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Constitutional Law: A New Suspect Class: A Final Reprieve for Homosexuals in the Military

Denise Dunnigan

NOTES

Constitutional Law: A New Suspect Class: A Final Reprieve for Homosexuals in the Military?

The Army's policy concerning homosexuals is and has been one of intolerance. Homosexuals, considered unfit for military service, are not permitted to serve in the armed forces in any capacity.[1] Homosexuality is considered by the military a severe character defect which lessens the efficiency of these individuals to function in society.[2]

Recognition of the homosexual option as a legitimate and alternative way of life is the major goal of the gay rights movement.[3] In furthering their fight to gain acknowledgment, perhaps in no other area has progress been so perceptible as the military. No substantial results, however, can be expected in this area until homosexuals receive statutory or judicial protection as a class.[4]

In *Watkins v. United States*,[5] the Court of Appeals for the Ninth Circuit rendered a landmark decision establishing homosexuals as a suspect class. By doing so, the appellate court expanded the groups which can receive suspect class status, a status which insures constitutional protection of their rights.[6] The Ninth Circuit's decision was rendered after Perry Watkins, a military career man, claimed Army regulations discriminated against him as an admitted homosexual.[7] The regulations in question mandated that all homosexuals be discharged from the service and that they not be allowed to re-enlist.[8]

Watkins challenged the Army's regulations on several statutory and constitutional grounds. One claim stated that the regulations denied him equal protection of the laws in violation of the fifth amendment.[9] Upon discharge,

1. *Hearings Before the Subcomm. on Constitutional Rights of Senate Comm. on the Judiciary*, 89th Cong., 2nd Sess. 921, *discussed in* C. WILLIAMS & M. WIENBERG, HOMOSEXUALS AND THE MILITARY 24 (1971).

2. *Id.*

3. Rice, Legalizing Homosexual Conduct: The Role of the Supreme Court in the Gay Rights Movement 2 (Constitutional Commentary No. 1, Center for Judicial Studies, 1984).

4. McCrary & Gutierrez, *The Homosexual Person in the Military and in National Security Employment*, 5 J. OF HOMOSEXUALITY 115, 140 (1979-80).

5. Watkins v. United States Army, 847 F.2d 1329 (9th Cir. 1988) (hereinafter *Watkins III*).

6. *Id.* at 1352.

7. *Id.* at 1335.

8. Army Regulation 635-200, ch. 15, effective July 1984.

9. *Watkins III*, 847 F.2d at 1335. An equal protection claim can be correctly based on the fifth amendment of the United States Constitution. The fifth amendment contains a due process clause. As for equality, the fifth amendment also seeks the same end as the equal protection clause of the fourteenth amendment. The concept of equal justice under the law is served by both clauses. Each forbids unequal government action, so there is an equal protection aspect of the due process clause. *See* Bolling v. Sharpe, 347 U.S. 497 (1954); B. SCHWARTZ, CONSTITUTIONAL LAW 362 (1979).

Watkins joined a long list of homosexual military personnel seeking equal treatment under the law.[10]

This note will advocate that *Watkins v. United States* has embodied the appropriate and necessary doctrine for furthering the equal protection of homosexuals. First, the factual background of the *Watkins* case and how it came before the Ninth Circuit must be examined. Second, the analysis will turn to several equal protection tests, standards of review, and the court's application of these tests to groups recognized as suspect classes. In the third section, the concern will focus on the major cases, including *Bowers v. Hardwick*,[11] upon which the Army based its argument. The Army claimed these cases foreclosed Watkins' claim of constitutional violation.

The fourth section will examine the Ninth Circuit's application of the equal protection analysis to *Watkins*. This will include an examination of the reasoning behind the court's recognizing homosexuals as a suspect class. Finally, the military's justifications for its regulations will be surveyed and proven to be constitutionally unwarranted.

The Ninth Circuit's analysis of homosexuals as a suspect class was correct. Only by allowing homosexuals to be a suspect class can such individuals be afforded equal protection guaranteed to all under the fifth amendment.

Watkins v. United States

In 1967, nineteen-year-old Perry Watkins enlisted in the United States Army. When completing the Army's medical preinduction form, Watkins' answered "yes" to a query concerning his homosexual tendencies. Nonetheless, the Army inducted him into its ranks.[12] Again in 1968, Watkins admitted to the Army that he was a homosexual and he had engaged in sodomy with two other servicemen. Such an act was a military crime, punishable by court martial under military law.[13]

Upon those admissions, several criminal investigations were conducted into Watkins' sexual conduct. Due to insufficient evidence, the investigations were dropped. Watkins was repeatedly allowed to re-enlist even though his homosexuality was known.[14]

Finally, in 1975 an Army board convened in order to determine whether Watkins should be discharged because he had admitted his preference for homosexuality. During this investigation, Watkins' commanding officer testified that Watkins' homosexuality had not affected his service in the Army and that his performance had been exemplary. The board found that

10. *See also* Matthews v. Marsh, 755 F.2d 182 (1st Cir. 1985); benShalom v. Secretary of the Army, 489 F. Supp. 964 (E.D. Wis. 1980); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980); Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984); Miller v. Rumsfeld, 647 F.2d 80 (9th Cir. 1981).

11. Bowers v. Hardwick, 478 U.S. 186 (1986).

12. *Watkins III*, 847 F.2d at 1330.

13. *Id.* at 1331.

14. *Id.*

Watkins was suitable for retention in the service because no evidence indicated his behavior had affected his unit or his job performance.[15]

In 1977, the Army granted Watkins a security clearance for information classified as "Secret." Because Watkins had admitted his homosexuality, the security clearance had initially been rejected. Watkins' commanding officer again testified to his outstanding professional attitude. Upon an Army physician's determination that Watkins' homosexuality had no effect on his work, the decision was reversed.[16]

After working without incident until 1979, the Army revoked Watkins' security clearance based on his latest admission of homosexuality. However, in 1979 Watkins was allowed to re-enlist.[17]

In 1981, the Army promulgated a new regulation which mandated that all homosexuals be discharged, regardless of merit. A new Army board recommended that Watkins be discharged from the service and denied re-enlistment based solely on his homosexual admissions.[18] Before the actual discharge was issued, the district court enjoined the Army from discharging Watkins on the basis of double jeopardy.[19]

Subsequently, however, the Army denied Watkins' application to re-enlist. Nevertheless, the district court again enjoined the Army from denying his right to re-enlist. Watkins' re-enlistment application was approved, but he was warned that the re-enlistment would be voided if the district court's injunction was not upheld on appeal.[20]

While the Army's appeal was pending, Watkins was rated on his performance and professionalism by the Army. He received outstanding ratings and was recommended for promotion by his evaluators.[21]

The district court's injunction was reversed on appeal,[22] and the case was remanded. The appellate court reasoned that the federal courts could not order the military to violate their own regulations without a showing that the regulations were unconstitutional.[23]

On remand, the district court held that the regulations were constitutional and granted summary judgment to the Army. Watkins appealed to the Ninth Circuit.[24] Finding the Army regulations unconstitutional, the court of appeals

15. *Id.*
16. *Id.*
17. *Id.* at 1332.
18. *Id.*
19. Watkins v. U.S. Army, 541 F. Supp. 249, 259 (W.D. Wash. 1982). The district court held that the evidence could not support a finding that Watkins engaged in homosexual conduct before the 1975 discharge proceeding. The Army's double jeopardy provision barred the Army from basing Watkins' discharge on statements that just repeated what Watkins had stated in the 1975 discharge proceedings. The statements merely reaffirmed that Watkins was a homosexual. *Id.*
20. Watkins v. United States Army, 551 F. Supp. 212, 223 (W.D. Wash. 1982).
21. *Watkins III*, 847 F.2d at 1333.
22. Watkins v. United States Army, 721 F.2d 687, 690-91 (9th Cir. 1983).
23. *Id.*
24. *Watkins III*, 847 F.2d at 1334.

established homosexuals as a suspect class. As a result, the Ninth Circuit reversed the district court's rulings.[25]

An Analysis of Watkins' Constitutional Claims

Only one of Watkins' five claims survived the court of appeals' scrutiny. Watkins first argued that the Army's regulations were arbitrary and capricious under section 706(2)(A) of the Administrative Procedure Act.[26] The court rejected this argument because Watkins had not claimed the rationale for the Army's regulations was arbitrary and capricious. He claimed only that the Army's *actions* in discharging him and denying him re-enlistment were in violation of the act.[27]

Watkins also claimed that by discharging him and denying him re-enlistment, the Army violated his freedom of speech as guaranteed by the first amendment. Watkins argued these actions constituted due process entrapment because the Army had induced him to believe that his homosexuality would not disqualify him from the Army.[28] The court concluded that the Army's determination of Watkins' homosexuality was based on his own admissions concerning sexual preferences and his 1968 admission that he had engaged in homosexual acts. The regulations warrant that homosexual acts give rise to a presumption of homosexuality.[29]

In the appellate court's words "under the regulations, any *homosexual* who engages in homosexual acts is automatically disqualified from service."[30] After Watkins' 1968 admission that he had engaged in homosexual acts, he was presumed to have a homosexual orientation. He could not rebut that presumption, because Watkins' orientation was in fact homosexual. Regardless whether he had ever stated he had homosexual tendencies, the regulations mandated his discharge and denial of re-enlistment.[31] Therefore, Watkins' claim could not stand unless he could show that the regulations which discharge those who engage in homosexual *acts* are invalid.[32]

Watkins recognized that he was foreclosed from his due process claim[33] by the ruling laid down in *Bowers v. Hardwick*.[34] As a result, the court was left to determine whether the Army's regulations denied Watkins equal protection of the laws, violating his fifth amendment rights.[35] Watkins argued

25. *Id.* at 1352.
26. *Id.* at 1334.
27. *Id.*
28. *Id.*
29. *Id.* at 1335. *See also* Army Regulation 635-200, ch. 15-2.
30. *Id.* (emphasis added).
31. *Id.*
32. *Id.* (emphasis added).
33. *Id.* at 1334.
34. 478 U.S. 186 (1986).
35. The fifth amendment of the United States Constitution states in relevant part that "no person will be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

that the Army's regulations constituted invidious discrimination against sexual orientation.[36]

Evolution of Equal Protection

Pursuant to the fifth and fourteenth amendments of the United States Constitution, no government official, agent or entity may deprive any person of the equal protection of the laws.[37] Modern equal protection has two branches: the "fundamental" rights branch and the branch which disapproves of governmental action subject to levels of scrutiny and suspect classes.[38] First, the proper standard of judicial review must be identified.

The traditional standard, rational basis, is normally used to test the constitutionality of economic and social legislation. As the least stringent of the applicable standards, the rational basis test requires only that the discrimination bear "some rational relationship to legitimate state purposes."[39]

At the other end of the spectrum, the strict scrutiny standard will only uphold a discriminatory legislative classification if it is necessary to accomplish a "compelling state interest."[40] This test is appropriate if the statute discriminates against a "suspect class"[41] or violates a specially protected constitutional right.[42] The justification most often advanced for the special treatment of a legislative classification is the need to protect "discrete and insular minorities" which are thought to be "relatively powerless to protect their interests in the political process."[43]

Since 1970, an intermediate level of judicial scrutiny has developed.[44] This standard, often called rational basis "with a bite," is found in cases where the classification is close to being "suspect," or the interest in question, although not held to be fundamental, is still very important.[45] This intermediate level of review requires that a statute which discriminates must be struck down unless it is shown to be substantially related to an important state goal.[46]

Race, the model paradigm of suspect class analysis, is often joined by alienage and national origin as the only three suspect classes recognized by

36. *Watkins III*, 847 F.2d at 1335.

37. U.S. CONST. amend. V (the due process clause) and the fourteenth amendment.

38. P. POLYVIOU, EQUAL PROTECTION OF THE LAWS 79 (1980).

39. San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973).

40. City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

41. Loving v. Virginia, 388 U.S. 1, 11 (1967).

42. Shapiro v. Thompson, 394 U.S. 618 (1969).

43. U.S. v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938). In Justice Stone's famous footnote, he remarked that "prejudice against discrete and insular minorities may tend to curtail the operation of those political processes ordinarily to be relied upon to protect minorities and . . . may call for a more searching judicial scrutiny."

44. Shapiro v. Thompson, 394 U.S. 618 (1969). New equal protection, or the advent of the intermediate scrutiny test, was basically a product of the Warren Court. The doctrine received its first comprehensive interpretation in the *Shapiro* case.

45. Polyviou, *supra* note 38, at 182. *See also* Craig v. Boren, 429 U.S. 190 (1976); Reed v. Reed, 404 U.S. 71 (1971).

46. Mills v. Habluetzel, 456 U.S. 91 (1982).

the United States Supreme Court.[47] The intermediate standard is most often applied to gender and illegitimacy cases, or quasi-suspect classifications.[48]

When deciding whether homosexuals constituted a suspect class, the appellate court first looked at several relevant factors essential to a suspect class inquiry. If evidence existed that homosexuals fit these factors, a suspect class would be found. In that case, strict scrutiny would automatically be applied to the Army regulations.[49] Those relevant factors include immutable characteristics, highly visible characteristics, historical disadvantage and relative lack of political representation.[50]

Bowers Distinguished

Before the court in *Watkins* applied equal protection analysis, it chose to address the Army's argument that existing precedent foreclosed the Ninth Circuit from addressing the issue.[51] The Army first argued that the Supreme Court's decision in *Bowers v. Hardwick*[52] prevented Watkins from making an equal protection claim.[53] In *Bowers*, the Court held that homosexuals have no fundamental right to engage in consensual sodomy. Specifically, the Court found that the right to privacy did not extend to acts of consensual homosexual sodomy.[54] The Court's holding was limited to one due process question. Whether homosexuals were a suspect class was never addressed.[55]

In *Watkins*, the Army argued that it would be inconsistent to find their regulations discriminatory after the *Hardwick* decision.[56] The court addressed the Army's claim by noting that nothing in *Hardwick* implied that a state may penalize homosexuals for their sexual orientation.[57] Also, *Hardwick* was silent as to whether a state may make injurious distinctions when regulating sexual conduct.[58]

The Army also argued that *Hardwick*'s concern about the limits of the Supreme Court's role in carrying out its constitutional mandate[59] should prohibit courts from applying equal protection doctrine to protect homosexuals.

47. City of Cleburne v. Cleburne Living Center, 473 U.S. 440 (1985). Classifications based on race and national origin have been held to be suspect, and as such, are given special judicial protection. *Id.* Alienage is also sometimes considered to be a suspect classification, unless the case involves the "political function" exception. *See* 163 C.J.S. *Constitutional Law* § 714 (1985).

48. Polyviou, *supra* note 38, at 239. *See also* Craig v. Boren 429 U.S. 190 (1976) (Court applying intermediate standard of equal protection analysis to gender); Mills v. Habluetzel, 456 U.S. 91 (1982) (Court applying intermediate equal protection standard to illegitimacy and finding that it constituted a quasi-suspect class).

49. *Watkins III*, 847 F.2d at 1345.

50. 163 C.J.S. *Constitutional Law* § 714 (1985).

51. *Watkins III*, 847 F.2d at 1339.

52. Bowers v. Hardwick, 478 U.S. 186 (1986).

53. *Watkins III*, 847 F.2d at 1339.

54. 478 U.S. 186 (1986).

55. *Id.*

56. *Watkins III*, 847 F.2d at 1340.

57. *Id.*

58. *Id.*

59. *Id.* at 1341.

The *Hardwick* court seemed particularly concerned with the problems allegedly created when judges recognize constitutional rights not expressly stated in the Constitution, and having little or no recognizable ties to the language of the Constitution.[60]

The *Watkins* court recognized that the right to equal protection had a clear foundation in the United States Constitution.[61] Indeed, the framers of the fourteenth amendment understood it to be a broadly worded injunction. The amendment could be interpreted by future generations in accordance with the vision and needs of those generations. Accordingly, the equal protection clause could be construed the same way.[62]

The Army also relied on *Beller v. Middendorf*,[63] *Hatheway v. Secretary of the Army*,[64] and *DeSantis v. Pacific Telegraph and Telephone Co.*[65] In reviewing those cases, the Ninth Circuit found all three decisions unpersuasive or inapplicable.[66] Because Watkins claimed only that the Army regulations discriminated against him because he was homosexual,[67] his assertion was not barred by precedent. The next step was to subject Watkins' claims to equal protection analysis.[68]

Applying Equal Protection Analysis to Watkins

The *Watkins* court engaged in a three-stage inquiry when deciding whether the Army regulations had in fact denied Watkins of equal protection.[69] First,

60. *Id.*

61. *Id.*

62. Oregon v. Mitchell, 400 U.S. 112, 218 (1970) (Harlan).

63. Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980). *Beller*, like *Bowers*, was a substantive due process case and therefore not applicable precedent. *Watkins III*, 847 F.2d at 1342. Courts use substantive due process to review the government's ability to restrict the freedom of action of all persons. Equal protection analysis is used to review governmentally established classification. In Justice Kennedy's opinion, he made a clear statement that *Beller* was not presented to the court as involving the creation of a suspect class. *Beller*, 632 F.2d at 807.

64. Hatheway v. Secretary of the Army, 641 F.2d 1376 (9th Cir. 1981). The Ninth Circuit also found that *Hatheway* was not controlling in *Watkins III*. *Watkins III*, 847 F.2d at 1343. The claim in *Hatheway* stated that the Army was prosecuting cases involving homosexual sodomy, but not heterosexual sodomy. The claim rested on the fundamental rights branch of equal protection doctrine. This inquiry concerned whether a governmental classification burdens a fundamental right. The court applied intermediate scrutiny to the Army's actions and found that selective prosecutions were permissible. *Hatheway* at 1382. As a result, the court rejected Hatheway's claim based on the fundamental rights branch of the equal protection doctrine, the branch on which Watkins did not rely. *Watkins III*, 847 F.2d at 1343.

65. DeSantis v. Pacific Tel. and Tel. Co., 608 F.2d 327 (9th Cir. 1979). The Army contended that the Ninth Circuit in *DeSantis* had already determined that homosexuals do not constitute a suspect class. Even though the court's observation turned in part on the idea that courts have not designated homosexuals a suspect class, the Ninth Circuit in *DeSantis* did not affirmatively hold that homosexuals were in fact a suspect group. *DeSantis*, 608 F.2d at 333.

66. *Watkins III*, 847 F.2d at 1345. (court concluding that no federal appellate court had decided the critical claim raised by Watkins).

67. *Id.*

68. *Id.*

69. *Id.* at 1335.

the court determined whether the regulations discriminated on the basis of sexual orientation.[70] Second, the court determined which level of judicial scrutiny applied to sexual orientation discrimination. Finally, the court determined whether the challenged regulations could survive the applicable level of scrutiny.[71]

To determine whether the regulations were in fact discriminatory, the court looked at both the re-enlistment and discharge regulations concerning homosexuals.[72] A portion of the re-enlistment regulation stated that applicants would be denied re-enlistment if they had a history of homosexuality.[73] This included persons who had merely admitted to be homosexuals, even though no evidence had been presented that they had engaged in homosexual acts either before or during military service. Additionally, the regulation denied re-enlistment to persons who had committed homosexual acts. However, if the homosexual acts were in an isolated episode, stemming from curiosity, intoxication or immaturity, those persons would not be denied reenlistment.[74]

The Army regulation which mandated discharge was similar to the re-enlistment portion.[75] The court concluded that on their face the regulations did

70. *Id.*

71. *Id.* at 1336.

72. *Id.*

73. Army Regulation 601-280, ¶ 2-21 states in relevant part that:

> Applicants to whom the disqualifications below apply are ineligible for reenlistment at any time and requests for waiver or exception to policy will not be submitted . . .
>
> c. Persons of questionable moral character and a history of antisocial behavior, sexual perversion or homosexuality. A person who has committed homosexual acts or is an admitted homosexual but as to whom there is no evidence that they have engaged in homosexual acts either before or during military service is included.
>
> k. Persons being discharged under AR 635-200 for homosexuality . . .
>
> Note: Persons who have been involved in homosexual acts in an apparently isolated episode, stemming solely from immaturity, curiosity, or intoxication, and in the absence of other evidence that the person is a homosexual, normally will not be excluded from reenlistment. A homosexual is a person who desires bodily contact between persons of the same sex, actively undertaken or passively permitted, with the intent to obtain or give sexual gratification. Any official, private, or public profession of homosexuality, may be considered in determining whether a person is an admitted homosexual.

74. *Id.*

75. Army Regulation 635-200 provides in relevant part that:

> 15-2 Definitions . . .
>
> a. Homosexual means a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts.
>
> b. Bisexual means a person who engages in, desires to engage in, or intends to engage in homosexual or heterosexual acts.
>
> c. A homosexual act means bodily contact, actively undertaken or passively permitted, between soldiers of the same sex for sexual satisfaction.
>
> 15-3 Criteria
>
> The basis for separations may include preservice, prior service, or current service conduct or statements. A soldier will be separated per this chapter if one or more of the following approved findings is made:

discriminate against homosexuals on the basis of sexual orientation. According to the regulations, a serviceman who had engaged in any homosexual act or who had made a statement admitting homosexuality raised the presumption of a homosexual orientation. Unless one was able to rebut the presumption, he was forbidden from joining the Army.

Essentially, the regulations targeted homosexual orientation itself rather than homosexual activity. Acts and statements would be mere relevant indicators of that orientation.[76]

Therefore, the ultimate determination was whether the applicant had a homosexual orientation. As to the confessions of homosexuality, the regulations did not penalize all statements of sexual desire, or only those of homosexual desire. The regulations penalized only statements of homosexual orientation made by homosexuals.[77]

One important point is that persons could still qualify for service in the Army, despite their past homosexual conduct, if they could prove to the Army that their orientation was heterosexual, not homosexual. The regulation did not apply to heterosexual soldiers who were involved in any homosexual acts in an apparently isolated episode.[78]

The *Watkins* court offered the example that if a homosexual soldier and a heterosexual soldier of the same sex engage in homosexual acts because they were drunk, the heterosexual soldier may remain in the Army while the homosexual soldier would be discharged.[79] The Army regulations dictated this result because the heterosexual soldier's act stemmed from an isolated episode of drunkeness. He would be able to rebut the presumption of homosexuality on that basis. The homosexual soldier would be unable to rebut the presumption because his orientation was in fact homosexual.

Essentially, the regulations penalized soldiers who had engaged in homosexual acts only when the Army concluded that those soldiers were actually

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a. The soldier has engaged in, attempted to engage, or solicited another to engage in a homosexual act unless there are further approved findings that—

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

(2) Such conduct is unlikely to recur because it is shown, for example, that the act occurred because of immaturity, intoxication, coercion, or a desire to avoid military service and

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

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

(5) The soldier does not desire to engage in or intend to engage in homosexual acts.

76. *Watkins III*, 847 F.2d at 1337.

77. *Id.*

78. *Id.* at 1338.

79. *Id.* at 1339.

gay.[80] Under that analysis, the court determined that the regulations burdened persons of homosexual orientation.[81]

Next, the *Watkins* court applied the relevant factors to determine if homosexuals constituted a suspect class. These factors included the class' historical disadvantage, the class' immutable characteristics and a cluster of other traits. The first factor involved whether the class had been subjected to a disadvantage historically. Presence of a historical disadvantage would indicate that the class had been the victim of discrimination.[82]

Historically, homosexuals have been subjected to prolonged hostility.[83] Frequently victims of violence, homosexuals have been banned from schools, churches, housing, jobs and even families.[84] More recently, in *High Tech Gays v. Defense Industrial Security Clearance Office*,[85] the same harsh truth was echoed. In *High Tech Gays*, the federal district court concluded that "lesbians and gays have been the object of some of the deepest prejudice and hatred in American society."[86]

The court in *Watkins* determined that the discrimination faced by homosexuals was comparable to the discrimination faced by other groups treated as suspect classes. These classes include aliens or people of a particular national origin.[87]

The second factor concerned a cluster of highly visible characteristics. In applying this concept, the court applied three sublevels of inquiry. These levels include: (1) whether the disadvantaged class was defined by a trait that "frequently bears no relation to ability to perform or contribute to society;"[88] (2) whether the class has been encumbered with unique disabilities because of inaccurate stereotypes and prejudices; and (3) whether the trait defining the class was immutable.[89]

These levels of inquiry were used to determine whether the discrimination incorporated a gross unfairness. If affirmative evidence existed as to each inquiry, the case for discrimination became more concrete. Such inequality must be sufficiently inconsistent with equal protection goals to determine if it is invidious.[90]

Plainly, no nexus exists between a person's sexual orientation and that

80. *Id.*

81. *Id.*

82. City of Cleburne v. Cleburne Living Center, 473 U.S. 441 (1985).

83. C. WILLIAMS & M. WEINBERG, HOMOSEXUALS AND THE MILITARY 24, 25 (1971).

84. Note, *An Argument for the Application of Equal Protection: Heightened Scrutiny to Classification Based on Homosexuality*, 57 S. CAL. L. REV. 797, 824-25 (1984). *See also* Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984) (naval officer discharged on grounds of private homosexual activity); Chaffin v. Frye, 45 Cal. App. 3d 39 (1975) (lesbian mother denied custody).

85. 668 F. Supp. 1361 (N.D. Cal. 1987).

86. *Id.*

87. *Watkins III*, 847 F.2d at 1345.

88. Frontiero v. Richardson, 411 U.S. at 686 (1973).

89. City of Cleburne v. Cleburne Living Center, 473 U.S. at 440-44 (1985).

90. *Watkins III*, 847 F.2d at 1346.

person's success as a teacher, parent, citizen or soldier.[91] Indeed, in *Watkins* the Army did not claim that homosexuality impairs a person's job performance. A review of Watkins' exemplary military record attested to quite the opposite.[92] The Army itself found no evidence that Watkins' homosexuality had a degenerating effect upon the unit's performance, discipline, morale, or upon his own job performance.[93] The inapplicability of sexual orientation to a person's success in society also implies that prejudice and inaccurate stereotypes are inherent in classifications based on sexual orientation.[94]

The Army justified its regulations in part on the basis that prejudice against homosexuals was so pervasive that their presence in the Army would taint the Army's image and deter enlistment.[95] The Army also justified its regulations as reflecting public opinion against persons who engage in immoral acts.[96]

The *Watkins* court held that the regulations burdened the class defined by sexual orientation, and the court recognized that homosexual orientation was not a crime. The Army's premise could not stand.[97]

In fact, the regulations discriminated against all persons of homosexual orientation, regardless of whether they had committed sodomy.[98] Sodomy, the only consensual adult sexual conduct criminalized by Congress,[99] was the only form of homosexual conduct found to be illegal.[100] The Army regulations covered many other forms of homosexual conduct aside from sodomy which were not criminal.[101] The Army's regulations might have been justified if the class they discriminated against was comprised of only sodomists. The *Watkins* court determined that this was not the case.[102] The evidence which indicated that Watkins had engaged in any act of sodomy was inconclusive, yet the regulations mandated his discharge.[103]

Another indicator of a suspect class determination concerns immutable characteristics as a consideration of gross unfairness. The Supreme Court is willing to treat a trait as immutable if it was determined by causes not within the individual's control.[104] Immutability is described as those traits that are

91. Farrell, *Equality, Classifications and Irrelevant Characteristics*, 12 VT. L. REV. 11, 53 (1987).
92. *Watkins III*, 847 F.2d at 1331-33.
93. *Id.* at 1346.
94. City of Cleburne v. Cleburne Living Center, 473 U.S. at 440-41 (1985).
95. *Watkins III*, 847 F.2d at 1346.
96. *Id.*
97. *Id.*
98. *Id.*
99. 10 U.S.C. § 925 (1956). Article 125 deals with sodomy generally. It includes a procedure for court-martial and provides for punishment of up to sixteen years of hard labor upon conviction.
100. *Watkins III*, 847 F.2d at 1347.
101. Army Regulation 635-200, ch. 15-2(a).
102. *Watkins III*, 847 F.2d at 1347. The class banned from the Army was not composed of sodomists or homosexual sodomists. The class was composed of persons of homosexual orientation whether or not they had committed sodomy. The record in *Watkins* shows that the Army had no proof that Watkins ever engaged in any act of sodomy.
103. *Id.* at 1332-33.
104. *Id.* at 1347. An example of an immutable characteristic is eye color.

so inherent in a person's identity that it would be irrational for the government to penalize a person for an unwillingness to change them.[105]

Scientific research has determined that sexual orientation is largely immune to change.[106] Sexual orientation as a trait thus plays an important role in a person's self-perception, group affiliation and identification by others. Under this explanation of immutability, sexual orientation would join race and sex as one of few characteristics that have such an intense impact on these three aspects of personhood.[107] The court concluded that sexual orientation falls under the scope of an immutable trait.[108]

The final factor to be considered in suspect class analysis is whether the burdened group lacks political representation.[109] When evaluating whether a class is politically underrepresented, the Supreme Court has focused on whether the class is a "discrete and insular minority."[110]

Most people rarely encounter homosexuals,[111] or those they do encounter seek to hide their sexual orientation. Thus, people have little exposure to homosexuals.[112] Because of this, many people, including elected officials, have difficulty understanding or empathizing with homosexuals.[113] Indeed, the most blatant examples of discrimination against homosexuals have been enacted by state legislatures and Congress. The fact that these discriminatory laws still exist is evidence of the lack of homosexuals' political power.[114] Pervasive discrimination against homosexuals has seriously impaired their ability to gain a politically viable voice for their views in state and local legislatures and in Congress.[115]

Even when homosexuals can overcome this prejudice, general animosity towards homosexuals makes their participation totally ineffective.[116] Coupled

105. *Id. see also* MERRIAM-WEBSTER DICTIONARY 352 (3d ed. 1974) (defining immutability as "unchangeable, unchanging."); Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (opinion of Brennan, J.) ("sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth . . .").

106. Note, *An Argument for the Application of Equal Protection: Heightened Scrutiny to Classification Based on Homosexuality*, 57 S. CAL. L. REV. at 817-21. *See also* Warren, *Homosexuality and Stigma*, HOMOSEXUAL BEHAVIOR: MODERN REAPPRAISAL 123, 125-26 (1980); R. KRONEMEYER, OVERCOMING HOMOSEXUALITY 195 (1980) (homosexuality is not a choice); *Baker v. Wade*, 553 F. Supp. 1121, 1129 (N.D. Tex. 1982) (citing evidence that "sexual orientation would be difficult and painful, if not impossible, to reverse by psychiatric treatment).

107. Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1303 (1985).

108. *Watkins III*, 847 F.2d at 1348.

109. 473 U.S. at 441 (1985).

110. *Watkins III*, 847 F.2d at 1348. Justice Stone, in a footnote to U.S. v. Carolene Products, 304 U.S. 144, 152 n.4 (1938), coined the phrase "discrete and insular minority."

111. *Id.* The *Watkins* court arrived at this conclusion by the fact that homosexuals are a minority and are frequently excluded from jobs, schools, churches and heterosexual social circles. Because of these circumstances, heterosexuals generally have few opportunities to meet homosexuals.

112. *Id.*

113. *Id.*

114. Note, *supra* note 84, at 827.

115. High Tech Gays v. Defense Indus. Security Clearance Office, 668 F. Supp. at 1370.

116. Note, *supra* note 107, at 1285.

with the idea that legislators sensitive to public prejudice may refuse to support homosexual legislation, these beliefs give credence to the impossible position in which homosexuals find themselves when trying to participate in the political process.[117]

The court in *Watkins* held that the relevant factors compelled the conclusion that homosexuals did in fact constitute a suspect class.[118] The Ninth Circuit then determined whether the regulations could survive the applicable standard of review.

The Army's Justifications For Excluding Homosexuals

Because the court concluded that homosexuals were a suspect class, the Ninth Circuit's final task was to subject the Army's regulations to the strict scrutiny standard of review. The regulations could only be upheld if they were necessary to promote a compelling governmental interest.[119] The court realized that even under strict scrutiny, courts must be more deferential in reviewing military regulations than in reviewing civilian laws.[120]

Military and civilian life are regulated by separate systems of justice. Although they are parallel in some ways, they are nevertheless distinct.[121] Civilian court power is limited in a military setting because "courts are poorly-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."[122] The court, however, may use its power to determine if military regulations are unconstitutional.[123] Even granting special deference to the Army's policy choices, the court rejected many of the Army's claims because they were based on illogical private biases.[124]

The Army first argued that it had a valid interest in maintaining discipline and morale by avoiding hostilities between known homosexuals and other servicemen who despise homosexuality.[125] These concerns are similar to those voiced about women and blacks and have a very familiar ring. The armed forces have always displayed a substantial resistance to permitting persons outside the social mainstream to serve in their ranks.[126] Throughout World War II there were rigorous debates as to whether blacks should be integrated

117. *Id. See also* Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 732-33 (1985) (even if homosexuals do choose to participate, they may be so repellent to certain other groups that they will be unable to bargain effectively in the political world).

118. *Watkins III*, 847 F.2d at 1349.

119. Dunn v. Blumstein, 405 U.S. 330, 342 (1972).

120. Goldman v. Weinberger, 475 U.S. 503 (1986).

121. Watkins v. U.S. Army, 721 F.2d 687, 690 (1983).

122. Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962).

123. Watkins v. U.S. Army, 721 F.2d at 690 (1983).

124. *Watkins III*, 847 F.2d at 1349.

125. *Id.* at 1350.

126. McCrary & Gutierrez, *supra* note 4, at 116.

into regiments.[127] Similar contentions were set forth by the military to oppose the integration of women into the ranks.[128]

The Army's claim was not valid. The peculiar nature of Army life always required the fusing together of disparate personalities such as blacks and women. The Army's vital mission had withstood these changes in gender and racial standards. It should be able similarly to withstand any changes necessary to operate without the regulations which courts have found offensive.[129]

Indeed, the Army does not stand alone as the only military branch to set out regulations it feels are in its best interests. The Department of Defense's directive concerning enlisted administrative separations[130] has been adopted with slight variations by each branch of the service.[131]

The Navy's justifications for the exclusion of homosexuals even includes a claim that homosexuals may be less productive than their heterosexual counterparts.[132] Because the military is a specialized society separate from the civilian world, the Navy claims it is justified in its determination that homosexual conduct impairs its capacity to carry out its mission.[133]

In various cases involving homosexual discrimination, job performance has been a key issue. In all of these cases, the homosexual military personnel had exceptional performance records.[134] Knowledge divulged from numerous court cases and current psychiatric thought finds no basis for homosexuality as per se disqualifying one from positions of trust and responsibility.[135] The majority of homosexuals who serve in the military do so with honor.[136]

127. *Id. See also Hearings on H.R. 9832, 10705, 11267, 11711, and 13720 Before the Subcom. No. 2 of the Housed Armed Services*, 80th Cong., 2d Sess. (1974).

128. *Id.*

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

130. Department of Defense Directive 1332-14, (revised and reissued in 1982), Section H, subtitled "Homosexuality," states:

> 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 servicemembers; to insure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of servicemembers 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.

131. Army: Army Regulation 635-200, Ch. 15.
Navy: NAVMILPERSMAN 3630400
Air Force: AFR 39-10
Marine Corps: MARCORSEPMAN 6207

132. Saal v. Middendorf, 427 F. Supp. 192 (N.D. Cal. 1977).

133. Dronenburg v. Zech, 741 F.2d 1388, 1398 (D.C. Cir. 1984).

134. *See* Matthews v. Marsh, 755 F.2d 182 (1st Cir. 1985); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980); Dronenberg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984).

135. 632 F.2d 788 (1980).

136. J. WILLIAMS & M. WEINBERG, HOMOSEXUALS AND THE MILITARY 24, 187 (1971).

The military's adverse policies regarding treatment of the homosexual are steeped in history. The armed forces have a long tradition of aversion to the presence of homosexual personnel in their ranks.[137] In practice, homosexuality is routinely considered by all branches of the military as an administrative matter, resulting in the initiating of automatic discharge procedures.[138]

However, the historical record bears confirmation that homosexual men have played a substantial role in the military of numerous nations, particularly as military leaders.[139] Many 20th century societies have concluded that homosexual soldiers should not automatically be excluded from military service.[140]

In *Watkins*, the Army also claimed that its ban against homosexuals is simply a reflection of society's moral judgments. However, the court found that widespread public distaste against homosexuals could not condone official discrimination.[141]

Equal protection doctrine requires that ideas of morality be tempered by the equal protection principles and that these ideas be applied evenly. Laws that limit the focus of one's sexual proclivity to heterosexual relationships cannot survive strict scrutiny without a compelling governmental justification.[142]

The Army's final two claims bear little relation to the questioned regulations and deserve only cursory treatment. The Army argued that military discipline will be subverted if homosexuals of different ranks develop emotional relationships.[143] Although this may be a legitimate interest, the *Watkins* court determined that heterosexuals are no less likely to develop emotional attachments than homosexuals. Yet the Army regulations failed to address heterosexual emotional attachments.[144]

Finally, the Army asserted a professed concern regarding breaches of secur-

137. National Lawyers Guild Anti-Sexism Committee, *Sexual Orientation and the Law*, 6-3 (1987).

138. Department of Defense Directive 1332.14 (1982).

139. McCrary & Gutierrez, *supra* note 4, at 116.

140. *Id.* (Court concluding that Italy, Japan, Taiwan, Thailand, Philippines, Norway, Spain, Belgium and the Netherlands have no specific prohibitions against homosexual persons in the armed services).

141. *Watkins III*, 847 F.2d at 1351.

142. *Id.* at 1352.

143. *Id.* The incidence of AIDS has also become a military concern. Until 1985, the various services were free to develop informal policies about the treatment of servicemembers, with the result that each service created its own guidelines. In 1985, however, the DOD issued a uniform policy for the armed services which called for AIDS testing of all recruits and servicemembers. The new policy memo set forth several reasons for the testing program. They suggest that servicemembers must be screened for the antibody to prevent transmission of the virus in battlefield blood transfusions. However, person-to-person blood transfusions in the field are not commonly used by the military and have not been for many years: the military blood supply is already "protected" by AIDS testing of blood donors. *See* Defense Department, Military Implementation of Public Health Service Provisional Recommendations Concerning Testing Blood and Plasma for Antibodies of HTLV-III (Mar. 13, 1985).

144. *Id.*

ity.[145] The Army does have a legitimate interest in excluding persons who may be susceptible to blackmail. The court determined, however, that this problem would only arise if a homosexual is secretive about his sexual orientation. Again, Army regulations do not address this problem.[146]

The Department of Defense has long assumed that homosexuals are inherently security risks.[147] Presumably, a person who is secretive may invite blackmail, but probably no more than the heterosexual person who engages in secret extramarital sexual conduct.[148]

In concluding the *Watkins* analysis, the Ninth Circuit found the Army's regulations violated the equal protection clause. The regulations in question were found to be discriminatory against persons of homosexual orientation, a suspect class. Applying the equal protection test for strict scrutiny, the court ruled that the regulations were not necessary to promote a compelling governmental interest.[149]

The Ninth Circuit reversed the district court's denial of Watkin's motion for summary judgment. The case was remanded with instructions for the district court to rule on any unanswered claims.[150] The *Watkins* case was reheard by the Ninth Circuit en banc in October of 1988.

If the case reaches the Supreme Court, the Court will probably overturn the Ninth Circuit's opinion concerning homosexuals' suspect class status. A reversal is probable because the Supreme Court has been very restrictive in pronouncing new suspect classes.[151] Until that time, however, the question remains whether homosexuals will be recognized as a suspect class.

Reaffirming the position that homosexuals must be recognized as a suspect class, this note supports an application of strict scrutiny analysis for discriminatory legislation. Homosexuality is a trait which is difficult, if not often impossible to overcome. Because of this trait, homosexuals bear the burden of a history of discrimination and stigma. Unable to guard their own interests, the naming of homosexuals as a suspect class would stop the perpetuation of incorrect stereotypes, which injure a person's self-respect.[152]

145. *Id.*

146. *Id.*

147. McCrary & Gutierrez, *supra* note 4, at 133. Department of Defense Directive 5220.6 includes fourteen criteria for finding ineligibility for clearances. Under these criteria, homosexuals have routinely been denied clearances. Examples of criteria customarily cited include "any criminal or dishonest conduct, or sexual perversion and any facts or circumstances which furnish reason to believe that the applicant may be subjected to coercion, influence, or pressure which may be likely to cause action contrary to the national interest."

148. *Id.*

149. *Watkins III*, 847 F.2d at 1352.

150. *Id.* at 1352-33.

151. Polyviou, *supra* note 38, at 239-40. Differences of opinion exist among the court about which classifications other than race should be designated as suspect. No reasoning has been given as to why suspect classification has been withheld from many other classifications sharing the same characteristics as race, the model of a suspect class.

152. Note, *supra* note 84, at 835.

Despite the Supreme Court's position, heightened scrutiny in homosexual discrimination cases is justified by the very factors which determine suspectness. Moreover, the fight for recognition of homosexual rights is not generally outweighed by any compelling state interest. *Watkins* is a prime example.

Finally, a constitutional foundation exists to allow homosexuals to be recognized as a legitimate suspect class. Some commentators believe that since the framers of the Constitution understood that the document would have to survive from one generation to the next, they conceived of it being broadly construed.[153] The court is therefore justified in subjecting other statutory classifications to strict scrutiny.

Conclusion

The *Watkins* holding was the correct and only decision available to the Ninth Circuit. Army regulations concerning discharge and re-enlistment discriminated against homosexuals on the basis of their sexual orientation. Applying equal protection analysis, the court properly found that the class of homosexuals met all the tests for strict scrutiny.

The fifth and fourteenth amendments call for equal protection under the laws for all people. Under equal protection analysis, regulations and statutes are subjected to varying standards of review. These include rational basis, intermediate scrutiny and strict scrutiny. Under the strict scrutiny standard, courts will only uphold regulations if they are justified by a compelling state interest. This standard is normally applied to statutes which discriminate against a suspect class.

A suspect classification allows for special treatment of a class thought to be relatively powerless to protect its interests. Certain factors, including immutability, visible characteristics, a historical disadvantage and a lack of political representation, are considered when determining a suspect class.

The *Watkins* court found that the questioned regulations discriminated against any soldier who had engaged in a homosexual act and who the Army determined to be homosexual. The court struck down the regulations on the basis that restriction of sexual conduct must be done evenhandedly. In analyzing the relevancy of the factors, the court concluded that homosexuals do constitute a suspect class.

The court's final duty was to see if the Army's regulations could be upheld as necessary to promote a compelling governmental interest. Many of the Army's justifications failed because they were based on irrational personal biases. In fact, the Army had offered the same justifications for keeping women and blacks out of their ranks. No important governmental interest was supported by the military's justifications. The Ninth Circuit found the regulations unconstitutional.

If *Watkins* reaches the Supreme Court, the Court will probably not affirm the Ninth Circuit's ruling. However, homosexuals are justified as a suspect

153. Polyviou, *supra* note 38, at 239-40. *See also* Oregon v. Mitchell, 400 U.S. 112, 278 (1970).

class because of the very concerns, such as a history of discrimination, the Supreme Court has recognized when protecting other minority classes. Also, no compelling state interest geared to the prevention of actual harm can generally overcome homosexual rights.

As depicted in this case, the military's continuing policy of discrimination against homosexual servicemembers is constantly under attack in the courts. These civil suits, whether successful or not, have some impact on the shaping of military policy.[154] The importance of the armed services to remain able and ready for any crises cannot be underestimated. However, the military must temper readiness with the constitutional protections which are at the very foundation of the American way of life. Every citizen, without fear of arbitrary punishment, should be allowed to serve and defend the U.S.[155] One person's sexual preference should have no bearing on willingness to volunteer for the armed services. Strict regulations as to sexual choice may tend to discourage rather than encourage enlistment as an alternative career option. The status quo may also result in dwindling human resources to be used for our nation's defense and protection.

Denise Dunnigan

154. National Lawyer's Guild Anti-Sexism Committee, *Sexual Orientation and the Law*, 6-3 (1987).

155. Comment, *Homosexuals in the Military: They Would Rather Fight Than Switch*, 18 J. MARSHALL L. REV. 937, 966 (Spr. 1985).