ASK, TELL, AND BE MERRY: THE CONSTITUTIONALITY OF “DON’T ASK, DON’T TELL” FOLLOWING LAWRENCE V. TEXAS AND UNITED STATES V. MARCUM

Evangelos Kostoulas

On November 30, 1993, President Clinton signed a law, commonly referred to as “Don’t Ask, Don’t Tell,” which bans homosexuals from openly serving in the armed forces. Though it was not the first military policy to discriminate against homosexuals, it is the controlling law today. Since being signed into law, the constitutionality of “Don’t Ask, Don’t Tell” has been challenged in the courts on various grounds, and each challenge has failed.

Recently, a number of complaints have been filed in district courts around the country questioning the constitutionality of the military’s “Don’t Ask, Don’t Tell” policy in light of the United States Supreme Court’s decision in Lawrence v. Texas. This Comment will examine
the role that *Lawrence* should play in invalidating "Don’t Ask, Don’t Tell." In Part I, I provide an introduction to "Don’t Ask, Don’t Tell" and the previous challenges to that law, which will serve as a backdrop in future challenges. In Part II, I will examine the Court’s decision in *Lawrence*. The majority invalidated the Texas statute criminalizing sodomy in *Lawrence* based on a violation of due process, but the scope of the liberty interest identified and the standard of review that the Court utilized are both ambiguous. I examine the Court’s language for some clarity on these subjects, ultimately concluding that the Court in *Lawrence* recognized a fundamental right. In Part III, I discuss another case, *United States v. Marcum*, in which the United States Court of Appeals for the Armed Forces (C.A.A.F.) determined that *Lawrence* was applicable in the military context. Though *Marcum* involved a prosecution under the Uniform Code of Military Justice, the Court’s opinion is enlightening because it considers the unique circumstances of military life before developing a test to determine the circumstances under which *Lawrence* should apply to military prosecutions. In Part IV, I build on the discussions in Parts II and III in analyzing the constitutionality of "Don’t Ask, Don’t Tell." I argue that the acts prong of "Don’t Ask, Don’t Tell" infringes on the fundamental liberty interest identified in *Lawrence*. I further argue that, though the Court affords Congress great deference in reviewing military regulations, the reasons provided for this deference apply equally well to the decisions of the C.A.A.F. For this reason, the Court should integrate decisions made by the C.A.A.F. into its balancing. Taking all of this into consideration, I ultimately conclude that the Supreme Court should find the acts prong of "Don’t Ask, Don’t Tell" unconstitutional in many circumstances, and therefore, should find the statements prong unconstitutional.

I. INTRODUCTION

The military’s "Don’t Ask, Don’t Tell" policy is codified at 10 U.S.C. § 654. This statute requires that a member of the armed

6 This Comment will focus on the constitutionality of the "acts" prong and the resulting ramifications to the "statements" prong should the Court determine that the "acts" prong of "Don’t Ask, Don’t Tell" is unconstitutional. Because of the tenuous status of same-sex marriage in the United States, this Comment will assume that 10 U.S.C. § 654(b)(3) is constitutional. See Wyatt Buchanan, *Profound Issues in Seattle Lawsuit State High Court Set to Rule on Gay Rights*, S.F. CHRON., Jan. 3, 2006, at A1 ("Thirty-nine states in all bar same-sex marriage, 18 have enacted constitutional bans and in some states both laws and the constitution bar same-sex marriage.").

7 60 M.J. 198 (C.A.A.F. 2004).

8 See infra notes 9-10 and accompanying text for an explanation of what the "acts" and "statements" prongs are.
forces be "separated" from the military if one or more of the following findings are made:

(1) [t]hat 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 . . . 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 the 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) [t]hat the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding . . . 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) [t]hat the member has married or attempted to marry a person known to be of the same biological sex.\(^9\)

When examining this policy, courts often refer to 10 U.S.C. § 654(b)(1) as the "acts prong" and 10 U.S.C. § 654(b)(2) as the "statements prong."\(^10\) In previous suits, the acts prong has been challenged primarily on the basis that it violates the equal protection component of the Due Process Clause of the Fifth Amendment.\(^11\) The courts have uniformly held that rational basis is the proper standard of review for evaluating equal protection claims against laws that discriminate against homosexuals,\(^12\) often noting that the laws passed by Congress regarding the military are entitled to deference by the courts.\(^13\) Previous cases have challenged the statements prong on the

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\(^10\) E.g., Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1128 (9th Cir. 1997) (using "acts prong" and "statements prong" terminology).
\(^11\) See, e.g., Able v. United States, 155 F.3d 628, 631 (2d Cir. 1998) (applying equal protection analysis to 10 U.S.C. § 654(b)(1)); Holmes, 124 F.3d at 1132 (same); Philips v. Perry, 106 F.3d 1420, 1424-25 (9th Cir. 1997) (same); Thomasson v. Perry, 80 F.3d 915, 927 (4th Cir. 1996) (applying equal protection analysis to 10 U.S.C. § 654(b)).
\(^12\) See, e.g., Able, 155 F.3d at 631-32 (applying rational basis review); Philips, 106 F.3d at 1425 (same); Thomasson, 80 F.3d at 927-28 (same). But see Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) ("When a law exhibits . . . a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.") (emphasis added).
\(^13\) See, e.g., Able, 155 F.3d at 633 ("Deference by the courts to military-related judgments by Congress . . . is deeply recurrent in Supreme Court caselaw . . ."); Philips, 106 F.3d at 1425
basis that it violates the First Amendment. Courts have rejected this argument, finding it rational to assume that a homosexual will engage in homosexual conduct, thereby violating the acts prong. A service person’s statements concerning his or her homosexual orientation, thus, can be used as probative evidence of a propensity or intention to engage in proscribed conduct; therefore, the constitutionality of the statements prong relies on the acts prong being constitutional.

II. LAWRENCE V. TEXAS

In Lawrence v. Texas, the United States Supreme Court reviewed the case of two men convicted of engaging in “deviate sexual intercourse” in violation of a Texas statute making homosexual acts illegal. The Court granted certiorari to consider three separate questions: (1) whether the Texas law violated the Equal Protection Clause of the Fourteenth Amendment because it made certain acts illegal only when committed by same-sex couples; (2) whether the Texas laws violated their “vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment;” and (3) whether it should overrule Bowers v. Hardwick. The majority decided to overrule Bowers v. Hardwick, concluding that “Bowers was not cor-

(stating that the judiciary should defer to Congress in matters relating to the military); Thomasson, 80 F.3d at 925-27 (stating that Congress is entitled to deference when courts scrutinize the constitutionality of laws regulating military affairs); see also Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (“[R]eview of military regulations ... is far more deferential than constitutional review of similar laws or regulations designed for civilian society.”); Rostker v. Goldberg, 453 U.S. 57, 70 (1981) (“[J]udicial deference ... 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.”).

14 See, e.g., Philips, 106 F.3d at 1429-30 (challenging 10 U.S.C. § 654(b)(2) under the First Amendment); Thomasson, 80 F.3d at 931-34 (same); Able v. United States, 88 F.3d 1280, 1292-1300 (2d Cir. 1996) (reviewing the district court’s decision that 10 U.S.C. § 654(b)(2) violates the First Amendment).

15 E.g., Thomasson, 80 F.3d at 932 (“[A] service member’s statement that he is a homosexual has substantial evidentiary value regarding whether he has a propensity to engage in homosexual acts ... ”). It has been argued that punishing a member of the military for admitting that he has a homosexual orientation discriminates unconstitutionally on the basis of status rather than conduct. Such an interpretation was rejected prior to the Supreme Court’s decision in Lawrence. See Able, 88 F.3d at 1298 (2d Cir. 1996) (reversing district court’s holding that the statute discriminates based on status).

16 See Able, 155 F.3d at 631 (“[I]f the acts prohibition of subsection (b)(1) is constitutional ... the statements presumption of subsection (b)(2) does not violate the First Amendment,” because the ‘subsections rise or fall together.’”) (internal citations omitted) (quoting Able, 88 F.3d at 1292, 1296).


18 Id. at 564.

rect when it was decided, and it is not correct today." The majority further stated that the Texas statute violated the rights of the petitioners under the Due Process Clause, though the level of scrutiny used by the majority in reaching that conclusion is unclear.

A. Due Process Under Lawrence

1. The Standard of Review

In cases regarding due process and equal protection, the Court has often made an explicit statement specifying the standard of review employed. The absence of such a statement in Lawrence has created confusion about the level of scrutiny that should be applied by lower courts in deciding cases regarding discrimination against homosexuals. Some have argued that the Court was applying strict scrutiny because it was protecting a fundamental right. Others have interpreted Lawrence as requiring only rational basis review. Both arguments have found supporting evidence in the Lawrence decision.

The Court began its analysis by stating that "the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause . . . ." The Court then discussed the evolution of its recognition of the right to privacy, citing Griswold v. Connecticut, Eisenstadt v. Baird, Roe v. Wade, and Carey v. Population Services International. The Court explained that it was citing these opinions because "[b]oth Eisenstadt and Carey, as well as the holding

20 Lawrence, 539 U.S. at 578.
21 Id. at 578-79.
22 See Cook v. Rumsfeld, 429 F. Supp. 2d 385, 394 n.11 (D. Mass. 2006) ("[T]he Court did not explicitly state what standard of review it was using.").
23 See, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 926 (1992) ("Our precedents and the joint opinion's principles require us to subject all non-de-minimis abortion regulations to strict scrutiny."). But see Lawrence H. Tribe, Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name, 117 HARv. L. REv. 1893, 1917 (2004) ("To search for the magic words proclaiming the right protected . . . to be 'fundamental,' and to assume that in the absence of those words mere rationality review applied, is to universalize what is in fact only an occasional practice.").
24 See, e.g., Tribe, supra note 23 (arguing that the Court recognized a fundamental right to form homosexual relationships).
25 See, e.g., United States v. Marcum, 60 M.J. 198, 205 (C.A.A.F. 2004) ("In Lawrence, the Court did not expressly identify the liberty interest as a fundamental right. Therefore, we will not presume the existence of such a fundamental right . . . .")
26 Lawrence, 539 U.S. at 564.
27 Id. at 564-66.
28 381 U.S. 479 (1965).
and rationale in Roe, confirmed that the reasoning of Griswold could not be confined to the protection of rights of married adults. The Court continued by admonishing its decision in Bowers v. Hardwick, stating:

The Court began its substantive discussion in Bowers as follows: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . . ." That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake.

The Court continued by analogizing a homosexual relationship to that of a married couple. To characterize the rights of homosexuals as simply the right to engage in sodomy, the Court commanded, is demeaning to those individuals and akin to distilling marriage into "the right to have sexual intercourse."

The Court's language in Lawrence is instructive of its intentions. Though the statute in question only outlawed a sexual act, the Court described its purpose as seeking to prevent homosexuals from forming intimate relationships. The Court rebuked laws against sodomy for attempting to "control a personal relationship" akin to that of a married heterosexual couple. Homosexuals routinely enter into committed personal relationships with each other, and laws such as the Texas statute challenged in Lawrence effectively make those relationships a crime. The Court recognized that "whether or not entitled to formal recognition in the law," those relationships were protected under the Constitution as a liberty interest. The Court was consistent in its language, relying on privacy cases invoking strict scrutiny to invalidate a law that touched "upon the most private hu-

52 Lawrence v. Texas, 539 U.S. 558, 566 (2003). See also Griswold, 381 U.S. at 485 ("The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.").
53 See id. ("The facts in Bowers had some similarities to the instant case.").
54 Id. at 566-67 (citation omitted).
55 Id. at 567.
56 See TEX. PENAL CODE ANN. § 21.06 (2003), invalidated by Lawrence, 539 U.S. 558 (defining homosexual conduct as a Class C misdemeanor).
57 Lawrence, 539 U.S. at 567.
58 Id.
60 See Lawrence, 539 U.S. at 573 (stating that, in 2003, thirteen states prohibited sodomy).
61 The Court recognized that sodomy is a physical manifestation of homosexual relationships, but was careful to distinguish between the two. See id. at 567 ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.") (emphasis added).
62 Id.
man conduct...in the most private of places...". This suggests that the Court was utilizing strict scrutiny in its decision.

Justice Scalia goes to great lengths in his dissent to establish that there is no fundamental right to homosexual sodomy. However, the majority expressly stated that the error of Bowers was exactly that. That is, the Court analyzed the Bowers case by determining if there was a fundamental right to engage in homosexual sodomy, and that very framing of the issue itself "discloses the Court’s own failure to appreciate the extent of the liberty at stake." Justice Scalia repeatedly noted that fundamental rights must be "deeply rooted in this Nation’s history and tradition." Yet, this is not inconsistent with the conclusion that Lawrence recognized a fundamental right.

2. The Scope of the Liberty Interest in Lawrence

As a preliminary matter, it is critical to identify the scope of the liberty interest identified in Lawrence, for the level of generality with which a right is defined is often an outcome-determinative issue. As Tribe and Dorf explained in Levels of Generality in the Definition of Rights, Justice Scalia argues in footnote 6 of Michael H. v. Gerald D. that the level of specificity with which a right should be recognized is "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." Even if this dictum is accepted as the proper standard by which to delineate constitutional rights, its deceptively simple standard ignores the complexity that necessarily follows in its application. The most obvious problem with this standard is that "reasonable people can disagree about the content of particular traditions, and...they can disagree even about which traditions are relevant to the definition of 'liberty'..." Similarly, if there is no societal tradition regarding the specific issue being considered by the Court, there is no single correct method for expanding the analysis of traditions to the next most specific level.

43 Id.
44 Id. at 586–605 (Scalia, J., dissenting). Justice Scalia goes so far as to suggest that the constraint on liberty posed by anti-sodomy laws is equivalent to that posed by laws against prostitution and heroin use. Id. at 592.
45 Id. at 567 (majority opinion).
46 See, e.g., id. at 593 (Scalia, J., dissenting) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).
47 See Laurence H. Tribe & Michael C. Dorf, Levels of Generality in the Definition of Rights, 57 U. CHI. L. REV. 1057, 1066 (1990) (explaining that the majority and dissent came to different legal conclusion in Bowers because they defined "the right at issue" differently).
49 Id. at 137 (Brennan, J., dissenting).
For example, in *Michael H.*, Justice Scalia argues that if there was no tradition "regarding the rights of the natural father of a child adulterously conceived," the Court should look to the rights of natural fathers generally. However, legal problems are rarely, if ever, one dimensional, as Justice Scalia's assertion implicitly assumes. Tribe and Doff argued that, in this example, one could legitimately decide to ignore the gender of the parent rather than whether the child was conceived through adultery and examine instead the *parental* rights of children adulterously conceived. Such a problem would almost always be present in evaluating the rights protected by tradition because the issue before the Court can always be sufficiently narrowly framed as to preclude the existence of a tradition regarding it. Ultimately, the Court must make a value judgment in determining how abstractly rights should be defined. Thus, a better approach for the Court would be to look at the rationales behind existing cases and traditions and determine if they apply to the case before it.

With this in mind, I turn back to Justice Scalia's assertion that the majority in *Lawrence* could not have recognized a fundamental right because there was no such right that was "deeply rooted" in this country's "history and tradition." In *Lawrence*, the majority identified a liberty interest, not in a sexual act, but in the formation of intimate personal relationships, whether homosexual or heterosexual. It is because statutes that prohibit acts of sodomy "seek to control" those relationships, in the case of homosexuals, that they are invalid. Though Justice Scalia pointed out that sodomy does not meet the requirements for a fundamental right, the right to form an intimate personal relationship with another is a right "deeply rooted in this Nation's history and tradition."

The right of heterosexuals to form such personal relationships has long been protected through the right to marry. Though the right to marry is distinct from the liberty interest identified in *Lawrence*, it was the marriage relationship to which the majority in *Lawrence*...
analogized the relationship in *Bowers*. This does not mean that the right identified in *Lawrence* extends to same-sex marriage. Indeed, the Court noted explicitly that it was not addressing same-sex marriage. The fact that homosexuals have been denied the fundamental right to form intimate personal relationships in the past does not mean that such a fundamental right does not exist. Here, the level of generality at which the Court defines a right becomes important. If broadly generalized, historical traditions can be cited to support propositions to which they bear no relation. For example, Tribe and Dorf observed that prior to the industrialization of this country, there were no minimum wage laws. Yet, the historical absence of such laws does not indicate that when such laws were passed, they infringed upon a fundamental right to work for small sums of money. Rather, minimum wage laws did not exist before industrialization because there was no need for them.

"Conversely, the presence of positive laws encroaching upon a right does not negate the fundamentality of that right." One need only look at this country's historical treatment of interracial marriage for proof of this axiom. Prior to 1948, many states had laws banning interracial marriage. In 1948, California was the first state to hold its anti-miscegenation statute unconstitutional, with a number of other states following suit shortly thereafter. In 1967, the United States Supreme Court issued its decision in *Loving v. Virginia*, which held that Virginia's anti-miscegenation statute violated the Fourteenth Amendment of the Constitution. Simultaneously, the Court recognized a fundamental right to marry, which extended to interracial couples. The fact that this country had a historical tradition of prohibiting interracial marriage did not prevent the Court from determining that a fundamental right to marriage existed or that such a right extended to interracial couples.

Although *Loving* was the first time that the Court had ruled on the constitutionality of statutes prohibiting interracial marriage, its past

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58 *Id.* at 567 (majority opinion).
59 See *id.* at 578 ("[The present case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.").
60 Tribe & Dorf, *supra* note 47, at 1088.
61 *Id.*
62 *Id.*
63 *Id.*
64 See *Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967) (listing states that had bans on interracial marriage and states that had repealed their bans).
65 *Id.*
66 *Id.* at 12.
67 See *id.* ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival.").
68 *Id.* at 2.
rulings were not consistent with the existence of a fundamental right to marry. To deny that a fundamental right could be recognized in Lawrence because "a right to engage in homosexual sodomy [is] not "deeply rooted in this Nation's history and tradition"" is equivalent to saying that there could be no fundamental right recognized in Loving because a right to interracial marriage is not deeply rooted in this Nation’s history or tradition. In both cases, the critical issue becomes the level of specificity with which a right is protected.

3. Lawrence Recognized a Fundamental Right

The rationales of the privacy cases cited by the Court at the beginning of the Lawrence opinion are consistent with protecting a fundamental right to forming intimate associations. In Griswold, the Court objected to a statute prohibiting the use of contraceptives because it forbade "the use of contraceptives rather than regulating their manufacture or sale." This prohibition extended to married people. Because the statute regulated the private and intimate behavior of married people, the Court held that it was destructive to their relationships and therefore violated their fundamental privacy rights. In Eisenstadt, the Court expanded the protection granted in Griswold to unmarried people under a similar rationale. However, in Eisenstadt the Court clarified that "the marital couple is not an independent entity." The right to privacy of married individuals derives from each individual's right to privacy. Each individual's right to form private, intimate relationships is protected by their right to privacy, which extends to "the decision whether to bear or beget a

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69 See infra note 71.


71 If anything, there is a history and tradition of anti-miscegenation in this country. In Pace v. Alabama, the Court upheld an Alabama statute that punished interracial fornication more severely than another statute prohibiting fornication between non-interracial couples. 106 U.S. 583 (1883). The statute in question also prohibited interracial marriage, Ala. Code § 4189 (1876), though the Court did not address the constitutionality of that issue. Pace, 106 U.S. at 584-85. Prior to Loving, the Court similarly signaled its approval of anti-miscegenation laws through its passive acceptance of them. See McLaughlin v. Florida, 379 U.S. 184, 195 (1964) (failing to "reach[ ] the question of the validity of [Florida's] prohibition against interracial marriage"); State v. Bell, 66 Tenn. 9, 9 (1872) (allowing indictment of interracial couple married in Mississippi for violating Tennessee miscegenation law), cited with approval in Yarborough v. Yarborough, 290 U.S. 202, 218 n.10 (1933) (Stone, J., dissenting).


73 Id. at 480.

74 Id. at 485.


76 Id.

77 Id.
child. The Court used similar reasoning in the plurality opinion of Carey, though it applied a lower level of scrutiny in that case because the challenged law involved minors. In Roe, the Court extended its reasoning, deciding that because pregnancy impacts a woman's life so profoundly, an individual's right to privacy extends to the decision of whether to have an abortion. However, the Court noted that in the case of abortion, the state has a countervailing interest in the "protection of health, medical standards, and prenatal life" that must be balanced against a woman's right to an abortion.

The rationales of these cases are wholly consistent with the Court's holding in Lawrence that a fundamental right exists to form intimate personal relationships under the penumbra of privacy. In both Griswold and Eisenstadt, the Court determined that the right to privacy encompassed the right to use contraceptives because it interfered with the underlying right to form intimate relationships free from governmental interference. Carey and Roe help to limit the scope of the right; thus, these cases can be used to explain why the right does not necessarily extend to protect same-sex marriage. In both Carey and Roe, individual privacy rights were balanced against significant state interests. In Carey, the Court considered "the States' greater latitude to regulate the conduct of children" and the fact that children are less capable of making important decisions, which the privacy right in that case demanded. In Roe, the Court weighed the state's interest in "safeguarding health, in maintaining medical standards, and in protecting potential life." Same-sex marriage likewise involves ancillary state interests that were not present in Lawrence. Lawrence was about private, intimate conduct. The other privacy cases cited by the Court likewise involved private behavior. However, marriage is by no means private. Marriage creates a legal status that bestows state and federal legal rights upon the parties entering into it.

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78 Id.
79 Id. at 678, 685 (1977) (noting Griswold and Eisenstadt).
80 Id. at 693 & n.15 (1977) ("State restrictions inhibiting privacy rights of minors are valid only if they serve 'any significant state interest....' This test is apparently less rigorous than the 'compelling state interest' test applied to restrictions on the privacy rights of adults.") (quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976)). The Court in Lawrence specifically distinguished its case from a case applying to minors, stating "[t]he present case does not involve minors." Lawrence v. Texas, 539 U.S. 558, 578 (2003).
82 Id. at 155.
83 Carey, 431 U.S. at 693 n.15.
84 Roe, 410 U.S. at 154.
85 See, e.g., Letter from Dayna K. Shah, Associate General Counsel, U.S. General Accounting Office, to Bill Frist, U.S. Senate Majority Leader (Jan. 23, 2004), available at http://www.gao.gov/new.items/d04353r.pdf (noting that there are 1,138 federal statutory provisions "in which marital status is a factor in determining or receiving benefits, rights, and privileges").
The operation of law is generally considered public.\textsuperscript{86} Marriage licenses themselves become part of the public record.\textsuperscript{87} In short, the rationales of the cases cited by the majority in \textit{Lawrence} support the Court's holding that a fundamental right exists to form personal, intimate relationships, but those rationales would not necessarily extend to support the recognition of same-sex marriage.

Thus, to say that the right to form intimate relationships has been protected among heterosexuals through marriage is not to say that the right to form intimate relationships is identical to the right to marriage. Rather, each is a distinct right. The relationship between these two rights can be analogized to an insulated wire. The wire represents the relationship, while the surrounding insulation represents marriage. A wire can conduct electricity between two points regardless of whether or not it has insulation. Similarly, a relationship can exist between two people outside of marriage. The insulation provides protection to the wire and the current that it carries, shielding it from interference, but both exist separately with different properties. Marriage likewise provides legal protections and stability to a relationship.\textsuperscript{88} Just as one would not look at an insulated wire and see only the insulation, one cannot look at marriage and ignore the underlying relationship the Court has sought to protect with its decisions. The privacy cases cited by the \textit{Lawrence} Court centered their rationales on this relationship, rather than its formal, legal recognition through marriage. Thus, it makes sense that, just as the Court in \textit{Loving} recognized that marriage was a fundamental right that had been denied to interracial couples, the Court in \textit{Lawrence} recognized that the right to form intimate personal relationships was a right that had been denied to homosexuals.\textsuperscript{89}

Still, it should be noted that the majority in \textit{Lawrence} also stated that "[t]he Texas statute furthers \textit{no legitimate state interest} which can

\textsuperscript{86} See, e.g., \textit{Shelley v. Kraemer}, 334 U.S. 1, 12-18 (1948) (distinguishing between a private covenant, which is beyond the reach of the Fourteenth Amendment, and enforcement of that covenant through judicial means, which is not).


\textsuperscript{88} See Hernandez v. Robles, Nos. 86-89, 2006 N.Y. LEXIS 1836, at *7 (N.Y. July 6, 2006) ("[A]n important function of marriage is to create more stability and permanence in the relationships that cause children to be born.").

\textsuperscript{89} Both \textit{Loving} and \textit{Lawrence} are stories of forbidden love transcending their artificial boundaries. Stories such as these are themselves engrained in our country's history and culture. See, e.g., \textit{William Benemann, Male-Male Intimacy in Early America: Beyond Romantic Friendships} (2006) (describing male homosexual relationships in eighteenth- and nineteenth-century America); \textit{Gary Nash, Forbidden Love: The Secret History of Mixed-Race America} 82-83 (1999) (describing interracial couples such as William G. Allen and Mary King, who married in early America despite social pressures to the contrary); \textit{William Shakespeare, Romeo and Juliet} (describing two lovers separated because of their last names).
justify its intrusion into the personal and private life of the individual." Many have pointed to this sentence as evidence that the Court was utilizing rational basis review. Yet, the mere use of the word "legitimate" alone does not necessarily mean that rational basis is the appropriate standard of review. Just as opinions applying strict scrutiny usually refer to "compelling" interests that are "narrowly tailored," opinions applying rational basis review typically inquire as to whether laws are "rationally related" to "legitimate" state interests. Interestingly, the only time the majority opinion used the word "rational" was to describe the Court's holding in Romer v. Evans. The ambiguity of the standard of review in the Lawrence decision was discussed at length by the C.A.A.F. in United States v. Marcum.

While the C.A.A.F. ultimately decided that the liberty interest discussed in Lawrence did not represent a fundamental right in the military context, the court expressly stated that it only did so because the Supreme Court did not "expressly identify" a fundamental right in Lawrence. This decision should be viewed as a sign of caution on the part of the C.A.A.F. rather than an endorsement of an interpretation.

91 See, e.g., id. at 586 (Scalia, J., dissenting) (arguing that, because the Court stated that "the Texas statute 'furthers no legitimate state interest,'" it was applying rational basis review, albeit "an unheard-of form of rational-basis review"); Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1236 (11th Cir. 2004) ("[T]he Lawrence opinion ... ultimately applied rational-basis review, rather than strict scrutiny, to the challenged statute.") (citing Lofton v. Sec. of Dept. of Children & Family Servs., 358 F.3d 804, 816-17 (11th Cir. 2004)).
92 See, e.g., Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring) (stating "the State of Washington lacks even a legitimate governmental interest—to say nothing of a compelling one" and arguing strict scrutiny should be applied).
93 See, e.g., Gratz v. Bollinger, 539 U.S. 244, 275 (2003) ("[B]ecause the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause ... ."); see also Lawrence, 539 U.S. at 593 (Scalia, J., dissenting) ("Our opinions applying the doctrine known as 'substantive due process' hold that the Due Process Clause prohibits States from infringing fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest." (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997))).
94 See, e.g., Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000) ("States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest.") (emphasis added); see also Lawrence, 539 U.S. at 593 (Scalia, J., dissenting) ("All other liberty interests may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest.").
95 See Lawrence, 539 U.S. at 574 (majority opinion) ("We concluded that the provision was 'born of animosity toward the class of persons affected' and further that it had no rational relation to a legitimate governmental purpose." (quoting Romer v. Evans, 517 U.S. 620, 634 (1996))).
98 See id. at 205 ("[W]e will not presume the existence of such a fundamental right in the military environment when the Supreme Court declined in the civilian context to expressly identify such a fundamental right.").
of Lawrence where the Court utilized rational basis review. This conclusion becomes obvious when a similar, hypothetical case is considered. Suppose that the Supreme Court decided another case with an ambiguous standard of review, only this time, the Court was actually utilizing rational basis review. The issue decided in such a case comes before the C.A.A.F. and they are asked to determine whether to apply rational basis review or strict scrutiny. Were they to decide to apply strict scrutiny, a rather perverse result ensues once the Supreme Court clarifies its standard of review. A constitutional right would exist that would be fundamental in the military context, but only subject to rational basis review in the civilian context. If anything, the constitutional rights of members of the military should be more restricted than the rights of civilians because of the special needs of military society. Thus, to prevent such a result, the C.A.A.F. would have to respond to an ambiguous Supreme Court opinion in the manner in which it did. That is, it would apply rational basis review while noting that the Supreme Court did not explicitly indicate that a fundamental right existed.

While some evidence exists indicating that the Court utilized rational basis review in Lawrence, a careful examination of that evidence reveals its flaws. After a comprehensive analysis of the opinion, it becomes clear that the Court identified a fundamental liberty interest in forming intimate, personal relationships.

B. Equal Protection in Lawrence

Although the Court expressly stated that it had granted certiorari to consider three questions, the majority opinion had very little to say about whether the Texas law violated the Equal Protection Clause. Devoting a single paragraph to the issue, the Court stated that "the instant case requires us to address whether Bowers itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants." Justice O'Connor, in her concurrence, was the only Justice to decide that the challenged statute violated the Equal Protection Clause. However, that does not mean that the majority determined that the statute did not violate the Equal Protection Clause. Quite the contrary, the majority character-
ized an equal protection challenge to the Texas statute as "a tenable argument."\textsuperscript{103} The majority simply declined to rule on the issue with respect to the Equal Protection Clause because such a ruling would not prohibit states from passing statutes prohibiting sodomy so long as they applied to both heterosexuals and homosexuals.\textsuperscript{104} While Justice O'Connor felt that such a law "would not long stand in our democratic society,"\textsuperscript{105} the majority disagreed.\textsuperscript{106} By failing to address the equal protection challenge to the law, the Court declined the opportunity to determine that homosexuals constituted a protected or quasi-protected class entitled to heightened scrutiny.\textsuperscript{107}

Where "prejudice against discrete and insular minorities... tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities," the Court may utilize "a correspondingly more searching judicial inquiry" in reviewing laws challenged under equal protection.\textsuperscript{108} Such is the case with homosexuals.\textsuperscript{109} Homosexuals are discrete\textsuperscript{110} and insular\textsuperscript{111} minorities who are victimized by prejudice through the political process which is supposed to protect them.\textsuperscript{112} Recognizing that the Texas sodomy law

\textsuperscript{103} Id. at 574 (majority opinion).
\textsuperscript{104} Id. at 575.
\textsuperscript{105} Id. at 585 (O'Connor, J., concurring).
\textsuperscript{106} See id. at 575 (declining to rule on equal protection grounds because such a ruling would not protect homosexuals from a law against sodomy that applied equally to heterosexuals).
\textsuperscript{107} Cf. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 437 (1985) ("Concluding that no fundamental right was implicated and that mental retardation was neither a suspect nor a quasi-suspect classification, the court employed the minimum level of judicial scrutiny applicable to equal protection claims."). In prior cases adjudicating the constitutionality of "Don't Ask, Don't Tell," the circuit courts applied rational basis review because the Supreme Court has heretofore declined to apply heightened scrutiny to classification based on sexual orientation. See cases cited supra note 12.
\textsuperscript{108} United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (declining to determine whether prejudice against minorities constitutes a special condition); cf. In re Griffiths, 413 U.S. 717, 721 (1973) (holding that aliens as a class are discrete and insular minorities, that such classifications "are inherently suspect and subject to close judicial scrutiny" (quoting Graham v. Richardson, 403 U.S. 365, 372 (1971))).
\textsuperscript{109} See Watkins v. U.S. Army, 847 F.2d 1329, 1349 (9th Cir. 1988) (concluding that homosexuals constitute a suspect class warranting strict scrutiny); Jeffrey A. Williams, Re-Orienting the Sex Discrimination Argument for Gay Rights After Lawrence v. Texas, 14 COLUM. J. GENDER \\& L. 131, 142-48 (2005) (arguing that classification based on sexual orientation should be entitled to strict scrutiny because homosexuals are a suspect class).
\textsuperscript{110} See Andrew J. Seligsohn, Choosing Liberty Over Equality and Sacrificing Both: Equal Protection and Due Process in Lawrence v. Texas, 10 CARDozo Women's L.J. 411, 418 (2004) ("[B]y identifying a 'homosexual agenda' Scalia suggests that gays and lesbians might be a discrete minority." (quoting Lawrence, 539 U.S. at 602 (Scalia, J., dissenting))).
\textsuperscript{111} See Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014 (1985), denying cert. to 730 F.2d 444 (6th Cir. 1984) (Brennan, J., dissenting) ("[H]omosexuals constitute a significant and insular minority of this country's population.").
\textsuperscript{112} See Romer v. Evans, 517 U.S. 620, 634-35 (1996) (invalidating a Colorado constitutional amendment banning anti-discrimination laws or policies protecting homosexuals because it was
in *Lawrence* was based solely on moral disapproval of homosexuals, Justice O'Connor applied "a more searching form of rational basis review" in her concurring opinion to find it unconstitutional. Regardless of the level of scrutiny utilized by Justice O'Connor, none of the other Justices joined in her opinion, so her opinion does not represent the holding of the Court. Therefore, the Court would not be bound to follow it under stare decisis. However, it does provide some persuasive authority for the Court in deciding a future challenge under equal protection.

### III. UNITED STATES V. MARCUM

Article I, Section 8 of the Constitution provides Congress the exclusive power to raise and regulate the armed forces. Though this provision does not exempt Congress's military regulations from judicial review, the United States Supreme Court has repeatedly stated that, in matters relating to the military, the Court should give great deference to legislative and executive judgments. Within its powers to regulate the armed forces, Congress created the Court of Appeals for the Armed Forces to act as a "Supreme Court" for the military.

passed based solely on "a bare... desire to harm a politically unpopular group" (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

See *Lawrence*, 539 U.S. at 582–83 (O'Connor, J., concurring).

Id. at 580.

See U.S. CONST. art. I, § 8 ("The Congress shall have Power... To make Rules for the Government and Regulation of the land and naval Forces ....").

See United States v. Jacoby, 11 C.M.A. 428, 430–31 (1960) ("[I]t is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces.").

See Goldman v. Weinberger, 475 U.S. 503, 507 (1986) ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."); Chappell v. Wallace, 462 U.S. 296, 303–04 (1983) ("The special status of the military has required, the Constitution has contemplated, Congress has created, and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel."); Rostker v. Goldberg, 453 U.S. 57, 64–65 (1981) ("The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference.").

The Court of Appeals for the Armed Forces was originally called the Court of Military Appeals. See 10 U.S.C. § 867 (2000) (originally enacted in Pub. L. No. 81-506, art. 67, 64 Stat. 107, 129–30 (1950)) (establishing the Court of Military Appeals, which is now the Court of Appeals for the Armed Forces).

As such, that court's decisions regarding military law are entitled to significant deference from the United States Supreme Court.\footnote{See Middendorf v. Henry, 425 U.S. 25, 43 (1976) ("Dealing with areas of law peculiar to the military branches, the Court of Military Appeals' judgments are normally entitled to great deference.").}

In United States v. Marcum, the Court of Appeals for the Armed Forces declared that the Lawrence decision applies to members of the military in certain contexts.\footnote{United States v. Marcum, 60 M.J. 198, 206 (C.A.A.F. 2004).} The court in Marcum was faced with a challenge to Article 125 of the Uniform Code of Military Justice,\footnote{10 U.S.C. § 925 (2000).} which prohibits a member of the military from engaging in either heterosexual or homosexual sodomy. In its analysis, the court acknowledged that "Congress has indeed exercised its Article I authority to address homosexual sodomy in the Armed Forces, but this occurred prior to the Supreme Court's constitutional decision and analysis in Lawrence. . . ."\footnote{Marcum, 60 M.J. at 206.} Rejecting a facial challenge to Article 125 as overly broad,\footnote{See id. ("[B]ecause Article 125 addresses both forcible and non-forcible sodomy, a facial challenge reaches too far.").} the court announced a three-part inquiry to determine if Lawrence applies to a given situation:

First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in Lawrence? Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the Lawrence liberty interest?\footnote{Id. at 206-07 (internal citation omitted).} The first question essentially asks if the conduct was "private, consensual sexual activity between adults."\footnote{Id. at 207.} The second question adds some additional requirements,\footnote{Lawrence notes the following elements about the relationship in the case: The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. Lawrence v. Texas, 539 U.S. 558, 578 (2003).} the most important in the military context being that the parties are not situated such that consent may not be easily refused.\footnote{Marcum did not identify any additional fac-}
tors relevant in the military environment that the court might consider in its analysis, but subsequent cases have indicated that this factor relates to any relevant military regulations regarding romantic relationships. Thus, at the very least, Marcum indicates that private, consensual sexual activity between a member of the military and a civilian where both are adults, and where the activity does not constitute prostitution, is protected under Lawrence in the military context.

On some level, Marcum creates a paradox. Marcum identified a liberty interest that protects members of the military who engage in homosexual sodomy under certain circumstances. However, the consequences of "Don’t Ask, Don’t Tell" necessitate that a member of the military who exercises that liberty interest be separated from the military. How can one have a liberty interest in the military context that, if exercised, would result in separation from the military? Of course, some would rush to respond that there is no paradox at all, as the liberty interest simply prevents one from being thrown in jail instead of being thrown out of the military. Indeed, such a response would be consistent with the jurisdiction of the C.A.A.F., which is limited to military criminal appeals. However, simply because the C.A.A.F. does not have jurisdiction over "Don’t Ask, Don’t Tell" does not mean that its decisions regarding the treatment of homosexuals by the military should be completely ignored. As the highest court with exclusively military jurisdiction, the C.A.A.F. stands in a unique position. It has tremendous experience in incorporating the distinct requirements of the military into its adjudications, experience which should not be ignored.


130 Though it is possible that the Marcum test may allow activity between two members of the military to be protected under Lawrence in certain circumstances, such a conclusion is not necessary for my analysis.


132 Id. § 867.
IV. CONSTITUTIONALITY OF “DON’T ASK, DON’T TELL”

Following *Lawrence*, the acts prong of “Don’t Ask, Don’t Tell” could be challenged as either a violation of equal protection or due process under the Fifth Amendment. Under both challenges, the Court would provide tremendous deference to Congress because “Don’t Ask, Don’t Tell” is a military regulation. However, “deference does not mean abdication.”

A. Military Deference

In defending its deference to Congress regarding decisions about the military, the Court has explained that it lacks competence to make the “complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force[,] which are essentially professional military judgments” that would be necessary to review such Congressional decisions. However, the C.A.A.F. routinely must balance the interests of the military as a whole against the constitutional rights of its members. As a court of exclusively military jurisdiction, it has an innate “understanding of military culture and mission,” superior to that of Congress. In sum, the opinion of the C.A.A.F. should be highly persuasive authority in matters of military law.

In *Marcum*, the government argued that “Congress definitively addressed homosexual sodomy by enacting 10 U.S.C. § 654,” determining that it was “incompatible with military service.” The government further argued that the “presence in the armed forces of persons who... engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion.” Although not commenting on the con-

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133 As “Don’t Ask, Don’t Tell” is a federal law, equal protection and due process analyses of that law are governed by the Fifth Amendment. Although the Fifth Amendment does not have an equal protection clause, the Court has implied a requirement of equal protection by the federal government. See *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (arguing that it would “be unthinkable” that the Constitution imposes “a lesser duty on the Federal Government” than on the states). The Court has also stated that “[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.” *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

134 See cases cited *supra* note 117.


136 *Id.* at 65 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)).

137 See, e.g., *United States v. Marcum*, 60 M.J. 198, 206 (C.A.A.F. 2004) (stating that the Court of Appeals for the Armed Forces has a practice of applying constitutional rights to areas “where national security and constitutional rights are both paramount interests”).

138 *Id.*

139 *Id.*

140 *Id.* (citing 10 U.S.C. § 654(a)(15) (2000)).
stitutionality of "Don’t Ask, Don’t Tell," the court did not accept this argument as persuasive. Instead, the court noted that, although Congress had exercised its legislative power to address homosexual sodomy through "Don’t Ask, Don’t Tell," it had done so at a time when Bowers was the controlling law. Furthermore, the court rejected the government's narrow characterization of the liberty interest identified in Lawrence as a right to homosexual sodomy, quoting the Supreme Court's own language. Because "[c]onstitutional rights identified by the Supreme Court generally apply to members of the military unless by text or scope they are plainly inapplicable," the court determined through a balancing test that accounted for "the nuance of military life" that Lawrence should be applicable to the military in cases that satisfy its three-part inquiry. Because of the intimate familiarity that the C.A.A.F. has obtained over the years by applying laws exclusively in the military context, its decision to accept the Lawrence decision in the military context should be treated as highly persuasive and act as a counterbalance to the deference afforded to Congress by the Court.

B. Government as Employer

Members of the military are government employees. As such, they cannot be fired "for a reason that infringes upon constitutionally protected rights." Though the majority of cases dealing with this issue involve infringement of freedom of speech, one can analogize the present issue to that line of cases. Under an ordinary freedom of speech case involving a governmental employer, an employee must show that "his conduct was constitutionally protected" and that the conduct was a motivating factor in the employee's termination. The employee must also show the speech involved "a matter of public concern." If it does, the Court must balance the interests of the employee's First Amendment rights against "the interest of the State, as an employer, in promoting the efficiency of the public services it

141 Marcum, 60 M.J. at 206.
142 Id. ("To say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put forward[.]") (quoting Lawrence v. Texas, 539 U.S. 558, 567 (2003)).
143 Id.
performs through its employees.\textsuperscript{147} By comparison, the Court has not applied this test in freedom of speech cases involving members of the military. Instead, the Court has analyzed the issue as a matter of military necessity, imposing a much more exacting standard, and giving the proper deference to congressional action.\textsuperscript{148} Such an analysis implicitly incorporates the traditional public employer analysis, utilizing military necessity as a compelling state interest that must be balanced against the constitutional rights of individuals in the military. Thus, for purposes of "Don't Ask, Don't Tell," the government-as-employer issue can be addressed through congressional deference to the matters of the military.

\textbf{C. Equal Protection Challenge}

Although previous challenges to "Don't Ask, Don't Tell" under the Equal Protection Clause have failed, that does not necessarily preclude a successful equal protection challenge today. At the time that previous equal protection challenges were brought against "Don't Ask, Don't Tell," \textit{Bowers} was the controlling law and was cited as justification for applying rational basis review to laws discriminating against homosexuals.\textsuperscript{149} Since \textit{Lawrence} has overruled \textit{Bowers}, the failure of previous challenges does not preclude a successful equal protection challenge today nor does it preclude a finding by the Court that homosexuals constitute a suspect class.\textsuperscript{150} The Court has recognized two forms of heightened scrutiny in Equal Protection Clause cases: strict scrutiny and intermediate scrutiny.\textsuperscript{151} The criteria for applying these levels of scrutiny have not been clearly defined by the Court.\textsuperscript{152} However, the Court has alluded to

\begin{itemize}
\item[\textsuperscript{147}] Id. at 388 (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)).
\item[\textsuperscript{148}] See, e.g., Brown v. Glines, 444 U.S. 348, 360 (1980) ("Both Congress and this Court have found that the special character of the military requires civilian authorities to accord military commanders some flexibility in dealing with matters that affect internal discipline and morale.").
\item[\textsuperscript{149}] See supra notes 4, 11-12 and accompanying text.
\item[\textsuperscript{150}] See, e.g., Philips v. Perry, 106 F.3d 1420, 1426 & n.11 (9th Cir. 1997) (citing Bowers v. Hardwick, 478 U.S. 186, 194-96 (1986)) (denying application of heightened scrutiny under equal protection); see also Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1137 (9th Cir. 1997) (Reinhardt, J., dissenting) ("Although I must follow that decision [Philips] here, I note that it is necessarily rooted in \textit{Bowers v. Hardwick} . . .").
\item[\textsuperscript{151}] Lawrence v. Texas, 539 U.S. 558, 578 (2003) (overruling \textit{Bowers}).
\item[\textsuperscript{152}] See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 645-46 (2d ed. 2002) ("All laws not subjected to strict or intermediate scrutiny are evaluated under the rational basis test.").
\item[\textsuperscript{153}] See United States v. Virginia, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) ("I think we can do better than applying strict scrutiny and intermediate scrutiny whenever we feel like it . . .").
\end{itemize}
several justifications for the application of strict scrutiny, which include a long history of past discrimination and possessing an immutable trait. Homosexuals possess both of these characteristics. Homosexuals have been subjected to a range of discriminatory acts in the distant and recent past, including being categorized as mentally ill, incarcerated for not remaining celibate, and excluded from hate crime legislation despite being targets of such crimes. It is also generally accepted that homosexuals cannot change their sexual orientation. However, even if there was some method of altering sexual orientation, it certainly would be more difficult to change than alienage, another suspect classification, for those aliens eligible for U.S. citizenship.

The criteria that distinguish the application of intermediate scrutiny from that of strict scrutiny are even less clear. What is clear is

154 See, e.g., Strauder v. West Virginia, 100 U.S. 303, 306-08 (1879) (arguing that equal protection is necessary to combat historical prejudices).

155 See Nyquist v. Mauclet, 432 U.S. 1, 17-18 (1977) (Rehnquist, C.J., dissenting) ("Presumptively, such a minority group [for which strict scrutiny is appropriate] is one identifiable by a status over which the members are powerless.").

156 See Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014 (1985), denying cert. to 730 F.2d 444 (6th Cir. 1984) (Brennan, J., dissenting) ("[H]omosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is 'likely... to reflect deep-seated prejudice rather than... rationality.'" (quoting Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982))).

157 See Note, Regulating Preimplantation Genetic Diagnosis: The Pathologization Problem, 118 HARV. L. REV. 2770, 2786 (2005) ("In 1952, the American Psychiatric Association (APA) listed homosexuality as a mental disorder in the Diagnostic and Statistical Manual, Mental Disorders (DSM-I), the profession's standard nosology.... Not until 1973... did the APA delete homosexuality from its nomenclature.").

158 See, e.g., Lawrence v. Texas, 539 U.S. 558, 572 (2003) ("[B]efore 1961 all 50 states had outlawed sodomy[.]"); Gertrude Samuels, The Fight for Civil Liberties Never Stays Won, N.Y. TIMES, June 19, 1966, at 14 (noting that the New York City police commissioner had to be "persuaded... to issue orders forbidding plainclothesmen to entice homosexuals into illegal acts for the sake of making arrests").

159 Compare Kevin Sack, 2 Confess to Killing Man, Saying He Made a Sexual Advance, N.Y. TIMES, Mar. 5, 1999, at A10 (describing a hate crime against a gay man in Alabama), with ALA. CODE § 13A-5-13(a)(1) (2005) (protecting people from threats based on "race, color, religion, national origin, ethnicity, or physical or mental disability," but not sexual orientation).

160 Every major mental health organization in the United States has released statements warning that there is no evidence that so-called "reparative therapy" can change a person's sexual orientation and that such therapy can actually be harmful. Robert L. Spitzer, Can Some Gay Men and Lesbians Change Their Sexual Orientation? 200 Participants Reporting a Change from Homosexual to Heterosexual Orientation, 32(5) ARCHIVES OF SEXUAL BEHAVIOR 403, 404 (2003). Nevertheless, experts disagree on whether homosexuality is an immutable characteristic. See Warren Throckmorton, Initial Empirical and Clinical Findings Concerning the Change Process for Ex-Gays, 33(5) PROF. PSYCHOL.: RES. & PRAC. 242, 247 (2002) ("[M]any mental health professionals believe same-gender sexual orientation cannot be changed but... others believe change is possible.").

161 See Nyquist v. Mauclet, 432 U.S. 1, 8-9 & n.11 (1977) (applying strict scrutiny to a law that discriminated against only those aliens who were eligible for, but nonetheless refused to apply for, citizenship).
that the Court uses intermediate scrutiny to examine cases of discrimination based on sex or illegitimacy. Beyond that, the Court has said little about when intermediate scrutiny should be applied. However, academics have postulated that intermediate scrutiny, rather than strict scrutiny, is appropriate for cases of gender discrimination for several reasons, including: (1) the Fourteenth Amendment was initially meant only to outlaw racial discrimination, (2) the existence of biological differences between men and women makes it more likely that classifications based on sex are warranted, and (3) women are a political majority. Of these three, only the first applies to homosexuals. Homosexuals are by no means a political majority nor are differences between heterosexuals and homosexuals generally a legitimate basis for legislation differentiating the two. Although the Fourteenth Amendment was not initially meant to apply to homosexuals, this alone should not disqualify classification based on sexual orientation from being subject to strict scrutiny, as the same can be said about alienage, to which the Court has applied strict scrutiny. Even if the Court were to recognize homosexuals as a protected class, the Court would still provide deference to Congress in matters relating to military regulations. Because “Don’t Ask, Don’t Tell” would also infringe upon the fundamental right identified in Lawrence, a due process challenge to that law would likely be more successful.

D. Due Process Challenge

Putting aside the Court’s deference to Congress for a moment, Congress’s actions would fail any sort of heightened scrutiny. In enacting “Don’t Ask, Don’t Tell,” Congress made fifteen separate findings, which are codified in the law itself. Among these findings, Congress determined that success in combat depended most on unit

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162 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.”).
163 CHEMERINSKY, supra note 152, at 728.
164 See Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014 n.7 (1985), denying cert. to 730 F.2d 444 (6th Cir. 1984) (Brennan, J., dissenting) (“[H]omosexuals may constitute from 8-15% of the average population.”).
165 See Romer v. Evans, 517 U.S. 620, 624 (1996) (challenging Colorado statute that prohibited inclusion of sexual orientation as a protected class in anti-discrimination policies or laws); Rowland, 470 U.S. at 1014 (“[I]t is fair to say that discrimination against homosexuals is ‘likely... to reflect deep-seated prejudice rather than... rationality.’” (quoting Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982))).
166 See Nyquist, 432 U.S. at 8-9 & n.11 (1977).
167 See cases cited supra note 117.
cohesion and that the presence of homosexuals in the military would create an unacceptable risk to unit cohesion.\textsuperscript{169} In suits challenging “Don’t Ask, Don’t Tell,” the government has reiterated this justification to maintain the policy.\textsuperscript{170} However, the actions of the military suggest other, invidious motives.

During congressional hearings preceding the enactment of “Don’t Ask, Don’t Tell,” members of the military argued that allowing openly gay soldiers in the military would be “immensely disruptive” to a unit\textsuperscript{171} and would “be just too detrimental to [the] combat readiness of the squadron or the unit.”\textsuperscript{172} Former General H. Norman Schwarzkopf agreed:

\begin{quote}
[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.
\end{quote}

\ldots

[I]n every case that I am familiar with... unit effectiveness suffered. Plain and simply, that has been my experience.\textsuperscript{173}

Congress codified this justification for excluding homosexuals from the military in “Don’t Ask, Don’t Tell.”\textsuperscript{174} Because Congress’s concern

\textsuperscript{169} Id. §§ 654(a)(7), 654(a)(15).
\textsuperscript{170} See, e.g., Philips v. Perry, 106 F.3d 1420, 1434–35 (9th Cir. 1997) (Fletcher, J., dissenting) (“The primary justification preferred for the ‘don’t ask/don’t tell’ policy is ‘unit cohesion,’ ‘Good morale,’ ‘discipline,’ and the ability to recruit and retain military personnel are related sub-interests.”); see also Able v. United States, 155 F.3d 628, 634 (2d Cir. 1998) (“In this litigation, the United States has justified § 654’s prohibition on homosexual conduct on the basis that it promotes unit cohesion, enhances privacy and reduces sexual tension.”) (emphasis added); Philips, 106 F.3d at 1429 (“Here, the Navy has explained that in its judgment separating members who engage in homosexual acts is necessary to further military effectiveness by maintaining unit cohesion, accommodating personal privacy and reducing sexual tension.”) (emphasis added); Thomasson v. Perry, 80 F.3d 915, 927 (4th Cir. 1996) (“In the end, alternatives to [“Don’t Ask, Don’t Tell”] were rejected because ‘the maintenance of military unit cohesion—which is the key to combat capability—... must remain paramount over the desires of a single individual or group.’”) (citation omitted); Transcript of Motion to Dismiss at 7, Cook v. Rumsfeld, CA No. 04-12546-GAO (D. Mass. July 8, 2005), available at http://www.sldn.org/binary-data/SLDN ARTICLES/pdf_file/2275.pdf (arguing that “Don’t Ask, Don’t Tell” be upheld because “what Congress found is that the core of military readiness is the importance of unit cohesion”).
\textsuperscript{172} Id. at 556 (statement of Lt. Fred Frey, U.S. Navy), available at http://dont.stanford.edu/hearings/Hearings5-10-93.pdf.
\textsuperscript{173} Id. at 595–96 (statement of Gen. H. Norman Schwarzkopf, USA (Ret.)) (emphasis added), available at http://dont.stanford.edu/hearings/Hearings5-11-93.pdf.
\textsuperscript{174} See, e.g., 10 U.S.C. § 654(a)(6) (2000) (“Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.”); id. § 654(a)(7)
about maintaining unit cohesion was based on ensuring the effectiveness of units in combat, the government’s interest in unit cohesion would be at its apogee in times of armed conflict when units are most likely to engage in combat. Since the major purported purpose of “Don’t Ask, Don’t Tell” is to promote unit cohesion, one would expect that in times of war, it would be more likely to be enforced. However, the military does the exact opposite; it discharges significantly fewer homosexuals in times of war than in times of peace.\textsuperscript{176}

Between 1994 and 2001, the year in which the United States went to war in Afghanistan, homosexual discharges under “Don’t Ask, Don’t Tell” increased in “every year but one.”\textsuperscript{176} In 2002, “the first full year America was at war,”\textsuperscript{177} the number of homosexual discharges under “Don’t Ask, Don’t Tell” decreased by almost thirty percent from the previous year.\textsuperscript{178} In 2003, the number of discharges decreased even further, down about fifteen percent from the number of discharges in 2002.\textsuperscript{179} In fact, homosexual discharges from the military have decreased “every time America has entered a war.”\textsuperscript{180}

Though the members of the military have limited rights as compared to civilians, the rights they do have cannot be taken away without at least a rational reason,\textsuperscript{181} and the military’s actions are the very definition of irrational.\textsuperscript{182} How can a law guarded by military necessity survive when the military’s actions show that it is not necessary at all?\textsuperscript{183}

\textquote{(One of the most critical elements in combat capability is unit cohesion . . . .) (emphasis added).} 

\textsuperscript{175}See infra notes 177–79 and accompanying text. By contrast, the total number of discharges from the military resulting from general and special courts-martial were higher in 2002 and 2003 than in 2001. See Annual Reports of the Code Committee on Military Justice, Fiscal Years 2001–03, available at http://www.armfor.uscourts.gov/Annual.htm.


\textsuperscript{177}Id.


\textsuperscript{179}See id. (same).

\textsuperscript{180}Id.

\textsuperscript{181}See Beller v. Middendorf, 632 F.2d 788, 810 (9th Cir. 1980) (“While it is clear that one does not surrender his or her constitutional rights upon entering the military, the Supreme Court has repeatedly held that constitutional rights must be viewed in light of the special circumstances and needs of the armed forces.”).

\textsuperscript{182}See BLACK’S LAW DICTIONARY 834 (7th ed. 1999) (defining irrational as “[n]ot guided by reason or by a fair consideration of the facts”).

\textsuperscript{183}See Philips v. Perry, 106 F.3d 1420, 1429 (9th Cir. 1997) (“[S]eparating members who engage in homosexual acts is necessary to further military effectiveness . . . .”).
In the face of such data, the government may base its argument to uphold "Don’t Ask, Don’t Tell" on another of Congress’s findings. That is, the government may argue that "[t]here is no constitutional right to serve in the armed forces[,]" so there can be no deprivation of a constitutional right by prohibiting homosexuals from serving in the military. While Justice Holmes might have agreed with such a statement, the Supreme Court has firmly rejected such reasoning. Denial of military service to homosexuals denies them public employment, not to mention a myriad of benefits granted to veterans, which can only be obtained through service in the military. As Lawrence recognizes a constitutional right that protects homosexuals who engage in certain acts of sodomy, depriving them of military service for exercising that right would be a deprivation of a governmental benefit. This deprivation would have to survive strict scrutiny to be constitutional.

Historical discharge data indicates that the reasons proffered by Congress in support of "Don’t Ask, Don’t Tell" are pretextual. Moreover, the restrictions are not narrowly tailored to serve a compelling government purpose. "Don’t Ask, Don’t Tell" does not simply prevent homosexuals from participating in combat roles, where unit cohesion is relevant; it is an absolute bar to service for any homosexual with a "propensity to engage in... homosexual

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185 In McAuliffe v. Mayor of New Bedford, Justice Holmes stated in dictum that a police officer "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." 155 Mass. 216, 220 (1892).
186 See, e.g., Bd. of Comm’rs, Wabaunsee City v. Umbehr, 518 U.S. 668, 674 (1996) (noting that “precedents have long since rejected Justice Holmes’ famous dictum”); see also Perry v. Sindermann, 408 U.S. 593, 597 (1972) (“[E]ven though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, .... it may not deny a benefit to a person on a basis that infringes his constitutionally protected interests ....”).
187 See Perry, 408 U.S. at 597 (“[M]ost often, we have applied the principle [that the government may not deny a person a valuable benefit for exercising a constitutional right] to denials of public employment.”).
189 See supra notes 175–79 and accompanying text (describing how data demonstrates a decrease in homosexual discharges during wartime, when unit cohesion is most important).
190 The prohibition on military service under “Don’t Ask, Don’t Tell” extends even to employment as a judge advocate. See 10 U.S.C. § 801(13) (2000) (defining judge advocate); see also Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 126 S. Ct. 1297 (2006) (upholding a law denying universities federal funding if law schools prevented military recruiters from having equal access to students for on-campus recruiting, even though doing so violated the schools’ nondiscrimination policies).
acts. For these reasons, it is unlikely that the law would survive strict scrutiny.

This is not to suggest that the Court’s deference to congressional decisions regarding the military can be ignored. However, the Court should not blindly defer to congressional decisions, either. As previously noted, the Court defers to Congress because it lacks the ability to make complex judgments about the military that would be necessary to review such congressional decisions. However, the C.A.A.F. regularly must make subtle judgments that incorporate the special circumstances of military life. The C.A.A.F. made such a judgment in Marcum and designed a three-part inquiry to determine when Lawrence should be applicable in the military context. Thus, when the Court considers whether a congressional law regulating the military infringes on the fundamental right identified in Lawrence, it should consider the C.A.A.F.’s opinion in Marcum highly persuasive because the C.A.A.F. has the expertise that the Court lacks in making judicial evaluations of military matters. If the Court applies the C.A.A.F.’s three-part test, it would be unconstitutional to enforce the acts prong of “Don’t Ask, Don’t Tell” in the limited circumstances where Lawrence is applicable under the Marcum test.

If the Court determined that such as-applied challenges would be successful, the statements prong of “Don’t Ask, Don’t Tell” could be successfully challenged facially. Previous challenges of the statements prong failed because the courts concluded that it was rational to assume a homosexual will engage in homosexual conduct. This, in turn, would violate the acts prong, under which discharge was always constitutional. However, if there are cases when homosexual conduct would not result in discharge under the acts prong, this would no longer be the case. This would renew the viability of a First Amendment challenge of the statements prong.


See supra note 118 and accompanying text.


See supra text accompanying note 130.

Such a challenge would likely have the greatest practical effect on the military’s policy, as the majority of those discharged under “Don't Ask, Don't Tell” were discharged under the statements prong. See U.S. GOV'T ACCOUNTABILITY OFF., MILITARY PERSONNEL: FINANCIAL COSTS AND LOSS OF CRITICAL SKILLS DUE TO DOD'S HOMOSEXUAL CONDUCT POLICY CANNOT BE COMPLETELY ESTIMATED 11 fig. 3 (2005), available at http://www.gao.gov/new.items/ d05299.pdf [hereinafter MILITARY PERSONNEL] (stating that eighty-three percent of discharges under “Don't Ask, Don't Tell” between 1994 and 2003 were under the “statements” prong).

See supra note 15.

See supra notes 4, 11–13, and accompanying text.
First Amendment rights, like many other rights of members of the military, are substantially more restricted when compared to those of civilians. Still, statutes passed under Congress's powers to regulate the military can be invalidated for being overly broad, as the Court did in United States v. Robel. In Robel, the Court struck down a statute that prohibited Communists from working "in any defense facility." Though the government justified the statute under Congress's "war power," the Court held that the statute unconstitutionally burdened the First Amendment rights of individuals. By requiring discharge of any homosexual who makes an affirmative statement about his or her sexual orientation at any time, "Don't Ask, Don't Tell" oversteps the powers of Congress. Prior cases found no constitutional violation because the statute did not "target mere status or speech." Rather, the courts argued, it used speech as evidence that one will engage in impermissible conduct. This justification breaks down when stating "I am gay" is no longer indicative that one will necessarily engage in unsuitable conduct. It would not be difficult for a homosexual member of the military to limit sexual activity to those circumstances when Lawrence would apply in the military context. In fact, most homosexual members of the military already do so. A statute that punishes a member of the military for stating that he or she will engage in conduct that is constitutionally protected would

198 See, e.g., Parker v. Levy, 417 U.S. 733, 758 (1974) ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections.").


200 Id.

201 Id. at 263, 266.

202 Under 10 U.S.C. § 654(b)(2), stating that one is a homosexual will result in discharge unless that individual can show that he or she does not have "a propensity to engage in ... homosexual acts." Having a propensity to engage in homosexual acts is the very characteristic that defines a homosexual orientation.

203 Richenberg v. Perry, 97 F.3d 256, 263 (8th Cir. 1996); accord, e.g., Thomasson v. Perry, 80 F.3d 915, 931 (4th Cir. 1996) ("The statute does not target speech declaring homosexuality; rather, it targets homosexual acts ... and permissibly uses the speech as evidence.").

204 E.g., Thomasson, 80 F.3d at 931.

205 See MILITARY PERSONNEL, supra note 195, at 11 (illustrating that only seventeen percent of those discharged under "Don't Ask, Don't Tell" actually engaged in some sort of homosexual conduct). Though the data only discriminates between same-sex marriage and other homosexual conduct, only one percent of discharges were for same-sex marriage violations. The remaining sixteen percent may or may not have involved activity protected under Lawrence and Marcum. Id.
surely be found to be unconstitutionally overbroad, as Robel indicates.206

V. CONCLUSION

Though Congress is entitled to deference in regulating the military, the Court should not blindly accept "Don't Ask, Don't Tell" in its constitutional analysis. The Court of Appeals for the Armed Forces, which routinely must integrate the unique demands of military life, has determined that Lawrence applies in the military context when the facts of the situation satisfy a three-part test. Though the Court may lack the necessary skill to incorporate military interests in its constitutional analysis, the C.A.A.F. does not. For this reason, its holding in Marcum should be viewed by the Court as highly persuasive.

Adoption of the three-part test created by the court in Marcum for determining if an action is protected by Lawrence in the military context would significantly reduce the number of constitutional discharges from the military under "Don't Ask, Don't Tell." Application of the Marcum test to "Don't Ask, Don't Tell" would result in a greater set of instances where it would be unconstitutional to discharge a member of the military for homosexual conduct. However, even more significantly, the protection of homosexual conduct that satisfies the Marcum test would no longer necessarily mean that it is reasonable to assume that a homosexual will engage in conduct that can be constitutionally proscribed by "Don't Ask, Don't Tell." As the majority of discharges under "Don't Ask, Don't Tell" are for statements indicating a homosexual orientation, adoption of the Marcum test by the Court would eliminate the de facto proscription against homosexuals in the military.

206 See 389 U.S. 258, 266 (1967) (holding that, although it is within Congress's discretion to create laws limiting access to military factories, the law itself was unconstitutional because it overburdened the First Amendment).