Cir. 1981) (holding that discharge for sodomy was permissible); *Beller v. Middendorf*, 632 F.2d 788, 811-12 (9th Cir. 1980) (stating that discharge for conduct is constitutional under Equal Protection Clause); *Cammermeyer v. Aspin*, 850 F. Supp. 910, 918-20 (W.D. Wash. 1994) (holding that 1982 DOD Directive permits discharge for conduct but not for status), *appeal dismissed and remanded sub nom. Cammermeyer v. Perry*, 97 F.3d 1235 (9th Cir. 1996).

homosexual conduct.⁹⁹ Numerous lower courts have addressed the issue of gays in the military, but because *Bowers* provided little guidance, the holdings of these courts are inconsistent.¹⁰⁰

In a recent case, *Able v. United States*,¹⁰¹ a district court held that the 1993 Act violated a homosexual's Fifth Amendment right to equal protection of the laws.¹⁰² In deciding whether the statement prong violated the

99. See *Bowers*, 478 U.S. at 192 (holding that there is no fundamental right to engage in homosexual sodomy); *Meinhold*, 34 F.3d at 1479-80 (holding that there is no fundamental right to engage in sodomy but adding that discharge based solely on homosexual status is unconstitutional); *Pruitt*, 963 F.2d at 1165 (conceding that military can discharge on basis of homosexual conduct); *Falk*, 870 F.2d at 947-48 (holding that conduct-based discharge does not violate Equal Protection Clause); *Hatheway*, 641 F.2d at 1382-84 (holding that discharge for sodomy was permissible); *Beller*, 632 F.2d at 811-12 (stating that discharge for homosexual conduct is constitutional under Equal Protection Clause); *Cammermeyer*, 850 F. Supp. at 918 (acknowledging that Act permits discharge for homosexual conduct). For a discussion of rights that the Court deemed fundamental, see *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969) (recognizing right to interstate travel as fundamental); *Baker v. Carr*, 369 U.S. 186, 292 (1962) (Frankfurter, J., dissenting) (recognizing right to vote and run for elective office as fundamental).

100. Compare *Meinhold*, 34 F.3d at 1479-80 (stating discharge based on orientation violated equal protection), *Able v. United States*, 968 F. Supp. 850, 852 (E.D.N.Y. 1997) (stating that *Romer* governed challenge to military policy on homosexuals), *Holmes v. California Army Nat'l Guard*, 920 F. Supp. 1510, 1534-36 (N.D. Cal. 1996) (holding 1993 Act, which punished service members who acknowledged that they were homosexual, was unconstitutional under First and Fifth Amendments), *rev'd*, 124 F.3d 1126 (9th Cir. 1997), *Thorne v. United States Dep't of Defense*, 916 F. Supp. 1358, 1368, 1372 (E.D. Va. 1996) (concluding that policy was "plainly a content-based restriction" on speech that violated First Amendment); *Cammermeyer*, 850 F. Supp. at 925 (stating that discharge based on orientation was unconstitutional); and *Dahl v. Secretary of the United States Navy*, 830 F. Supp. 1319, 1337 (E.D. Cal. 1993) (granting summary judgment to service member challenging 1982 Directive on equal protection grounds), *with Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir.) (en banc) (stating that discharge was permissible solely on basis of statement of homosexual orientation), *cert. denied*, 117 S. Ct. 358 (1996), *Steffan v. Perry*, 41 F.3d 677, 698 (D.C. Cir. 1994) (en banc) (stating that orientation is conduct and thus discharge was constitutional), *Watson v. Perry*, 918 F. Supp. 1403, 1413-15 (W.D. Wash. 1996) (holding discharge resulting from statement of orientation was permissible because it also implied conduct), *rev'd sub nom.*, *Holmes v. California Army Nat'l Guard*, 124 F.3d 1126 (9th Cir. 1997), *Richenberg v. Perry*, 909 F. Supp. 1303, 1313 (D. Neb. 1995) (upholding statement prong as constitutional because it is likely that individual engages or will engage in conduct), *aff'd*, 97 F.3d 256 (8th Cir. 1996), and *cert. denied*, 118 S. Ct. 45 (1997), and *Selland v. Perry*, 905 F. Supp. 260, 263, 267 (D. Md. 1995) (reasoning that statement of orientation and present homosexual relationship can lead to permissible discharge), *aff'd*, 100 F.3d 950 (4th Cir. 1996), and *cert. denied sub nom.* *Selland v. Cohen*, 117 S. Ct. 1691 (1997).

101. 968 F. Supp. 850 (E.D.N.Y. 1997).

102. *Id.* at 852 (agreeing that *Romer* governed and that policy was clearly prejudicial, and therefore, policy was unconstitutional). In *Able*, six homosexuals challenged the 1993 Act under both the First and Fifth Amendments. See *id.* (discussing earlier district court ruling which held that plaintiffs did not have standing to sue under § 654(b)(1) of 1993 Act, but which held that subsection (b)(2) violated plaintiffs' right to free speech). On appeal, the United States Court of Appeals for the Second Circuit overruled the standing decision and re-

Equal Protection Clause, the court reiterated the Supreme Court's holding in *Romer* that "government discrimination against homosexuals in and of itself violates the constitutional guarantee of equal protection."¹⁰³ The *Able* court continued: "Implicit in this holding is a determination that such discrimination, without more, is either inherently irrational or invidious."¹⁰⁴ The court looked at the government's proffered reasons for the Act—unit cohesion, privacy and sexual tension—and held that these justifications are not legitimate government interests, rather they are prejudicial.¹⁰⁵

In *Meinhold v. United States Department of Defense*,¹⁰⁶ the Ninth Circuit held that the 1982 DOD Directive, which prohibited homosexuals who engaged in homosexual conduct from service, was constitutionally permissible when it regulated conduct.¹⁰⁷ The court, however, found that the pertinent issue was the constitutionality of the statement prong.¹⁰⁸ The

mandated the case to determine whether the statement prong of the 1993 Act violated the plaintiffs' equal protection rights. *See Able v. United States*, 88 F.3d 1280, 1300 (2d Cir. 1996) (remanding case to determine if policy limits speech and equal protection rights).

103. *Able*, 968 F. Supp. at 852 (citing *Romer v. Evans*, 116 S. Ct. 1620, 1627-28 (1996)).

104. *Id.* The court went on to state that the 1993 Act explicitly applied solely to homosexuals. *See id.* at 855. Additionally, the court noted prominent military officials who have vouched for the ability of homosexuals to serve well within the military. *See id.* (citing General Norman Schwartzkopf's statement that "homosexuals have served in the past and have done a great job serving their country" in Senate hearings on military policy concerning homosexuality).

105. *See id.* at 858-61 (relying on *Romer* decision to state that prejudicial acts are unconstitutional). First, the court rejected the unit cohesion rationale because it catered to the prejudicial attitudes of heterosexual service members and, thus, was not a legitimate reason to exclude homosexuals from service. *See id.* at 858-59 ("The private prejudices of heterosexual service members are illegitimate reasons for government-sanctioned discrimination against gay and lesbian service members.") (citing *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996)). Second, the court stated that the privacy argument was equally troubling. *See id.* at 860. According to the court, the argument assumed that if homosexuals kept their sexuality a secret, rational beings would believe that there were no gay service members. *See id.* Additionally, the court reasoned that because the government has conceded that homosexuals are no more likely to violate the Uniform Code of Conduct than heterosexuals, such discrimination was not rationally related to privacy. *See id.* at 860-61. Third, the court ruled that the sexual tension argument was also unworkable because the policy was underinclusive, targeting only openly homosexual service members, not closeted homosexuals. *See id.* The court stated that the congressional reports overtly announced the prejudices of the government against homosexuals in the military, and because the 1993 Act was based on irrational prejudice, it violated the Equal Protection Clause. *See id.* at 862-64.

106. 34 F.3d 1469 (9th Cir. 1994).

107. *Id.* at 1478 & n.10 (noting that sodomy is prohibited under Uniform Code of Military Justice).

108. *See id.* at 1479 (noting that prong which punished based solely on status was troubling). Circuit Judge Rymer noted in his opinion that the "DOD contends that a statement admitting homosexuality under the regulation admits 'desire' and 'propensity' to commit homosexual acts. Arguably it does, in the abstract, because

court deduced that the statement prong required more than a mere expression of status, rather it required “a concrete . . . desire to commit homosexual acts despite their being prohibited.”¹⁰⁹ The court held that the prong was overinclusive because it discharged service members without proof that they violated any code of conduct, and thus, the military could not discharge service members “based solely on their revelations of homosexuality.”¹¹⁰

In *Cammermeyer v. Aspin*,¹¹¹ the plaintiff argued that the Army violated her equal protection rights by discharging her merely because she stated that she was a lesbian.¹¹² The United States District Court for the Western District of Washington held that the plaintiff’s discharge from the Army

the regulatory definition of ‘homosexual’ is a person who ‘engages in, desires to engage in, or intends to engage in homosexual acts.’” *Id.*

In *Meinhold*, Naval Petty Officer Volker Keith Meinhold announced, “[y]es, I am in fact gay” on ABC Nightly News. *See id.* at 1472. The DOD argued that the statement prong’s presumption in the 1982 Directive was constitutional because it is constitutional to conclude that homosexual conduct adversely affects the military. *See id.* at 1476. The DOD argued that, by simply stating his sexuality, Meinhold admitted to a “desire” or “propensity” to commit homosexual acts. *See id.* The court disagreed with this rationale. *See id.*

109. *Id.* at 1479. The Ninth Circuit explained its holding:

Nothing in the policy states that the presence of persons who say they are gay impairs the military mission. Rather, the focus is on prohibited conduct and the person who is likely to engage in prohibited conduct. Construing the regulation to reach only statements which manifest a fixed or expressed desire to commit a prohibited act not only coincides with the military’s concern for its mission, but gives content to “desire” apart from the defining characteristic or sexual orientation.

Id.

110. *Id.* at 1479-80.

111. 850 F. Supp. 910 (W.D. Wash. 1994), *appeal dismissed and remanded sub nom.*, *Cammermeyer v. Perry*, 97 F.3d 1235 (9th Cir. 1996).

112. *Id.* at 914, 922 (providing that plaintiff must supply evidence to rebut government’s rationale under stringent *Heller* standard). First, *Cammermeyer* offered several government reports stating that many homosexuals served in the military with distinction, and therefore, homosexuality was not incompatible with service, nor did it interfere with the military mission. *See id.* at 922. Second, *Cammermeyer* provided evidence that Congress’s prejudice fueled the belief that homosexuals affect discipline, good order and morale. *See id.* at 923 (noting evidence that largest reason for policy stems from nongay service member’s fears). Additionally, *Cammermeyer* stated that this rationale was the same rationale that the military presented to prevent African-Americans from entering the service. *See id.*; *see also* RAND REPORT, *supra* note 37, at 158-90 (discussing integration of African-Americans into military as analogy for homosexual integration). *Cammermeyer* relied on the Rand Report to rebut the contention that homosexuals had a negative effect on unit cohesion. *See Cammermeyer*, 850 F. Supp. at 922 (citing RAND REPORT, *supra* note 37, at 283 (“At present, there is no scientific evidence regarding the effects of acknowledged homosexuals on a unit’s cohesion and combat effectiveness. Thus, any attempt to predict the consequences of allowing them to serve in the United States military is necessarily speculative.”)). *Cammermeyer* also rebutted the alleged effect that homosexuals have on the privacy of heterosexuals, recruitment of military personnel and security. *See Cammermeyer*, 850 F. Supp. at 923-24.

violated her rights as guaranteed under the Equal Protection Clause.¹¹³ The court ruled that prejudice was the basis of the statement prong in the 1982 DOD Directive, and therefore, the prong violated the plaintiff's rights under the Equal Protection Clause.¹¹⁴ These inconsistent lower court holdings stem from a lack of guidance from the Supreme Court and from the varying rational basis standards applied in equal protection challenges.¹¹⁵ Fortunately, in *Romer*, the Supreme Court recently applied the equal protection analysis to a statute that discriminated against homosexuals.¹¹⁶

III. *ROMER V. EVANS*: THE SUPREME COURT TACKLES HOMOSEXUALITY AND THE EQUAL PROTECTION CLAUSE

During the 1996-1997 Term, in a 6-3 vote, the Supreme Court ruled that a Colorado statute banning homosexuals from having special rights to seek legal redress from discrimination was unconstitutional.¹¹⁷ In *Romer*,

113. See *Cammermeyer*, 850 F. Supp. at 926 (finding that discharge solely because of status was impermissible). Cammermeyer was an Army nurse who had 27 cumulative years of service in the Army and the National Guard. See *id.* at 912. During a top-secret security check, when asked about her sexual orientation, Cammermeyer stated she was a lesbian. See *id.* at 912-13. Six months later, the Army initiated discharge proceedings against her. See *id.* at 913.

114. See *id.* at 926 (ruling that policy was invalid because prejudice was real rationale behind 1982 DOD Directive). The court stated that courts should not defer to Congress in military matters without reviewing reasons behind legislation because "equal protection clause claims [have] traditionally been the domain of the federal courts to scrutinize classifications challenged on equal protections ground." See *id.* at 915-16. Additionally, the court applied an active rational basis standard and stated that "[w]hile it is true that, under *Heller*, the government policymaker is not required to submit evidence to justify its policy, and may offer only 'rational speculation' to explain the discriminating classification, the Court remains obligated to determine whether there is a rational basis for the policy." See *id.* at 917. The court acknowledged that while the military may discharge a service member for homosexual conduct under *Bowers*, there is a distinction between status and conduct. See *id.* at 918. "[I]t is inherently unreasonable to presume that a certain class of persons will violate the law solely because of their orientation or status." See *id.* at 919.

115. Petitioner's Brief at 25-30, *Thomasson v. Perry*, 117 S. Ct. 358 (1996) (noting inconsistent application of precedent to issue of gays in military). For a discussion of inconsistencies among lower courts, see *supra* note 100 and accompanying text.

116. *Romer v. Evans*, 116 S. Ct. 1620, 1629 (1996) (striking down Colorado's Amendment Two as unconstitutional).

117. See *id.* at 1623, 1629 (holding statute that prohibits legislative, executive or judicial action to protect homosexuals is unconstitutional because it does not further proper end, but instead makes them unequal). Justice Kennedy delivered the opinion for the majority and was joined by Justices Stevens, O'Connor, Souter, Ginsburg and Breyer. See *id.* at 1623. Justice Scalia wrote a scathing dissent in which Chief Justice Rehnquist and Justice Thomas joined. See *id.* at 1629.

The plaintiffs were homosexuals who alleged that they would be subjected to "immediate and substantial risk of discrimination" because of their sexuality if the Court enforced Colorado's Amendment Two. See *id.* at 1624. Several municipalities and government entities joined in the action because they sought to protect

the Court applied a heightened rational basis standard to Colorado's Amendment Two, which stated in part: "Neither the State of Colorado, . . . [nor any governmental entity] shall . . . adopt . . . any statute, . . . or policy whereby homosexual . . . orientation, conduct, practices or relationships shall constitute . . . any minority status, quota preferences, protected status or claim of discrimination."¹¹⁸ The Supreme Court held that Amendment Two violated the Equal Protection Clause for two reasons.¹¹⁹ First, the Court stated that Amendment Two was simultaneously both too broad and too narrow.¹²⁰ Second, the Court found that Amendment Two was so broad that the only explanation for its creation was prejudice against homosexuals.¹²¹

Justice Kennedy, writing for the Court, commenced the opinion with the famous quote that "the Constitution 'neither knows nor tolerates classes among citizens.'¹²² The Court ruled that Amendment Two withdrew from homosexuals specific legal protection afforded to all others who are injured by discrimination, and thus, Amendment Two violated the Equal Protection Clause.¹²³ In reaching this conclusion, the Court

homosexuals from discrimination and they asserted that Amendment Two threatened the progress of their actions toward protecting homosexuals from discrimination. *See id.*

The relevant text of Amendment Two reads as follows:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

COLO. CONST., art. II, § 30(b) (1992).

118. *Romer*, 116 S. Ct. at 1623.

119. *See id.* at 1629. For a discussion of the Court's analysis in *Romer*, see *infra* notes 122-33 and accompanying text.

120. *See Romer*, 116 S. Ct. at 1628 (stating that law which makes it more difficult for one group to seek aid from government violates equal protection). The Court held that Amendment Two classified a narrow group of persons based on a single trait, then it denied them any and all protection available to them under the Constitution. *See id.*

121. *See id.* at 1628-29 (stating that Amendment Two inflicts injuries that cannot be rationally related to legitimate end). The Court stated that, the amendment raises the "inevitable inference that . . . [it] is born of animosity toward the class of persons affected." *Id.* at 1628. "Amendment 2 [cannot be said to be] directed to any identifiable legitimate purpose or discrete objective. It is a status-based . . . classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Id.* at 1629.

122. *Id.* at 1623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* *Brown v. Board of Educ.*, 347 U.S. 483 (1954)).

123. *See id.* at 1625 (holding that Amendment Two puts homosexuals in "solitary class with respect to transactions and relations"). The State of Colorado argued that the amendment simply "puts gays and lesbians in the same position as all other persons . . . by denying them special rights." *Id.* at 1624. The Court rejected

held that Amendment Two barred homosexuals from seeking legal protection in all spheres of life.¹²⁴ The Court held that Amendment Two failed to serve a legitimate government purpose because a “law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”¹²⁵ Furthermore, the Court ruled that the Amendment Two was inevitably borne from an animus towards homosexuals because the policy did not further a legitimate governmental interest.¹²⁶ The Court held that because Amendment Two was based on status and “undertaken for its own sake,” it was unconstitutional.¹²⁷

this argument and discussed the drastic change in legal status this amendment had on homosexuals. *See id.* at 1624-26. Prior to enactment of the amendment, local and state governments implemented detailed statutory schemes that countered discrimination in public accommodations and enumerated a wide group of people, including homosexuals and bisexuals, who were protected by these antidiscrimination laws. *See id.* (citing ASPEN, COLO., MUN. CODE § 13-98(a)(1) (1977); BOULDER, COLO., REV. CODE §§ 12-1-1 to 12-1-4 (1987); DENVER, COLO., REV. MUN. CODE art. IV, §§ 28-91 to 28-119 (1991); COLO. REV. STAT. §§ 24-34-401 to 707 (1988 & Supp. 1995)).

124. *See id.* (stating that Amendment Two’s effect on private life and in government settings is far reaching). Amendment Two abolished any specific legal protection homosexuals had in existing ordinances in “all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment.” *Id.* at 1626.

125. *Id.* at 1628. Ordinarily, the Court noted, they would sustain legislation that advanced a legitimate governmental interest, even if the interest disadvantaged a group or its rationale seemed tenuous. *See id.* at 1627 (citing *New Orleans v. Dukes*, 427 U.S. 297, 304-05 (1976) (stating that tourism benefits justified classification favoring pushcart vendors of certain longevity); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 490 (1955) (assuming that health concerns justified law favoring optometrists over opticians); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 113 (1949) (holding that potential traffic hazards justified exemption of vehicles advertising owner’s products from general advertising ban); *Kotch v. Board of River Port Pilot Comm’rs*, 330 U.S. 552, 563 (1947) (upholding licensing scheme that disfavored persons unrelated to current river boat pilots justified by possible efficiency and safety benefits of closely knit pilotage system)).

126. *See id.* at 1628-29 (“If the constitutional conception of “equal protection of the laws” means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” (quoting *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973))).

The State of Colorado argued that the rationale behind Amendment Two was to give citizens freedom to associate and to give those citizens, who have a personal or religious objection to homosexuality, their rights due under the Constitution. *See id.* at 1629. The Court also rejected this rationale and stated that legislation which classified individuals for the state’s sake was impermissible under the Equal Protection Clause. *See id.*

127. *See id.* (“[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment” (quoting *The Civil Rights Cases*, 109 U.S. 3, 24 (1883))).

The Court's opinion was harshly criticized in Justice Scalia's dissent.¹²⁸ Justice Scalia advocated for the application of a looser rational basis standard, and he took issue with the majority's failure to mention the Supreme Court's precedent in *Bowers*.¹²⁹ He argued that Amendment Two would not deprive homosexuals of legal relief in the event of private and public discrimination, and he also disagreed with the majority's finding that there was no legitimate rational basis for the substance of Amendment Two.¹³⁰ Finally, Justice Scalia condemned the animus argument purported by the majority for two reasons.¹³¹ First, he argued that be-

128. *See id.* at 1629 (Scalia, J., dissenting) (stating that Court misconstrued Amendment Two as desire to harm homosexuals instead of modest attempt to preserve traditional sexual mores).

129. *See id.* (Scalia, J., dissenting) (stating that Court ignored its earlier holding in *Bowers* when it stated "homosexual[s] cannot be singled out for disfavorable treatment"). Additionally, Justice Scalia asserted that the Court was wrong to hold that discrimination against "homosexuality is as reprehensible as racial or religious bias." *Id.* (Scalia, J., dissenting). Justice Scalia added that because the Constitution did not address this issue, the issue should be left open to the political process, which included Coloradans. *See id.* at 1631-34 (Scalia, J., dissenting). Justice Scalia added that:

Today's opinion has no foundation in American constitutional law, and barely pretends to. The people of Colorado have adopted an entirely reasonable provision which does not even disfavor homosexuals in any substantive sense, but merely denies them preferential treatment. Amendment 2 is designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans, and is not only an appropriate means to that legitimate end, but a means that Americans have employed before. Striking it down is an act, not of judicial judgment, but of political will. I dissent.

Id. at 1637 (Scalia, J., dissenting).

130. *See id.* at 1629-31 (Scalia, J., dissenting) (stating that Amendment Two only bans special treatment of homosexuals). Justice Scalia relied on the reasoning employed by the Supreme Court of Colorado in deciding on the constitutionality of Amendment Two. *See id.* at 1630 (Scalia, J., dissenting). Justice Scalia further opined: "It is significant to note that Colorado law currently proscribes discrimination against persons who are not suspect classes, including discrimination based on age []; marital or family status []; and for any legal, off-duty conduct such as smoking tobacco" *Id.* (Scalia, J., dissenting) (citing *Evans v. Romer*, 882 P.2d 1335, 1346 n.9 (Colo. 1994) *aff'd*, 116 S. Ct. 1620 (1996)). Justice Scalia reasoned that because *Bowers* criminalizes homosexual conduct, states should be able to pass legislation that merely disfavored such conduct. *See id.* at 1631-32 (Scalia, J., dissenting). Justice Scalia also stated:

But assuming that, in Amendment 2, a person of homosexual "orientation" is someone who does not engage in homosexual conduct but merely has a tendency or desire to do so, *Bowers* still suffices to establish a rational basis for the provision. If it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct. Indeed, where criminal sanctions are not involved, homosexual "orientation" is an acceptable stand-in for homosexual conduct.

Id. at 1632 (Scalia, J., dissenting).

131. *See id.* at 1633 (Scalia, J., dissenting) (stating that Amendment Two did not exhibit hostility toward homosexuals and that it was democratic counter to homosexual's political power).

cause there was a history and tradition of prejudice against homosexuals in the United States, the animus argument was irrelevant.¹³² Second, he contended that because the homosexual community had the political power to achieve social acceptance, the referendum was an appropriate democratic measure whose constitutionality should not be challenged.¹³³

IV. ANALYSIS: *THOMASSON V. PERRY*

In an en banc decision, the Fourth Circuit considered whether the 1993 Act and its accompanying directives were under the Equal Protection Clause of the Fifth Amendment, both facially and as applied to a service member who stated he was gay.¹³⁴ In *Thomasson*, the Fourth Circuit resolved Thomasson's equal protection challenge by holding that the 1993 Act did not violate his equal protection rights.¹³⁵ The dissent, however, concluded that the 1993 Act was unconstitutional.¹³⁶

A. *The Court's Opinion*

The Fourth Circuit affirmed the holding of the United States District Court for the Eastern District of Virginia and stated that the circuit court must give Congress extreme deference in making rules and regulations affecting military life.¹³⁷ The circuit court held that the 1993 Act served

132. *See id.* (Scalia, J., dissenting) (adding that moral disapproval of homosexuality existed and that, even though this disapproval did not discriminate against homosexuals in Amendment, it prohibited homosexuals from being favored because of their sexual status).

133. *See id.* at 1634 (Scalia, J., dissenting) (stating that homosexuals have right to use political power to achieve full social acceptance of homosexuality and it is subject to lawful, democratic measures to counter it). Justice Scalia discussed the political power of homosexuals and stated that it was "much greater than their numbers" because homosexuals disproportionately reside in certain neighborhoods and care about political issues, specifically gay-rights issues, more than the general public. *See id.* (Scalia, J., dissenting).

134. *Thomasson v. Perry*, 80 F.3d 915, 919 (4th Cir.) (en banc) (concluding that military policy toward homosexuals was constitutional and plaintiff's honorable discharge was appropriate), *cert. denied*, 117 S. Ct. 358 (1996).

135. *See id.* at 931 (holding that 1993 Act is "legitimate . . . match of ends and means that withstands . . . equal protection challenges"). For a discussion of the facts and ruling of *Thomasson*, see *supra* notes 4-17, *infra* notes 134-73 and accompanying text.

136. *See Thomasson*, 80 F.3d at 954 (Hall, J., dissenting) (noting that power of military to control speech is "exceedingly narrow"). For a discussion of Judge Hall's dissenting opinion in *Thomasson*, see *infra* notes 164-73 and accompanying text.

137. *See Thomasson*, 80 F.3d at 925 (noting that courts should defer to Congress because they have task of balancing rights of servicemen against needs of military). The majority focused on the effect of the 1993 Act and not the 1993 Directive. *See id.* Circuit Judge Luttig, joined by Judges Russell, Widener, Wilkins, Hamilton and Williams, concurred with the court's opinion, agreeing that the 1993 Act was constitutional and did not violate the Equal Protection Clause. *See id.* at 949 (Luttig, J., concurring). Nevertheless, the judges felt an analysis of the DOD's 1993 Directive was also necessary. *See id.* at 935-49 (Luttig, J., concurring).

the legitimate governmental purpose of maintaining unit cohesion.¹³⁸ Similarly, the court ruled that the presumption that homosexuals had a propensity or intended to engage in homosexual acts was indeed rational.¹³⁹

1. *Judicial Deference to Military Cases*

In reviewing the 1993 Act, the Fourth Circuit noted that separation of powers principles and Supreme Court precedent mandated a level of deference to congressional decisions on military matters.¹⁴⁰ The court discussed the thorough democratic process involved in creating both the 1993 Act and the revised 1993 DOD Directive.¹⁴¹ The court then noted

The concurring judges concluded that the DOD did exceed its authority in implementing the 1993 Act when it revised its directives changing the "desires" language to "propensity," and therefore, the court should have invalidated the DOD 1993 Directive as unconstitutional. *See id.* at 941-42 (Luttig, J., concurring). Chief Judge Luttig deduced that Congress enacted the 1993 Act based on the belief that the new policy did not lift the ban on homosexuals in the military, thereby essentially codifying the ban against homosexuals serving in the military. *See id.* at 936 (Luttig, J., concurring). Chief Judge Luttig opined that when the DOD subsequently revised its directive and redefined the statutory term "propensity," the DOD created a "sanctuary for known homosexuals whom the military determine[d] were] not likely to engage in homosexual acts." *See id.* at 941 (Luttig, J., concurring). Therefore, the concurring judges decided that the DOD overstepped its authority by redefining the policy enacted by Congress. *See id.* at 942 (Luttig, J., concurring).

138. *See id.* at 929-30 ("Section 654(b) thus accommodates the reasonable privacy concerns of heterosexual service members . . .").

139. *See id.* at 930 (stating that "the legislature was certainly entitled to presume that a service member who declares that he is gay has a propensity to engage in homosexual acts").

140. *See id.* at 924-27 (recognizing that military has most knowledge of issue and is best suited to examine it); *see also* *Weiss v. United States*, 510 U.S. 163, 177 (1994) ("[T]he Constitution contemplates that Congress has 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.'" (quoting *Chappell v. Wallace*, 462 U.S. 296, 301 (1983))); *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981) ("[J]udicial deference to [a] congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."); *see, e.g.*, *Perpich v. Department of Defense*, 496 U.S. 334, 338-39 (1990) (challenging Congress's power to order members of National Guard into service and finding power expressly in Constitution); *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988) (recognizing presidential authority to control and classify access to national security information); *Parker v. Levy*, 417 U.S. 733, 744-45 (1974) (upholding Congress's ability to regulate conduct under Uniform Code of Military Justice); *Orloff v. Willoughby*, 345 U.S. 83, 90 (1953) (upholding executive discretion in granting military commission).

141. *See Thomasson*, 80 F.3d at 921-23 (explaining that 1993 Act was compromise between executive and legislative branches). A memorandum from President Clinton to Secretary Aspin directed the Secretary to conduct a study and recommend a policy revising the established military ban on homosexuals. *See id.* at 921-22 (citing Memorandum on Ending Discrimination in the Armed Forces, PUB. PAPERS 23 (Jan. 29, 1993)). President Clinton implemented an interim policy that

that they could not do as Thomasson wished—set aside congressional efforts and substitute the court’s own judgment in its stead.¹⁴²

Aside from uprooting a thoroughly democratic process, the Fourth Circuit stated that courts must give great deference to the military decisions of the other two governmental branches because the Constitution explicitly assigned the power to govern military life to the executive and legislative branches.¹⁴³ The court stated that the “Founders failed to provide the federal judiciary with a check over the military powers of Congress and the President. . . . [and thus, t]he judiciary has no authority to make rules for the regulation of military forces.”¹⁴⁴ Additionally, the court cited

banned questions regarding a recruit’s sexual orientation. *See id.* at 922. Within one month, a Senator offered an amendment to the Family and Medical Leave Act requesting that the Senate overturn the interim policy and freeze the existing military ban on homosexuals. *See id.* The amendment failed, but the Senate agreed to review the existing policy on the ban. *See id.* Extensive review of the policy followed in both the Senate and the House of Representatives Armed Services Committees. *See id.* The DOD also worked diligently in reviewing the policy and commissioned a study regarding the existing policy, soliciting recommendations for change. *See id.* On July 19, 1993, President Clinton announced the revised policy as a result of the DOD’s review. *See id.* Both houses of Congress followed the proposal with extensive debate and ultimately voted on a new act. *See id.* at 923.

142. *See id.* (holding that “Act of Congress reflects a range of views that a judicial decision cannot replicate” and overturning those “solutions [without] a clear constitutional mandate would transform the judiciary into an instrument for disenfranchisement for all those who use the political process to register democratic will”). The court added:

What Thomasson challenges, therefore, is a statute that embodies the exhaustive efforts of the democratically accountable branches of American government and an enactment that reflects month upon month of political negotiation and deliberation. . . . Thomasson requests that we simply set aside these lengthy labors of the legislative process and supplant with our own judicial judgment the product of a serious and prolonged debate on a subject of paramount national importance.

Id.

143. *See id.* at 924 (stating that Constitution grants Congress and President control over military affairs). Article I, Section 8 of the Constitution states:

The Congress shall have Power . . . to pay the Debts and provide for the common Defence and general Welfare of the United States . . . [t]o declare War, . . . [t]o raise and support Armies, . . . [t]o provide and maintain a Navy; [t]o make Rules for the Government and Regulation of the land and naval Forces; . . . [t]o provide for organizing, arming, and disciplining, the Militia . . .

U.S. CONST. art. I, § 8. Similarly, Article II, Section 2 of the Constitution states that “[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States.” U.S. CONST. art. II, § 2.

144. *Thomasson*, 80 F.3d at 924. In *Weiss*, the Supreme Court stated that “the Constitution contemplates that Congress has ‘plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.’” *Weiss*, 510 U.S. at 177 (quoting *Chappell*, 462 U.S. at 301).

Similarly, the court noted that in *Rostker*, the Supreme Court stated that “judicial deference to [a] congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and

to precedent that maintained a high level of judicial deference in other challenges to congressional and executive decisions.¹⁴⁵

2. *The Equal Protection Clause*

The court rejected Thomasson's effort to subject the 1993 Act to strict scrutiny.¹⁴⁶ The court ruled that the military's goal of preserving and maintaining unit cohesion was a legitimate government purpose.¹⁴⁷ The court also concluded that the policy behind the 1993 Act was rationally related to preserving unit cohesion.¹⁴⁸

The court held that the application of the strict scrutiny standard to a statute was appropriate only when the target of the classification was a suspect class or when the statute restricted the exercise of a fundamental constitutional right.¹⁴⁹ The court added that very few classifications trigger application of strict scrutiny, and in deference to the legislative branch, courts are reluctant to establish new suspect classes.¹⁵⁰ The court

make rules and regulations for their governance is challenged." *Rostker*, 453 U.S. at 70.

145. See *Perpich*, 496 U.S. at 338-39 (challenging Congress's power to order members of National Guard into service); *Egan*, 484 U.S. at 520 (questioning presidential authority to control and classify access to national security information); *Rostker*, 453 U.S. at 57-58 (exacting Congress's decision to keep draft all male); *Parker*, 417 U.S. at 744-45 (disputing Congress's regulation of conduct under Uniform Code of Military Justice); *Orloff*, 345 U.S. at 90 (doubting executive discretion in granting military commission).

146. See *Thomasson*, 80 F.3d at 928 (finding that strict scrutiny is especially inappropriate in "specialized society" like military). Several commentators have argued that homosexuals deserve the protection of the strict scrutiny standard. See Baggett, *supra* note 98, at 258 (stating that unfortunately most circuit courts sanction discrimination against homosexuals because they refuse to use strict scrutiny to protect their interests); *The Constitutional Status of Sexual Orientation: Homosexuality As a Suspect Classification*, *supra* note 71, at 1285 (stating that homosexuals receive inordinately low degree of protection from states and courts); Miller, *supra* note 71, at 797 ("[C]ourts should apply equal protection heightened scrutiny to classifications based on homosexuality. . . ."); John F. Niblock, Comment, *Anti-Gay Initiatives: A Call For Heightened Judicial Scrutiny*, 41 UCLA L. REV. 153 (1993), at 156 ("Should such anti-gay measures withstand judicial scrutiny, the lesbian, gay, and bisexual civil rights movement in America would suffer an enormous setback.")

147. See *Thomasson*, 80 F.3d at 929 ("It was legitimate . . . for Congress to conclude that sexual tensions and attractions could play havoc with a military unit's discipline and solidarity.").

148. See *id.* at 930-31 (stating that lack of "mathematical" certainty is not enough to justify court's overturning policy).

149. See *id.* at 927-28 (examining strict scrutiny classifications) (citing *Heller v. Doe*, 509 U.S. 312 (1993); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985)).

150. See *id.* at 928 (respecting separation of powers requires courts to be reluctant to establish new suspect classes) (citing *Cleburne*, 473 U.S. at 441); see also *Shaw v. Reno*, 509 U.S. 630, 631 (1993) (applying strict scrutiny to racial reapportionment of voting districts), *rev'd sub nom.*, *Shaw v. Hunt*, 116 S. Ct. 1894 (1996); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 472 (1989) (subjecting race-based job requirements to strict scrutiny); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (sub-

further stated that homosexuals did not constitute a suspect class.¹⁵¹ Similarly, the court held that service members did not have a fundamental constitutional right to engage in homosexual acts.¹⁵² Therefore, the court determined that the rational basis standard was the appropriate standard of review.¹⁵³

In applying the first prong of the rational basis test, the court held that the government had a legitimate purpose in passing the 1993 Act.¹⁵⁴ The court agreed with Congress's findings that prohibition of homosexual conduct was a long-standing tradition in the military that was necessary in the unique circumstances of military service.¹⁵⁵ The court also agreed with the finding that "the presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability."¹⁵⁶ The court further stated that because Congress could prohibit ho-

jecting illegitimacy to intermediate scrutiny); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 (1982) (applying intermediate scrutiny to gender); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (extending strict scrutiny to statutes prohibiting interracial marriage); *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (subjecting segregation statutes to strict scrutiny); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (stating that racial and national origin classifications are subject to strict scrutiny).

151. *See Thomasson*, 80 F.3d at 928 (finding classification based on homosexual conduct not suspect) (citing *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc)).

152. *See id.* ("[T]here is no fundamental constitutional right on the part of a service member to engage in homosexual acts and there is a legitimate military interest in preventing the same.").

153. *See id.* ("Heightened scrutiny of this statute would involve the judiciary in an inventive constitutional enterprise, and it would frustrate the elected branches of government in their efforts to deal with this question. Rational basis is accordingly the suitable standard of review.").

154. *See id.* at 929-30 (noting unique living situation presented by military life).

155. *See id.* at 929 (citing Policy Concerning Homosexuals in the Armed Forces, 10 U.S.C. § 654(a)(13) (1994)). During Senate hearings in front of the Committee on Armed Forces, General Colin L. Powell emphasized the importance of unit cohesion in the military:

[T]o win wars, we create cohesive teams of warriors who will bond so tightly that they are prepared to go into battle and give their lives if necessary for the accomplishment of the mission and for the cohesion of the group We cannot allow anything to happen which would disrupt that feeling of cohesion within the force.

Senate Hearings on Military Policy Concerning Homosexuality, *supra* note 51, at 706, 707-08 (statement of General Colin Powell, Chairman Joint Chiefs of Staff).

156. *Thomasson*, 80 F.3d at 929 (citing 10 U.S.C. § 654(a)(15)). General H. Norman Schwarzkopf also offered his view on open homosexuality and unit cohesion: "[I]n my years of military service, I have experienced the fact that the introduction of an open homosexual into a small unit immediately polarizes that unit and destroys the very bonding that is so important for the unit's survival in time of war." *Senate Hearings on Military Policy Concerning Homosexuality*, *supra* note 51, at 594, 595-96 (statement of General H. Norman Schwarzkopf).

mosexual conduct in the military, it could also safeguard against any potential for homosexual conduct.¹⁵⁷ Therefore, the court ruled that preserving unit cohesion and morale were legitimate governmental purposes.¹⁵⁸

In applying the second prong of the rational basis test, the court held that the 1993 Act was rationally related to preserving unit cohesion and morale.¹⁵⁹ The court held that the presumption that a homosexual had a propensity to engage in homosexual acts was rational and noted that it would be irrational to believe that all homosexuals would remain celibate.¹⁶⁰ The court held that “courts are compelled . . . to accept a legislature’s generalizations even when there is an imperfect fit between means and ends.”¹⁶¹

The court stated that the military policy rationally discharged service members who declared their homosexuality and did not successfully rebut that presumption.¹⁶² Finding that both prongs of the rational basis test

157. See *Thomasson*, 80 F.3d at 929 (persisting in its logic that homosexuals will engage in homosexual conduct, even if that means violating Uniform Code of Conduct). The court stated that:

Given that it is legitimate for Congress to proscribe homosexual acts, it is also legitimate for the government to seek to forestall these same dangers by trying to prevent the commission of such acts. The statements provision, by discharging those with a propensity or intent to engage in homosexual acts, operates in this preventive way.

Id. (citations omitted); see also *Steffan v. Perry*, 41 F.3d 677, 685-86 (D.C. Cir. 1994) (en banc) (holding that statement’s presumption is legally permissible); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) (same).

158. See *Thomasson*, 80 F.3d at 929 (holding conclusion that sexual tensions would affect military’s discipline legitimate).

159. See *id.* at 930-31 (holding that means are rationally related to legitimate ends).

160. See *id.* at 930 (summarizing that *Thomasson* argued it was irrational to presume that all declared homosexuals engaged in or have propensity or intent to engage in homosexual acts, especially when those acts are forbidden under Uniform Code of Military Justice).

161. *Id.* (quoting *Heller v. Doe*, 509 U.S. 312, 312 (1993)). The court held that generally, the legislature was permitted to presume that a declared homosexual engaged in or had a propensity to engage in homosexual acts. See *id.* The court added that Congress provided for the rebuttable presumption, which *Thomasson* refused to rebut. See *id.* Furthermore, the court stated that the inclusion of the presumption shifted the burden of proof onto the service member, who was most knowledgeable about the facts in question. See *id.*

162. See *id.* (holding policy rationally discharges service members that provide evidence of their propensity to engage in homosexual conduct). *Thomasson* argued that the lack of inquiry into a service member’s propensity to engage in homosexual acts by the military rendered the policy unconstitutional. See *id.* The court held, however, that the military had balanced competing interests from the day the military stopped questioning new recruits regarding their sexual orientation. See *id.* at 931. Additionally, merely because the policy resulted in some inequality does not render the policy unconstitutional. See *id.*

were met, the court concluded that the 1993 Act did not violate the Equal Protection Clause of the Fifth Amendment.¹⁶³

B. *The Dissenting Opinion*

The dissent concluded that the military discharged Thomasson without any evidence that he violated the military code of conduct.¹⁶⁴ They acknowledged the need for judicial deference in a military setting, but noted that the role of the judicial branch was to defend the Constitution, including violations by the executive and legislative branches.¹⁶⁵

The dissent believed that Congress based the 1993 Act on the irrational motivation of prejudice against homosexuals.¹⁶⁶ They argued that there were three flaws to Congress's unit cohesion rationale.¹⁶⁷ First, the dissent noted that the policy represented a "shocking assessment" of the ability of today's service members to follow orders and stay focused on professional military concerns.¹⁶⁸ Second, according to the dissent, "kowtowing to the prejudices of some by excluding others has never been

163. See *id.* at 930-31 (stating that "[the 1993] Act represents a legitimate legislative match at ends and means that withstands . . . equal protection challenge").

164. See *id.* at 954 (Hall, J., dissenting) (recognizing Thomasson's record of service and likelihood that it would continue to be excellent in future). The dissenters, who included Judges Hall, Ervin, Michael and Motz, stated that Thomasson merely expressed his state of mind, which was the "cause of his 'honorable' banishment from the Navy." *Id.* (Hall, J., dissenting).

165. See *id.* at 949 (Hall, J., dissenting) (stating that rules of constitutional laws that apply to civilian life may have to be tailored for military service, however, these rules still apply). Circuit Judge Hall continued, "[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile." *Id.* (Hall, J., dissenting) (quoting *United States v. Robel*, 389 U.S. 258, 264 (1967)). Additionally, "[p]ermitt[ing] disrespect of constitutional rights to flourish within the military would inevitably cause disrespect of them without it." See *id.* at 950 (Hall, J., dissenting).

166. See *id.* at 950-51 (Hall, J., dissenting) (stating that evidence suggested that statute was motivated by prejudice). The dissent noted that this prejudice was evidenced by the majority's reliance on the unit cohesion argument. See *id.* at 951 (Hall, J., dissenting). The dissent stated:

Private prejudice is a private matter; we are free to hate. But the same concept of liberty for all that protects our prejudices precludes their embodiment in law. "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." This rule applies even though the group targeted by the prejudice is not a "suspect" or "quasi-suspect" class for equal protection analysis. Consequently, the desire to disadvantage a politically unpopular group is never a legitimate governmental interest.

Id. (Hall, J., dissenting) (footnotes and citations omitted) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

167. See *id.* (Hall, J. dissenting) (stating that there is no evidence that discharging Thomasson will promote unit cohesion). For a discussion of the flaws behind the unit cohesion rationale, see *infra* notes 167-70 and accompanying text.

168. See *Thomasson*, 80 F.3d at 951 (Hall, J., dissenting) (noting that majority fails to acknowledge service member's ability to "follow orders and do other jobs").

an acceptable policy rationale."¹⁶⁹ And third, the dissent found no evidence that declared homosexuals in the military led to bad morale or unit disintegration.¹⁷⁰

Finally, the dissent argued that the policy operated on an unconstitutional bedrock: the presumption that homosexuals engaged in, or had a propensity to engage in, homosexual acts even if it is against the rules of conduct.¹⁷¹ The dissent stated that this presumption did not comport with due process because it presumed that homosexuals would violate the Uniform Military Code of Justice.¹⁷² The dissent concluded that the military discharged Thomasson not for rational reasons, but because of a long-standing prejudice against homosexuals.¹⁷³

V. THE IMPACT OF *ROMER V. EVANS* ON *THOMASSON V. PERRY* AND OTHER SIMILAR CHALLENGES TO THE 1993 ACT

The *Thomasson* decision preceded the Supreme Court's decision in *Romer*.¹⁷⁴ Nevertheless, *Romer's* effect on homosexual equal protection

169. *Id.* (Hall, J., dissenting).

170. *See id.* at 951-52 (Hall, J., dissenting) (stating that no study proves that presence of homosexuals affects unit cohesion). The dissent pointed out that Thomasson continued to serve in the Navy for 15 months after he announced he was gay. *See id.* at 952 (Hall, J., dissenting). Although some of his coworkers within his unit disagreed with permitting homosexuals in the military, none of the soldiers testified that they had suffered diminished morale. *See id.* (Hall, J., dissenting). One sailor even stated:

At first [after Thomasson's disclosure], I was shocked and did not know whether or not to back out [of a volunteer assignment to work with Thomasson] His sexual orientation had no adverse effect on myself or to the Navy. With so few good naval officers, the Navy should definitely keep LT PAUL THOMASSON.

Id. at 952 n.7 (Hall, J., dissenting) (noting evaluation by Yeoman Third Class John J. Broughton).

171. *See id.* at 953 (Hall, J., dissenting) (stating that if it is presumed that persons "will act upon every urge or desire, whatever the legal consequences, then rules are a vain exercise").

172. *See id.* (Hall, J., dissenting) (stating that in America it is presumed that people will follow rules, not that they will disobey them). "Most people obey the law even when they disapprove of it. This obedience may reflect a generalized respect for legality or the fear of prosecution, but for whatever reason, the law's prohibitions are matters of consequence." *Id.* (Hall, J., dissenting) (citing *Jacobson v. United States*, 503 U.S. 540, 551 (1992)); *see also Powell v. Texas*, 392 U.S. 514, 543 (1968) (Black, J., concurring) ("Punishment for a status is particularly obnoxious . . . the mental element is not simply part of the crime but may constitute all of it."); *United States v. Robel*, 389 U.S. 258, 262-68 (1967) (noting that member of Communist Party cannot be presumed to have specific intent to further unlawful goals).

173. *See Thomasson*, 80 F.3d at 953 (Hall, J., dissenting) (holding that accommodation of prejudices of service members cannot be vital to military effectiveness).

174. *Compare Romer v. Evans*, 116 S. Ct. 1620 (1996) (deciding case on May 20, 1996), *with Thomasson*, 80 F.3d at 915 (delivering opinion on April 5, 1996).

challenges appears to be far reaching.¹⁷⁵ This Part will examine several theories on the scope of *Romer*.¹⁷⁶

This examination shows that *Romer* provides homosexuals in the military with new, powerful ammunition necessary to challenge the 1993 Act.¹⁷⁷ First, while *Romer* does not expressly overrule *Bowers*, it does replace *Bowers* as the standard future courts should apply in equal protection challenges by homosexuals.¹⁷⁸ Second, *Romer* institutes a heightened rational basis standard, and in applying this new standard, courts must recognize that prejudice towards homosexuals is not a legitimate government interest.¹⁷⁹ Third, while deference to military policy has been extreme in the past, courts should review future examinations of the policy under a

175. For a discussion of the impact of *Romer* on *Bowers*, see *infra* notes 181-93 and accompanying text.

176. For a discussion regarding the scope of *Romer*, see *infra* notes 194-212 and accompanying text.

177. See, e.g., *Philips v. Perry*, 106 F.3d 1420, 1434 (9th Cir. 1997) (Fletcher, J., dissenting) ("We must examine the possible justifications for the policy in light of the factual context in the record." (citing *Romer*, 116 S. Ct. at 1627 ("[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained."))); *Cyprus v. Diskin*, 936 F. Supp. 259, 264 (E.D. Pa. 1996) (stating that *Romer* treated evidence of animus as illegitimate government interest); Deb Price, *At Last, Supreme Court Gay-Friendly; How Much So, We'll Know in Coming Months*, STAR-TRIB., June 3, 1996, at 11A (analogizing "prejudice-propelled" Amendment Two to "don't ask, don't tell" policy). *But see* Stuart Taylor Jr., *Is Judicial Restraint Dead?* N.J. L.J., Aug. 26, 1996, at S1 (stating that *Romer* is indistinguishable from *Bowers* and decision is unfounded on legal principle).

In *Philips*, the dissent quoted from *Cleburne*, stating that "[b]ecause in our view the record does not reveal any rational basis for believing that [a group home for persons with mental retardation] would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the [zoning that prohibited the home's existence] invalid as applied in this case." *Philips*, 106 F.3d at 1434 (Fletcher, J., dissenting) (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985)). The dissent in *Philips* cited *Romer* to further reinforce its argument: "[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Id.* (Fletcher, J., dissenting) (quoting *Romer*, 116 S. Ct. at 1627).

178. See *Nabozny v. Podlesney*, 92 F.2d 446, 458 n.12 (7th Cir. 1996) (stating that *Romer* will replace *Bowers* in equal protection analysis). For a discussion of the effect *Romer* has on *Bowers*, see *infra* notes 181-93 and accompanying text.

179. See *Philips*, 106 F.3d at 1436 (Fletcher, J., dissenting) ("Just as the desire to accommodate other citizens' personal or religious objections to homosexuality did not suffice to uphold Amendment 2, . . . the desire to accommodate the attitudes of heterosexual service members opposed to homosexuality does not provide a legitimate reason for excluding gay men and lesbians from the military." (citations omitted)); *Nabozny*, 92 F.3d at 458 n.12 (stating that *Romer* would soon eclipse *Bowers* in area of equal protection); *Cyprus*, 936 F. Supp. at 264 (stating that *Romer* found that while Amendment Two does not burden fundamental rights or target suspect classes it may nonetheless violate equal protection if it does not "bear[] a rational relation to a legitimate end," and treated evidence of animus as lack of legitimate government interest).

less deferential standard and should interfere when congressional findings infringe on a person's constitutionally protected rights.¹⁸⁰

A. Romer's *Effect on Bowers*

Under *Bowers*, most courts agreed that the military could discharge service members for engaging in homosexual conduct.¹⁸¹ There was a divide, however, among lower courts on the constitutionality of the statement prong, a presumption that mandates discharge on status without conduct.¹⁸² Commentators have since speculated about the meaning of

180. See *Philips*, 106 F.3d at 1439 (Fletcher, J., dissenting) ("However, the military is not above the constitution."); see also *Parisi v. Davidson*, 405 U.S. 34, 55 (1972) (Douglas, J., concurring) ("When the military steps over [the] bounds [of civil liberties], it leaves the area of its expertise and forsakes its domain. The matter then becomes one for civilian courts to resolve, consistent with the statutes and with the Constitution." (footnotes omitted)); Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 191 (1962) (noting that in deciding military cases which infringe on protected liberties "the Court has usually been of the view that it can and should make its own judgment, at least to some degree, concerning the weight a claim of military necessity is to be given").

181. Policy Concerning Homosexuals in the Armed Forces, 10 U.S.C. § 654 (1994) (stating that ban on homosexual conduct is long-standing element of military life); Enlisted Administrative Separations, DOD Directive 1332.14, *supra* note 60 (stating that homosexual acts, statements, marriage or attempted marriage are grounds for enlisted members separation from Military Service); see also *Bowers v. Hardwick*, 478 U.S. 186, 193 (1986) (holding that there is no fundamental right to engage in homosexual sodomy); *Philips*, 106 F.3d at 1424 (permitting discharge based on homosexual acts); *Richenberg v. Perry*, 97 F.3d 256, 261 (8th Cir. 1996) (stating that discharge for homosexual conduct is permissible), *cert. denied*, 118 S. Ct. 45 (1997); *Falk v. Secretary of the Army*, 870 F.2d 941, 947-48 (2d Cir. 1989) (holding that conduct-based discharge does not violate Equal Protection Clause); *Hatheway v. Secretary of the Army*, 641 F.2d 1376, 1382-84 (9th Cir. 1981) (holding discharge for sodomy permissible); *Beller v. Middendorf*, 632 F.2d 788, 811-12 (9th Cir. 1980) (stating discharge for conduct constitutional under Equal Protection Clause).

182. See *Able v. United States*, 88 F.3d 1280, 1292 (2d Cir. 1996) (remanding to see effect *Romer* has on rational basis standard and how standard applies to military cases); *Meinhold v. United States Dep't of Defense*, 34 F.3d 1469, 1479-80 (9th Cir. 1994) (stating that discharge based on orientation was violation of equal protection); *Cammermeyer v. Aspin*, 850 F. Supp. 910, 918 (W.D. Wash. 1994) (holding that discharge for orientation alone was unconstitutional), *appeal dismissed and remanded sub nom.*, *Cammermeyer v. Perry*, 97 F.3d 1235 (9th Cir. 1996); *Dahl v. Secretary of the United States Navy*, 830 F. Supp. 1319, 1337 (E.D. Cal. 1993) (granting summary judgment to service member challenging policy on equal protection grounds); see also *Jacobson v. United States*, 503 U.S. 540, 551 n.3 (1992) (ruling prior conduct does not demonstrate propensity to engage in future illegal conduct); *Powell v. Texas*, 392 U.S. 514, 532 (1968) (Fortas, J., dissenting) ("Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change."); *Robinson v. California*, 370 U.S. 660, 667 (1962) (striking down statute that criminalized drug addict status).

Nevertheless, one commentator analyzing Justice Scalia's dissent in *Romer* pointed to a misinterpretation of *Bowers* and the status-conduct distinction. See Chai Feldblum, *Opinions Steeped in Moral Vision*, CONN. L. TRIB., Aug. 5, 1996, at 14. Professor Feldblum noted that *Bowers* "never held that homosexual conduct may be criminalized by a state. It held that homosexual sodomy may be criminalized by

Romer and its effect on future homosexual challenges under the Equal Protection Clause.¹⁸³ The *Romer* ruling gave rise to two theories regarding its effect on *Bowers*.¹⁸⁴

The first theory advanced states that *Romer* overrules *Bowers*.¹⁸⁵ This theory is difficult to accept because the two cases are clearly distinguishable.¹⁸⁶ First, *Bowers* challenged a statute that banned specific conduct, while the Colorado statute challenged in *Romer* discriminated on the basis of status.¹⁸⁷ Second, *Bowers* involved a privacy issue, while *Romer* involved an equal protection challenge.¹⁸⁸ While these reasons support the notion that *Romer* did not overrule *Bowers*, they also lend support to the second

a state." See *id.* Similarly, Professor Feldblum noted that states can also criminalize heterosexual sodomy. See *id.* Furthermore, homosexual sodomy does not equal homosexual conduct, homosexual conduct encompasses a broad range of activities which are generally not criminalized in any state, such as "kissing, hugging, caressing, genital manipulation and acts of simple love." See *id.*

183. See Richard C. Reuben, *Gay Rights Watershed? Scholars Debate Whether Past and Future Cases Will Be Affected By Supreme Court's Romer Decision*, A.B.A. J., July 1996, at 30 (summarizing opinions of several scholars on meaning of *Romer*). For a discussion of the possible scope of *Romer* on future equal protection challenges by homosexuals, see *infra* notes 190-212 and accompanying text.

184. See Reuben, *supra* note 183, at 30 ("Justice Antonin Scalia . . . argued that the majority opinion contradicts *Bowers*."); Sunstein, *supra* note 98, at 67 (stating that *Bowers* is not in tension with *Romer*).

185. See Reuben, *supra* note 183, at 30 (noting that constitutional law scholar Laurence Tribe states that *Romer* is "in very considerable tension with *Bowers*"); see also Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261, 266-68 (6th Cir. 1995) (conflating homosexual sodomy with homosexual conduct), *vacated*, 116 S. Ct. 2519 (1996) (mem.); High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990) (same); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) (same); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (same); Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) (same). Whichever theory is adopted, *Romer* dispels the flawed analysis used by many courts that examined the constitutionality of the 1993 Act and determined that there is no right to privacy to engage in homosexual conduct.

186. See Able v. United States, 968 F. Supp. 880, 864 (E.D.N.Y. 1997), 968 F. Supp. at 864 ("This case involves neither a due process challenge nor a classification based on sodomy. This is therefore not the occasion to consider whether *Romer* . . . foreshadows the overruling of the five-to-four decision in *Bowers*."); Sullivan, *supra* note 97, at C7 (arguing that *Romer* and *Bowers* are distinguishable).

187. See Sullivan, *supra* note 97, at C7 (stating that constitutional claims in *Bowers* and *Romer* can be distinguished); see also Sunstein, *supra* note 98, at 66 (noting that Amendment Two targeted people regardless of their actions and that while *Bowers* permitted governments to criminalize homosexual sodomy "it does not follow that it can punish mere homosexual status. It would certainly be unconstitutional to make 'homosexual status' a crime.").

188. See Sullivan, *supra* note 97, at C7 (stating that although *Romer* did not necessarily overrule *Bowers*, *Romer* was important because it "was the first [decision] ever by the Court to extend the reach of the Equal Protection Clause to gay men and lesbians"); see also Sunstein, *supra* note 98, at 67 (finding that Court in *Bowers* noted that plaintiff never asserted equal protection challenge and differentiated "tradition-correcting" Equal Protection Clause from "tradition-protecting" Due Process Clause).

theory that *Romer* replaces *Bowers* as the leading precedent when homosexuals challenge a statute on equal protection grounds.¹⁸⁹

Romer will affect future challenges to the military policy on homosexuals. In the day when *Bowers* governed, courts such as the Fourth Circuit framed their analysis on the premise that the military policy was conduct based.¹⁹⁰ This premise was essential for the court's finding that the policy was constitutional.¹⁹¹ Now, however, *Romer* has advanced the analysis of homosexual equal protection challenges beyond *Bowers* and has given credence to the long-argued concept that homosexuals have rights as a class under the Equal Protection Clause.¹⁹² Furthermore, military policies that equate homosexual conduct with homosexual status are clearly based on invidious prejudices that cannot withstand even a rational basis review in light of *Romer*.¹⁹³

189. See Sunstein, *supra* note 98, at 67 ("In view of the different constitutional provisions at issue, *Romer* leaves *Hardwick* untouched, simply because different provisions were at issue.")

190. See *Thomasson v. Perry*, 80 F.3d 915, 930 (4th Cir.) (en banc) ("The presumption that declared homosexuals have a propensity or intent to engage in homosexual acts certainly has a rational factual basis."), *cert. denied*, 117 S. Ct. 358 (1996).

191. See Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 290 (1996) (faulting homosexual rights advocates who argue that limitations on status impermissible because this in turn sacrifices rights of homosexuals to engage in homosexual conduct). Professor Feldblum argues that reliance on *Bowers*, in pre-*Romer* times, in Equal Protection Clause challenges regarding homosexuals was flawed. See *id.* at 282-85. Professor Feldblum argues that courts have incorrectly leapt from *Bowers*, a decision regarding sodomy, to decide that sexual orientation classification must be granted rational basis review. See *id.* at 285. Professor Feldblum refers to this as the "*Dronenburg/Padula* reasoning" that equates homosexual sodomy with all homosexual conduct. See *id.* at 283 (citing *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987); *Dronenburg v. Zeck*, 741 F.2d 1388 (D.C. Cir. 1984)).

192. See *Romer v. Evans*, 116 S. Ct. 1620, 1628-29 (1996) (holding that amendment to Colorado Constitution prohibiting governmental protection for homosexuals violated Equal Protection Clause). Justice Kennedy stated:

We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause, and the judgment of the Supreme Court of Colorado is affirmed.

Id. at 1629.

193. See *Meinhold v. United States Dep't of Defense*, 34 F.3d 1469, 1478 (9th Cir. 1994) ("Equating status or propensity with conduct or acts that are prohibited is problematic . . ."); *Pruitt v. Cheney*, 963 F.2d 1160, 1165 (9th Cir. 1991) (conceding military can discharge on basis of homosexual conduct); *Falk v. Secretary of the Army*, 870 F.2d 941, 947-48 (2d Cir. 1989) (holding that conduct-based discharge does not violate Equal Protection Clause); *Hatheway v. Secretary of the Army*, 641 F.2d 1376, 1382-84 (9th Cir. 1981) (holding discharge for sodomy permissible); *Beller v. Middendorf*, 632 F.2d 788, 811-12 (9th Cir. 1980) (stating discharge for conduct constitutional under Equal Protection Clause); *Cammermeyer v. Aspin*, 850 F. Supp. 910, 918 (W.D. Wash. 1994) ("The Ninth Circuit has recognized a distinction between homosexual status or orientation and conduct."), *ap-*

B. *Applying the Heightened Romer Standard*

Several theories exist to explain the standard applied in *Romer*.¹⁹⁴ *Romer* requires future courts to declare a law unconstitutional when it deprives a group of equal protection because of invidious prejudices or arbi-

peal dismissed and remanded sub nom. Cammermeyer v. Perry, 97 F.3d 1235 (9th Cir. 1996).

194. See Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENTARY 257, 260 (1996) (stating that *Romer* applied "rational basis standard with teeth"). These commentators discuss the possibility that the decision may have followed a *Plyler/Cleburne* analysis, but they later reject this view because the Court failed to cite to either case in its opinion and instead relied upon "weak formulations of the rational basis test." See *id.* But see *Philips v. Perry*, 106 F.3d 1420, 1433 (9th Cir. 1997) (Fletcher, J., dissenting) (stating *Romer* and *Cleburne* require examination of record when homosexual challenge was on equal protection grounds); *Richenberg v. Perry*, 97 F.3d 256, 260-61 n.5 (8th Cir. 1996) (stating that Court applied rational basis review in *Romer* and cited to *Cleburne*, but actually applied *Heller* standard), *cert. denied*, 118 S. Ct. 45 (1997). For a discussion of the heightened rational basis standard, see *supra* notes 93-96 and accompanying text.

Courts apply the heightened rational basis standard when the classification is not suspect or when the discrimination does not infringe on a fundamental right and courts still invalidate the statute despite purporting to apply a rational basis standard. See Farber & Sherry, *supra*, at 260. Support for this theory is evidenced by the Court's explicit application of the rational basis standard, even though the Court struck down the Colorado statute as unconstitutional. See *Romer*, 116 S. Ct. at 1627 ("By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.").

Another theory states that *Romer* is a temporary ruling that the Court is using as a building block to obtain quasi-suspect classification for homosexuals. See Farber & Sherry, *supra*, at 263 (speculating into meaning of *Romer*). Commentators suggest that, like classifications based on gender and illegitimacy that were initially analyzed under a heightened minimal scrutiny and were later accorded intermediate scrutiny, the Court will also apply intermediate scrutiny to equal protection challenges by homosexuals. See *Able v. United States*, 968 F. Supp. 850, 862-63 (E.D.N.Y. 1997) (noting history of discrimination, lack of political power and immutable characteristics of homosexuals); Farber & Sherry, *supra*, at 263 (discussing evolution of intermediate scrutiny and gender).

In one case, the Court invalidated a law under a rational basis standard that gave preference to men over women in the choice of administrators of estates. See *Reed v. Reed*, 404 U.S. 71, 71-74 (1971). Under traditional minimal scrutiny review, the policy supporting the law should have been sufficient to justify the law, but the Court nonetheless invalidated it. See *id.* Within the next six years, the Court dispensed of its purported minimal scrutiny analysis and applied intermediate scrutiny. See *Craig v. Boren*, 429 U.S. 190, 204, 210 (1976) (holding that Oklahoma statute that prohibited sale of nonintoxicating 3.2% beer to males under age 21 and females under age 18 constituted denial of equal protection to males of ages 18-20). The same trend occurred when the Court considered illegitimacy as a classification under the Equal Protection Clause; it first invalidated a statute under minimal scrutiny, but later applied intermediate scrutiny. Compare *Lalli v. Lalli*, 439 U.S. 259 (1978) (invalidating illegitimacy statute under minimal scrutiny), with *Clark v. Jeter*, 486 U.S. 456 (1988) (applying intermediate scrutiny to illegitimacy statute). See generally Tobias Barrington Wolff, Note, *Principled Silence*, 106 YALE L.J. 247, 252 (1996) (arguing that "*Romer* tracks *Reed*, rather than *Cleburne*, employing a rational basis review that would be entirely consistent with a future determination that gay people require heightened judicial protection").

trary reasons.¹⁹⁵ *Romer* thus gives credence to the lower courts who have held that the statement prong of the 1993 Act is unconstitutional.¹⁹⁶ Be-

195. See *Romer*, 116 S. Ct. at 1628 (“[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”); *Able*, 968 F. Supp. at 852 (“[*Romer*] established that government discrimination against homosexuals in and of itself violates the constitutional guarantee of equal protection. Implicit in this holding is a determination that such discrimination, without more, is either inherently irrational or invidious.”); Sunstein, *supra* note 98, at 62 (stating that purpose of discouraging homosexual behavior or homosexuality is no longer legitimate under rational basis standard). This theory posits that *Romer* furthers the principle, established in *Reed* and *Cleburne*, that animus and prejudice do not constitute a rational purpose, and therefore, when animus is the basis of the legislation, it will not even pass minimal rational basis scrutiny. See *id.* Sunstein added that “when the state discriminates against homosexuals, the Equal Protection Clause requires that the discrimination must be rational in the sense that it must be connected with a legitimate public purpose, rather than the fear and prejudice or a bare desire to state public opposition to homosexuality as such.” *Id.* at 69; see *Philips*, 106 F.3d at 1436 (Fletcher, J., dissenting) (“Disapproval of homosexuality on the part of heterosexual service members is an impermissible reason for discriminating against gay service members.”); see also *Romer*, 116 S. Ct. at 1627-29 (rejecting dissent’s contention that moral disapproval of homosexuality creates legitimate state interest justifying discrimination against homosexuals).

This theory argues that if the law is inexplicable, but for prejudice towards the class affected, the law lacks a rational relationship to a legitimate governmental interest and is unconstitutional. See *Romer*, 116 S. Ct. at 1628 (“[I]f the constitutional conception of “equal protection of the laws” means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” (quoting *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973))); see also *Philips*, 106 F.3d at 1436 (Fletcher, J., dissenting) (“Just as the desire to accommodate other citizens’ personal or religious objections to homosexuality did not suffice to uphold Amendment 2, . . . the desire to accommodate the attitudes of heterosexual service members opposed to homosexuality does not provide a legitimate reason for excluding gay men and lesbians from the military.” (citation omitted)); *Senate Hearings on Military Policy Concerning Homosexuals*, *supra* note 51, at 261 (statement of David H. Marlowe, Chief of the Department of Military Psychiatry, Walter Reed Army Institute of Research) (stating that prejudice was basis behind policy banning homosexuals from military service); Sullivan, *supra* note 97, at C7 (“At a minimum, discrimination against gay and lesbian military service members . . . can no longer be defended on the basis of disapproval or animus toward gay people alone, raising the bar for the government side in the military cases now percolating in the lower federal courts.”).

Some lower courts have already grasped the idea that prejudice is an irrational purpose for excluding homosexuals from military service. See *Philips*, 106 F.3d at 1436 (stating that military’s justification for excluding homosexuals from service accommodates only negative attitudes of some members that are not legitimate government interests); *Meinhold*, 34 F.3d at 1479-80 (stating that if military discharges solely on basis of status without evidence of homosexual conduct, actions are based on prejudices and are irrational); *Able*, 968 F. Supp. at 852 (finding that prejudice is basis for 1993 Act and, thus, is irrational); *Cammermeyer*, 850 F. Supp. at 926 (stating that government failed to provide rational basis for discharge based solely on status).

196. Compare *Steffan v. Perry*, 41 F.3d 677, 708-09 (D.C. Cir. 1994) (en banc) (Wald, J., dissenting) (applying *Cleburne* standard in dissent and finding presumption to be based on prejudice), *Meinhold*, 34 F.3d at 1478 (holding that presump-

cause Congress's proffered reasons for the prong are clearly invidious and prejudicial, courts should invalidate the 1993 Act as violative of the Fifth Amendment Equal Protection Clause. As the court in *Romer* invalidated Amendment Two because it was both too broad and too narrow, future courts should invalidate the 1993 Act because it is both overinclusive and underinclusive.¹⁹⁷

Future courts deciding equal protection challenges to the 1993 Act must actively review Congress's findings applying *Romer*'s heightened rational basis standard.¹⁹⁸ When examining the record, courts should be cognizant that the evolution of the military policy clearly illustrates the biases and prejudices of the military toward homosexuals.¹⁹⁹ The original policy equally restricted both heterosexual and homosexual conduct.²⁰⁰ Nevertheless, the policy evolved into a ban of homosexuals under the guise of unit cohesion, privacy and sexual tension. The government itself has defeated this rationale because of its own conduct of enlisting known homosexuals during wartime.²⁰¹ Not only did the military discredit its

tion based on statement alone was irrational), *Pruitt*, 963 F.2d at 1165-66 (applying *Cleburne* "active" rational basis standard to issue), and *Dahl v. Secretary of the United States Navy*, 830 F. Supp. 1319, 1326-27 (E.D. Cal. 1993) (stating that *Heller* standard applied, but holding that review of record was nevertheless required, and finding that presumption was irrational), with *Watson v. Perry*, 918 F. Supp. 1403, 1412, 1416 (W.D. Wash. 1996) (applying *Heller* standard and finding that presumption was constitutional), *rev'd sub nom.*, *Holmes v. California Army Nat'l Guard*, 124 F.3d 1126 (9th Cir. 1997), and *Selland v. Perry*, 905 F. Supp. 260, 266 (D. Md. 1995) (stating that *Heller* requires that plaintiff negate all possible justifications), *aff'd*, 100 F.3d 950 (4th Cir. 1996) and *cert. denied sub nom.*, *Selland v. Cohen*, 117 S. Ct. 1691 (1997).

197. See *LIVELY ET. AL.*, *supra* note 79, at 417 ("A law is under-inclusive when it benefits or burdens one group in pursuit of an objective but excludes others who should have been included. A law is over-inclusive when it burdens or benefits those intended but also applies to others not similarly situated as those targeted by the governmental action."); see also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 578 (1993) (Blackmun, J., dissenting) ("A State may no more create an underinclusive statute, one that fails truly to promote its purported compelling interest, than it may create an overinclusive statute, one that encompasses more protected conduct than necessary to achieve its goal.").

198. See *Romer*, 116 S. Ct. at 1628 ("The absence of precedent for Amendment 2 is itself instructive; '[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'" (alteration in original) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928))).

199. See *Thomasson v. Perry*, 80 F.3d 915, 919-20 (4th Cir.) (en banc) (providing background information on 1993 Act), *cert. denied*, 117 S. Ct. 358 (1996); see also *Philips*, 106 F.3d at 1423 (same). For a discussion of the history of the ban and the evolution of the 1993 Act, see *supra* notes 36-66 and accompanying text.

200. See Articles of War of 1916, art. 93, 39 Stat. 650, 664 (1916) (prohibiting "assault with intent to commit any felony").

201. See Policy Concerning Homosexuality in the Armed Forces, 10 U.S.C. § 654(a)(14) (1994) ("The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability."); Enlisted Administrative

own rationale for excluding homosexuals, the irrationality of this reasoning is further evidenced because the military utilized the same rationale when it sought to prohibit African-Americans from service.²⁰²

While unit cohesion is a vital governmental interest in times of war, the government has failed to provide reasons, other than prejudice, why exclusion of homosexuals from service would further unit cohesion.²⁰³ The military has stated that the presence of openly gay soldiers would disrupt unit cohesion because "heterosexual members may morally disapprove of homosexuals."²⁰⁴ Such private prejudices, which were also present in *Romer* and *Cleburne*, are illegitimate reasons to justify discrimination against homosexuals.²⁰⁵ "*Romer* . . . makes it clear that the Equal Protection Clause prohibits the government from discriminating against one group in order to accommodate the prejudices of another."²⁰⁶

The statement prong and its presumption are overinclusive because they preclude service members from the military for merely announcing

Separations, Department of Defense Directive 1332.14, *supra* note 60 (stating that policy promotes high standards of conduct and performance). *But see* SHILTS, *supra* note 43, at 64-70 (discussing use of homosexual soldiers in combat during World War II and Korean War).

202. *See* RAND REPORT, *supra* note 37, at 312 (stating that if presence of homosexuals affects anything, it affects social cohesion rather than task cohesion). The report defined task cohesion as affecting an individual's ability to share a commitment to the group's purpose and objective. *See id.* (stating that "similarity of social attitudes and beliefs is not associated with task cohesion"). It also defined social cohesion as an individual's ability to bond with others in terms of friendship, caring and closeness. *See id.* ("Thus if a unit had one or more acknowledged homosexuals, and one or more heterosexuals who dislike homosexuality, a reduction in social cohesion would be likely."). The report concluded that the "potential effect of permitting homosexuals to serve in the military are not groundless, but the problems do not appear to be insurmountable." *Id.* at 329-30; *see also* Philips, 106 F.3d at 1439 (Fletcher, J., dissenting) ("As courts and commentators have noted, the 'unit cohesion' rationale proffered in support of the 'don't ask/don't tell' policy is disturbingly similar to the arguments used by the military to justify the exclusion from and segregation of African Americans in military service."); *Watkins v. Perry*, 875 F.2d 699, 729 (9th Cir. 1989) (Norris, J., concurring) ("For much of our history, the military's fear of racial tension kept black soldiers separated from whites. As recently as World War II both the Army Chief of Staff and the Secretary of the Navy justified racial segregation in the ranks as necessary to maintain efficiency, discipline, and morale."). For a further discussion of the analogy of race and unit cohesion to homosexuality, *see* RAND REPORT, *supra* note 37, at 171-90.

203. *See generally* NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1994, S. REP. NO. 103-112 (1993) (including statements from Generals Schwartzkopf and Powell regarding service by homosexuals).

204. *Able v. United States*, 968 F. Supp. 850, 858 (E.D.N.Y. 1997) (citing Defendants' Reply to Plaintiff's Post-Trial Brief at 10, *Able v. United States*, 44 F.3d 128 (2d Cir. 1995) (No. 965, 94-6181)). "Heterosexual animosity toward known homosexuals can cause latent or even overt hostility, resulting in degradation of team or unit esprit." *Id.*

205. *See id.* at 859 ("The Constitution does not grant the military special license to act on prejudices or cater to them.").

206. *Id.* at 860 (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985); *Palmore v. Sidotti*, 466 U.S. 429, 433 (1984)).

their sexual orientation.²⁰⁷ It is irrational for the government to conflate sexual orientation with sexual conduct, especially because the government has conceded that heterosexuals are just as likely to break the Uniform Code of Conduct for sexual violations as are homosexuals.²⁰⁸ Similarly, the 1993 Act is underinclusive because it punishes only those service members who have declared that they are homosexual, while excluding undeclared homosexuals from its targeted range, even though both groups share the same characteristics that the 1993 Act seeks to punish.²⁰⁹

The presumption of the statement prong inferring homosexual conduct based upon homosexual orientation is irrational because it discriminates against homosexuals serving in the military for no legitimate reason other than Congress's prejudice against homosexuals.²¹⁰ Thus, the 1993

207. See Enlisted Administrative Separations, Department of Defense Directive 1332.14, 32 C.F.R. 41(4) (March 9, 1982) (stating that homosexual conduct is grounds for separation from military service and defining homosexual conduct to include statement demonstrating propensity to engage in homosexual acts). For the full text of the statement prong, see *supra* note 45.

208. See *Steffan v. Perry*, 41 F.3d 677, 710 (D.C. Cir. 1994) (en banc) (Wald, J., dissenting) ("[T]here is no 'rational connection' between orientation/status and conduct as a factual or experiential matter. . . . [E]ven if a rational connection . . . could be shown, the Constitution prohibits presuming, on the sole basis of an admission of homosexual status, that a servicemember will 'one day' violate military regulations governing sexual conduct."); see also *Thomasson v. Perry*, 80 F.3d 915, 953 (4th Cir.) (en banc) (Hall, J., dissenting) (disagreeing with majority and stating that statement prong's presumption was unconstitutional), *cert. denied*, 117 S. Ct. 358 (1996); *Able*, 968 F. Supp. at 860 (noting justifications for ban are illegitimate because heterosexuals are just as likely to violate code of conduct as homosexuals).

In one case, a service member announced that he was gay and was not going to rebut the presumption permitted by the regulations. See *Watson v. Perry*, 918 F. Supp. 1403, 1407 (W.D. Wash. 1996) ("[H]e would not 'rebut the [statutory] presumption' that service members who state they are homosexuals engage in or have a propensity to engage in homosexual conduct."), *rev'd sub nom.*, *Holmes v. California Army Nat'l Guard*, 124 F. 3d 1126 (9th Cir. 1997). The court held that the statement "I am gay" alone was not enough to raise the presumption under the statute. See *Watson*, 918 F. Supp. at 1414 (construing statute so that presumption of propensity for homosexual conduct would not be triggered by mere statement of orientation). The statement that he did not intend to rebut the presumption, however, was sufficient to raise the presumption. See *id.* at 1414-15 ("[This statement] could reasonably be interpreted by the Navy as a statement regarding conduct.").

209. See Policy Concerning Homosexuality in the Armed Forces, 10 U.S.C. § 654(b)(2) (1994) (stating that member can be separated for stating status as homosexual); *Able*, 968 F. Supp. at 860-61 (stating that policy of banning homosexuals from military is underinclusive because it only targets openly gay service members); *Dahl v. Secretary of the United States Navy*, 830 F. Supp. 1319, 1334 (E.D. Cal. 1993) (finding distinction "untenable").

210. See *Thomasson*, 80 F.3d at 950 (Hall, J., dissenting) (citing DOD Directive which stated that "sexual orientation is not a bar to continued service"); see also *Able v. United States*, 88 F.3d 1280, 1292 (2d Cir. 1996) (remanding to see effect that *Romer* has on rational basis standard and how standard applies to military cases); *Meinhold v. United States Dep't of Defense*, 34 F.3d 1469, 1477-79 (9th Cir. 1994) (stating discharge based on orientation was violation of equal protection);

Act, like the 1981 Directive, is an exclusionary policy against homosexuals.²¹¹ Unlike the court in *Thomasson*, which required Thomasson to rebut every conceivable basis for the 1993 Act, future courts will find that Congress's findings camouflage its prejudice towards homosexuals, providing so-called legitimate reasons as a guise for its biases and, therefore, making its reasons underlying the policy illegitimate, irrational and unconstitutional.²¹²

appeal dismissed and remanded sub nom. Cammermeyer v. Aspin, 850 F. Supp. 910, 926 (W.D. Wash. 1994) (stating discharge based on orientation was violation of equal protection), *appeal dismissed and remanded sub nom.*, Cammermeyer v. Perry, 97 F.3d 1235 (9th Cir. 1996); *Dahl*, 830 F. Supp. at 1337 (granting summary judgment to service member challenging policy on equal protection grounds).

211. See Francisco Valdes, *Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct*, 27 CREIGHTON L. REV. 381, 469 (1994) (stating presumption "removes the need for some specific 'act' or conduct as a predicate for action against the individual"); Wells-Petry, *supra* note 49, at 5 (finding 1981 Directive exclusionary).

The court in *Meinhold*, for example, construed the 1981 Directive to turn on something more than status. *Meinhold*, 34 F.3d at 1479 ("Constitutional tensions may be avoided, however, if the regulation can reasonably be construed to mandate separation due to a statement of homosexuality only when the statement itself indicates more than an inchoate 'desire' or 'propensity' that inheres in status."). The court ruled that the presumption that Meinhold desired or intended to engage in prohibited conduct based solely on his statement of orientation was irrational. *See id.* at 1479-80 ("His statement—'I am in fact gay'—in the circumstances under which he made it manifests no concrete, fixed, or expressed desire to commit homosexual acts."). The court held that the government's presumption that equated status and propensity with prohibited conduct was irrational. *See id.* ("The Navy's presumption that Meinhold desires or intends to engage in prohibited conduct on the basis of his statement alone therefore arbitrarily goes beyond what DOD's policy seeks to prevent."); *see also*, *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-87 (1975) (ruling that ethnicity is insufficient basis to believe persons are illegal aliens); *Powell v. Texas*, 392 U.S. 514, 532-34 (1968) (recognizing rule that criminal penalties cannot be imposed solely because of status); *Robinson v. California*, 370 U.S. 660, 666-68 (1962) (holding unconstitutional statute that criminalized drug addict status). The court held that, because "nothing in the policy states that the presence of persons who say they are gay impairs the military mission," orientation should not be a bar to service. *See Meinhold*, 34 F.3d at 1479. Instead, the court ruled that discharge was appropriate only when a service member stated a concrete, expressed desire to engage in homosexual conduct. *See id.* ("Construing the regulation to reach only statements which manifest a fixed or expressed desire to commit a prohibited act not only coincides with the military's concern for its mission, but gives content to 'desire' apart from the defining characteristics of sexual orientation.").

212. *See Thomasson*, 80 F.3d at 928 (upholding military policy permitting discharge based on statements of homosexuality). The court stated that:

The question is simply whether the legislative classification is *rationality related to a legitimate government interest*. Under this standard, the Act is entitled to "a strong presumption of validity," and must be sustained if "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." To sustain the validity of its policy, the government is not required to provide empirical evidence. "[A] legislative choice is not subject to courtroom factfinding . . ." Rather, "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."

C. *The Thomasson Court Gave Congress Too Much Deference*

Commentators speculate that *Romer* will help further the rights of homosexuals generally.²¹³ Many believe, however, that *Romer* will not help homosexuals who challenge military policies because of the great deference courts give Congress in regulating military conduct.²¹⁴ Courts should no longer defer to Congress when a law infringes on a service member's constitutional right to equal protection of the laws.²¹⁵

The *Thomasson* court stated that the Constitution conferred broad powers to the executive and legislative branches in providing a national defense.²¹⁶ Accordingly, the court gave Congress great deference in regu-

Id. (alterations in original and citations omitted) (quoting *Heller v. Doe* 509 U.S. 312, 320-21 (1993); *FCC v. Beach Communications, Inc.*, 509 U.S. 307, 315 (1993)).

213. See David Sobelsohn, *Equal Protection or 'Kulturkampf'?; Debate Rages Over Kennedy's Analysis, Scalia's Vitriol in Landmark Gay Rights Case*, THE RECORDER, May 22, 1996, at 10 (stating *Romer* heralds heightened scrutiny for sexual orientation, but also feels Court will defer to congressional judgments in area of military ban).

214. See *A Victory For Gay Rights: The U.S. Supreme Court Says Animosity to Gays Is Unconstitutional*, S.F. EXAMINER, May 22, 1996, at A16 ("The government will still defend the ban on gays in the armed services, and same-sex marriage is a distant battlefield. But gays can justly celebrate the result in the Colorado confrontation."); Sobelsohn, *supra* note 213, at 10 (noting *Romer* provides heightened scrutiny for sexual orientation); Price, *supra* note 177, at 11A (noting *Bowers* no longer stands in way of full equal protection for homosexuals); see also Deb Price, *After Supreme Court Decision, What's Next for Gay Civil Rights?*, DET. NEWS, May 20, 1996, at Bonus Column (noting *Romer's* impact is far reaching and provides basis for attacking military ban).

The Supreme Court denied Thomasson's petition for a writ of certiorari at the beginning of their 1996-97 Term. See *Thomasson v. Perry*, 117 S. Ct. 358 (1996). The Supreme Court has only addressed homosexual challenges in two aspects. First, in *Bowers* due process challenge, it decided there was no fundamental right to engage in homosexual sodomy. *Bowers v. Hardwick*, 478 U.S. 186, 190-91 (1986). Second, in *Romer*, it decided that Colorado's Amendment Two was a violation of the equal protection rights of homosexuals. *Romer v. Evans*, 116 S. Ct. 1620, 1628 (1996). The Court has never addressed the constitutionality of the 1993 Act or the DOD's directives. While the Court could have reversed the Fourth Circuit's opinion and clarified which of the varying standards used by the lower courts applies to equal protection challenges by homosexuals in the military, it chose not to.

215. See *Thomasson*, 80 F.3d at 949 (Hall, J., dissenting) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile." (quoting *United States v. Robel*, 389 U.S. 258, 264 (1967))). Additionally, Judge Hall stated that "[p]ermitt[ing] disrespect of constitutional rights to flourish within the military would inevitably cause disrespect of them without it." See *id.*, at 950 (Hall, J., dissenting).

In *Rostker v. Goldberg*, 453 U.S. 57 (1981), the Court stated that "Congress is [not] free to disregard the Constitution when it acts in the area of military affairs." *Id.* at 67. Justice Marshall dissented and added that "congressional enactments in the area of military affairs must, like all other laws, be *judged* by the standards of the Constitution." *Id.* at 112 (Marshall, J., dissenting).

216. See U.S. CONST. art. 1, § 8 (giving Congress power to "provide for the common Defence and general Welfare of the United States . . . [t]o declare War . . . [t]o raise and support Armies . . . [t]o provide and maintain a Navy; [t]o make Rules for the Government and Regulation of the land and naval Forces . . .

lating the armed forces because of specific enumerated powers granted to Congress by the Constitution, the separation of powers doctrine and the limited competence the court has in deciding military matters.²¹⁷ The Fourth Circuit also recognized the special needs of the military and that these needs may permit infringing on a service member's constitutional rights.²¹⁸ Lastly, the court held that the "Founders failed to provide the federal judiciary with a check over the military powers of Congress and the President."²¹⁹

Additionally, Congress and the military must operate under the guide of both statutes and the Constitution.²²⁰ When courts give military poli-

[t]o provide for organizing, arming, and disciplining, the Militia . . ."); see also U.S. CONST. art. II, § 2 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States . . .").

217. See *Goldman v. Weinberger*, 475 U.S. 503, 507-08 (1986) (deferring to "professional judgment" of military official regarding composition of military); see also *Rostker*, 453 U.S. at 65-66 (stating that courts have least amount of competence in area of military); *Beller v. Middendorf*, 632 F.2d 788, 810 (9th Cir. 1980) (stating that "constitutional rights must be viewed in light of the special circumstances and needs of the armed forces").

218. See *Thomasson*, 80 F.3d at 925 ("Because our nation's very preservation hinges on decisions regarding war and preparation for war, the nation collectively, as expressed through its elected officials, faces "the delicate task of balancing the rights of servicemen against the needs of the military." (quoting *Weiss v. United States*, 510 U.S. 163, 172 (1994))); see also *Beller v. Middendorf*, 632 F.2d 788, 811 (9th Cir. 1980) ("Regulations which might infringe constitutional rights in other contexts may survive scrutiny because of military necessities.").

The *Thomasson* court also relied on the need for national defense, the legitimacy of the executive and legislative branches and the military need for unit cohesion as reasons to defer to Congress in regulating military conduct. See *Thomasson*, 80 F.3d at 925-26 (explaining that nation's survival depends on decisions regarding war and that if judicial branch infringed on elected officials' power to circumscribe these options, other branches lose their ability to impose their will on other nations and other nations may have power to impose their will on United States) (citing James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177, 237-38 (1983)). Next, the court found that military policies should evolve from the elected branches, because then changes in policy would result in less resistance from within the military and less societal division outside the military. See *id.* at 926 ("[T]he imprimature of the President, the Congress, or both imparts a degree of legitimacy to military decisions that courts cannot hope to confer."). Finally, the court pondered the need for deference because of the importance in maintaining unit cohesion. See *id.* ("[I]t is simply impossible to estimate the damage that a particular change could inflict upon national security.").

219. *Thomasson*, 80 F.3d at 924.

220. See *Johnson v. Orr*, 617 F. Supp. 170, 172 (E.D. Cal. 1985) ("Restricted judicial review is not, however, the equivalent of no judicial review. Courts will review, without hesitation, cases in which it is alleged that the military violated the Constitution, applicable statutes, or its own regulations."); Mark Strasser, *Unconstitutional? Don't Ask; If It Is, Don't Tell: On Deference, Rationality, and the Constitution*, 66 U. COLO. L. REV. 375, 380 (1995) (citing *Johnson*, 617 F. Supp. at 172).

Justice Brennan, dissenting, in *Goldman*, added:

A deferential standard of review, however, need not, and should not, mean that the Court must credit arguments that defy common sense. When a military service burdens the free exercise rights of its members in

cies complete deference, as the Fourth Circuit granted Congress's findings here, "power tends to corrupt and absolute power corrupts absolutely."²²¹ Nevertheless, the court has articulated that there is not now, nor ever will be, a military exception to the Constitution, therefore, Congress cannot proscribe conduct without regard to the Constitution.²²² One could understand some level of deference to military policy in wartime, however, the 1993 Act governs all recruits, in war and peace.²²³

The most recent delineation of the Supreme Court's deference to the military was in *Goldman v. Weinberger*.²²⁴ In *Goldman*, the Court upheld a military dress regulation that prohibited a service member from wearing his yarmulke while on duty and in uniform.²²⁵ The Court gave the professional judgment of the military great deference in encouraging uniformity and obedience.²²⁶ Although the Court's opinion articulated an extremely deferential view, the plurality of the court seemed to agree that the appropriate level of deference was that the regulation be narrowly tailored to serve a compelling military interest.²²⁷ Therefore, *Goldman* requires less

the name of necessity, it must provide, as an initial matter and at a minimum, a *credible* explanation of how the contested practice is likely to interfere with the proffered military interest. Unabashed *ipse dixit* cannot outweigh a constitutional right.

Goldman, 475 U.S. at 516 (Brennan J., dissenting) (footnotes omitted).

221. See Strasser, *supra* note 220, at 378 (citing Letter from Lord Acton to Bishop Mandell Creighton (April 5, 1887), reprinted in FAMILIAR QUOTATIONS 615 (John Bartlett ed., 15th ed. 1980)). Courts often conclude that they should give the military wide latitude to regulate in the name of national security. See *id.* at 380-81 (stating that confidence in both military and judiciary will erode if too much latitude is given).

222. See *Cammermeyer v. Aspin*, 850 F. Supp. 910, 915 (W.D. Wash. 1994) ("This principle applies with even greater force to equal protection claims since it has traditionally been the domain of the federal courts to scrutinize classifications challenged on equal protection grounds."), *appeal dismissed and remanded sub nom. Cammermeyer v. Perry*, 97 F.3d 1235 (9th Cir. 1996).

223. See *Korematsu v. United States*, 323 U.S. 214, 234 (1944) (Murphy, J., dissenting) ("[I]t is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support.").

224. 475 U.S. 503 (1986).

225. *Id.* at 504-06 (stating that Goldman, who was Orthodox Jew and ordained rabbi, challenged Air Force regulation, which mandated uniform dress code for personnel, arguing that regulation violated his free exercise of religion under First Amendment). The regulation in question stated that "Air Force members will wear the Air Force uniform while performing their military duties, except when authorized to wear civilian clothes on duty. . . . [Additionally, headgear may] not be worn [indoors] . . . except by armed security police in the performance of their duties." *Id.* at 5050.

226. See *id.* at 507 ("[W]hen evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.").

227. See *id.* at 516 (Brennan, J., dissenting) (noting that "[a] deferential standard of review, however, need not, and should not, mean that the Court must not

deference regarding homosexual military policy, not only because this policy stands during peacetime, but also because the military has already compromised this policy during wartime, thus giving credence to the belief that the unit cohesion rationale is not legitimate and cannot meet the compelling military interest standard.²²⁸

Finally, Congress should not be the ultimate arbiter of rationality in reviewing an equal protection challenge because such decisions have traditionally fallen within the purview of the federal courts.²²⁹ The fatal flaw in the *Thomasson* court's analysis, that the Framers did not intend for the judiciary to get involved in military conduct and regulations, is that the courts have the power of judicial review.²³⁰ Indeed, *Marbury v. Madison*²³¹ requires the Supreme Court to nullify any action that contravenes the Constitution.²³² It is the Court's job, as the ultimate interpreter of the Constitution, to check the other branches and strike down regulations, such as the 1993 Act, that violate the Equal Protection Clause.²³³ As one

credit arguments that defy common sense"). Additionally, a connection between the practice being regulated and the proffered interest supporting the regulation must exist. *See id.* (Brennan, J., dissenting) ("Unabashed *ipse dixit* cannot outweigh a constitutional right."). Justice Brennan believed that government restraints on service members "may be justified only upon showing a compelling state interest which is precisely furthered by a narrowly tailored regulation." *See id.* at 516 n.2 (Brennan, J., dissenting) (citing *Brown v. Glines*, 444 U.S. 348, 367 (1980)).

228. *See Philips v. Perry*, 106 F.3d 1420, 1435 (9th Cir. 1997) ("While unit cohesion is surely a legitimate government interest, the current policy simply does not further this interest in a rational and reasonably related way."). Circuit Judge Noonan wrote a concurring opinion in *Philips* and noted that, "[m]ilitary judgments are the product of personal military experience and past institutional experience. They are apt to include unarticulated premises and, it may be, incorporate prejudices as well as prudential observations: an institution tends to project its past practice as a necessity of its future existence." *Id.* at 1432 (Noonan, J., concurring). *But see* SHULTS, *supra* note 43, at 64-70 (discussing use of homosexuals in combat during World War II and Korean War).

229. *See Philips*, 106 F.3d at 1440 (Fletcher, J., dissenting) ("Judicial deference does not mean unquestioningly accepting the military's asserted justifications. Judicial deference to the military simply means sensitivity to the special circumstances of the military and appropriate respect for their particular role as our protectors, not abdication of our role as adjudicators of constitutional claims.").

230. *See* Kelly E. Henriksen, Comment, *Gays, The Military, and Judicial Deference: When the Courts Must Reclaim Equal Protection as Their Area of Expertise*, 9 ADMIN. L.J. AM. U. 1273, 1304 (1996) ("The *Thomasson* court substituted Congress's judgment of what is constitutionally permissible for its own."); *see also* *Rostker v. Goldberg*, 453 U.S. 57, 112 (1981) (Marshall, J., dissenting) ("Congressional enactments in the area of military affairs must, like all other laws, be *judged* by the standards of the Constitution.").

231. 5 U.S. 137 (1803).

232. *Id.* at 177 ("Certainly, all those who have framed written constitutions contemplate as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution is void.").

233. *See Rostker*, 453 U.S. at 67 (stating that "Congress is [not] free to disregard the Constitution when it acts in the area of military affairs"); *Marbury*, 5 U.S. at 178 (stating that "judicial power of the United States is extended to all cases arising

court explained: "The court, in reconciling the deference due Congress and its own constitutional responsibility, does not change the substantive content of equal protection, but gives deference to the military judgment as to the importance of the military interest."²³⁴ As former Chief Justice Earl Warren stated, "if judicial review is to constitute a meaningful restraint upon unwarranted encroachments upon freedom in the name of military necessity, situations in which the judiciary refrains from examining the merit of the claim of necessity must be kept to an absolute minimum."²³⁵

Therefore, because the proffered military interests are illegitimate and invidious, the courts should not defer to these judgments and, in turn, violate a person's equal protection rights.²³⁶ As one court has recognized, "[a] Service called on to fight for the principles of equality and free speech embodied in the United States Constitution should embrace those principles in its own ranks."²³⁷

VI. CONCLUSION

Although President Clinton sought to repeal the homosexual ban in the military, he instead permitted Congress to codify its prejudices against homosexuals into law. While this issue is ripe for decision by the Supreme Court, the Court has yet to grant certiorari to review the constitutionality of the 1993 Act.²³⁸ Until then, lower courts should apply *Romer* to decide that the policy banning homosexuals merely because of their sexual orientation is not based on a legitimate government interest, is irrational and, therefore, is a violation of the equal protection guarantee of the Fifth Amendment.²³⁹

Amy E. Pizzutillo

under the constitution"); see also *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (stating that Constitution vests power over military to legislative and executive branches that are not subject to judicial second-guessing, but also stating that "this Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military redress.").

234. *Able v. United States*, 968 F. Supp. 850, 856 (E.D.N.Y. 1997) (citations omitted).

235. Warren, *supra* note 180, at 193.

236. See *Able*, 968 F. Supp. at 852 ("[*Romer*] established that government discrimination against homosexuals in and of itself violates the constitutional guarantee of equal protection. Implicit in this holding is a determination that such discrimination, without more is either inherently irrational or invidious." (citation omitted)).

237. *Id.* at 865.

238. See *Thomasson v. Perry*, 117 S. Ct. 358 (1996).

239. See *id.* at 950-51 (Hall, J., dissenting). The dissent stated:

Private prejudice is a private matter; we are free to hate. But the same concept of liberty for all that protects our prejudices precludes their embodiment in law. "The Constitution cannot control such prejudices but

neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”
Id. (Hall, J., dissenting) (quoting *Palmore v. Sidotti*, 466 U.S. 429, 433 (1984)).