CONSTITUTIONAL LAW DOCTRINE MEETS REALITY: DON'T ASK, DON'T TELL IN LIGHT OF LAWRENCE V. TEXAS

Pamela Glazner*

I. INTRODUCTION

As the conflict in Iraq continues\(^1\) and the United States faces a potentially perpetual war on terror,\(^2\) it seems logical that the U.S. military would utilize every available recruitment and servicemember retention plan. Instead, the military has a continued to stand by a policy that officially excludes an entire group of able-bodied servicemembers: Don't Ask, Don't Tell ("DADT").\(^3\) Originally, the military flatly banned gay and lesbian people from serving in the military,\(^4\) and it implemented a policy that weeded out gay and lesbian people in order to deny them enlistment or to

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* Technical Editor and Ethics Editor, Santa Clara Law Review, Volume 46; J.D. Candidate, Santa Clara University School of Law; B.A., English and Communications, University of Denver.

1. See President George W. Bush, President's Address to the Nation (Dec. 18, 2005), http://www.whitehouse.gov/news/releases/2005/12/20051218-2.html (last visited May 11, 2006) ("It is also important for every American to understand the consequences of pulling out of Iraq before our work is done. . . . To retreat before victory would be an act of recklessness and dishonor, and I will not allow it. . . . We will see more sacrifice—from our military, their families, and the Iraqi people.").

2. See id. ("Terrorist operatives conduct their campaign of murder with a set of declared and specific goals—to de-moralize free nations, to drive us out of the Middle East, to spread an empire of fear across that region, and to wage a perpetual war against America and our friends.").

3. 10 U.S.C. § 654 (2000). This statute was originally termed the "National Defense Authorization Act," but it is known colloquially as "Don't Ask, Don't Tell." Thomasson v. Perry, 80 F.3d 915, 920 (4th Cir. 1996).

4. Thomasson, 80 F.3d at 935 (Luttig, J., concurring) ("For as long as it has had a military, the United States has excluded homosexuals for military service.").
dismiss them.\textsuperscript{5} Then, during his 1992 presidential campaign, candidate William Jefferson Clinton planned to end this policy and initially began the process once he was sworn in as president.\textsuperscript{6} Ultimately, however, President Clinton signed DADT into law on November 30, 1993.\textsuperscript{7} Under DADT, closeted\textsuperscript{8} and openly gay but celibate people may still serve in the military.\textsuperscript{9} Therefore, this policy essentially excludes openly gay and/or sexually active servicemembers. As a result, many necessary and willing men and women are unable to join or have been discharged from military service. Indeed, not only has DADT been effectively utilized to discharge nearly 10,000 servicemembers,\textsuperscript{10} but it has withstood constitutional challenge numerous times.\textsuperscript{11}

Courts reviewing DADT have consistently applied a rational basis test to uphold the policy.\textsuperscript{12} The primary authority upon which courts have relied to apply rational basis review and uphold DADT is the United States Supreme Court’s holding in \textit{Bowers v. Hardwick}.\textsuperscript{13} In \textit{Bowers}, the Court held that there is no fundamental right to homosexual sodomy,\textsuperscript{14} and consequently, courts have applied rational basis to strike down DADT.\textsuperscript{15}

Since most government policies withstand rational basis

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6. Thomasson, 80 F.3d at 921.
7. Id. at 923.
8. The DADT policy of exclusion is only triggered when servicemembers make statements that they are gay or when they engage in homosexual conduct as described in the statute. 10 U.S.C. § 654(b)(1)-(2).
9. Hensala v. Dept of the Air Force, 343 F.3d 951, 953 (9th Cir. 2003) ("[T]he presumption [that the person in question engages in homosexual conduct] can be rebutted by evidence of celibacy.").
11. See discussion infra Part II.C.2.
12. See, e.g., Able v. United States, 155 F.3d 628, 631-32 (2d Cir. 1998); Philips v. Perry, 106 F.3d 1420, 1424-25 (9th Cir. 1997); Thomasson, 80 F.3d at 927-28; Richenberg v. Perry, 97 F.3d 256, 260-61 (8th Cir. 1996); Watson v. Perry, 918 F. Supp. 1403, 1412 (W.D. Wash. 1996).
14. Id. at 191.
15. See supra note 12.
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review, it is clear that pro-gay advocates who wish to see gay people serving a stronger military need a new legal theory. This new legal theory must account for the embedded tiered system under which analysis of constitutional rights is conducted, as well as new doctrinal developments.

DADT suits a re-envisioned analysis in which Due Process and Equal Protection intersect at the level of intermediate scrutiny. Many gay-rights advocates claim that the policy is clearly status-based, but DADT supporters and the military claim that it is a conduct-based policy. Others have observed that it is both. As a status-based policy, DADT clearly falls under the Equal Protection rubric because it discriminates on the basis of sexual orientation. As a conduct-based policy, DADT clearly falls under the Due Process analysis as an infringement of the right to private, consensual, sexual conduct.

With its 2003 decision in Lawrence v. Texas, the Supreme Court created a space for innovation in analyzing gay and lesbian rights cases, including DADT. In Lawrence, the Supreme Court explicitly overruled Bowers as it struck down Texas’s same-sex sodomy statute. Nonetheless, Lawrence did not hold that there is a fundamental right to private consensual sexual conduct, so it did not raise the equal protection analysis to strict scrutiny. Lawrence did, however, discuss gay and lesbian sexual conduct in grand terms of liberty, and therefore can be interpreted to mean that there

17. In this comment, “rights analysis” refers generally to the analysis the Court performs in cases involving constitutional rights violated under substantive due process and/or equal protection. When necessary, this comment will distinguish between an analysis of rights under substantive due process and an analysis of rights under equal protection.
23. As Justice Antonin Scalia points out in his dissenting opinion, “[N]owhere does the Court's opinion declare that homosexual sodomy is a ‘fundamental right’ under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a ‘fundamental right.’” Id. at 586 (Scalia, J., dissenting) (first emphasis added).
24. Id. at 558-59, 562.
is a right more important than those rights subject only to rational basis review. Analysis of this newly articulated right should be elevated to intermediate scrutiny of the type Justice Thurgood Marshall suggested in his dissent in City of Cleburne v. Cleburne Living Center\(^{25}\) since, along with this quasi-fundamental right to private consensual sexual conduct, DADT contains status-based discrimination.

Part I will examine the traditional\(^{26}\) and alternative\(^{27}\) analyses and tests used to assess substantive due process and equal protection claims. This section includes a discussion of two key decisions: Cleburne\(^^{28}\) and Lawrence.\(^^{29}\) Part II will place traditional constitutional rights analysis in the military context and thereby illuminate its complications, particularly those arising from judicial deference.\(^{30}\) Part IV will examine DADT, its justification, and federal courts' interpretation of it.\(^{31}\) Finally, Part V will propose that courts embrace the flexibility of Lawrence and apply an intermediate standard of scrutiny to DADT, the result of which will be the demise of DADT as an unconstitutional infringement of individual rights.\(^{32}\)

**II. BACKGROUND**

In order to apply intermediate scrutiny to DADT, it is necessary to reconcile the traditional Due Process and Equal Protection doctrines. Due Process and Equal Protection are two separate bodies of law that exist to protect two different types of constitutional rights: the Due Process Clause governs "substantive constitutional rights,"\(^{33}\) and the Equal Protection

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27. See discussion infra Part II.A.2.
28. See discussion infra Part II.A.2.d.
29. See discussion infra Part II.A.2.b.
30. See discussion infra Part II.B.
31. See discussion infra Part IV.
32. See discussion infra Part V. This comment does not address another possible constitutional ground on which DADT could be challenged: the First Amendment. A number of other articles address this issue. See, e.g., Kelly Wessels, The First Amendment and Expression of Sexual Orientation, 5 GEO. J. GENDER & L. 109, 117-20 (2004); Tobias Barrington Wolf, Political Representation and Accountability Under Don't Ask, Don't Tell, 89 IOWA L. REV. 1633 (2004).
Clause ensures "the right to be treated equally by the law."\textsuperscript{34} Another way to frame the distinction is this:

If a law denies the right to everyone, then due process would be the best grounds for analysis; but if a law denies a right to some, while allowing it to others, the discrimination can be challenged as offending equal protection or the violation of the right can be objected to under due process.\textsuperscript{35}

These two legal doctrines are each composed of similar tiers of scrutiny stacked upon one another: strict scrutiny sits atop intermediate scrutiny, which sits atop rational basis review.\textsuperscript{36} Traditionally, however, Due Process completely lacks an intermediate scrutiny level.\textsuperscript{37}

Although the Due Process and Equal Protection doctrines are separate and distinct, they do intersect. Indeed, when a fundamental right is involved, the level of scrutiny in an equal protection case rises to strict scrutiny.\textsuperscript{38} This is the only bridge between the two doctrines that a majority of the U.S. Supreme Court has recognized.\textsuperscript{39} However, new doctrinal developments, including the implicit use of "rational basis with bite,"\textsuperscript{40} suggest that at least some members of the Court would entertain innovative flexibility within the tiered system.\textsuperscript{41} While a majority of the Court has not recognized an intermediate bridge between Due Process and Equal Protection, other members of the Court have. For instance, in his dissent in \textit{City of Cleburne v. Cleburne Living Center}, Justice Marshall clearly articulated the idea of applying intermediate scrutiny when both discrimination and infringement of a non-fundamental right are present.\textsuperscript{42}

\textsuperscript{34} \textit{Id.}
\textsuperscript{35}ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 696-97 (Sydney M. Irmis, ed., 2001).
\textsuperscript{36}See id. at 529.
\textsuperscript{37}See id. at 698.
\textsuperscript{38}See id. at 695.
\textsuperscript{39}See id. at 695-96.
\textsuperscript{40}"Rational basis with bite" appears in both substantive due process and equal protection opinions. See, e.g., \textit{Lawrence v. Texas}, 539 U.S. 558 (2003); \textit{Romer v. Evans}, 517 U.S. 620 (1996).
\textsuperscript{41}See discussion infra Part II.A.2.
A. The Spectrum of Constitutional Rights Analyses

The analysis of constitutional rights by lower courts has been defined by a series of Supreme Court cases that have interpreted the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Due Process Clause exists identically in both the Fifth and Fourteenth Amendments and has a substantive component from which analysis of individual rights derives. While the Fifth Amendment lacks an equal protection clause, the Court has read into its Due Process Clause an equal protection component. Accordingly, the Court in *Bolling v. Sharpe*, a case applying equal protection to school segregation, said,

The Fifth Amendment, which is applicable in the District of Columbia [and to the federal government], does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The “equal protection of the laws” is a more explicit safeguard of prohibited unfairness than “due process of law,” and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

1. Traditional Constitutional Rights Analysis

The Due Process Clause protects two types of rights regardless of whether there is discrimination: “fundamental” and “non-fundamental.” Whether the Court will label a right fundamental is not entirely clear because the Court has articulated two amorphous definitions: fundamental rights are those “implicit in the concept of ordered liberty” or “deeply rooted in this Nation’s history

43. Both Amendments read “without due process of law.” U.S. CONST. amends. V & XIV.
47. See CHEMERINSKY, supra note 35, at 698.
and tradition." The characterization of the right determines the level of scrutiny a court will apply.

Laws infringing on fundamental rights receive strict scrutiny, which requires the government to establish that the means the law employs "are suitably tailored to serve a compelling [governmental] interest." With such a high standard, the Court is more likely to strike down laws that infringe on fundamental rights. On the other hand, laws that infringe on non-fundamental rights receive rational basis review, which merely requires that the means the law employs are "rationally related to a legitimate [governmental] purpose." Under rational basis review, there is a presumption in favor of the legislation, so the courts are less likely to strike down the law.

Unlike the Due Process Clause, the Equal Protection Clause protects rights only if discrimination is present. It has been interpreted to be "a direction that all persons similarly situated should be treated alike." Generally courts apply the same rational basis test that they use in substantive due process to analyze laws that implicate non-fundamental rights. However, courts will apply the strict scrutiny test if there is a presence of either discrimination against a suspect class, or discrimination coupled with an infringement on a group's fundamental right. Under an equal protection analysis, the Court has also created a separate category to which it will apply a "heightened standard of review," otherwise termed intermediate scrutiny. When the Court finds a quasi-suspect class, the Court will require that the means the law employs are "substantially related to a sufficiently important

51. Watson, 918 F. Supp. at 1416.
52. Id.
54. See id.
55. Watson, 918 F. Supp. at 1416.
56. Cleburne, 473 U.S. at 440.
57. See id.
58. See Chemerinsky, supra note 35, at 528.
60. Id. at 440.
61. Id.
62. Id.
63. See Eisenbud v. Suffolk County, 841 F.2d 42, 45 (2d Cir. 1988).
governmental interest.\footnote{64}

The definition of a "suspect class" originally derives from footnote four of United States v. Carolene Products Co. In Carolene, the Court indicated that it would apply a higher standard of review when the law affected "discrete and insular minorities."\footnote{65} Courts have subsequently placed laws into this category and applied strict scrutiny when the laws classify by race, alienage, or national origin.\footnote{66} To qualify as a quasi-suspect class and trigger intermediate scrutiny, the group of people "must 1) have suffered a history of discrimination; 2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and 3) show that they are politically powerless, or alternatively show that the statutory classification at issue burdens a fundamental right."\footnote{67} Courts have subjected laws that classify on the basis of gender or illegitimacy to intermediate scrutiny.\footnote{68}

2. Alternative Constitutional Rights Analyses

In recent years, the Supreme Court has applied both the Substantive Due Process and Equal Protection analyses with less rigidity.\footnote{69} Some justices, most notably Justices Thurgood Marshall and John Paul Stevens, have found fault with the rote and rigid application of the categories.\footnote{70} The real

\footnote{64. Cleburne, 473 U.S. at 441. Different Justices use the terms "intermediate scrutiny" or "heightened scrutiny," but the standard of review is the same.}
\footnote{65. United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).}
\footnote{66. Cleburne, 473 U.S. at 440.}
\footnote{67. High Tech Gays, 895 F.2d at 573 (paraphrasing Bowen v. Gilliard, 483 U.S. 587, 602-03 (1987)).}
\footnote{68. Cleburne, 473 U.S. at 441. Justice Marshall, unlike the majority, includes alienage in the list of classifications subject to heightened scrutiny because of the Court's decision in Plyler v. Doe, 457 U.S. 202 (1982), in which it struck down a Texas law prohibiting districts from using state funds for children who are illegal aliens. Cleburne, 473 U.S. at 469 (Marshall, J., dissenting).}
\footnote{69. See infra Part II.A.2.}
\footnote{70. See, e.g., Cleburne, 473 U.S. at 451 (Stevens, J., concurring). In his concurring opinion, in which Justice Marshall concurs in part, Justice Stevens says that equal protection cases do not reflect clear tiered standards but rather "a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from 'strict scrutiny' at one extreme to 'rational basis' at the other." Id. (Stevens, J., concurring). Some commentators have also latched onto this apparent discomfort with the tiered system and have suggested other standards for evaluation. See, e.g., Suzanne}
erosion, however, occurred in the majority opinions of various due process and equal protection cases, but it occurred without the Court expressly mentioning it. Employing substantive due process analyses, the majority opinions in *Planned Parenthood v. Casey* and *Lawrence v. Texas* undermined the unbending tiered analysis by applying new tests and ambiguous language. In addition, employing equal protection analyses, the majority opinions in *Plyler v. Doe*, *City of Cleburne v. Cleburne Living Center*, and *Romer v. Evans* all impliedly altered the rigid tiered analysis.

a. Planned Parenthood v. Casey

In substantive due process analysis, the prime example of the erosion of the tiered analysis is *Planned Parenthood v. Casey*. In *Casey*, abortion clinics and physicians challenged as facially unconstitutional a Pennsylvania abortion law that included a spousal notification requirement. In its holding, the Court reaffirmed a fundamental right to abortion, but a plurality abandoned the traditional strict scrutiny analysis for an “undue burden” test. Since the Supreme Court enunciated an entirely new test in *Casey*, legal commentators and scholars have suggested that the Court is leaning toward a more fluid evaluation of substantive due process claims.


77. Id. at 844-45.
78. Id. at 846.
79. The Justices in the plurality were O’Connor, Kennedy, and Souter. Id. at 843-44.
80. Id. at 846. The Court defines “undue burden” as something that places a “substantial obstacle” before someone’s exercise of his or her fundamental right. Id. By using an entirely new test, instead of the strict scrutiny traditionally used in abortion cases such as *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court undermined the traditional substantive due process analysis.
81. Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1118 (2004) (suggesting that some of the Supreme Court justices are “moving the Court to a more flexible analytical structure for evaluating substantive due process claims”).
b. Lawrence v. Texas

The latest opinion to implicitly challenge the tiered structure under due process analysis is *Lawrence v. Texas*,\(^{82}\) a gay rights decision. In *Lawrence*, police in Harris County, Texas entered the home of petitioner John Geddes Lawrence in response to a report of a weapons disturbance.\(^{83}\) The police found the petitioner engaged in anal sex and the prosecutor charged the petitioner under Texas’s same-sex sodomy statute.\(^{84}\) A majority of five, led by Justice Kennedy, made the rare leap to disregard stare decisis and overruled *Bowers v. Hardwick*.\(^{85}\) In *Bowers*, the Court applied rational basis review because it found that there was no fundamental right to homosexual sodomy,\(^{86}\) and it upheld a Georgia sodomy statute under that test.\(^{87}\) *Lawrence* expressly rejected an asserted historical tradition against same-sex relations, a major premise on which *Bowers* rested.\(^{88}\)

The *Lawrence* majority opinion, while expressly grounded in substantive due process,\(^{89}\) is “a theoretically ambiguous decision.”\(^{90}\) The Court referred to the conduct involved as being encompassed in the concept of “liberty,” and stated that “[t]he liberty protected by the Constitution allows homosexual persons the right to make this choice [of with whom to engage in private sexual conduct].”\(^{91}\) The Court did not state the


\(^{83}\) *Id.* at 562.

\(^{84}\) *Id.* at 563. The text of the statute is: “A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.” Tex. Penal Code Ann. § 21.06(a) (Vernon 2003), invalidated by *Lawrence*. It defines “deviate sexual intercourse” as: “(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object.” *Id.* § 21.01(1).

\(^{85}\) *Lawrence*, 539 U.S. at 578 (“*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”).


\(^{87}\) *Id.* at 196.

\(^{88}\) *Lawrence*, 539 U.S. at 570.

\(^{89}\) *Id.* at 564. The majority expressly avoided analyzing the case under equal protection because it wanted to avoid loopholes where “some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct between same-sex and different-sex participants.” *Id.* at 575.

\(^{90}\) Leonard, supra note 5, at 189.

\(^{91}\) *Lawrence*, 539 U.S. at 562, 567.
applicable test or level of scrutiny and merely said that the government presented "no legitimate state interest which can justify its intrusion into the personal and private life of the individual."92 As Justice Antonin Scalia pointed out in his dissenting opinion, "nowhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a 'fundamental right.'"93

There are three basic interpretations of the Lawrence opinion: (1) it applied rational basis review, (2) it applied strict scrutiny, and (3) it applied neither. The first interpretation asserts that Lawrence merely indicated that same-sex sodomy statutes fail the rational basis test.94 This interpretation focuses on the fact that Justice Kennedy, in overruling Bowers, did not expressly state that there is a fundamental right to engage in homosexual sodomy.95 Also, the majority used language traditionally used in rational basis review, rather than clearly applying strict scrutiny, "which would have been the appropriate level of scrutiny if the Court intended to imply there was a fundamental right to engage in homosexual sodomy."96 This interpretation finds support in the fact that Justice Kennedy's opinion in Lawrence is similar to his opinion in Romer, which dealt with gay rights.97 As in Lawrence,98 Justice Kennedy did not specifically state that he applied rational basis review to Colorado's Amendment 2.99 In both cases Justice Kennedy

92. Id. at 578.
93. Id. at 586 (Scalia, J., dissenting) (first emphasis added).
94. See Meghan M. Peterson, Casenote, The Right Decision for the Wrong Reason: The Supreme Court Correctly Invalidates the Texas Homosexual Sodomy Statute, But Rather Than Finding an Equal Protection Violation in Lawrence v. Texas, the Court Incorrectly and Unnecessarily Overrules Bowers v. Hardwick, 37 CREIGHTON L. REV. 653, 707 (2004) (writing that the Lawrence Court was incorrect to overrule Bowers because the Court really applied a rational basis standard rather than stating that there was a fundamental right to homosexual sodomy and applying strict scrutiny); see also Martin A. Schwartz, Lawrence v. Texas: The Decision and Its Implications for the Future, 20 TouR O. REV. 221, 229 (2004) (interpreting the Court to have applied "a type of low level judicial scrutiny").
95. Peterson, supra note 94, at 701-02.
96. Id. at 702, 707.
98. Lawrence, 539 U.S. at 578.
99. See Romer, 517 U.S. at 631-32. Justice Scalia also notes that the
did not explicitly state which standard he applied, yet he did say that the states lacked legitimate purposes. Therefore, it is a fair assumption that these laws did not pass rational basis review.

In a second interpretation of Lawrence, some have argued that the majority applied strict scrutiny to strike down the same-sex sodomy statute, even though it did not expressly state that it intended to do so.100 This interpretation focuses on the fact that the majority situates its opinion in a line of cases addressing privacy and fundamental reproductive autonomy rights.101 The Lawrence majority opinion discussed Griswold v. Connecticut,102 Eisenstadt v. Baird,103 and Roe v. Wade,104 all of which addressed fundamental rights.105 It then stated that two post-Bowers cases, Casey106 and Romer,107 cast further doubt on Bowers.108 Furthermore, when the Court referred to “liberty” rather than “fundamental rights,” it did so only to ground in constitutional text its broad recognition of the right to privacy in one’s consensual sexual conduct.109 In addition, the Court’s reference to the lack of a legitimate governmental interest was not a ceiling but rather a floor, meaning that the sodomy statute failed to survive even the requirements for rational basis review, which

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101. Id. See also Hunter, supra note 81, at 1114.
102. Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing a fundamental right to privacy and striking down a state law prohibiting the distribution of contraceptives and information about them to married couples).
104. Roe v. Wade, 410 U.S. 113 (1973) (recognizing a women’s fundamental right to abortion).
106. Planned Parenthood v. Casey, 505 U.S. 833 (1992). This case reaffirmed women’s fundamental right to abortion, but a plurality rejected the trimester system of Roe v. Wade and used an “undue burden” test instead. Id.
107. Romer v. Evans, 517 U.S. 620 (1996) (striking down an amendment to the Colorado state constitution that prohibited the state and municipalities from enacting laws prohibiting discrimination on the basis of sexual orientation on equal protection grounds).
108. Lawrence, 539 U.S. at 573-74.
109. Carpenter, supra note 100, at 1160-61. See also Hunter, supra note 81, at 1103.
therefore meant it also failed the more rigorous requirements of strict scrutiny. 110 Alternatively, the Court implied that the state has a legitimate interest in regulating morality, but this interest was insufficient to survive strict scrutiny. 111

As a third interpretation, a few commentators have suggested that the Court applies neither rational basis review nor strict scrutiny. 112 Instead, the opinion indicated that the Court "is abandoning the project of identifying 'fundamental' rights so that lower courts can no longer simply apply a mechanistic tiered approach to judicial review." 113 Some posit that the Court found a quasi-fundamental right to private consensual sexual conduct, which elevated the level of scrutiny to intermediate scrutiny. 114

In her concurrence, Justice Sandra Day O'Connor decided the case on equal protection grounds under rational basis review and thereby avoided overruling Bowers. 115 Justice O'Connor noted that Texas's same-sex sodomy statute meant that people who engaged in the same conduct would be treated differently "based solely on the participants [involved]." 116 Since this law "brand[ed] all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else," 117 it was discriminatory and triggered an equal protection analysis. 118 She further found that "[m]oral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis of review under the Equal Protection Clause." 119 Justice O'Connor noted that national security is a legitimate state interest, but the state simply did

110. Hunter, supra note 81, at 1114. See also Carpenter, supra note 100, at 1156-57.
111. See Carpenter, supra note 100, at 1157.
112. See, e.g., Leonard, supra note 5.
113. Id. at 299.
116. Id. at 581 (O'Connor, J., concurring).
117. Id. (O'Connor, J., concurring).
118. Id. at 584 (O'Connor, J., concurring).
119. Id. at 582 (O'Connor, J., concurring) (emphasis added).
not have such an interest in Lawrence.\textsuperscript{120}

c. Plyler v. Doe

One of the first cases to avoid the inflexible tiered system in an equal protection analysis was Plyler v. Doe.\textsuperscript{121} In Plyler, the Court struck down Texas laws that withheld from local school districts state funds used to educate undocumented immigrant children.\textsuperscript{122} Since undocumented children are not considered a suspect class, nor is education considered a fundamental right,\textsuperscript{123} rational basis would appear to be the applicable standard of review. However, the Court instead required a weightier “substantial goal of the State,”\textsuperscript{124} and it struck down the Texas scheme.\textsuperscript{125} The Court found that “more is involved in these cases than the abstract question whether [the Texas law] discriminates against a suspect class, or whether education is a fundamental right.”\textsuperscript{126} The Court was concerned about the stigma that would follow the children because of a characteristic over which they had no control.\textsuperscript{127} Scholars have interpreted Plyler to create a new quasi-fundamental right to education that implicates a higher level of scrutiny.\textsuperscript{128} The Court itself did not use this term or any other term to describe the level of scrutiny it employed.

d. City of Cleburne v. Cleburne Living Center

Beyond Plyler's expansion of equal protection analysis, the Court has implicitly challenged the tiered system by applying a level of scrutiny that legal commentators have termed “rational basis with bite.”\textsuperscript{129} Under this standard, the Court purportedly applies a rational basis test while, in fact, it either applies rational basis review with more vigor, or it actually applies intermediate scrutiny but labels it rational basis review.\textsuperscript{130} The Court employed rational basis with bite

\textsuperscript{120} Id. at 585 (O'Connor, J., concurring).
\textsuperscript{121} Plyler v. Doe, 457 U.S. 202 (1982).
\textsuperscript{122} Id. at 230.
\textsuperscript{123} Id. at 223.
\textsuperscript{124} Id. at 224.
\textsuperscript{125} Id. at 230.
\textsuperscript{126} Id. at 223.
\textsuperscript{128} See Sproule, supra note 114, at 810.
\textsuperscript{129} Chemerinsky, supra note 35, at 550.
\textsuperscript{130} See Gayle Lynn Pettinga, Rational Basis With Bite: Intermediate
in both City of Cleburne v. Cleburne Living Center and Romer v. Evans. In Cleburne, a majority of the Court struck down a city zoning ordinance that denied a special use permit to a group who sought to establish a home for the "mentally retarded." The Court determined that there was no suspect or quasi-suspect class present, and therefore rational basis review should apply. However, it rejected the city's justifications for denying the permit, including negative attitudes of nearby property owners, and the facility's proximity to a school and existence on a flood plain. The Court also rejected the city's concerns about the number of occupants relative to the size of the home since the city would not have conditioned the permit on a restricted number of residents had the home been used for another purpose, such as a nursing home. However, it determined that there was no rational basis for denial of the permit in this case.

In his dissent, Justice Marshall expressed concerns about the majority's application of the rational basis test: "To be sure, the Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter be called 'second order' rational-basis review rather than heightened scrutiny." In addition, Justice Marshall called for a clear intermediate standard. He said, "the level of scrutiny employed in an equal protection case should vary with 'the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is

Scrupitony by Any Other Name, 62 IND. L.J. 779, 779-80 (1987).
133. Cleburne, 473 U.S. at 435.
134. Id. at 442.
135. Id. at 448-49.
136. Id. at 449-50.
137. Id. at 448. Justice O'Connor's interpretation of Cleburne, as well as Department of Agriculture v. Moreno, 413 U.S. 528 (1973), and apparently Lawrence v. Texas, 539 U.S. 558 (2003), is that the laws in those cases were struck down under rational basis at least partially because the Court is more apt to find fault when the law "inhibits personal relationships." See Lawrence, 539 U.S. at 580 (O'Connor, J., concurring).
138. Cleburne, 473 U.S. at 495. See also Pettinga, supra note 130, at 794-96 (citing portions of the majority's rationale that indicated its application of rational basis with bite).
drawn.” He determined that the mentally disabled had a strong interest in establishing group homes, and they had suffered a history of discrimination. Thus, a more heightened standard of review than the rational basis review the majority purportedly applied was appropriate. Accordingly, Justice Marshall proposed that the Court “require that the [law] be convincingly justified as substantially furthering legitimate and important purposes” when there is discrimination of a non-suspect class coupled with infringement of a non-fundamental right. This language suggests that Justice Marshall was calling for intermediate scrutiny in circumstances such as those presented in Cleburne.

e. Romer v. Evans

More recently, the Court applied rational basis with bite to an equal protection violation in Romer v. Evans. In Romer, the majority, led by Justice Anthony Kennedy, struck down an amendment to the Colorado state constitution that prohibited the state and municipalities from enacting laws prohibiting discrimination based on sexual orientation. The Court reasoned that it could not “say that Amendment 2 is directed to any identifiable legitimate purpose or discrete

141. Id. (Marshall, J., concurring).
142. Id. at 464 (Marshall, J., concurring).
143. Id. at 460 (Marshall, J., concurring). Similarly, the Second Circuit determined that a court should apply intermediate scrutiny “in cases where the classification is not facially invidious and the right impinging is important though not protected by the Constitution.” Eisenbud v. Suffolk County, 841 F.2d 42, 45 (2d Cir. 1988). The Second Circuit seems to misstate the test because the traditional distinction is not between rights that the Constitution protects and those that it does not. Instead, the distinction is between fundamental and non-fundamental rights. See supra Part II.A.1. It is more appropriate to say one has a right if the judiciary recognizes it at whatever level. Further, if a court were to apply intermediate scrutiny and strike down a law that prohibited some action, then one could appropriately say that the affected group had a right to that action.
145. Id.
objective. Justice Kennedy did not specifically state that he applied rational basis review to Colorado’s Amendment 2, nor did he state that he applied rational basis with bite or intermediate scrutiny. He simply failed altogether to state which standard he applied. Notably, the Court found it important that Amendment 2 was both over-inclusive and under-inclusive, characterizations that are mostly irrelevant in rational basis review, but pertinent under higher levels of scrutiny. This intensive analysis suggests that Justice Kennedy applied such a higher level of scrutiny.

Taken together, these seemingly aberrational cases actually defined the new landscape of constitutional rights by either expressly or impliedly eroding the traditional tiered analysis. These lines of cases challenge law students, legal scholars, and practitioners, and they open the door to new theories that can be used to strike down policies like DADT.

B. Constitutional Rights in the Military Context

Constitutional rights analyses in the military context are somewhat different than in the civil context. As Justice Kennedy said as a judge on the Ninth Circuit Court of Appeals, “[w]hile 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.” However, some courts go so far as to find a “constitutionally-mandated deference to military assessments and judgments [that] gives the judiciary far less scope to scrutinize the reasons . . . that the military has

146. Id. at 635.
147. See id. Justice Scalia also notes that the majority does not indicate the precise test that it is using, but that the majority “evidently agrees . . . that ‘rational basis’ is the governing standard.” Id. at 640 n.1 (Scalia, J., dissenting).
148. See id. (Scalia, J., dissenting).
149. See id. at 633.
150. CHERMERINSKY, supra note 35, at 532.
151. See, e.g., John H. Turner, Solid Waste Flow Control: The Commerce Clause and Beyond, 19 MISS. C. L. REV. 53, 90 (1998) ("Romer is, therefore, not simply a victory for gay rights advocates—it is an unequivocal and triumphant return to the ‘rational basis with bite’ approach that briefly surfaced in the early 1980s and had its high-water mark with the Court’s 1985 opinion in City of Cleburne, Texas v. Cleburne Living Center.").
152. Beller v. Middendorf, 632 F.2d 788, 810 (9th Cir. 1980).
advanced to justify its actions."\textsuperscript{153} The judiciary affords such deference partially because of its self-declared inadequacy in matters of the military.\textsuperscript{154} Courts also make a separation of powers argument and reason that the military's policies should be left to the legislative and executive branches.\textsuperscript{155} The political process, they argue, remedies any shortcomings because the people will vote out the elected officials who formulate undesirable military policy.\textsuperscript{156} A few judges, however, give less deference to the government when fundamental rights are involved.\textsuperscript{157}

C. The Military's Don't Ask, Don't Tell Policy

1. Pre-DaDcT Treatment of Gay and Lesbian People

Historically, the military exhibited hostility toward gay and lesbian servicemembers.\textsuperscript{158} Since its inception and until DADT, the military had flatly banned gay and lesbian people

\begin{itemize}
\item \textsuperscript{153} Able v. United States, 155 F.3d 628, 634 (2d Cir. 1998) (finding that cases such as Cleburne and Romer were inapplicable precedent in cases involving constitutional rights in the military context).
\item \textsuperscript{154} Thomasson v. Perry, 80 F.3d 915, 925-26 (4th Cir. 1997) (deferring because of Congress’s greater access to intelligence, expertise in military supervision, as well as the President’s authority). See also Rostker v. Goldberg, 453 U.S. 57, 65 (1981) (“Not only is the scope of Congress’ constitutional power in [the military] broad, but the lack of competence on the part of the courts is marked.”); Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (“[It is difficult to conceive of an area of governmental activity in which the courts have less competence [than the military] . . . [because of] the complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force . . . .”).
\item \textsuperscript{155} Able, 155 F.3d at 633 (“The framers did not view the federal judiciary—appointed with life tenure—as the appropriate body to exercise military authority . . . .”)
\item \textsuperscript{156} See Thomasson, 80 F.3d at 923 (“To overturn [military] solutions in the absence of a clear constitutional mandate would transform the judiciary into an instrument of disenfranchisement for all who use the political process to register the democratic will.”).
\item \textsuperscript{157} E.g., id. at 950 (Hall, J., dissenting) (“While I will defer, as I ought and must, to the professional judgment of military commanders on things military, I may never defer to their judgment on things constitutional.”).
\item \textsuperscript{158} See id. at 935 (Luttig, J., concurring) (“For as long as it has had a military, the United States has excluded homosexuals for military service.”). For a more detailed history of the military’s treatment of gay and lesbian servicemembers, see Sharon E. DeBage Alexander, A Ban by Any Other Name: Ten Years of ‘Don't Ask, Don't Tell,’ 21 HOFSTRA LAB. & EMP. L.J. 403, 404-11 (2004).
\end{itemize}
from serving.\textsuperscript{159} Courts in this era upheld the exclusion policy against constitutional attacks.\textsuperscript{160} For example, in his 1980 opinion in \textit{Beller v. Rumsfeld}, then-Ninth Circuit Judge Kennedy applied a standard between rational basis and strict scrutiny to uphold a military exclusion statute.\textsuperscript{161} In this pre-\textit{Bowers} opinion, Justice Kennedy reserved the question of whether there existed a fundamental right to private consensual sexual conduct.\textsuperscript{162} Ten years later, in \textit{High Tech Gays v. Defense Industrial Security Clearance Office}, the Ninth Circuit held that \textit{Bowers} meant that the court should apply a rational basis standard to the military's exclusion policy since the Supreme Court previously held that there existed no fundamental right to engage in homosexual conduct.\textsuperscript{163} In addition, the court declined to apply intermediate scrutiny because homosexuals were not a quasi-suspect class.\textsuperscript{164} It found that the class failed the three-prong test because "[h]omosexuality is not an immutable characteristic," homosexuals are not politically powerless, and the statutory classification does not burden a fundamental right.\textsuperscript{165}

2. \textit{DADT}'s Mandate

The flat ban against gay and lesbian servicemembers ceased when President Bill Clinton signed into law the DADT policy.\textsuperscript{166} Under DADT, if a servicemember either engages in homosexual conduct or states that he or she is homosexual, there is a rebuttable presumption that the servicemember will engage in homosexual conduct and therefore is subject to discharge.\textsuperscript{167} A servicemember may rebut the presumption that the homosexual \textit{conduct} raises by showing that such conduct is a departure from the member's usual and customary behavior; \ldots{} is unlikely to recur; \ldots{} was not accomplished by use of force, coercion, or intimidation; \ldots{}

\textsuperscript{159} \textit{Thomasson}, 80 F.3d at 935 (Luttig, J., concurring).
\textsuperscript{160} \textit{See}, \textit{e.g.}, \textit{High Tech Gays v. Def. Indus. Sec. Clearance Office}, 895 F.2d 533 (9th Cir. 1990); \textit{Beller v. Middendorf}, 632 F.2d 788 (9th Cir. 1980).
\textsuperscript{161} \textit{Beller}, 632 F.2d at 809.
\textsuperscript{162} \textit{Id.} at 807.
\textsuperscript{163} \textit{High Tech Gays}, 895 F.2d at 571.
\textsuperscript{164} \textit{Id.} at 574.
\textsuperscript{165} \textit{Id.} at 573-74.
\textsuperscript{166} \textit{Thomasson v. Perry}, 80 F.3d 915, 921-23 (4th Cir. 1997).
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 . . . the member does not have a propensity or intent to engage in homosexual acts.\footnote{168}

The presumption a \textit{statement} of homosexuality raises is rebuttable by showing that the servicemember “is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.”\footnote{169} A “homosexual act” is defined as “any bodily contact, actively taken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires . . . [and] which a reasonable person would understand to demonstrate a propensity or intent to engage [in such acts].”\footnote{170} However, the policy reserves two exceptions under which a servicemember who made statements that he or she is gay or engaged in “homosexual acts” will not be discharged.\footnote{171} First, the military will not discharge servicemembers if they make statements or engage in conduct “for the purpose of avoiding or terminating military service,”\footnote{172} or, second, if “separation of the member would not be in the best interest of the armed forces.”\footnote{173} The DADT mandate is largely based on the U.S. Supreme Court’s decision and language regarding homosexual conduct in \textit{Bowers}.\footnote{174}

In practice, DADT is only somewhat effective in limiting a commander’s discretion to eliminate gay and lesbian servicemembers. Although commanders “can’t directly ask a servicemember whether he is gay, and they can’t begin a campaign of surveillance based on unreliable information[,] . . . they can initiate investigations if they gain access to the fruits of ‘asking’ by other branches of government.”\footnote{175} The commander also retains a fair bit of discretion to initiate investigation based on homosexual

\footnote{168. \textit{Id.} § 654(b)(1)(A)-(E).}
\footnote{169. \textit{Id.} § 654(b)(2).}
\footnote{170. \textit{Id.} § 654(f)(3)(A)-(B).}
\footnote{171. \textit{Id.} § 654(e).}
\footnote{172. \textit{Id.} § 654(e)(1).}
\footnote{173. 10 U.S.C. § 654(a)(2) (2000).}
\footnote{174. \textit{HALLEY, supra} note 19, at 5.}
\footnote{175. \textit{Id.} at 51.}
conduct.\textsuperscript{176} The type of conduct that can raise the presumption that the servicemember will engage in homosexual conduct sufficient for discharge, according to a Department of Defense Training Manual, includes "two enlisted men holding hands in a secluded section of a public park."\textsuperscript{177} One commentator envisions a situation like this:

A commander who notes with suspicious displeasure that a male subordinate had marched in a gay rights parade in civilian clothes, made a memorial gift for a male friend who died of AIDS, and spoken in support of Clinton's reforms can deem these acts to be conduct that manifests a propensity. Even though no contacts are involved, the servicemember will find nothing in the regulations that allows him to challenge the commander's decision to open an investigation. The investigator can then contact college roommates, parents, and siblings seeking evidence of homosexual contacts, coming-out statements, or any other evidence that would manifest a propensity. Even if the investigation turns up no new evidence, it is nevertheless the servicemember's burden to show that he has no propensity . . . .\textsuperscript{178}

Since its inception, nearly 10,000 servicemembers have been discharged from the military under DADT.\textsuperscript{179} The typical situation leading to discharge is evident in the lower court decisions about DADT.\textsuperscript{180} In Richenberg v. Perry,\textsuperscript{181} when Air Force Captain Richard Richenberg informed his commanding officer that he was gay and failed to rebut the presumption that statement raised, he was discharged.\textsuperscript{182} The Eighth Circuit upheld the policy\textsuperscript{183} and Richenberg's discharge.\textsuperscript{184} Similarly, in Thomasson v. Perry,\textsuperscript{185} the Fourth Circuit encountered the same fact pattern where a Navy

\textsuperscript{176} Id. at 115.
\textsuperscript{177} Id. at 108.
\textsuperscript{178} Id. at 115.
\textsuperscript{179} Ten Years of "Don't Ask, Don't Tell," supra note 10, at 13.
\textsuperscript{180} See, e.g., Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1997); Philips v. Perry, 106 F.3d 1420, 1421 (9th Cir. 1997); Watson v. Cohen, 124 F.3d 1126, 1130 (9th Cir. 1997); Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1131 (9th Cir. 1997); Richenberg v. Perry, 97 F.3d 256 (8th Cir. 1996).
\textsuperscript{181} Richenberg v. Perry, 97 F.3d 256 (8th Cir. 1996).
\textsuperscript{182} Id. at 260.
\textsuperscript{183} Id. at 261.
\textsuperscript{184} Id. at 264.
\textsuperscript{185} Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1997).
Lieutenant wrote a letter to military officials in which he stated he was gay. 186 However, Thomasson failed to rebut the presumption that he intended to or had a propensity to engage in homosexual acts as defined in DADT. 187 The Fourth Circuit upheld DADT and therefore affirmed Thomasson's discharge. 188 Likewise, the Ninth Circuit upheld DADT and the discharge of a Navy enlisted man in Phillips v. Perry. 189 In this case, Philips stated that he was gay and that he previously had sexual relations with other men. 190 He failed to rebut the presumptions raised and was discharged. 191 Each of these cases demonstrates a fact pattern in which a servicemember stated that he was gay, failed to rebut the presumption that he would engage in homosexual conduct as defined by DADT, and was discharged.

3. DADT's Justification and Reality

The primary justification for DADT is unit cohesion. 192 Congress found that "[s]uccess in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion[,] . . . [which is] one of the most critical elements in combat capability." 193 Military personnel claim and Congress determined that the presence of gay and lesbian people places these values at risk. 194 As General Norman Schwarzkopf said in the Congressional hearings about DADT: "Whether we like it or not, in my years of military service I have experienced the fact that the introduction of an open homosexual into a small unit

186. Id. at 920.
187. Id. at 921.
188. Id. at 919.
189. Philips v. Perry, 106 F.3d 1420, 1421 (9th Cir. 1997).
190. Id. at 1421-22.
191. Id. at 1422. There are still more cases presenting the same fact pattern. See, e.g., Watson v. Cohen, 124 F.3d 1126, 1130 (9th Cir. 1997); Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1131 (9th Cir. 1997).
192. Hunter, supra note 81, at 1128. As General Norman Schwarzkopf said in his testimony before the Senate, "It's called unit cohesion, and in my 40 years of Army service in three different wars, I've become convinced that it is the single most important factor in a unit's ability to succeed on the battlefield." Policy Concerning Homosexuality in the Armed Forces: Hearings Before the S. Comm. on Armed Servs., 103d Cong. 595 (1993) [hereinafter Policy Concerning Homosexuality Hearings] (statement of General Norman Schwarzkopf, United States Army).
194. Id. § 654(a)(15).
immediately polarizes that unit and destroys the very bonding that is so important for the unit’s survival in time of war.”\(^{195}\)

However, this concern has been challenged by studies of the inclusion of gay and lesbian servicemembers in foreign militaries.\(^ {196}\) For example, in 1993, the Secretary of Defense commissioned a report of foreign militaries that revealed “no serious problems resulting from the presence of open homosexuals.”\(^ {197}\)

In addition, the fact that the servicemembers in the cases described above have stellar performance records\(^ {198}\) casts doubt on unit cohesion as a justification, since poor performance would likely affect unit cohesion. For example, in Richenberg, the dissent noted that the plaintiff’s “Officer Performance Reports (OPRs) are full of praise for his professionalism, dedication, and leadership abilities, and he received many medals over the course of his Air Force career.”\(^ {199}\) Likewise, the dissent in Thomasson explained that “[t]he performance coin has no other side: the Navy does not complain that [the plaintiff] ever rendered middling, let alone deficient, service.”\(^ {200}\) Moreover, some servicemembers report no problems due to their homosexuality.\(^ {201}\)

Some commentators have also suggested that DADT actually weakens the military, and consequently the nation’s security and defense, by eliminating and discouraging gay and lesbian people from serving.\(^ {202}\) A 2005 report found that

\(^{195}\) Policy Concerning Homosexuality Hearings, supra note 192, at 595-96 (statement of General Norman Schwarzkopf, United States Army).

\(^{196}\) See, e.g., Thomasson v. Perry, 80 F.3d 915, 952 (4th Cir. 1997) (Hall, J., dissenting).

\(^{197}\) Id. (Hall, J., dissenting).

\(^{198}\) See, e.g., Watson v. Cohen, 124 F.3d 1126, 1129 (9th Cir. 1997) (“His fourteen-year naval career is marked with many awards and honors.”); Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1131 (9th Cir. 1997) (“He earned many honors during his service, including promotion to First Lieutenant and Combat Military Police Platoon Leader.”).

\(^{199}\) Richenberg v. Perry, 97 F.3d 256, 265 (8th Cir. 1996) (Arnold, J., dissenting).

\(^{200}\) Thomasson, 80 F.3d at 950 (Hall, J., dissenting). The majority also mentioned the servicemember's record as being “commendable.” Id. at 920.

\(^{201}\) Philips v. Perry, 106 F.3d 1420, 1422 (9th Cir. 1997).

\(^{202}\) See, e.g., Diane H. Mazur, Is “Don’t Ask, Don’t Tell” Unconstitutional After Lawrence?: What It Will Take to Overturn the Policy, 15 J.L. & PUB. POLY 423, 439-40 (2004). With DADT, the military eliminates qualified military personnel from its ranks, and it discourages needed new recruits. Id.
nearly 10,000 servicemembers were discharged under DADT between 1994 and 2003. Although this accounts for only about 0.04% of all servicemembers who were separated from the military during that period, 757 of those discharged under DADT held critical occupations, and 322 were skilled in critical foreign languages such as Arabic, Farsi, and Korean. Furthermore, the report estimated that it cost the Department of Defense approximately $95 million to recruit replacements for servicemembers discharged under DADT during that nine year period.

4. Court Decisions

Prior to Lawrence, most courts that considered DADT applied rational basis review under the equal protection rubric. These courts used various justifications for the application of rational basis review over an elevated standard. First, these courts relied on Bowers. They argued that since legislatures were free to criminalize homosexual conduct under Bowers, they were also constitutionally capable of mandating discharge from the military for homosexual conduct. Further, since Bowers found no right to engage in homosexual sodomy, courts applied rational basis review and gave deference to the government in military matters.

Second, these courts rejected the presence of a

204. Id. at 1.
205. Id. at 4.
206. Id. at 4-5.
207. Id. at 3.
208. See, e.g., Able v. United States, 155 F.3d 628, 631-32 (2d Cir. 1998); Philips v. Perry, 106 F.3d 1420, 1424-25 (9th Cir. 1997); Thomasson v. Perry, 80 F.3d 915, 927-28 (4th Cir. 1997); Richenberg v. Perry, 97 F.3d 256, 260-61 (8th Cir. 1996); Watson v. Perry, 918 F. Supp. 1403, 1412 (W.D. Wash. 1996).
209. See, e.g., Watson, 918 F. Supp. at 1411; see also Leonard, supra note 5, at 207 ("Bowers has been the lynch pin for numerous lower court rulings—not just gay issues—that involved individual claims of privacy and protection for intimate life and choice.").
211. See, e.g., Watson, 918 F. Supp. at 1411 ("This Court is not permitted, however, to substitute its own judgment for that of Congress and the military or to question the wisdom of the military's policy.").
fundamental right or suspect class.\textsuperscript{212} Therefore, an increased level of scrutiny was not required.\textsuperscript{213}

Third, and most importantly, these courts determined DADT to be conduct-based and not status-based.\textsuperscript{214} The government framed the policy as conduct-based and asserted that “[a] member’s sexual orientation is considered a personal and private matter, and is not a bar to continued service . . . unless manifested by homosexual conduct.”\textsuperscript{215} The government and these courts consistently argued that DADT is conduct-based because “the statute carefully defines ‘homosexual’ for these purposes as limited to those who commit, intend to commit, or have a propensity to commit unacceptable sexual acts.”\textsuperscript{216} The result of such a characterization is that these courts did not apply a heightened standard\textsuperscript{217} and thus upheld DADT as constitutional under rational basis review.\textsuperscript{218}

Many concurring and dissenting opinions in DADT cases argued that the policy is clearly status-based.\textsuperscript{219} For example, the concurrence in Thomasson determined that characterizing the policy as conduct-based was a “politically expedient fiction.”\textsuperscript{220} As one commentator explained,

to deny a conceptual, indeed a statistically noticeable empirical relationship between same-sex erotic contacts and the social group of self-described gay men, lesbians, and bisexuals is not just conceptually absurd and empirically heroic; it contradicts the persistent tenets of gay, lesbian, bisexual, and queer political movements, which have sought to endorse, not abandon, same-sex

\footnotesize
\textsuperscript{212} See, e.g., Thomasson, 80 F.3d at 928; Philips, 106 F.3d at 1425; Holmes v. Cal. Army Nat’l Guard, 124 F.3d 1126, 1132 (9th Cir. 1997).

\textsuperscript{213} See, e.g., Thomasson, 80 F.3d at 928; Philips, 106 F.3d at 1425; Holmes, 124 F.3d at 1132.

\textsuperscript{214} See, e.g., Richenberg v. Perry, 97 F.3d 256, 261 (8th Cir. 1996); Philips, 106 F.3d at 1427.


\textsuperscript{216} Richenberg, 97 F.3d at 261.

\textsuperscript{217} See, e.g., Able v. United States, 155 F.3d 628, 632 (2d Cir. 1998) (refusing to consider whether heightened scrutiny applies since the plaintiffs only sought rational basis review).

\textsuperscript{218} See, e.g., id. at 635; Philips, 106 F.3d at 1425-27; Thomasson, 80 F.3d at 928-29; Richenberg, 97 F.3d at 262.

\textsuperscript{219} See, e.g., Thomasson, 80 F.3d at 934-35 (Luttig, J., concurring).

\textsuperscript{220} Id. at 934 (Luttig, J., concurring).
eroticism.221

Some argue the policy is not conduct-based because servicemembers may be discharged if they have a “propensity” to engage in homosexual conduct. As such, this propensity is more of “a hybrid of status and conduct.”222 Since “the word ‘propensity’ means merely an ‘inclination,’ precisely the definition the dictionaries ascribe to the term,”223 the policy targets homosexuals, not homosexual conduct. Furthermore, the government’s knowledge that DADT is not conduct-based is evident in “its repeated mischaracterization of the statute itself and its effective misquotation of the testimony of the various witnesses and legislators [who testified about the necessity and implications of this policy].”224 Some scholars point out that DADT is both status and conduct based because the two are intertwined,225 and the policy depends on whether the persons committing the acts are homosexual or heterosexual. As scholar Janet E. Halley explains, “Every moving part of [DADT] is designed to look like conduct regulation in order to hide the fact that it turns decisively on status.”226 Halley elaborates:

[S]ame-sex erotic acts are now deemed to be differently harmful depending on the sexual status of the people who perform them. A true heterosexual might mistakenly commit a same-sex erotic act [such as fellatio], but it should be deemed harmful to military essences because it tells us nothing about him; whereas a homosexual who engaged in the same act harms the military because his act provides an unmediated view into his sexual self.227

Another source that suggests DADT is a status-based policy is a set of hearing transcripts the Department of Justice submitted to courts to show how the presumption of propensity to engage in prohibited conduct had been rebutted successfully.228 The most telling instance is found in the transcript a titled the “Heterosexually Loyal Bisexual.”229

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221. HALLEY, supra note 19, at 62.
222. Thomasson, 80 F.3d at 939 (Luttig, J., concurring).
223. Id. at 943 (Luttig, J., concurring).
224. Id. at 939 (Luttig, J., concurring).
225. HALLEY, supra note 19, at 126-27.
226. Id. at 2.
227. Id. at 47.
228. Id. at 99.
229. Id. at 100.
This transcript details two male servicemembers who rebutted the presumption that they had the propensity to engage in homosexual conduct and remained in the military by saying they were bisexual but would choose to be sexually active with women and not men. This illustrated that the propensity presumption "can be rebutted only by affirmations of heterosexual status.... The DOJ tolerates the 'Heterosexually Loyal Bisexual' not because the servicemember has done anything to disprove his propensity to homosexual acts, but because he has demonstrated an ability to adhere to heterosexual status."  

Following Lawrence, there have been a few lower court decisions that considered Lawrence's effect on DADT. In Hensala v. Department of the Air Force, an Air Force reservist was discharged after stating he was gay, and the military subsequently ordered him to pay recoupment of his military-paid medical school expenses. The Ninth Circuit refused to consider his constitutional claim in light of Lawrence since Lawrence came down after the district court decided Hensala. However, the court stated that the parties could pursue the claim on remand.

Some commentators have speculated about Lawrence's effect on DADT. Some argue that Lawrence likely strikes down the military's sodomy statute since it struck down the sodomy statute in Bowers, which weakens the rationale for DADT but does not defeat the policy. The United States Court of Appeals for the Armed Forces held that Lawrence does not affect the military's sodomy law as applied to a particular appellant's conduct because that conduct fell outside Lawrence's scope. However, a military appeals court recently ruled that the sodomy statute must be struck
down when applied to heterosexual people who engage in sodomy.\textsuperscript{239} Some legal commentators proclaim this latter decision a victory for gay and lesbian people with respect to both the criminal sodomy statute and DADT.\textsuperscript{240} Others have argued that \textit{Lawrence} requires strict scrutiny because a fundamental right to private sexual conduct is implicated, and DADT cannot survive such scrutiny.\textsuperscript{241}

III. IDENTIFICATION OF THE PROBLEM

The United States and its military suffer along with gay servicemembers who face discrimination under DADT, and no remedy exists under the traditional constitutional rights analysis for servicemembers who are discharged under DADT. DADT keeps qualified and essential servicemembers from pursuing military careers unless they are either closeted, or openly gay but can prove they are celibate. Despite the obvious problems associated with DADT, the traditional legal scheme does not offer servicemembers recourse for their discharge.

Under traditional constitutional rights analysis, DADT is subject to rational basis review. The only available protection beyond rational basis review requires the implication of a fundamental right, a suspect class, or a quasi-suspect class. Despite the strong language in \textit{Lawrence} and its express overruling of \textit{Bowers}, there is no fundamental right to engage in private consensual sexual conduct. In addition, gays and lesbians are considered neither a suspect nor quasi-suspect class. Without a different rubric for analysis, DADT will continue to be upheld under rational basis review. This is an injustice to gays and lesbians who wish to serve their country, and it is detrimental to a military that is in need of able individuals.


\textsuperscript{240} Id.

IV. ANALYSIS: WHAT LAWRENCE MEANS FOR DADT

The Lawrence opinion is important for constitutional challenges to DADT. Lawrence explicitly overruled Bowers, the case upon which DADT rested and which courts followed as precedent when they upheld the policy.242 By holding that no right to homosexual sodomy existed, Bowers justified DADT and allowed courts freely to apply only rational basis review to DADT.243 Without such a right to homosexual sodomy, and in light of legislatures' ability to criminalize it, the military could have a policy that allowed discharge of members based on such conduct. However, since Bowers is no longer binding precedent, the rationale for the application of rational basis review to uphold DADT is questionable. Indeed, the ambiguity of Lawrence is evidenced by the subsequent array of law review articles and commentaries on how Lawrence affects the constitutional analysis of gay rights.244

In addition to overruling Bowers, the language used in the Lawrence opinion extends the line of cases that applied a higher level of scrutiny without expressly permitting such heightened scrutiny. Most interpretations of Lawrence have tried to pigeonhole the opinion into either a fundamental rights analysis requiring strict scrutiny245 or a non-fundamental rights analysis requiring rational basis review.246 This narrow view overlooks an alternative interpretation, supported by the fact that the majority, which surely was aware of the traditional rights analysis structure, chose not to employ it.247 Instead, Lawrence is an example of the Court's struggle with the rigid structure of rights analysis.248

In blurring the distinct tiered test for substantive due process analysis, the Court revealed its intent not to be bound by a particular structure, but rather to use common sense to

242. See discussion supra Part II.C.2, 4.
244. See discussion supra Part II.A.2.b.
245. See, e.g., Carpenter, supra note 100, at 1155 ("The better reading of Lawrence is that the Court views the right as fundamental.").
246. See, e.g., Peterson, supra note 94, at 698 ("[T]he Court subjected the Georgia anti-sodomy statute to rational review.").
248. See Leonard, supra note 5, at 209.
determine whether a law infringes upon a right.\textsuperscript{249} Though
he did not say so, Justice Kennedy showed his willingness to
apply a higher standard of review to gay rights cases through
his grandiose language and his use of particular precedents
such as \textit{Casey} and \textit{Romer}.\textsuperscript{250}

While the majority did not state that private consensual
conduct is a fundamental right, the strong language used also
suggests that rational basis review is not the appropriate
level of scrutiny. \textit{Lawrence} discussed private consensual
sexual conduct in terms of “liberty” and the opinion even
begins with that pregnant word.\textsuperscript{251} Justice Kennedy said:
“Freedom extends beyond spatial bounds. Liberty presumes
an autonomy of self that includes freedom of thought, belief,
expression, and certain intimate conduct. The instant case
involves liberty of the person both in its spatial and more
transcendent dimensions.”\textsuperscript{252} The presence of such grand
language suggests that the opinion analyzed the Texas
statute under a standard higher than rational basis. Given
this new realm of rational basis with bite,\textsuperscript{253} it is not
surprising that Justice Kennedy did not label his discussion
as intermediate scrutiny, especially because he may not have
been able to garner a sufficient number of supporting votes.

Another aspect of \textit{Lawrence} that suggests willingness to
apply a higher standard of review to gay rights issues is the
precedent the majority cited. Justice Kennedy specifically
mentioned cases that either clearly ignored the tiered
analysis or applied rational basis review with extra rigor. For
instance, the majority opinion cited to \textit{Casey},\textsuperscript{254} a substantive
due process opinion in which the Court declined to apply the
rigid tiered structure but rather contemplated whether a
right had actually been infringed.\textsuperscript{255} In \textit{Casey}, a plurality
omitted the tiered analysis and chose a new “undue burden”
test.\textsuperscript{256} In addition, Justice Kennedy discussed \textit{Romer},\textsuperscript{257} an

\begin{itemize}
\item[249.] See id.
\item[250.] See discussion supra Part II.A.2.b.
\item[251.] \textit{Lawrence}, 539 U.S. at 562.
\item[252.] Id.
\item[253.] See discussion supra Part II.A.2.d-e.
\item[254.] \textit{Lawrence}, 539 U.S. at 573.
\item[255.] Planned Parenthood \textit{v}. \textit{Casey}, 505 U.S. 833 (1992). See also discussion
\textit{ supra} Part II.A.2.a.
\item[256.] \textit{Casey}, 505 U.S. at 846.
\item[257.] \textit{Romer} \textit{v}. \textit{Evans}, 517 U.S. 620 (1996). See also discussion \textit{ supra} Part
\end{itemize}
opinion he authored in which he did not indicate which test he applied.\textsuperscript{258}

The fact that \textit{Lawrence} is a substantive due process case does not mean that it is inapplicable to an equal protection case. Indeed, rights protected under substantive due process can determine the appropriate level of scrutiny in an equal protection case.\textsuperscript{259} This is most evident when, under substantive due process, there is a fundamental right involved. In such a case, the level of scrutiny in the equal protection case rises to strict scrutiny.\textsuperscript{260} Likewise, when a fundamental right is absent, equal protection cases are analyzed under rational basis review.\textsuperscript{261} In recent years, the Court has blurred these bright theoretical distinctions in both substantive due process and equal protection cases.\textsuperscript{262}

\textit{Lawrence} and its recent predecessors open the door to intermediate scrutiny when discrimination and a quasi-fundamental right are involved. In \textit{Romer} and \textit{Cleburne}, the Court applied what appears to be a heightened form of rational basis, or rational basis with bite.\textsuperscript{263} \textit{Plyler} is the clearest example of this analysis. In \textit{Plyler}, the Court appeared to find a quasi-fundamental right to education and discrimination against a semi-unprotected class of children aliens.\textsuperscript{264} As a result of this combination, the Court struck down the Texas scheme, finding it lacked a “substantial” purpose,\textsuperscript{265} a term characteristically used with intermediate scrutiny.\textsuperscript{266} Another articulation of this standard is available in Justice Marshall’s dissent in \textit{Cleburne}. Justice Marshall suggested that the level of scrutiny should increase when there is both discrimination and infringement of even a non-

\section*{II.A.2.e.}

\textsuperscript{258} \textit{Lawrence}, 539 U.S. at 574. Justice Scalia assumes that the majority surreptitiously agreed on rational basis. \textit{Romer}, 517 U.S. at 640 n.1 (Scalia, J., dissenting). However, Justice Kennedy’s analysis of Amendment 2, particularly the care with which Justice Kennedy examined its under and over-inclusiveness, suggests that he applied a higher level a scrutiny.

\textsuperscript{259} \textit{See Chemerinsky, supra} note 35, at 696-97.

\textsuperscript{260} \textit{Id.} at 532-33.

\textsuperscript{261} \textit{Id.} at 695.

\textsuperscript{262} \textit{See} discussion \textit{supra} Part II.A.2.

\textsuperscript{263} \textit{See} discussion \textit{supra} Part II.A.2.d-e.


\textsuperscript{265} \textit{Id.} at 230.

\textsuperscript{266} \textit{Chemerinsky, supra} note 35, at 529.
fundamental right.\textsuperscript{267} Since the Court already applies intermediate scrutiny in equal protection cases,\textsuperscript{268} to employ Justice Marshall's test would not be a dramatic doctrinal shift but rather another avenue for applying that level of scrutiny.

V. PROPOSAL

A. The Proper Standard for Constitutional Analysis of DADT

Analysis of DADT under the equal protection component of the Fifth Amendment's Due Process Clause is appropriate because DADT creates a situation in which gay and lesbian servicemembers are treated differently than heterosexual servicemembers. DADT is not only conduct-based, it is also status-based since it defines homosexual conduct as any physical contact between people of the same sex.\textsuperscript{269} DADT does not target stereotypically homosexual conduct such as anal or oral sex regardless of whether it is performed by heterosexuals or homosexuals.\textsuperscript{270} Instead, DADT targets homosexuals who engage in physical conduct.\textsuperscript{271} It goes even further to target homosexuals by requiring that servicemembers prove they do not have a propensity to engage in homosexual conduct in order to rebut the presumption of such propensity.\textsuperscript{272} Of course, only gay, lesbian, or bisexual people have a propensity to engage in physical conduct with people of the same sex.\textsuperscript{273} Therefore, the policy targets and discriminates against gay and lesbian people based on their sexual orientation, not just their conduct.\textsuperscript{274}

The decisive question is which standard courts should apply under equal protection analysis. The safe underpinning of Bowers on which courts previously leaned

\textsuperscript{268} The areas in which the Court has applied intermediate scrutiny are gender and illegitimacy. See id. at 441.
\textsuperscript{269} See discussion supra Part II.C.2-3.
\textsuperscript{271} See discussion supra Part II.C.
\textsuperscript{272} See discussion supra Part II.C. Heterosexual people can engage in "homosexual conduct," such as oral sex, as well.
\textsuperscript{273} Thomasson v. Perry, 80 F.3d 915, 941-42 (4th Cir. 1997) (Luttig, J., concurring).
\textsuperscript{274} See id. at 934-35 (Luttig, J., concurring).
was overturned by Lawrence, so rational basis review is no longer the obvious choice of scrutiny. Since Lawrence did not implicate a fundamental right, it is unlikely that the Court will apply strict scrutiny. Further, this lack of a clear fundamental right implies that gay and lesbian people will not qualify as a quasi-suspect class under the test laid out in High Tech Gays. Therefore, this potential avenue will not lead to intermediate scrutiny.

As a result, the proper analysis under equal protection cannot include any of the traditional threshold questions asked to determine the proper level of scrutiny. Another alternative is to apply rational basis with bite. Instead of doing this, however, the Court should state that it is applying intermediate scrutiny and then apply it. This is important for at least two reasons. First, the application of a higher standard under the guise of rational basis review allows the Court and lower courts to apply a heightened level of scrutiny

275. Lawrence v. Texas, 539 U.S. 558, 578 (2003). See also Hunter, supra note 81, at 1128. Hunter further argues that Lawrence does not make any inevitable changes to DADT but that Lawrence removes “the imprimatur for antigay stigma provided by sodomy law” and makes it more difficult to uphold the rationales supporting DADT. Id.

276. See discussion supra Part II.A.2.b.

277. See discussion supra Part II.A.1. In order for strict scrutiny to apply, the Court would have to identify gays and lesbians as a suspect class, or private consensual conduct as a fundamental right. See id.

278. High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) (paraphrasing Bowen v. Gilliard, 483 U.S. 587, 602-03 (1987)). There are other potential problems with classifying gays and lesbians as a quasi-suspect class. The Ninth Circuit in High Tech Gays accepted that there was a history of discrimination, thereby satisfying the first prong of the test for a quasi-suspect class. Id. The Supreme Court in Lawrence, however, rejects Bowers’ assertion that there has been a historical precedent against homosexuality and notes that homosexual conduct had not been actively prosecuted until the 1970s. Lawrence, 539 U.S. at 571. Therefore, the first prong of the test for a quasi-suspect class may also present an obstacle to that particular avenue to intermediate scrutiny.

279. See supra Part II.A.2.d-e.

280. Other authors have suggested that the court should stop using rational basis with bite without articulating a clear heightened scrutiny standard. See, e.g., Jeremy B. Smith, The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation, 73 FORDHAM L. REV. 2769, 2805 (2005).

281. Two other problems created by not articulating a standard are inconsistency among the circuits and that courts who do attempt to apply the standard face criticism. Id.
to other classifications that would otherwise be subject to only rational basis review.\textsuperscript{282} Second, it provides even less guidance to lower courts to assess cases that are already difficult to characterize.\textsuperscript{283} Therefore, the Court should apply the “heightened scrutiny” test that Justice Marshall advocated in \textit{Cleburne}.\textsuperscript{284}

\textbf{B. The Application of Intermediate Scrutiny to DADT}

The two factors that Justice Marshall highlights to elevate the level of scrutiny are present in the DADT policy: invidious discrimination and impingement of a right.\textsuperscript{285} First, there is invidious discrimination against gay and lesbian people in the military. Prior to DADT, the military explicitly banned gay and lesbian servicemembers.\textsuperscript{286} Similarly, DADT constitutes invidious discrimination even though it is less blatant. It is still status-based since it defines the conduct that is actionable in terms of homosexuality.\textsuperscript{287} Indeed, one scholar notes that “[f]ellatio is no longer oral-genital contact but heterosexual or homosexual conduct, the deed of a certain type of person. The distinct procedural scripts for conduct thus depend on status ascriptions.”\textsuperscript{288} Even General Norman Schwarzkopf admitted in his testimony regarding the necessity of this policy that unit cohesion suffers and people refuse to enlist because, “[f]or whatever reason, the organization is divided into a majority who oppose, a small minority who approve, and other groups who either don’t care or just wish the problem would go away.”\textsuperscript{289} Moreover, Justice Marshall argued that a characteristic that the law targets need not “virtually always be irrelevant to warrant

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{282} City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 459-60 (1985) (Marshall, J., dissenting). Classifications that have always been subject to rational basis review are economic and commercial distinctions. \textit{Id.} at 460 (Marshall, J., dissenting).
\item \textsuperscript{283} See \textit{id.} (Marshall, J., dissenting).
\item \textsuperscript{284} See discussion supra II.A.2.d.
\item \textsuperscript{285} See \textit{Cleburne}, 473 U.S. at 460 (Marshall, J., dissenting).
\item \textsuperscript{286} Thomasson v. Perry, 80 F.3d 915, 935 (4th Cir. 1996) (Luttig, J., concurring) (“For as long as it has had a military, the United States has excluded homosexuals for military service.”).
\item \textsuperscript{287} See discussion supra Part II.C.2.
\item \textsuperscript{288} HALLEY, supra note 19, at 39.
\item \textsuperscript{289} \textit{Policy Concerning Homosexuality Hearings}, supra note 192, at 596 (statement of General Norman Schwarzkopf, United States Army).
\end{enumerate}
\end{footnotesize}
heightened scrutiny." Therefore, even if the military has some articulated basis for the exclusion of open homosexuals under DADT, the policy must still survive heightened scrutiny.

Second, in light of Lawrence, DADT clearly impinges on a right to engage in private consensual sexual conduct that the Court articulated and protected under the general category of "liberty." Despite the fact that the Court did not explicitly recognize the right to engage in private sexual conduct as fundamental, there is clearly some right couched in terms of "liberty" that the Constitution protects. Since DADT's distinction between heterosexuals and homosexuals is clearly drawn on an invidious basis of hatred and discomfort, and since gay and lesbian people have a recognizable right to engage in sexual conduct on which DADT impinges, DADT should be subject to intermediate scrutiny.

Under intermediate scrutiny, the government policy must be substantially related to a legitimate government interest. The military's interest in unit cohesion is certainly a legitimate government interest. However, DADT is not substantially related to such an interest. Despite assertions to the contrary, it is evident that openly gay servicemembers apparently have served in the military without causing detriment to unit cohesion. For instance, studies of other nations that indicate that unit cohesion does not suffer because of the presence of openly gay servicemembers. This appeal to international approaches is particularly relevant since Justice Kennedy in Lawrence examined other nations to discredit the reasoning of Bowers. Moreover, military personnel concede that there are plenty of gays and lesbians who have served the United

291. See discussion supra Part II.A.2.b. The Lawrence opinion itself even begins with the word "[l]iberty." Lawrence, 539 U.S. at 562.
293. See discussion supra Part II.A.2.b.
294. See discussion supra Part II.C.3.
295. See discussion supra Part II.A.2.b.
297. See supra notes 196-97 and accompanying text.
298. See discussion supra Part II.C.3.
299. See supra note 196 and accompanying text.
States well.\textsuperscript{301} Certainly these individuals would not have such great service records if they had caused problems in their units or if the officers had problems with subordinates.

Tellingly, DADT itself contains inconsistencies that refute the argument that unit cohesion suffers when openly gay and sexually active people are allowed to serve. If unit cohesion truly suffers as military officials assert it does,\textsuperscript{302} there would be no reason for DADT to allow the military to retain servicemembers who state that they are gay or engage in homosexual conduct as defined by the statute.\textsuperscript{303} If unit cohesion were in such danger from open gays and lesbians, the military would discharge servicemembers who state that they are gay, regardless of its motive or veracity,\textsuperscript{304} because such a statement would probably have the same effect on unit cohesion. It is likewise inconsistent for the military to say on the one hand that unit cohesion suffers because of openly gay servicemembers,\textsuperscript{305} and on the other hand to reserve the right to retain an openly gay servicemember when it is “in the best interest of the armed forces.”\textsuperscript{306} These inconsistencies suggest that excluding gay and lesbian servicemembers is not substantially related to the government’s interest.

In addition to the inconsistencies within the policy itself, unit cohesion and the military as a whole may suffer from the mere fact that servicemembers may lie to remain in the service. As one dissenter on the Ninth Circuit noted, “[the policy] seems entirely inconsistent with the proud traditions of our armed forces, with the slogans of Duty, Honor, Country, the Honor Codes, and the teachings that those who are wrongdoers or even know of wrongdoing are obligated to come forward and make full disclosure.”\textsuperscript{307}

Also, the military may actually weaken itself by adhering

\footnotesize{\begin{itemize}
  \item \textsuperscript{301} As General Norman Schwarzkopf said in his testimony, “homosexuals have served in the past and done a great job serving their country, and I feel they can in the future.” \textit{Policy Concerning Homosexuality Hearings, supra} note 192, at 612 (testimony of General Norman Schwarzkopf, United States Army).
  \item \textsuperscript{302} \textit{See supra} notes 193-95 and accompanying text.
  \item \textsuperscript{303} \textit{See discussion supra} Part II.C.2.
  \item \textsuperscript{304} 10 U.S.C. § 654(e)(1) (2000). A servicemember should not be discharged if the person “engaged in conduct or made statements for the purpose of avoiding or terminating military service.” \textit{Id.}
  \item \textsuperscript{305} \textit{Id.} § 654(a)(15).
  \item \textsuperscript{306} \textit{Id.} § 654(e)(2).
  \item \textsuperscript{307} Holmes v. Cal. Army Nat’l Guard, 124 F.3d 1126, 1139 (9th Cir. 1997) (Reinhardt, J., dissenting).}
\end{itemize}}
to the DADT policy. Given the hostile environment in which openly gay and lesbian individuals are either discharged or initially discouraged from joining the armed forces, the military loses qualified personnel.\textsuperscript{308} In fact, under DADT, the military has discharged nearly 10,000 servicemembers, including numerous military personnel who held critical positions and had language skills that are particularly relevant to the war on terrorism.\textsuperscript{309} These statistics, along with the internal and practical inconsistencies of DADT, clearly indicate that the policy is not substantially related to the government's interest in unit cohesion and overall effectiveness.

Finally, one important method by which courts assess the relationship of the government action to its objective is by examining whether the policy or law is over-inclusive or under-inclusive.\textsuperscript{310} An over-inclusive law applies not only to similarly situated people, but also to those who are not similarly situated, and therefore goes beyond its purpose.\textsuperscript{311} An under-inclusive law applies only to some similarly situated people and therefore does not completely accomplish its purpose.\textsuperscript{312} While an over-inclusive or under-inclusive law is not necessarily invalid, the courts are less tolerant of such laws under intermediate scrutiny than under rational basis review.\textsuperscript{313}

DADT suffers from both over- and under-inclusiveness. The ambiguity present in the language of DADT creates a situation for grave over-inclusiveness that renders DADT not substantially related to the interest of unit cohesion or any other government justification. For example, acts that would sufficiently satisfy a finding of homosexual conduct are endless. As one scholar explains, "It could include getting caught in flagrante delicto with a person of the same sex, or caught holding hands affectionately with a person of the same sex—or doing anything that a ‘reasonable person’ would think might indicate a capacity to enjoy same-sex sex."\textsuperscript{314}

\textsuperscript{308} Mazur, supra note 202, at 439-40.
\textsuperscript{309} U.S. GOV'T ACCOUNTABILITY OFFICE, supra note 203, at 4.
\textsuperscript{310} CHEMERINSKY, supra note 35, at 531.
\textsuperscript{311} Id.
\textsuperscript{312} Id.
\textsuperscript{313} Id. at 532.
\textsuperscript{314} HALLEY, supra note 19, at 4.
Furthermore, the "reasonable person" standard causes further ambiguity, leading to overbreadth. The military in general is hostile towards gays, and therefore its members are more likely to find benign acts to be indicative of homosexuality.\textsuperscript{315} Also, DADT "provide[s] no check on a commander’s decision about what a reasonable person would think manifests a propensity. When a commander thinks that befriending a ‘known homosexual’ manifests a propensity, that’s \textit{de jure} reasonable."\textsuperscript{316} Finally, the term “propensity” is also intentionally ambiguous because it refers "just as much to homosexual status as to homosexual acts."\textsuperscript{317}

Not only is DADT over-inclusive, but it is also under-inclusive. President Clinton proposed a conduct-based regulation assuming it would exclude only the type of behavior that the Uniform Code of Military Justice ("UCMJ") prohibited: sodomy, defined as oral-genital or anal-genital contact, regardless of the same or different sex of the participants.\textsuperscript{318} Assuming this is the military’s actual purpose, and is not a pretext to exclude gays and lesbians, DADT is under-inclusive because it does not target heterosexuals. Indeed, DADT defines oral-genital and anal-genital contact as "homosexual," even though it is possible for heterosexuals to engage in this conduct. The legislative history also indicates that Congress deleted language from DADT that defined the prohibited conduct in terms of concrete acts rather than in terms of the label of homosexuality.\textsuperscript{319} By excluding the possibility of discharging heterosexuals for conduct that the UCMJ prohibits, DADT is under-inclusive.

Assuming \textit{arguendo} that the presence of openly gay servicemembers adversely affects unit cohesion, and that DADT is sufficiently tailored, the ethos upon which the nation’s democracy rests counsels against upholding the policy. Unit cohesion suffers when subordinates refuse to follow a gay leader’s commands and when there is strife among the troops. These problems, however, are not created by the gay and lesbian servicemembers but rather by the

\hspace{1em}315. \textit{Id.} at 123.
\hspace{1em}316. \textit{Id.} at 4-5.
\hspace{1em}317. \textit{Id.} at 16.
\hspace{1em}318. \textit{Id.} at 107, 36.
\hspace{1em}319. \textit{Id.} at 36.
other servicemembers who are prejudiced against them. Yet, as Justice O'Connor stated in Lawrence, “[m]oral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis of review under the Equal Protection Clause.” So, “[d]isapproval of homosexuality on the part of heterosexual servicemembers is an impermissible reason for discriminating against gay servicemembers.” This is true even if that moral disapproval leads to problems in unit cohesion, a presumption that has been rebutted with empirical evidence. If this prejudice-laden foundation of DADT is not sufficient for rational basis review, it is also necessarily insufficient for intermediate scrutiny. Though Justice O'Connor may disagree since she reserved national security as a legitimate state interest, the core basis for DADT’s unequal treatment is prejudice, and it therefore should be impermissible despite the consequent effects of supposed deterioration of unit cohesion.

Finally, there remains the issue of judicial deference to the executive and legislative branches in military matters. The judiciary should not shirk its duty to protect constitutional rights of individuals. Despite the constitutionally mandated deference to the other branches in military matters, the judiciary must ensure that the military does not trample individual rights. The judiciary should maintain an active check on the other branches of government, at least when the other branches invade the

320. Philips v. Perry, 106 F.3d 1420, 1435 (9th Cir. 1997) (B. Fletcher, J., dissenting).
322. Philips, 106 F.3d at 1436 (B. Fletcher, J., dissenting). See also Thomasson v. Perry, 80 F.3d 915, 951 (4th Cir. 1996) (Hall, J., dissenting) (“Private prejudice is a private matter; we are free to hate. But the same concept of liberty for all that protects our prejudices precludes their embodiment in law.”).
323. See discussion supra Part II.C.3.
325. See discussion supra Part II.C.3.
326. See discussion supra Part II.B.
327. Thomasson v. Perry, 80 F.3d 915, 949 (4th Cir. 1996) (Hall, J., dissenting) (“I am convinced that the presence if a strong and independent judiciary, upon which the people may rely to guard individual rights, deserves much of the credit [for such a great military].”).
judiciary's clearly defined territory of individual rights.\textsuperscript{328}

As the government sends its troops to the far reaches of the earth, it should do so without compromising the democratic principles that are integral to the nation the military protects. Therefore, when a military policy cannot be justified under the appropriate standard, the judiciary should strike it down for lack of compliance with the higher purposes of the Constitution. Constitutionally protected rights, whatever their degree and characterization, mean nothing unless they are protected in every context.

VI. CONCLUSION

Considering the fluid and amorphous nature of the definition of constitutional rights, courts should be flexible in their interpretation. With DADT, courts should recognize its discriminatory reality and should follow the Supreme Court in legitimating the privacy rights of gay and lesbian people as did the Court in Lawrence.\textsuperscript{329} In so doing, courts should apply an intermediate standard of review and strike down DADT as an unconstitutional infringement of individual rights, despite its military context.

Constitutional rights analysis, despite the Court's valiant attempt to apply the traditional rigid tests, is evolving. The Court is recognizing the spectrum that exists between the polar opposites of rights and groups that deserve the utmost protection possible and those that deserve mere lip service. While this may force legislatures to consider carefully which policies will be constitutional and which will not, the virtue of an intermediate tier of scrutiny means that important rights and groups of people will be protected from unwarranted government sanction.

This middle ground is beneficial for a number of reasons. It is sufficiently narrow because it adds to the existing rational basis and strict scrutiny tests, rather than replacing them. This standard is not so different as to make application impossible, but it is flexible enough so that courts may utilize their judgment. More importantly, the standard gives credence to the plight of gays and lesbians. It legitimizes the pleas of people who suffer discrimination on

\textsuperscript{328} See id. (Hall, J., dissenting).
\textsuperscript{329} See discussion supra Part II.A.2.b.
the basis of sexual orientation since it requires attention above mere rational basis review. As Justice Marshall eloquently and wisely once said:

Heightened scrutiny does not allow courts to second-guess reasoned legislative or professional judgments tailored to the unique needs of a group . . . but it does seek to assure that the hostility or thoughtlessness with which there is reason to be concerned has not carried the day. By invoking heightened scrutiny, the Court recognizes, and compels lower courts to recognize, that a group may well be the target of the sort of prejudiced, thoughtless, or stereotyped action that offends principles of equality found in the Fourteenth Amendment.330

Application of intermediate scrutiny also reflects common sense. There are gradations of protection that rights and groups should be afforded depending on the course of history. The Court showed its willingness to be flexible in Lawrence, broadly with Constitutional rights, and specifically with the category of gay and lesbian rights. Future evaluation of DADT by courts should likewise embrace the flexibility that Justice Marshall recognized in Cleburne. Given this avenue, courts should apply intermediate scrutiny to strike down DADT as an unconstitutional infringement of individual rights. This comports not only with the reality of the policy and the harm it causes, but also the ethos of our democracy in which the military, the judiciary, and individual citizens co-exist.
