

January 1991

## Constitutional Law Summary

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### Recommended Citation

Carol A. Farmer and Thomas A. Johnson, *Constitutional Law Summary*, 21 Golden Gate U. L. Rev. (1991).  
<http://digitalcommons.law.ggu.edu/ggulrev/vol21/iss1/9>

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# CONSTITUTIONAL LAW

## SUMMARY

### *BLUESTEIN v. SKINNER*: FAA'S RANDOM DRUG TESTING UPHeld IN "SAFETY- SENSITIVE" JOBS

#### I. INTRODUCTION

In *Bluestein v. Skinner*,<sup>1</sup> the Ninth Circuit upheld Federal Aviation Administration (FAA) regulations requiring random drug testing of several categories of employees in the private commercial aviation industry.<sup>2</sup> The court rejected petitioners'<sup>3</sup> arguments that the regulations violate the fourth amendment<sup>4</sup> and are arbitrary and capricious in violation of section 10(e) of the Administrative Procedure Act.<sup>5</sup>

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1. *Bluestein v. Skinner*, 908 F.2d 451 (9th Cir. 1990) (per Norris, J.; the other panel members were Canby, J., and Chambers, J. concurring), *cert. denied*, 59 U.S.L.W. 3561 (U.S. Feb. 19, 1991) (No. 90-735).

2. *Bluestein*, 908 F.2d at 453.

3. Petitioners included commercial aviation industry employees who are subject to the drug testing, the industry labor organizations and an organization of aviation employees and employers. *Id.* at 454.

4. U.S. CONST. amend. IV. The fourth amendment provides in pertinent part: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . . ."

5. *Bluestein*, 908 F.2d at 453. See 5 U.S.C. § 706(2)(a) (1990). The Administrative Procedure Act 10(e) provides in pertinent part: "The reviewing court shall - (2) hold unlawful and set aside agency action, findings, and conclusions found to be - (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . ."

## II. BACKGROUND

## A. THE FAA REGULATIONS

On November 21, 1988 the FAA issued a rule<sup>6</sup> requiring commercial air carriers<sup>7</sup> and air traffic control facilities<sup>8</sup> to perform random drug testing on their employees.<sup>9</sup> Employees in several categories must be tested.<sup>10</sup> Tests for marijuana, cocaine, opiates, phencyclidine (PCP) and amphetamines must be performed.<sup>11</sup>

The regulations require employees to be randomly selected for testing, using computer generated numbers or a random number table that is matched with an employee's social security number, payroll identification number, or any other FAA-approved method.<sup>12</sup> After the first year of testing, employers must randomly test at least 50 percent of the employees annually in the job categories listed above.<sup>13</sup>

6. 53 Fed. Reg. 47024 (1988) (codified at 14 C.F.R. pts. 61, 63, 65, 121 and 135) (1990) (final rule Nov. 21, 1988). In an advance notice of proposed rule making (December, 1986), the FAA first proposed random drug testing. *Bluestein*, 908 F.2d at 453. See 14 C.F.R. pts. 61, 63, 65, 135) (1990). After receiving hundreds of written comments, the FAA issued a notice of proposed rule making (March 1988). *Bluestein*, 908 F.2d at 453. See 14 C.F.R. pts. 61, 63, 65, 121, 135)(1990). Written comments were then filed in response to this notice, and the FAA held a series of public hearings. *Bluestein*, 908 F.2d at 453. On Nov. 21, 1988 the final rule was issued. *Id.*

7. *Id.* This included those carrying passengers or cargo, scheduled or unscheduled. *Id.*

8. *Bluestein*, 908 F.2d at 453, n.2.

9. *Id.* at 453. See 14 C.F.R. pt. 121 (1990) (App. I - defining "employer" generally as all Part 121 and 135 certificate holders, i.e., commercial air carriers, both scheduled and unscheduled, carrying passengers or cargo, or an air traffic control facility except those operated by, or under contract with, the FAA or the U.S. military).

10. *Bluestein*, 908 F.2d at 453. Those tested include: a) flight crew members; b) flight attendants; c) flight (or ground) instructors; d) flight testing personnel; e) aircraft dispatchers; f) maintenance personnel; g) aviation security or screening personnel; and h) air traffic controllers. See 14 C.F.R. pt. 121 (1990) (App. I, III).

11. *Bluestein*, 908 F.2d at 453. See 14 C.F.R. pt. 121 (1990) (App. I, IV).

12. *Bluestein*, 908 F.2d at 453. See 14 C.F.R. pt. 121 (1990).

13. *Bluestein*, 908 F.2d at 453. See 14 C.F.R. pt. 121 (1990). The procedure for testing employees involves the employee arriving at a "collection site" with photographic identification, removing any coat or outer garment, then entering a stall and providing the required urine specimen. *Bluestein*, at 454. See 49 C.F.R. pt. 40 (1990). A monitor of the same gender as the employee must remain in the area, but outside the stall. *Bluestein*, 908 F.2d at 454. The monitor inspects the specimen for temperature, volume and color, and must then have it shipped to an HHS-certified drug testing laboratory. *Id.* The laboratory to which the specimen is sent performs an immunoassay test; if it is positive, a second test is done to confirm the positive test. *Bluestein*, 908 F.2d at 454.

Employees who cannot offer a satisfactory explanation for a test that has been confirmed as positive must be removed from their positions.<sup>14</sup> They may only return to duty upon the recommendation of a Medical Review Officer<sup>15</sup> or the Federal Air Surgeon.<sup>16</sup>

## B. JUDICIAL HISTORY

Upon the FAA's issuance of the rules, petitions for review were filed in the Fifth Circuit, the D.C. Circuit and the Ninth Circuit by commercial aviation employees, the industry's labor organizations, and an organization of aviation employees and employers.<sup>17</sup> The petitions were consolidated in this proceeding.<sup>18</sup>

Petitioners claimed that the drug testing regulations are unreasonable searches in violation of the fourth amendment.<sup>19</sup> Also, petitioners argued that the FAA failed to give a satisfactory explanation for its decision to require random drug testing, therefore violating section 10(e) of the Administrative Procedure Act.<sup>20</sup>

## III. THE COURT'S ANALYSIS

### A. FOURTH AMENDMENT CHALLENGE

In analyzing the potential fourth amendment violation, the Ninth Circuit relied upon the Supreme Court's decisions in *National Treasury Union v. Von Raab*<sup>21</sup> and *Skinner v. Railway Labor Executives Association*.<sup>22</sup>

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The regulations also require pre-employment testing, post-accident testing, testing at certain employees' first medical examinations, testing based on reasonable cause, and testing after returning to duty following a positive test or a refusal to test. *Id.* at 453-54 n.3.

14. *Bluestein*, 908 F.2d at 454.

15. *Id.* The employee's Medical Review Officer must be a qualified physician. *Id.*

16. *Bluestein*, 908 F.2d at 454.

17. *Id.*

18. *Id.*

19. *Id.* See *supra* note 4 for language of fourth amendment.

20. See 5 U.S.C. § 706(2)(a) (1990) (reproduced in part, *supra* note 5).

21. 109 S. Ct. 1384 (1989). The Court upheld a Customs Service random drug testing program. *Id.*

22. 109 S. Ct. 1402 (1989). The Court upheld railroads testing those employees in-

In *Von Raab*, the Court upheld a United States Customs Service requirement that employees competing for promotions or transfers to particular positions submit to urinalysis.<sup>23</sup> In *Skinner*, the Court upheld a Federal Railroad Administration program requiring that railroad companies perform blood and urine tests on train workers involved in major railroad accidents; breath and urine testing are permitted of an employee who violates certain safety rules.<sup>24</sup>

In *Bluestein*, the Ninth Circuit noted that certain threshold fourth amendment questions had been answered by *Von Raab* and *Skinner*.<sup>25</sup> First, drug testing, required by government regulations and performed by private employers, is subject to constitutional restrictions.<sup>26</sup> Second, urinalysis constitutes a search under the fourth amendment because it intrudes upon society's reasonable expectations of privacy.<sup>27</sup> Third, the standard fourth amendment requirements of a warrant and probable cause may not always apply in the drug testing context.<sup>28</sup>

The Ninth Circuit compared the government's need for testing U.S. Customs employees in *Von Raab* to the government's need to test aviation personnel in *Bluestein* and found that clearly the FAA rules serve needs "beyond the normal need for law enforcement."<sup>29</sup> In both cases, the testing rules were set up to deter drug use among employees in either safety-sensitive or security-sensitive positions.<sup>30</sup> The court also observed that both the FAA drug testing rules and those in *Von Raab* provide that the employee's consent is necessary for test results to be used in a criminal prosecution of the employee.<sup>31</sup>

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volved in a train accident or safety rule violation. *Id.*

23. *Bluestein*, 908 F.2d at 454.

24. *Id.* at 454-55.

25. *Bluestein*, 908 F.2d at 455.

26. *Id.* See *Skinner*, 109 S. Ct. at 1411-12.

27. *Bluestein*, 908 F.2d at 455 (citing *Skinner*, 109 S. Ct. at 1413; accord *Von Raab*, 109 S. Ct. at 1390).

28. *Bluestein*, 908 F.2d at 455. If a search "serves special governmental needs, beyond the normal need for law enforcement," the government's interests must be balanced against the individual's privacy expectations to find whether requiring a warrant or probable cause in that instance would be impractical. *Id.* (quoting *Von Raab*, 109 S. Ct. at 1390).

29. *Bluestein*, 908 F.2d at 455.

30. *Id.*

31. *Id.*

The court next balanced the government's interests against the employee's privacy interest.<sup>32</sup> The court stated that it was primarily guided by *Von Raab* because, like *Von Raab*, the FAA testing program is random and does not require any level of individualized suspicion or suspicious activity (e.g., a safety violation).<sup>33</sup> The Court in *Von Raab* had reasoned that the government's compelling interest in preventing drug use, in positions<sup>34</sup> where it might endanger the Nation's borders or its citizens, outweighed the privacy interests of employees seeking promotions to such positions.<sup>35</sup>

Applying the *Von Raab* reasoning, the Ninth Circuit concluded that government's interest in preventing drug use by employees in safety-sensitive positions in the aviation industry is at least as strong as the interest in preventing drug use by Customs officers.<sup>36</sup>

In responding to the argument that the FAA failed to show a sufficiently high level of drug use in the industry to warrant its testing program, the Ninth Circuit observed that in *Von Raab*, the Customs Service testing plan had not been implemented in response to any perceived drug problem among their employees.<sup>37</sup> Nevertheless, the Court in that case upheld the testing because of its deterrent purposes and the potential for grave harm.<sup>38</sup> The Ninth Circuit noted that the FAA administrative record did contain some evidence of drug use by airline employees.<sup>39</sup> The court reasoned that harm caused by an airplane crash

32. *Id.*

33. *Bluestein*, 908 F.2d at 455. In contrast, the drug testing in *Skinner* was limited to employees involved in a safety rule violation or a major train accident. *Id.*

34. *Id.* Customs Service positions subjected to drug testing involved either: 1) direct involvement in drug-related law enforcement; 2) a requirement that the employee carry a firearm; or, 3) a requirement that the employee handle "classified" material. The Court upheld testing in the first two position types and remanded the third category for clarification. *Id.*

35. *Id.* at 455-56. See *Von Raab*, 109 S. Ct. at 1397-98.

36. *Bluestein*, 908 F.2d at 456.

37. *Id.* In *Von Raab*, there was evidence that out of 3,600 employees tested for drugs, only five tested positive. *Bluestein*, 908 F.2d at 456. See *Von Raab*, 109 S. Ct. at 1394.

38. *Bluestein*, 908 F.2d at 456. See *Von Raab*, 109 S. Ct. at 1395.

39. *Bluestein*, 908 F.2d at 456. The evidence showed that a number of pilots and other crew members had been treated for cocaine addiction or overdoses; that tests done within the industry found drug use by pilots and mechanics; and drugs were present in the bodies of pilots in two plane crashes. *Id.*

is at least as great as that caused by drug impairment within Customs Service employment.<sup>40</sup> Therefore, the court concluded that the need for the FAA's random drug testing program equaled, if not exceeded, that for the program approved in *Von Raab*.<sup>41</sup>

Petitioners also contended that the FAA testing program invaded more deeply on privacy interests than the program in *Von Raab* violated the privacy interests of the Customs Service employees.<sup>42</sup> They noted that the FAA allows immediate testing (no notice), while the Customs Service program requires at least five days' notice and is only triggered by specific events (i.e., applying for promotions or transfers).<sup>43</sup>

The Ninth Circuit, however, found the provision for random testing without notice insufficient to "tip the scales" against the FAA drug testing program.<sup>44</sup> The court noted that the reasoning of the D.C. Circuit court in *Harmon v. Thornburgh*,<sup>45</sup> was persuasive.<sup>46</sup> In *Harmon*, a Justice Department testing plan was upheld that provided for random testing with notice as slight as within two hours of the scheduled testing.<sup>47</sup> The D.C. circuit concluded that even though the Justice Department testing plan was random in nature, that was insufficient to require undertaking a different analysis from that applied by the Court in *Von Raab*.<sup>48</sup> The Ninth Circuit asserted that random drug testing in particular weighs more heavily (than privacy interests) in view of the FAA's rational conclusion that random testing without advance notice will deter drug use more than testing with advance notice.<sup>49</sup>

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40. *Id.*

41. *Id.*

42. *Bluestein*, 908 F.2d at 456.

43. *Id.*

44. *Id.* at 456-57.

45. 878 F.2d 484 (D.C. Cir. 1989), *reh'g denied*, (Sept. 1, 1989), *cert. denied*, 110 S. Ct. 865 (1990). The D.C. Circuit court upheld a random urinalysis drug testing program so far as testing those employees holding top secret national security clearances. *Harmon v. Thornburgh*, 878 F.2d 484, 485 (D.C. Cir. 1989).

46. *Bluestein*, 908 F.2d at 457.

47. *Id.* See *Harmon*, 878 F.2d at 486.

48. *Harmon*, 878 F.2d at 489.

49. *Bluestein*, 908 F.2d at 457. The court noted three other decisions upholding random drug testing following *Von Raab*: *American Fed'n of Gov't Employees v. Skinner*, 885 F.2d 884 (D.C. Cir. 1989) (random urine drug testing upheld for Department of

The court dismissed the argument that the FAA plan gives employers too much discretion.<sup>50</sup> The Ninth Circuit maintained that the strict randomness requirements makes certain that no employer will have discretion as to which employees should be tested.<sup>51</sup> Further, employers' discretion in structuring their testing programs will be restricted by collective bargaining and the mandatory FAA approval of each employer's plan.<sup>52</sup>

In conclusion, the Ninth Circuit found that the potential fourth amendment violation was substantially indistinguishable from the fourth amendment issue decided by the Court in *Von Raab*.<sup>53</sup> Consequently, the Ninth Circuit rejected petitioners' constitutional challenge to the FAA testing program.<sup>54</sup>

#### B. ADMINISTRATIVE PROCEDURE ACT CHALLENGE

The Ninth Circuit determined that the claim that the FAA's decision was arbitrary and capricious in violation of section 10(e) of the Administrative Procedure Act,<sup>55</sup> was meritless.<sup>56</sup>

The court found that the FAA had explained why it chose to require random drug testing; there was more evidence supporting the effectiveness of random testing than of non-random programs.<sup>57</sup> The court also concluded that the FAA's decision that safety interests outweigh privacy interests in this context was a reasonable decision, which could not be overruled as arbi-

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Transportation employees in positions having a direct impact on public health, safety, or national security); *National Fed'n of Fed. Employees v. Cheney*, 884 F.2d 603 (D.C. Cir. 1989)(upheld the Army's random drug urinalysis of certain of its civilian employees); *Thomson v. Marsh*, 884 F.2d 113 (4th Cir. 1989) (Army's random drug testing on certain civilian employees at a chemical weapons plant was upheld.) *Bluestein*, 908 F.2d at 457 n.8.

50. *Bluestein*, 908 F.2d at 457.

51. *Id.*

52. *Id.* The court noted the FAA's statement that it will review each employer's programs to ensure that discretion is in fact properly limited under each plan. *Id.* at 457 n.9.

53. *Bluestein*, 908 F.2d at 457.

54. *Id.*

55. *Id.* See 5 U.S.C. § 706(2)(A) (1990), reproduced in part *supra* note 19.

56. *Bluestein*, 908 F.2d at 457.

57. *Id.* (citing 14 C.F.R. pt 121 (1990)).

trary and capricious.<sup>58</sup>

Finally, the Ninth Circuit rejected the contention that the FAA's decision to include flight attendants in the drug testing program was inconsistent with previous FAA decisions regarding on-duty time.<sup>59</sup> The court found no conflict between the duty time decisions and the inclusion of flight attendants in the drug testing program, since the FAA had found no evidence of a correlation between flight attendant duty time and risk to passengers.<sup>60</sup> The court noted, however, that impaired performance of attendants can at times be a public safety consideration, and that the administrative record supported the FAA finding that flight attendant positions are in fact safety-sensitive.<sup>61</sup> Thus, the Ninth Circuit held that the FAA had acted within its authority in mandating random drug testing of flight attendants.<sup>62</sup>

#### IV. CONCLUSION

The Ninth Circuit upheld the constitutionality of the FAA's random drug testing regulations. The court concluded that the agency's decision to require random testing of employees in the aviation industry (whose positions affect public safety) was not arbitrary and capricious. Random drug testing was shown by the FAA to be a greater deterrent against drug use than non-random testing. In balancing the government's safety interests against the individual's privacy interests, the court upheld the FAA's decision that public safety concerns outweighed privacy concerns under these circumstances.

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58. *Bluestein*, 908 F.2d at 457.

59. *Id.* The FAA duty time decisions denied petitions of flight attendants to establish safety rules limiting their on-duty time. *Id.*

60. *Id.* at 457.

61. *Bluestein*, 908 F.2d at 457 n.10. Specifically, flight attendants must perform important safety functions in emergencies, and are also routinely in charge of ensuring safely stored luggage and proper closing and locking of airplane doors prior to departure. *Id.* at 457-58 n.10.

62. *Bluestein*, 908 F.2d at 458.

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# CONSTITUTIONAL LAW

## *HIGH TECH GAYS v. DEFENSE INDUSTRIAL SECURITY CLEARANCE OFFICE: THE NINTH CIRCUIT ADDRESSES THE CLASS STATUS OF HOMOSEXUALS FOR EQUAL PROTECTION PURPOSES*

### I. INTRODUCTION

In *High Tech Gays v. Defense Industrial Security Clearance Office*,<sup>1</sup> a class action suit,<sup>2</sup> the Ninth Circuit held that homosexuals do not constitute a suspect or quasi-suspect class<sup>3</sup> under the equal protection component of the fifth amendment's due process clause.<sup>4</sup> Therefore, the court determined that the

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1. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990) (per Brunetti, J.; the other panel members were Leavy, J., and Curtis, J., senior U.S. District Judge, Central District of California, sitting by designation), *reh'g en banc denied*, 909 F.2d 375 (1990).

2. *High Tech Gays*, 895 F.2d at 565. The plaintiff class consisted of: "All gay persons who, since January 1982, have applied for, are now applying for, or may in the future apply for Secret or Top Secret industrial clearances from DISCO, in any of the eight DIS regions in the country, and all gay persons who, since January, 1982, have held, now hold, or may in the future hold such clearances." *Id.* at n.1.

3. *Id.* at 574. See *infra* notes 56-99 and accompanying text for discussion on the three-tiered standard of review.

The scope of this holding extends to homosexual conduct. *High Tech Gays*, 895 F.2d at 573. The Ninth Circuit did not discuss whether the holding only applied to gay men so as to exclude lesbian or bisexual employees of defense contractors. However, the court stated that the term "homosexual" encompassed both the terms "gay" and "lesbian." *Id.* at 565 n.2. In general, the courts do not differ significantly in their treatment of gay men, lesbian women, or bisexuals. See, e.g., Rich, *Sexual Orientation Discrimination in the Wake of Bowers v. Hardwick*, 22 GA. L. REV. 773 n.2 (1988).

Throughout this Note, the term "gay" and "homosexual" will refer to both lesbian women, gay men and bisexuals unless otherwise noted.

4. *High Tech Gays*, 895 F.2d at 574. See *infra* notes 48-51 and accompanying text for a discussion of the fifth amendment right of equal protection.

homosexual class was only entitled to rational basis review.<sup>5</sup> The court found that actions of the Defense Industrial Security Clearance Office (DISCO)<sup>6</sup> did not violate first amendment guarantees of freedom of speech and association.<sup>7</sup>

## II. FACTS

Plaintiffs brought a class action<sup>8</sup> against the Department of Defense (DoD) for conducting expanded investigations into the backgrounds of all gay applicants for Secret and Top Secret Clearances.<sup>9</sup> The three named plaintiffs, Joel Crawford, Timothy Dooling and Robert Weston,<sup>10</sup> challenged the constitutionality of

5. *High Tech Gays*, 895 F.2d at 571. The court found that the Department of Defense's (DoD) regulations were rationally based and, in this instance, did not violate plaintiffs' fifth amendment right to equal protection. *Id.* at 576.

6. Throughout this Note, the following acronyms will be used:

DIS	Defense Investigative Service
DISCO	Defense Industrial Security Clearance Office
DISCR	Directorate for Industrial Security Clearance Review
DoD	Department of Defense

7. *High Tech Gays*, 895 F.2d at 580. DISCO recommended denial of Secret security clearance for the plaintiff Dooling because of sexual perversion; several "homosexual attributes" were cited including membership in a gay organization. *Id.* at 580. DISCO automatically referred all homosexual applicants to the Directorate for Industrial Security Clearance Review (hereinafter DISCR) for an expanded investigation. *Id.* at 568. See *infra* notes 23-41 for a discussion of the security clearance process. The court noted that the plaintiffs had "not shown that membership in a gay organization to be a distinct, separate, abstract ground for denying security clearances." *High Tech Gays*, 895 F.2d at 580. Finally, the court found that the plaintiffs' right to petition the courts for redress of grievances was not violated. See *id.* at 580-81 (dismissing Crawford's first amendment claim).

8. See *supra* note 2 for definition of the plaintiff class.

9. *High Tech Gays*, 895 F.2d at 565.

10. *Id.* at 569. In December of 1981, SRI International, a defense contractor, forwarded the application of Joel Crawford, a gay employee, to DISCO for a Secret industrial clearance. *Id.*; see also Brief for Appellants at 9, *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990) (No. 87-2987). DISCO initially recommended ineligibility based on his promiscuity and his current treatment for an ongoing schizophreniform disorder. *High Tech Gays*, 895 F.2d at 580. DISCO forwarded the application to DISCR. *Id.* The district court found that DISCR denied the clearance because of "homosexual activity and susceptibility to coercion." *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1366 (N.D. Cal. 1987) (per Henderson, J.), *rev'd*, 895 F.2d 563 (9th Cir. 1990). After receiving correspondence from Crawford's attorney, DISCR withdrew its decision for further consideration. *Id.* DISCR then changed the basis of ineligibility to Crawford's prior use of marijuana. *High Tech Gays*, 895 F.2d at 580.

In May of 1983, Lockheed, a defense contractor, forwarded Timothy Dooling's application for a Secret industrial clearance to DISCO. *Id.*; see also Brief for Appellants at 9. In March of 1984, DISCO referred the application to DISCR for an expanded investiga-

the policies and practices of DISCO and the Directorate for Industrial Security Clearance Review (DISCR).<sup>11</sup> The plaintiffs alleged that the expanded investigations and additional procedural hurdles<sup>12</sup> to which heterosexual applicants were not subjected violated equal protection<sup>13</sup> and denied gay applicants the rights of free association guaranteed by the first amendment.<sup>14</sup> The defendants maintained that their regulations were

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tion because of Dooling's admissions relating to Dooling's homosexuality and recommended that he be considered ineligible. *High Tech Gays*, 895 F.2d at 579. His admissions included "disclosures regarding his visits to gay bathhouses, his membership in [High Tech Gays] a homosexual organization, his homosexual activities with casual acquaintances, his intention to inform his employer as to his homosexuality, and his intention to continue his homosexual lifestyle in the future. . . ." *Id.* Despite DISCO's recommendation, DISCR granted Dooling a Secret clearance. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. at 1366.

Robert Weston, a gay employee at Lockheed Missiles & Space Co., had been granted a Secret Clearance. *High Tech Gays*, 895 F.2d at 569. At the time, DoD guidelines instructed companies not to submit Top Secret applications absent compelling need if the application contained information which would cause lengthy delays. *Weston v. Lockheed Missiles & Space Co.*, 881 F.2d 814, 815 (9th Cir. 1989) (appeal dismissed solely because plaintiff failed to address the government's successful assertion of the state secrets privilege in the lower court). Lockheed believed that these regulations required non-submittal of applications revealing evidence of homosexuality. *Id.* Weston's application was not forwarded as it disclosed his membership in a gay organization. *High Tech Gays*, 895 F.2d at 569 n.5.

11. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. at 1366. See *infra* notes 23-41 and accompanying text for a discussion of the security clearance process.

The plaintiffs asked the district court to: 1) declare unconstitutional and enjoin the DISCO policy of refusing to grant clearances to gays who have participated in homosexual activities in the last 15 years and automatically requiring that applications of gays be forwarded to DISCR for further proceedings; 2) declare unconstitutional and enjoin the DIS practice of subjecting gay applicants to extensive additional investigations; 3) declare unconstitutional DISCO's use of 'five reasons' to recommend denial of plaintiff-Dooling's clearance; 4) declare unconstitutional DISCR's processing of plaintiff-Crawford's application subsequent to the filing of this lawsuit; and 5) purge the Defense Central Index of Investigations of derogatory information about all class members. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. at 1367.

Plaintiffs also sought an injunction to prevent the defendants from continuing to enforce such policies. *Id.*

12. See *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. at 1364, 1366. The plaintiffs did not specifically allege that the defendants, as a policy, denied security clearances to all gay applicants. *Id.* at 1366. The government had granted a Secret clearance to Dooling, one of the class representatives. *High Tech Gays*, 895 F.2d at 569.

13. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. at 1367. See *infra* notes 43-55 and accompanying text for discussion of the fifth amendment's applicability to these issues.

14. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. at 1367, 1377-78.

rationally based.<sup>15</sup>

15. *Id.* at 1373. The defendants presented the following evidence supporting their policy with respect to gays:

1) Plaintiffs Crawford and Dooling allegedly had emotional problems adjusting to their sexual orientation. *Id.* at 1374.

2) A newspaper account quoted a person convicted for stealing secret documents who at his sentencing hearing said that he stole "to prove . . . I could be a man and still be gay." *Id.*

3) John Donnelly, an Assistant Deputy for Under Secretary of Defense for Counter-intelligence and Security, concluded that hostile intelligence agencies often attempt to exploit human weaknesses including sexual vulnerability. *High Tech Gays*, 895 F.2d at 576 (discussing John Donnelly's Declaration in Support of DoD's Motion for New Trial (Reconsideration) at 3). He noted that such agencies evaluate each individual with the desired access and assess the best approach to compromise them. *Id.*

4) Major Francis R. Short, USMC, Judge Advocate in the United States Marine Corps, stated that at the trial of Sergeant Lonetree, the court accepted the testimony of Mr. John Barron as an expert. *Id.* at 576 (discussing Major Francis R. Short's Declaration in Support of DoD's Motion for a New Trial). Major Short declared that Mr. Barron testified: "[T]he KGB will attempt to identify those who are . . . experiencing problems with . . . homosexuality. . . ." *Id.* at 577 (emphasis added by the Ninth Circuit) (discussing Major Short's Declaration at 1-2). Barron testified that the KGB entrapped a Canadian ambassador to the Soviet Union through the exploitation of a homosexual relationship. *Id.*

5) Barron stated that the KGB believes "homosexuality often is accompanied by personality disorders that make the victim potentially unstable and vulnerable to adroit manipulation." *Id.* (discussing BARRON, KGB THE SECRET WORK OF SOVIET SECRET AGENTS 280 (1974)). The KGB believes that as gays are aware they are different and this makes them want to seek revenge against society. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp at 1374.

6) Sergeant Lonetree made sworn statements to special agents of the Naval Investigative Service relating a meeting with a KGB officer. *High Tech Gays*, 895 F.2d at 577. Extracts of the statements revealed that the KGB officer specifically asked Lonetree "to tell him who were the homosexuals . . . and people who were exploitable who worked in the embassy as civilians." *Id.* (emphasis added by the Ninth Circuit) (discussing Statement of Sgt. Lonetree, Dec. 29, 1986).

The plaintiffs, however, presented the following evidence that it was irrational to treat gays differently from heterosexuals:

1) The American Psychiatric Association in a position statement found that homosexuality *per se* is one form of sexual behavior and, like other forms which are not by themselves psychiatric disorders, is not considered a mental disorder. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. at 1374 (discussing AM. PSYCHIATRIC ASSOC., POSITION STATEMENT ON HOMOSEXUALITY AND CIVIL RIGHTS (Dec. 15, 1973)). The Association also declared that "[h]omosexuality *per se* implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." Resolution of the American Psychological Association, January 1975.

2) The United States Public Health Service no longer considers homosexuality to be a mental disorder and refuses to issue medical certificates solely on the basis of homosexuality. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. at 1374-75 (discussing *Hill v. United States INS*, 714 F.2d 1470, 1472, 1481 (9th Cir. 1983) (the Health Service has recognized that "current and generally accepted canons of medical practice" do not consider homosexuality *per se* to be a psychiatric disorder)).

3) At Senate subcommittee hearings, the F.B.I. and the Defense Intelligence Agency produced no evidence of persons being blackmailed because of homosexuality. *Id.* at

The district court found that classifications<sup>16</sup> such as the DoD security clearance regulations which disadvantage gays must either withstand heightened scrutiny, as gay people are a quasi-suspect class,<sup>17</sup> or must withstand strict scrutiny as they violate the right of gays to engage in any homosexual activity, not merely sodomy, and thus impinge upon their exercise of a fundamental right.<sup>18</sup> Further, even if neither strict nor heightened scrutiny were applied, there was no rational basis for subjecting all gay applicants to expanded investigations.<sup>19</sup> The dis-

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1375 (discussing *Federal Government Security Clearance Programs: Hearings Before the Permanent Subcomm. on Investigations of the Comm. on Governmental Affairs United States Senate*, 99th Cong., 1st Sess. 171-87, 913-26 (1985)). Of approximately 40 significant espionage cases, only two involved homosexuals and none involved blackmail. *Id.*

4) A factual study allegedly demonstrated that of 19 gay applicants for security clearances who were subjected to expanded investigations, only two were denied security clearances. *High Tech Gays*, 895 F.2d at 575 (discussing Plaintiffs' Brief Supporting Motion for Summary Judgment at 6-7).

5) In a deposition, Richard Olinger, a former manager of the Government Security Department at Lockheed Missiles and Space Company, told of two conferences he attended while at Lockheed regarding security concerns. *Id.* at 575-76 (discussing Plaintiffs' Brief Supporting Motion for Summary Judgment at 9). He stated that the question of whether homosexuality posed a security risk was not discussed at these conferences. *Id.*

16. See *infra* notes 52-99 and accompanying text for discussion of various classifications under equal protection review.

17. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. at 1368. The district court reasoned that factors warranting heightened scrutiny for gender classifications are also present in classifications based on sexual orientation. *Id.* at 1369. The sex characteristic bears no relation to ability to perform or contribute to society and reflect an outmoded notion of the relative capabilities of the sexes. *Id.*

The court also observed that pervasive discrimination against gays has seriously impaired their ability to gain a politically viable voice for their view in state and local legislatures and in Congress. *Id.* at 1370. See *infra* notes 92-96 and accompanying text for discussion of heightened scrutiny and quasi-suspect classes.

18. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. at 1370. The district court found that DoD regulations required expanded investigation for any homosexual activity. *Id.* The court observed that states are only allowed to criminalize homosexual sodomy. *Id.* at 1370-71 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986), which did not address whether gays may engage in other activities such as kissing, holding hands, and caressing). See *infra* notes 100-07 and accompanying text for discussion of *Hardwick*.

The district court held that the right to privacy extends to all persons and mandates a fundamental right to engage in affectional and sexual activity that has not been traditionally proscribed as sodomy. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. at 1372. For example, the district court found that the Constitution protects the freedom to express physically basic human emotions and feelings, the right to express affection, attraction, and love for another human being through sexual activity not proscribed by *Hardwick*. *Id.*

19. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. at 1373.

strict court held that the DoD violated the plaintiffs' equal protection rights<sup>20</sup> and granted the plaintiffs' motion for summary judgment;<sup>21</sup> DISCO appealed.<sup>22</sup>

### III. BACKGROUND

#### A. SUMMARY OF THE SECURITY CLEARANCE PROCESS

If a defense contractor employee needs a Secret or Top Secret clearance to perform his job, the contractor submits an application to the DoD.<sup>23</sup> The DoD forwards a Secret clearance application to DISCO,<sup>24</sup> who conducts a record check with the FBI and the Defense Central Intelligence Index.<sup>25</sup> The investigation may also include records checks with the CIA, the State Department, the Office of Personnel Management, and the Immigration

20. *Id.* at 1373. The plaintiffs pleaded their case on the assumption that either the first or fifth amendment contains an equal protection clause. *Id.* at 1367.

21. *Id.* at 1377. The district court enjoined the DoD from enforcing its regulations with respect to other members of the class for which plaintiffs were representatives. *Id.* at 1379. Summary judgment shall be granted if evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. FED. R. CIV. P. 56(c).

22. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 565 (9th Cir. 1990). DISCO filed motions for stay pending appeal and for reconsideration based on new evidence that foreign intelligence services target gays. *Id.* at 568-70. The district court granted the motion for stay, but denied the motion for reconsideration. *Id.* at 569-70.

DISCO appealed the district court's denial of its motion for summary judgment and sought reversal of the district court's grant of the plaintiff's motion for summary judgment based on the following issues:

1) the district court's determination that homosexuals are a quasi-suspect class for purposes of equal protection review;

2) the application of the "heightened scrutiny" standard to the review of DoD regulations;

3) the court's determination that plaintiff's evidence and affidavits made a sufficient showing that the DoD does not have a rational basis for its expanded security investigation of homosexuals;

4) the determination that the DoD did not meet its burden of persuasion by demonstrating that its policies and procedures for homosexuals are rationally related to permissible ends; and

5) the court's finding that DISCO's use of mere membership in a 'gay organization' as grounds to refuse a clearance and automatically requiring additional investigation violated the plaintiffs' first amendment rights. *Id.* at 570-79 (quoting *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. at 1378).

23. 32 C.F.R. §§ 154.30-.31 (1989).

24. See *High Tech Gays*, 895 F.2d at 565-66.

25. *Id.* at 566 (discussing 32 C.F.R. § 154.3(m); DoD 5200.2-R, app. B (1979)).

and Naturalization Service.<sup>26</sup> For a Top Secret clearance application, the Defense Investigative Service (DIS) conducts a "Background Investigation."<sup>27</sup>

DISCO uses guidelines set forth as part of the DoD Personnel Security Program<sup>28</sup> in determining whether there is adverse information<sup>29</sup> that will prevent the granting of clearance.<sup>30</sup> If adverse information is uncovered, DISCO will conduct an expanded investigation to substantiate or disprove the information.<sup>31</sup> In addition, a personal interview of the applicant is conducted.<sup>32</sup> Thereafter, DISCO will grant the Secret clearance unless that would be inconsistent with the national interest, in which case the application is forwarded to DISCR.<sup>33</sup> A similar procedure is followed for Top Secret Clearances.<sup>34</sup>

DISCR evaluates referrals using criteria set forth in DoD directives<sup>35</sup> and determines whether or not to grant a clearance.<sup>36</sup> The DIS Manual for Personnel Security Investigations estab-

26. *Id.* A record check similar to that done with the FBI is done with these agencies. *Id.*

27. *Id.* A Background Investigation includes a "local records check" and interviews with personal sources. *Id.*

28. 32 C.F.R. pt. 154, app. D (1989)

29. *Id.* Background Investigations must be considered devoid of significant adverse information unless they contain, for example, information characterized as "[m]ental, nervous, emotional, psychological, psychiatric, or character disorders. . . ." *Id.* at 504 § 4. Adverse information "impunge[s] the subject's moral character, threaten[s] the subject's future federal employment, raise[s] the question of subject's security clearability, or [is] otherwise stigmatizing." *High Tech Gays*, 895 F.2d at 566 (discussing 32 C.F.R. § 154.8(i)(2) (1989)).

30. *High Tech Gays*, 895 F.2d at 566 (discussing DoD 5200.2-R, app. E (1979)).

31. 32 C.F.R. § 154.8(j) (1989). The adverse information must be relevant to a security determination. *Id.*

32. *Id.* at § 154.8(i)(2).

33. *Id.* at §§ 155.2(c), 155.7(a).

34. *High Tech Gays*, 895 F.2d at 566, 568; see 32 C.F.R. §§ 155.2(c), 155.7(a) (1989).

35. 32 C.F.R. § 154.6(b) (1989). For example, in determining whether a person is eligible for clearances, "all available information, the person's loyalty, reliability, and trustworthiness [must be] such that entrusting the person with classified information . . . is clearly consistent with the interests of national security." *Id.*

The decision must be an overall common sense determination based on all available facts. *Id.* at § 154.7. The criteria for determining ineligibility for a clearance includes "[a]cts of sexual misconduct or perversion indicative of moral turpitude, poor judgment, or lack of regard for the laws of society." *Id.* at § 154.7(q). Disqualifying factors under sexual misconduct are listed and include acts performed in public places, recent adultery, child molesting, and sodomy. *Id.* at pt. 154, app. H.

36. *Id.* at § 155.7(b).

lishes operational, investigative, and procedural policy.<sup>37</sup> Allegations of heterosexual conduct between consenting adults are normally ignored.<sup>38</sup> However, other deviant sexual conduct,<sup>39</sup> which may cast doubt on the individual's morality, emotional or mental stability and may raise questions as to susceptibility to coercion is investigated.<sup>40</sup> DISCO unconditionally refers all gay applicants to the DISCR for expanded investigations for both types of clearances.<sup>41</sup>

## B. EQUAL PROTECTION ANALYSIS

The equal protection clause of the fourteenth amendment<sup>42</sup> guarantees that all persons similarly situated are to be treated alike.<sup>43</sup> The equal protection clause mandates that the states refrain from enacting any statute or regulation which invidiously discriminates against a group of persons.<sup>44</sup> A statute or regulation also cannot discriminate against people based on characteristics irrelevant to a constitutional purpose.<sup>45</sup>

37. *High Tech Gays*, 895 F.2d at 568 (discussing Defense Investigative Service Manual DIS 20-1-M (1985)).

38. *Id.* (discussing DIS 20-1-M ¶ 4-10, at 4-5 (1985)). However, extramarital sexual relations are considered legitimate grounds for inquiry when the potential for undue influence exists. *Id.*

39. *Id.* Deviant sexual conduct includes exhibitionism, sadism, and voyeurism. *Id.*

40. *Id.* (discussing DIS 20-1-M, ¶ 4-11, at 4-5, 4-6 (1985)).

41. *Id.* at 568.

42. U.S. CONST. amend. XIV, §1. The fourteenth amendment provides, in part, that: "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*

43. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1954) (zoning ordinance, as applied, resulted in the denial of a special use permit for construction of a group home for the mentally retarded) (citing *Plyer v. Doe*, 457 U.S. 202, 216 (1982)).

44. *See, e.g., Brown v. Board of Educ.*, 347 U.S. 483, 490-91 n.5 (1954) (segregation in public schools in various states alleged to deprive black children of their equal protection rights under the fourteenth amendment). *Id.* In *Brown*, the Court observed that the fourteenth amendment contains a positive immunity: the right of blacks to exemption from "unfriendly legislation against them *distinctively as colored* . . . implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and [from] discriminations which are steps towards reducing them to the condition of a subject race." *Id.* (emphasis added).

45. *See, e.g., McLaughlin v. Florida*, 379 U.S. 184, 192-93 (1964) (state statute prohibited unmarried interracial couples from habitually occupying the same room at night; punishment of promiscuity with one racial group and not with another was not related to state's interest in preventing breaches of basic concepts of sexual decency). *See Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1299 (1985) [hereinafter *Homosexuality as a Suspect*

The fourteenth amendment applies to the states but not to the federal government.<sup>46</sup> In *Bolling v. Sharpe*,<sup>47</sup> the United States Supreme Court observed that the fifth amendment's due process clause<sup>48</sup> contains an equal protection requirement.<sup>49</sup> Therefore, fourteenth amendment equal protection guarantees apply to the federal government through the fifth amendment.<sup>50</sup>

The analytic approach to a fifth amendment equal protection claim mirrors the approach used to review a fourteenth amendment claim.<sup>51</sup> A court begins its review by determining

*Classification*].

46. See *United States v. Sperry Corp.*, 110 S. Ct. 387, 396 (1989) (equal protection claim against the United States brought under the fifth amendment due process clause); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (segregation of public schools in the District of Columbia alleged to deprive black children of their due process rights under the fifth amendment).

47. 347 U.S. 497 (1954).

48. U.S. CONST. amend. V. The fifth amendment of the United States Constitution provides, in part "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." *Id.* The fifth amendment does not contain an equal protection clause. *Schneider v. Rusk*, 377 U.S. 163, 168 (1964) (statute mandated loss of citizenship to a naturalized citizen if the citizen resided continuously for three years in the territory of the foreign state of which he was formerly a national); *Bolling*, 347 U.S. at 499.

49. See *Bolling*, 347 U.S. at 499-500 (equal protection and due process are not mutually exclusive concepts). In *Bolling*, the Court observed that the fifth and not the fourteenth amendment applies to the District of Columbia. *Id.* at 498-99. However, the Court found that while not interchangeable, "concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." *Id.* The Court found that governmental discrimination which violates equal protection guarantees may be so unjustifiable as to also violate due process. *Id.* (discussing *Brown v. Board of Educ.*, 347 U.S. 483 (1954)). The Court held that segregation of public schools in the District of Columbia deprived black schoolchildren of their fifth amendment right to due process as such discrimination had deprived them of equal protection. *Id.* at 499-500. See also *Sperry Corp.*, 110 S. Ct. 387, 396 (1989) (user fees, authorized by § 502 of the Foreign Relations Authorization Act, charged against awards received by claimants from the Iran-United States Claims Tribunal, did not violate the due process clause equal protection component); *INS v. Pangilinan*, 486 U.S. 875, 885 (1988) (statute authorized the Commissioner of Immigration and Naturalization to designate representatives to receive petitions, conduct hearings, and grant naturalization outside the United States; the naturalization officer's authority was revoked for a nine-month period between 1945 and 1946; Filipino nationals who had served the United States Armed Forces during World War II sought citizenship pursuant to the statute); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2, 643-53 (1975) (Act of Congress granted survivors' benefits based on earnings of a deceased husband and father both to the widow and to the couple's minor children in her care but granted benefits based on the earnings of a deceased wife and mother only to the minor children and not to the widower).

50. See *Sperry Corp.*, 110 S. Ct. at 396; *Pangilinan*, 486 U.S. at 885; *Wiesenfeld*, 420 U.S. at 638 n.2; *Bolling*, 347 U.S. at 499-500.

51. *E.g.*, *Wiesenfeld*, 420 U.S. at 638 n.2 (approach to fifth amendment equal protection claims precisely the same as fourteenth amendment equal protection claims); see

the standard of review to apply to the challenged classification: strict,<sup>52</sup> heightened,<sup>53</sup> or rational basis<sup>54</sup> scrutiny.<sup>55</sup>

### 1. Strict Scrutiny

Strict scrutiny is applied to suspect classes<sup>56</sup> and is generally fatal to legislative or regulatory classifications.<sup>57</sup> Under

also *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion) (statute provided that spouses of male Air Force officers were dependents for purposes of medical, dental and housing benefits but that spouses of female officers were not dependents, unless they were in fact dependent for over one half of their support; denial of dependent status and resulting benefits to Air Force officer's spouse alleged to deny servicewoman of due process). In *Frontiero*, a fifth amendment claim was analyzed using fourteenth amendment precedent. See *id.*

52. See *infra* notes 56-91 and accompanying text.

53. See *infra* notes 92-96 and accompanying text.

54. See *infra* notes 97-99 and accompanying text.

55. See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1954).

56. See *Homosexuality as a Suspect Classification*, *supra* note 45, at 1297-98. The courts generally base the determination of who is a suspect class on the model of race. *Id.* See *infra* notes 59-68 for discussion of classes afforded suspect class status. In practice, courts may consider the possible state interests which would support the classification as part of determining who is afforded suspect class status. *Homosexuality as a Suspect Classification*, at 1298.

Apart from the race model, suspect status has been asserted to protect "discrete and insular minorities." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (Congress prohibited the interstate shipment of "filled" milk; legislation upheld over claimed due process violation).

57. See, e.g., Gunther, *The Supreme Court, 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). Groups qualifying for strict scrutiny are said to command extraordinary protection from the majoritarian political process. *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). See *infra* notes 65-76 and accompanying text for discussion of *Rodriguez*.

Whether the standard of review applied has any effect on the outcome of any case has been questioned. See *Craig v. Boren*, 429 U.S. 190, 212 (1976) (Stevens, J., concurring) (Oklahoma statutes prohibited the sale of 3.2% beer to males under the age of 21 and females under the age of 18). In *Craig*, Justice Stevens observed that:

[W]hat has become known as the [tiered] analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion. . . . *I have always asked myself whether I could find a "rational basis" for the classification at issue.* The term "rational" . . . includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word "rational" . . . includes elements of legitimacy and neutrality. . . .

strict scrutiny, legislation is constitutional only if it is suitably tailored to serve a compelling<sup>58</sup> state interest.<sup>59</sup>

The classification that most clearly qualifies for suspect class treatment under the fourteenth amendment are those based on race.<sup>60</sup> In *Palmore v. Sidoti*,<sup>61</sup> the Court observed that

*Id.* (emphasis added).

58. *City of Cleburne*, 473 U.S. at 440. The Court has attached no particular significance to the varied characterizations of a “compelling” state interest. *In re Griffiths*, 413 U.S. 717, 722 (1973) (statute prohibited aliens from practicing law; permissible and substantial interest required). *See Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) (statute required residence in the state for one year and in the county for three months as a prerequisite for registration to vote; important interest required); *Graham v. Richardson*, 403 U.S. 365, 375 (1971) (several states had made eligibility for welfare benefits conditioned upon citizenship or, in the case of aliens, upon having resided in the country for a specified number of years; compelling interest required); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (statute prohibited miscegenation; overriding interest required); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (overriding statutory purpose).

59. *See, e.g., City of Cleburne*, 473 U.S. at 440 (citing *McLaughlin*, 379 U.S. at 192). As strict scrutiny is generally fatal to legislative classifications, this aspect of the analysis (considering the state’s interests) is often slighted. *See Homosexuality as a Suspect Classification*, *supra* note 45, at 1298. The consideration of what state interests are permissible has become more important with the advent of intermediate levels of scrutiny as such consideration addresses the issue of what majoritarian goals are permissible under the equal protection clause. *Id.* In short, how is a court to know “whether prejudice against discrete and insular minorities [is] a special condition, which tends seriously to curtail the operation of those political processes ordinarily . . . relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry[?]” *Carolene Products*, 304 U.S. at 152 n.4.

This controversial issue is beyond the scope of this Note. However, as the Constitution itself protects religious, national and racial minorities, former Judge Bork has suggested that the minorities Justice Stone referred to in *Carolene Products* are those who cannot win their battles in the political process because of prejudice. R. BORK, *THE TEMPTING OF AMERICA*, 58-61 (1990). Judge Bork criticized Stone’s “more searching judicial inquiry” as allowing Justices to inject into the Constitution their own subjective values and policy preferences — to, in effect, overrule democratic majorities. *Id.* at 61.

60. *See Palmore*, 466 U.S. at 432 (core purpose of the fourteenth amendment is to end all governmentally imposed race discrimination); *Loving*, 388 U.S. at 10 (central purpose is to eliminate all official state sources of invidious racial discrimination); *McLaughlin*, 379 U.S. at 192 (central purpose is to eliminate racial discrimination by the states and thereby renders racial classifications constitutionally suspect); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (classifications based on race are constitutionally suspect); *Brown v. Board of Educ.*, 347 U.S. 483, 490 n.5 (1954) (while prohibitory, also has a positive immunity: the right for blacks to be exempt from legislation aimed directly at them as blacks and the right to be exempt from legal discrimination implying inferiority in civil society); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (Executive Order excluded citizens of Japanese origin from a West Coast military area and required them to remain in their residences from 8 p.m. to 6 a.m.; restrictions curtailing the civil rights of a single racial group are suspect); *see also, Homosexuality as a Suspect Classification*, *supra* note 45, at 1298.

61. 466 U.S. 429 (1984).

racial classifications deserve the most exacting scrutiny as classifying persons according to race likely reflects prejudice rather than legitimate public concerns.<sup>62</sup> Classifications based on "national origin" are extended strict scrutiny as national origin is similar to race.<sup>63</sup> Suspect class status has also been extended to alienage classifications.<sup>64</sup>

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62. *Palmore*, 466 U.S. at 432 (preventing possible injury and social stigmatization of child). Further, private biases are impermissible considerations in determining a child's custody. *Id.* at 433.

63. *City of Cleburne*, 473 U.S. at 440. See also *Trimble v. Gordon*, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting) (Illinois statute allowed illegitimate children to inherit by intestate succession only from their mothers while legitimate children could inherit by intestate succession from both parents). Justice Rehnquist observed that the Framers obviously meant the equal protection clause to apply to national origin, the "first cousin" of race. *Id.*; *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410, 425-27 (1948) (Murphy, J., concurring) (California statute barred issuing commercial fishing licenses to persons "ineligible to citizenship"; the purpose of such legislation, directed against aliens of Japanese birth, was to give effect to racial animosity); *Jamil v. Secretary, Dept. of Defense*, 910 F.2d 1203, 1205 (4th Cir. 1990) (DoD employee discharged for failure to obtain a Top Secret security clearance; plaintiff had Asian-American parents living abroad and had defaulted on a student loan). In *Jamil*, the court observed that if the plaintiff had been dismissed because of his national origin, he would have had a valid equal protection claim. *Id.* at 1209.

Classifications based on race and national origin are usually invalidated as the state interests are not compelling. See *Palmore*, 466 U.S. at 432-33 (state court's divestment of child from natural mother because she married a black man held unconstitutional; state interest in preventing injury from private biases). In *Palmore*, the Court observed that racial classifications are invalidated if they show invidious discrimination even if the seeming purpose of the classification is to protect against acknowledged discrimination. *Id.* at 433-34. See also *Loving*, 388 U.S. at 11 (state interest in preserving racial pride, integrity and preventing the corruption of blood was not a legitimate, independent, overriding basis for anti-miscegenation laws; such classifications amount to invidious discrimination and were characterized as designed to maintain white supremacy); *Bolling*, 347 U.S. at 499-500 (racial segregation is unjustifiable discrimination); *Brown v. Board of Educ.*, 347 U.S. at 493 (schools segregated pursuant to state laws; interest in providing equal educational opportunities); but contra *McLaughlin*, 379 U.S. at 193 (interest in preventing illicit extra- and pre-marital promiscuity and other basic notions of sexual decency); *Korematsu*, 323 U.S. at 216-19 (the government's interest in protecting against espionage and sabotage deemed compelling).

These types of classifications are also invalidated where they are not suitably tailored to serve legitimate interests. See *McLaughlin*, 379 U.S. at 192-93 (Florida statute punishing unmarried interracial couples and not couples of the same race who cohabit in the same room at night amounts to invidious discrimination; law did not have general application); *Bolling*, 347 U.S. at 500 (segregation in public education is not reasonably related to a proper governmental objective); see also *Brown v. Board of Educ.*, 347 U.S. at 493 (segregation of children in public schools solely on the basis of race is not reasonably related to providing black children with equal educational opportunities). But see *Korematsu*, 323 U.S. at 218 (classification was related to government interest as the government had grounds to believe that persons constituting threat to national security could not be isolated and separately dealt with).

64. *City of Cleburne*, 473 U.S. at 440. See *Bernal v. Fainter*, 467 U.S. 216, 219 n.5

Until the mid-1970s, the Court lacked coherent principles to determine what standard of review applied to non-racial classifications.<sup>65</sup> In *San Antonio School District v. Rodriguez*,<sup>66</sup> the

(state barred aliens from becoming notary publics; strict scrutiny applied as the actual function of a notary public is ministerial and not policymaking); *In re Griffiths*, 413 U.S. 717, 720-21 (1973) (state court rule prohibited resident aliens from taking the bar examination solely because of lack of citizenship; classifications based on alienage are inherently suspect); *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973) (state law provided that only U.S. citizens could hold permanent positions in the competitive class of the state civil service); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (states denied welfare benefits to resident aliens or to aliens who had not resided in the United States for a certain number of years; aliens are a prime example of a discrete and insular minority).

*But contra* *Ambach v. Norwick*, 441 U.S. 68, 80 (1979) (statute prohibited permanent certification of non-U.S. citizens from teaching positions unless the applicant manifested an intent to seek U.S. citizenship; rational basis standard applied as teaching is a governmental function); *Foley v. Connelie*, 435 U.S. 291, 296 (1978) (statute prohibited employing aliens as state troopers; rational basis scrutiny applied as the police execute government policies and the right to govern may be reserved to a state's citizens). In *Foley*, the Court observed that some limitations on aliens do not require strict scrutiny review. *Id.* at 294 (citing *Dougall*, 413 U.S. at 648 (the Court observed that not all limitations on aliens are unconstitutional)).

Alienage classifications are invalidated if the state lacks a compelling interest. *Bernal*, 467 U.S. at 227 (interest that notaries be reasonably familiar with state law or ensuring the later availability of notaries' testimony); *In re Griffiths*, 413 U.S. at 722-23 (assuring general fitness requisite of persons licensed to practice law); *Dougall*, 413 U.S. at 641 (having the undivided loyalty of employees without the potential impairment of judgment attendant with foreign citizenship); *Richardson*, 403 U.S. at 372 (state's interest in reserving limited welfare benefits for own citizens inadequate to justify denial of the necessities of life (welfare benefits) to aliens). *But contra* *Norwick*, 441 U.S. at 77 (inculcating children with the fundamental values necessary to the maintenance of a democratic political system); *Foley*, 435 U.S. at 296 (legitimate to have citizens employed as police officers as they execute broad public policy).

Alienage classifications are also invalidated where they are not necessarily related to accomplishing its purpose. *See In re Griffiths*, 413 U.S. at 722 (the statute must be necessary to the accomplishment of its purpose or the safeguarding of its interest). *See also Bernal*, 467 U.S. at 219, 227 (interest must be furthered by the least restrictive means available); *Dougall*, 413 U.S. at 643 (the means the state employs must be precisely drawn in light of the acknowledged purpose).

*But contra* *Norwick*, 441 U.S. at 80 (rational relationship required; citizenship requirement applicable to teaching in the public schools was carefully framed to serve its purpose as it bars from teaching only those aliens who have demonstrated their unwillingness to obtain citizenship). *Foley*, 435 U.S. at 296 (state must only show a rational relationship between the interest sought to be protected and the limiting classification). In *Foley*, the government's interest (the right of the public to ensure government by its own peers), justified the classification. *Id.* at 296-97. The reservation of policy-making positions to its citizens was within the State's constitutional prerogatives. *Id.*

65. *Homosexuality as a Suspect Classification*, *supra* note 45, at 1297; *see City of Cleburne*, 473 U.S. at 451-52 (Stevens, J., concurring). Justice Stevens noted that the Court had not delineated any well defined standards in the area of equal protection and that the Court's precedent reflected only judgmental responses to differing classifications. *Id.* at 451.

66. 411 U.S. 1 (1973) (Mexican-American parents instituted a class action suit on

Court developed general criteria describing which groups warrant the strict scrutiny standard.<sup>67</sup> The group must be saddled with disabilities,<sup>68</sup> subjected to a history of discrimination,<sup>69</sup> and

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behalf of school children of minority groups or poor families who resided in school districts having a low property tax base). In *Rodriguez*, the state supplied roughly half of all public school funds. *Id.* at 9. The school districts supplemented their revenues from *ad valorem* taxes on property within each jurisdiction. *Id.* at 10-11. The plaintiff-class claimed this reliance on local property taxes favored the more affluent districts in violation of equal protection. *See id.* at 16. The Court found that substantial interdistrict disparities in school expenditures did in fact exist. *Id.* at 15. However, the Court found that the Texas system did not operate to the disadvantage of any identifiable suspect class. *Id.* at 28-29. Wealth discrimination, where poor persons receive less expensive educations than more affluent persons, is not a suspect classification as the defined classes of poor schoolchildren were not *absolutely* deprived of an education. *Id.* at 25. *See also*, *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987) (amendments to the AFDC program requiring that a family's eligibility for benefits must take into account the income of all parents, brothers and sisters living in the same home; close relatives are not a suspect or quasi-suspect class) (citing *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-15 (1976) (*per curiam*) (classification called for the mandatory retirement of uniformed state police officers at age 50 upheld as it rationally protects the public by assuring physical preparedness of police)).

67. *Rodriguez*, 411 U.S. at 28. However, the general characteristics of a group may play much less a role than the legitimacy of the perceived state interest in determining whether the group is a suspect class. *See Homosexuality as a Suspect Classification*, *supra* note 45, at 1298.

68. *Id.* at 28. In determining class status for equal protection analysis, the disability that a class suffers from is important if it is one that society has imposed because of stereotyped characteristics: an irrational conclusion about the abilities of a class made after considering an irrelevant class trait or characteristic. *See City of Cleburne*, 473 U.S. at 441-42; *Murgia*, 427 U.S. at 313.

When individuals in a group affected by a statute have distinguishing characteristics relevant to the interests of a state, the state has the authority to implement the statute if the statute bears a rational relationship to the legitimate interest. *City of Cleburne*, 473 U.S. at 441. In *City of Cleburne*, the Court found that mentally retarded persons have a reduced ability to cope with and function in the everyday world. *Id.* at 442. Consequently, mental retardation is a classification that only requires rational basis review. *Id.* at 442.

But with respect to gender classifications, the Court noted that "the sex characteristic" usually bears no relation to ability to perform or contribute to society. *Id.* at 440-41. Similarly, the Court has observed that illegitimacy is beyond an individual's control and bears no relation to the individual's ability to participate in and contribute to society. *Id.* at 441 (citing *Mathews v. Lucas*, 427 U.S. 495, 505 (1976) (provision in Social Security Act denied presumptions of dependency to illegitimate but not legitimate children for determining survivor's benefits)). In *Mathews*, the Court observed that illegitimate children have suffered disabilities in the past; however, discrimination against illegitimates had never approached the severity or pervasiveness of the historic legal and political discrimination against women and blacks. *Id.* at 506 (rejecting a strict scrutiny standard); *but contra Pickett v. Brown*, 462 U.S. 1, 8 (1983) (statute prohibited a mother from initiating a paternity suit to identify the father of an illegitimate child for child support if the child is more than two years old; heightened scrutiny applied). *See also Murgia*, 427 U.S. at 313 (although the aged suffer from discrimination they are not subjected to unique disabilities that are based on stereotypes).

have been banished to a position of political powerlessness.<sup>70</sup> The immutability of the group's identifying trait should also be considered.<sup>71</sup>

Strict scrutiny review is also applied to statutory classifications which burden a fundamental right.<sup>72</sup> Fundamental rights are interests implicit in the concept of ordered liberty<sup>73</sup> or are deeply rooted in our Nation's history and tradition.<sup>74</sup> In *Rodri-*

69. *Rodriguez*, 411 U.S. at 28 (a history of purposeful, unequal treatment). The Court found in *Rodriguez*, under wealth classifications, precise equal advantages are not required. *Id.* at 24. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (close relatives have not been subjected to discrimination); *Murgia*, 427 U.S. at 313 (the aged have not experienced a history of purposeful unequal treatment).

70. *Rodriguez*, 411 U.S. at 28; see *City of Cleburne*, 473 U.S. at 443 (mentally retarded individuals are not politically powerless as their needs have been addressed by lawmakers); *Castillo*, 477 U.S. at 638 (close relatives are not politically powerless).

See also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (discussing the "presumption of constitutionality" when legislation appears facially to be within a specific prohibition of the Constitution). Justice Stone introduced the idea that prejudice against 'discrete and insular' minorities may be a special condition which curtails the operation of political processes or outcomes in favor of those minorities. *Id.* at 153 n.4. Justice Stone implied such a condition might warrant a "more searching judicial inquiry." *Id.*

71. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). Identifying traits are generally considered physical characteristics which are obvious or distinguishing. See *id.* In *Frontiero*, Justice Brennan found that sex, as an accident of birth, is an immutable characteristic like race and national origin. *Id.* at 686 (Brennan, J., plurality opinion). Race, of course, is considered an immutable characteristic. *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (provision of the Public Works Employment Act required that absent administrative waiver, the state or local grantee of federal funds for public works projects must use at least 10% of the funds to procure services or supplies from businesses owned by minorities). Cf. *City of Cleburne*, 473 U.S. at 442 (retarded persons are immutably different in relevant respects). In *City of Cleburne*, the Court also observed that the aging, disabled, mentally ill, and the infirm also have immutable characteristics. *Id.* at 444-46. *Contra Bowen*, 483 U.S. at 602 (parents, children, and siblings do not have characteristics that define them as a group); *Castillo*, 477 U.S. at 638 (federal food stamp program determined benefit levels by treating parents, children, and siblings who live together as a single household, but excluded more distant relatives and groups of unrelated persons from the household; close relatives do not exhibit obvious, immutable, or distinguishing characteristics).

72. *Bowen*, 483 U.S. at 602-03 (citing *Lyng*, 477 U.S. at 638).

73. See *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937) (state appealed a conviction for second degree murder with a sentence for life imprisonment under a statute allowing appeal in criminal cases; upon reversal and retrial, the accused was convicted of first degree murder and sentenced to death — fourteenth amendment due process claim). In *Palko*, the Court found that the right must be such "that neither liberty nor justice would exist if [it was] sacrificed." *Id.* at 326.

74. See *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (housing ordinance limited occupancy of a dwelling unit to members of a "single family," defined as to exclude a mother living with her son and two grandsons — fourteenth amendment due process claim).

*quez*,<sup>75</sup> the Court noted that fundamental rights are either explicitly or implicitly guaranteed by the Constitution.<sup>76</sup> The Court has found that voting,<sup>77</sup> interstate travel,<sup>78</sup> access to the

75. 411 U.S. 1 (1973).

76. See, e.g., *Rodriguez*, 411 U.S. at 33-35. In *Rodriguez*, the Court recognized that education is an important state function. *Id.* at 29-30. The importance of a service performed by a state does not determine whether it is a fundamental right. *Id.* at 30. See also *Lindsey v. Normet*, 405 U.S. 56 (1972) (statute imposed procedural limitations on tenants in suits brought by landlords). In *Lindsey*, the Court observed that the social importance of a statute is not the critical determinant of whether to subject a statute to strict scrutiny. See *id.* at 74. Cf. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (right to individual privacy guaranteed); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (statute conditioning the right to vote on a one year residency requirement; right to participate in elections on an equal basis with other citizens protected); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (right of procreation within the right of personal privacy protected by the Constitution).

77. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (Virginia statute making the right to vote contingent on payment of a poll tax). In *Harper*, the Court found that the conditioning of the right to vote on the payment of a poll tax should be closely scrutinized. *Id.* at 670. Classifications which might restrain or invade fundamental rights or liberties must be carefully confined. *Id.* The right to vote is fundamental to the preservation of all other rights. *Id.* at 667 (citing *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (existing and proposed plans for Alabama legislative apportionment challenged as violating equal protection guarantees)). The Court found that the right of suffrage is a fundamental matter in a free and democratic society. *Id.*

Further, the measuring of a voter's qualifications based on his ability to pay a fee is a capricious and irrelevant factor. *Id.* at 668. Wealth, like race, creed or color, is irrelevant to the ability to participate intelligently in the electoral process. *Id.* at 668-70. Making suffrage dependent on the voter's affluence or ability to pay is an invidious discriminatory state standard. *Id.* at 666. The statute was invalidated as the equal protection clause restrains the states from fixing voter qualifications which invidiously discriminate. *Id.* Further, once the right to vote is granted, lines may not be drawn which are inconsistent with the equal protection clause. *Id.* at 665.

See *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) (New York Education statute provided that in certain districts residents permitted to vote only if they are parents, have custody or children enrolled, or they owned or leased taxable real property within the district). Strict scrutiny was applied as statutes distributing the franchise are part of the foundation of representative society. *Id.* at 626. Any unjustified discrimination in determining who may participate in political affairs or in selecting public officials undermines the legitimacy of representative government. *Id.* Thus, statutes limiting the right to vote must be narrowly tailored to accomplish a legitimate purpose. See *id.* at 632. The statute was unconstitutional as it permitted inclusion of persons with remote interests in school affairs and excluded others with direct interests. *Id.*

78. *Shapiro v. Thompson*, 394 U.S. 618 (1969) (statute predicating the receipt of welfare assistance on a one year residency requirement challenged on equal protection grounds). In *Shapiro*, the Court observed that the right to interstate travel is a basic right under our Constitution. *Id.* at 630-31 (citing *United States v. Guest*, 383 U.S. 745, 757 (1966) (defendants indicted under 18 U.S.C. § 241 for conspiring to deprive black citizens of the exercise of constitutional rights, including the right to engage in interstate travel)). This right is implicit under several sections of the Constitution. *Id.* at 630 n.8: U.S. CONST. art. IV, § 2. See also *Ward v. Maryland*, 12 Wall. 418, 430 (1871) (state statute imposed a discriminatory tax on non-resident traders; right to interstate travel

courts<sup>79</sup> are fundamental rights. Some forms of privacy are also

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grounded upon the privileges and immunities clause). U.S. CONST. art. XIV, § 1. *See also* *Edwards v. California*, 314 U.S. 160, 181 (1941) (state statute prohibited bringing into the state any non-resident knowing him or her to be an indigent; privileges and immunities clause of the fourteenth amendment). U.S. CONST. art. V. *See also* *Kent v. Dulles*, 357 U.S. 116, 125 (1958) (Secretary of State denied passports to plaintiffs because of their alleged communist beliefs and refusal to file affidavits regarding past or present membership in the communist party; due process clause of the fifth amendment).

The nature of our society and our notions of personal liberty require that all citizens be free to travel interstate without unreasonable restrictions. *Shapiro*, 394 U.S. at 629-30. As the classification affected a fundamental right, it is reviewed under strict scrutiny. *See id.* at 638. The Court found the statute unconstitutional as the interest in deterring indigent migration was not a compelling state interest. *Id.* at 631.

*See Blumstein*, 405 U.S. 330 (1972). In *Blumstein*, the Court observed that a classification which serves to penalize the right to travel will be invalidated whether or not it actually does penalize. *Id.* at 339-40. *See also* *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974) (Arizona statute required one year of residency in a county as prerequisite for an indigent to receive nonemergency hospitalization or medical care). Whether a statute is invalidated turns largely on whether a penalty affects a "necessity of life." *See id.* at 259. The Court found that medical care is such a necessity of life. *See id.* at 259-61.

However, states do have a compelling interest in not meddling in matters where another state has a paramount interest. *See Sosna v. Iowa*, 419 U.S. 393 (1975) (statute requiring one year of residency before bringing a divorce action against a non-resident). Further, the state has an interest in divorce consequences which may include provisions for custody and support. *Id.* at 406-07. This residency requirement does not irretrievably foreclose a person from seeking a divorce. *Id.* The Court concluded those who seek a divorce may reasonably be required to have some sort of attachment to the state. *Id.* at 407.

79. *Douglas v. California*, 372 U.S. 353 (1963) (California required an indigent to make a preliminary showing of merit before appointing counsel for a direct appeal of right; indigent criminal defendants appealed denial of appointed counsel to represent them). In *Douglas*, the Court recognized that the fourteenth amendment's equal protection clause demands equality of access and protection between the rich and poor. *See id.* at 357-58. This equality requirement cannot be satisfied where a rich man has a meaningful appeal but the indigent, where the record is unclear or the errors are hidden, is only afforded a meaningless ritual. *Id.* at 358. The Court found that on a first appeal of right, the right to counsel is fundamental under the equal protection clause. *See id.* at 356-58. If a state grants such an appeal, it must provide counsel to those defendants who cannot afford counsel, so they may obtain equal access and properly exercise such rights. *See id.* The Court considered prior decisions where it had invalidated laws discriminating against indigent criminal defendants. *Id.* at 355 (discussing *Griffin v. Illinois*, 351 U.S. 12 (1956) (indigent criminal defendant appealed conviction on fourteenth amendment due process grounds as the state denied him a free trial transcript, which was a prerequisite to obtaining appellate review)). Thus, when California denied counsel to the indigent plaintiff on his only appeal, it invidiously discriminated against him. *Id.* at 355.

However, access to the judicial process for discretionary state appeals is not considered a fundamental right. *Ross v. Moffitt*, 417 U.S. 600, 619 (1974) (North Carolina denied appointment of counsel to convicted indigent on discretionary review). In *Ross*, the Court observed that there is no constitutional mandate requiring counsel for discretionary state appeals or for applications to the Supreme Court. *Id.* at 610, 612. The state has no obligation to provide an appeal. *Id.* at 611. Therefore, if the state does not provide counsel for discretionary appeals, there is no violation of the Constitution. *See id.* Unfairness results only if indigents are denied meaningful access to the appellate system

protected by the Constitution. For example, in *Griswold v. Connecticut*,<sup>80</sup> the Court held that a state law prohibiting the use of contraceptives was unconstitutional as the law violated a fundamental right to marital privacy.<sup>81</sup> The Court observed that this right to marital privacy is fundamental<sup>82</sup> as it is within a general "zone of privacy" emanating from the first,<sup>83</sup> third,<sup>84</sup> fourth,<sup>85</sup> and fifth amendments.<sup>86</sup> The Court has expanded privacy rights to include the right of persons to obtain contraceptives without undue restriction<sup>87</sup> and the right of a woman not to be unduly

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because of their poverty. *Id.*

80. 381 U.S. 479 (1965).

81. *Griswold*, 381 U.S. at 485-86.

82. *See id.*

83. *Id.* at 482-83 (citing *Pierce v. Society of Sisters*, 268 U.S. 510, 511 (1925) (Oregon statute required that parents and others having control of children send them to state primary schools; the right to educate one's children as one chooses)).

The first amendment provides in part: "Congress shall make no law . . . abridging the freedom of speech, or . . . the right of the people peaceably to assemble. . . ." U.S. CONST. amend. I. In *Griswold*, the Court found a specific marital right to privacy. *See Griswold*, 381 U.S. at 485-86. *See also Meyer v. Nebraska*, 262 U.S. 390, 401-03 (1923) (Nebraska statute prohibited the teaching of any language other than English in public or private schools; right to study a particular subject or foreign language); *DeJonge v. Oregon*, 299 U.S. 353, 363-65 (1937) (Oregon statute prohibited "criminal syndicalism," the advocacy of crime or violence as a means of effecting industrial or political change; right to assembly); *NAACP v. Alabama*, 357 U.S. 449, 460-63 (1958) (the Alabama attorney general sought memberships lists of all members and agents of the Alabama NAACP under a statute that required foreign corporations to file a corporate charter with the secretary of state, designate a place of business and an agent for service of process; right of freedom of speech and of association).

84. *Griswold*, 381 U.S. at 484. The third amendment provides: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.

85. *Griswold*, 381 U.S. at 484 (citing *Boyd v. United States*, 116 U.S. 616, 630 (1886) (Customs Act of 1874 authorized the attorney general to order production of relevant papers belonging to persons accused under the Act; the right of people to be secure in their persons, houses, papers, and effects)). The fourth amendment provides, in part: "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend. IV.

86. *Griswold*, 381 U.S. at 484. The fifth amendment provides, in part: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V.

87. *See Carey v. Population Serv. Int'l*, 431 U.S. 678, 685 (1977) (statute prohibiting the sale or distribution of any contraceptive except by licensed pharmacists to persons over sixteen). In *Carey*, the Court found that the Constitution protects not only use of contraceptives but more importantly protects individual decisions regarding childbearing from unjustified state intrusion. *Id.* The right to privacy requires individual autonomy in childbearing matters. *Id.* at 687. Thus, the Court invalidated the statute. *Id.* at 699.

*See Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (ban on distributing contraceptives to unmarried persons for purpose of preventing pregnancy). In *Eisenstadt*, the Court

restricted from having an abortion.<sup>88</sup> Finally, the Supreme Court has determined that education,<sup>89</sup> welfare benefits,<sup>90</sup> housing and shelter<sup>91</sup> are not fundamental rights.

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observed that if the right to privacy is to be meaningful, it must apply to *individuals* and not merely inhere in a marital relationship. *Id.* at 453. The statute infringed upon an individual's choice of whether to beget a child and was thus held unconstitutional. *See id.* at 443, 453.

*Cf. Skinner v. Oklahoma ex rel. Williams*, 316 U.S. 535 (1942) (statute providing for the sterilization of habitual criminals). In *Skinner*, the Court recognized that equal protection requires that those who commit the same quality of offense must be treated the same; otherwise, the law invidiously discriminates. *Id.* at 541. The statute was invalidated as some classes of criminals (for example, those committing grand larceny) were subject to sterilization, while other classes who engaged in similar offenses (for example, embezzlers) were not. *Id.*

The Court also examined the relationship between the asserted right of marriage and procreation, and the human race. *Id.* at 541. Laws infringing on the right to procreate require strict scrutiny as marriage and procreation are essential to the survival of the human race. *Id.* Sterilization negates this right and can have devastating effects if in the wrong hands. *Id.* Thus, the Court noted that the right to marriage and procreation is so important that remedying the inequality by enlarging the class of criminals subject to sterilization might not solve "this particular constitutional difficulty." *Id.* at 453.

88. *Roe v. Wade*, 410 U.S. 113, 153, 164-65 (1973) (state statutes prohibiting the right to an abortion except on medical advice to save the life of the mother). In *Roe*, the Court noted that the Constitution does not explicitly mention any right of privacy. *Id.* at 152. However, the Court found a woman's right to decide whether to terminate her pregnancy was encompassed within a general right of privacy. *See id.* at 152-53 (right derived from the Bill of Rights; the first, fourth, fifth and ninth amendments; and the concept of liberty in the fourteenth amendment).

89. *Rodriguez*, 411 U.S. 1 (1973). The Court found that education is not afforded explicit nor implicit protection under the Constitution. *Id.* at 35. Education does bear a close relationship to other rights, such as the effective exercise of first amendment freedoms and the right to vote. *Id.* However, elevating education to a fundamental right would exceed the Court's judicial competence and authority. *Id.* at 31, 36. It is not the Court's function to guarantee citizenry the most effective speech or the most informed electoral choices. *Id.* at 36.

90. *Dandridge v. Williams*, 397 U.S. 471 (1970) (statute granted welfare benefits to eligible families based on their 'standard of need' but imposed maximum grant limits of \$250 per month per family regardless of family size or need). In *Dandridge*, the Court found that the regulation did not affect any freedoms guaranteed by the Bill of Rights. *Id.* at 484. Thus, the Court found that the receipt of welfare benefits is not a fundamental right. *See id.* at 484 (plaintiff claimed the regulation violated the fourteenth amendment only because it resulted in some disparity in payments to the largest families). In the area of social and economic regulation, a state simply had to provide a reasonable basis for the regulation. *Id.* at 485. Although the regulation was imperfect, the state did not violate equal protection simply because of some disparity in the classifications. *Id.*

91. *See, e.g., Lindsey v. Normet*, 405 U.S. 45, 74 (1972). In *Lindsey*, the Court noted the importance of safe and sanitary housing. *Id.* However, the Constitution does not provide protection or remedies for all social and economic ills. *Id.* No constitutional guarantee exists which provides for access to dwellings of a particular quality or a tenant's right to occupy a landlord's real property beyond the lease term without paying rent or otherwise contrary to the terms of the agreement. *Id.* Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relation-

## 2. Heightened Scrutiny

A classification is constitutional under heightened scrutiny if it serves important governmental objectives<sup>92</sup> and is substantially related to achieving those objectives.<sup>93</sup> Heightened scrutiny

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ships are legislative functions and not fundamental rights. *Id.*

92. See *Rostker v. Goldberg*, 453 U.S. 57, 78-79 (1981) (Military Selective Service Act requiring the registration of males but not females for possible military service upheld; interest was in developing a pool of potential combat troops). See also *Michael M. v. Superior Court*, 450 U.S. 464, 470 (1981) (plurality opinion) (statutory rape law punishing the male, but not female, participant in intercourse when the female was not 18 years of age and not married to the male). In *Michael M.* the state's interest in preventing illegitimate teenage pregnancies was upheld as a strong state interest. *Id.*; *Craig v. Boren*, 429 U.S. 190, 191-92 (1976) (Oklahoma statutes prohibited the sale of 3.2% beer to males under the age of 21 and females under the age of 18). In *Craig*, the state's interest was in the enhancement of traffic safety. *Id.* at 199. *Cf.* *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (statute required the appointment of men over women as estate administrators). In *Reed*, an early review of a gender classification, the Court found that under the lesser rationality review, the state's interest in avoiding intra-family controversy and administrative ease and convenience was an arbitrary legislative choice. *Id.* at 76. Under heightened scrutiny, the state was not justified in eliminating a class of contests through such a gender classification. *Id.* at 77.

The Court has also reviewed governmental objectives *vis-a-vis* illegitimacy classifications. See *Pickett v. Brown*, 462 U.S. 1, 6 (1983) (state interest in preventing the litigation of stale or fraudulent paternity claims); *Mills v. Habluetzel*, 456 U.S. 91, 99-100 (1982) (prohibition same as in *Pickett*, except time period of one year; state interest in preventing litigation of stale or fraudulent claims); *Lalli v. Lalli*, 439 U.S. 259, 265, 271 (1978) (plurality opinion) (upholding a state statute which allowed an illegitimate child to inherit from his intestate father only if a court of competent jurisdiction had, during the father's life, entered an order declaring paternity; interest in encouraging legitimate family relationships and maintaining accurate and efficient method of disposing decedent's property); see also *Homosexuality as a Suspect Classification*, *supra* note 45, at 1287 n.14.

93. See *Rostker*, 453 U.S. at 79. In *Rostker*, the Court observed a high degree of deference to Congress in military affairs in finding that gender classification was not invidious. *Id.* at 65; *Michael M.*, 450 U.S. at 472-73 (statute sufficiently related to California's objective in preventing teenage pregnancy); *cf.* *Craig*, 429 U.S. at 200-04 (state statistics showing that males are substantially more likely to drive under the influence of alcohol held insufficient to support the conclusion that gender based discrimination closely serves to achieve the state's objectives).

The Court has also examined illegitimacy classifications. *Lalli*, 439 U.S. at 271-72, 275-76 (statute substantially related to state's interest in ensuring the accuracy and efficient disposal of an intestate decedent's property as delay and uncertainty are minimized where the rights of an illegitimate child to notice and participation is a matter of judicial record before the administration commences; fraudulent assertions of paternity are less likely to succeed if a paternity suit is brought before a court of law while the decedent is alive); *cf.* *Pickett*, 462 U.S. at 14-15 (no substantial relation between two year limitation period for bringing paternity claims and state's interest in preventing stale claims as illegitimate children who were public charges could have paternity and support suits brought at any time prior to the child's 18th birthday); *Mills*, 456 U.S. at 101 (no substantial relationship as evidence essential to paternity actions does not disappear within

tiny is given to illegitimacy<sup>94</sup> and gender<sup>95</sup> classifications. The Court affords these classes heightened scrutiny as such characterizations are generally archaic and overbroad.<sup>96</sup>

### 3. Rational Review

All other classifications are given rational basis scrutiny.<sup>97</sup> Such classifications are constitutional if the classification is rationally related<sup>98</sup> to a legitimate state interest.<sup>99</sup>

the time period).

94. *See, e.g., Pickett*, 462 U.S. at 8 (classifications based on legitimacy are subject to a heightened level of scrutiny); *Mills*, 456 U.S. at 99 (restrictions must be substantially related to a legitimate state interest); *Cf. Lalli*, 439 U.S. at 265 (illegitimacy classification upheld).

95. *See Rostker*, 453 U.S. at 69 (heightened scrutiny applied to gender based discrimination); *Michael M.*, 450 U.S. at 469, 472-73; *Craig*, 429 U.S. at 197 (gender classifications must serve important governmental objectives and must be substantially related to achievement of those objectives).

The Supreme Court's extension of heightened scrutiny to non-racial classifications such as gender has been questioned. R. BORK, *supra* note 59, at 66. Former Judge Bork has observed the equal protection clause does not forbid virtually all classifications based on gender as it forbids all classifications that disfavor racial minorities. *See id.* The ratifiers of the fourteenth amendment did not think racial and sexual groups needed special protection to the same degree. *Id.*

96. *Craig*, 429 U.S. at 198 (citing *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) (statute provided for 13 years of commissioned service for female naval officers and only nine years for males before a mandatory discharge for want of a promotion)). The Court will invalidate a classification where there is a weak relationship between gender and the characteristic or trait that gender supposedly represents. *Id.* at 199. Providing gender classifications heightened review is based on an uncertain rationale. *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). Sex frequently provides no sensible ground for differential treatment. *Id.* Former Justice Brennan would impose strict scrutiny as gender based discrimination is similar to racial discrimination. *See id.* at 686-88.

*See also Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975). In *Weinberger*, the Court found that the inconsistent payment of survivor's benefits were pernicious classifications which deprived women of protection for their families which men receive as a result of their employment. *Id.* at 645. The Constitution forbids gender based differentiation based upon a dependency assumption that when a woman dies her family will require less protection. *Id.*

97. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1954) (the general rule is that legislation is presumed valid).

98. *City of Cleburne*, 473 U.S. at 440. The state may not rely on classifications whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. *Id.* at 446.

Under this standard of review, legislation is usually found rationally related to the state interest. *See Lyng v. Castillo*, 477 U.S. 635, 642 (1986) (classification rationally related to interest in preventing fraud, mistake, and ensuring cost-effectiveness as close relatives sharing a home tend to purchase and prepare meals together while distant relatives and unrelated individuals might not); *Schweiker v. Wilson*, 450 U.S. 221, 237-38 (1981) (Congress declined to grant supplemental income benefits to otherwise eligible

mentally ill patients if they were 21 through 64 years of age and confined in public institutions not receiving Medicaid funds for their care; such allowances were afforded to inmates of public institutions that received Medicaid funds for their care). In *Schweiker*, the Court found that the exclusion was rationally related to Congress's interest in avoiding duplicative spending as Congress can legitimately assume the States would or should continue to have primary responsibility for providing equivalent funds or basic care. *Id.* at 237. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. at 176-78 (1980) (classifications rationally related to interest in the financial integrity of the Railroad Retirement system as Congress could properly conclude that persons who had actually acquired statutory entitlement to windfall benefits while still employed in the industry had a greater equitable claim to benefits than members of the class who were no longer employed when they became eligible for dual benefits); *Ambach v. Norwick*, 441 U.S. 68, 80-81 (1979) (statute rationally related to preserving the political community as it was carefully framed so as to exclude only those aliens who demonstrated their unwillingness to obtain United States citizenship; the plaintiffs and others similarly situated, in effect, chose to classify themselves).

However, legislation has been found irrational under this standard. See *City of Cleburne*, 473 U.S. at 450 (the record contained no evidence that the proposed group home posed any threat to the city's legitimate interest as applied); *Zobel v. Williams*, 457 U.S. 55, 57, 61 (1982) (Alaska statutory scheme distributed income derived from natural resources to adult citizens in varying amounts based on the length of each citizen's residence; a scheme granting greater dividends to persons for their residency during the 21 years prior to enactment does not rationally serve the state's legitimate interests); see also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (Blackmun, J., concurring, addressing the equal protection claim which was not a basis for Justice Blackmun's separate majority opinion) (state statute divided employment discrimination complaints into two groups accorded disparate treatment: claims processed within 120 days are given full consideration on the merits whereas identical claims that do not receive a hearing within 120 days are terminated). In *Logan*, Justice Blackmun observed that terminating potentially meritorious claims does not rationally serve state interests as the length of time it takes the unemployment commission to process a claim is unrelated to protecting against frivolous claims. *Id.* at 439-40.

99. *City of Cleburne*, 473 U.S. at 440. The Court has observed many legitimate state interests. See *Lyng*, 477 U.S. at 640 (preventing fraud, mistake, and ensuring cost-effectiveness); *Zobel*, 457 U.S. at 61 (interests in creating a financial incentive for individuals to establish and maintain residence in Alaska; encouraging prudent management of the fund); *Logan*, 455 U.S. at 439 (eliminating employment discrimination and protecting against unfounded charges of discrimination); *Schweiker*, 450 U.S. at 237 (avoiding spending federal resources on behalf of individuals whose care and treatment are being fully provided for by state and local government units); *Fritz*, 449 U.S. at 174 (insuring the solvency of the railroad retirement system and protecting vested benefits); *Norwick*, 441 U.S. at 74, 80 (preserving the political community (citing *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973))).

*But contra City of Cleburne*, 473 U.S. at 447 (objective of harming politically unpopular groups is not a legitimate state interest); *Zobel*, 457 U.S. at 61 (interest in apportioning benefits in recognition of undefined contributions which residents have made during their years of residency).

### C. JUDICIAL REVIEW OF CASES INVOLVING HOMOSEXUAL CLASSIFICATIONS

In *Bowers v. Hardwick*,<sup>100</sup> the plaintiff had been charged with committing sodomy<sup>101</sup> with another adult male in the bedroom of his home.<sup>102</sup> The criminal charge was dropped;<sup>103</sup> however, the plaintiff challenged the statute as violating his fourteenth amendment due process rights.<sup>104</sup> The Court found that the Constitution does not confer a right to privacy that extends to homosexual conduct;<sup>105</sup> and that homosexual activity is not a fundamental right protected by the Federal Constitution.<sup>106</sup>

100. 478 U.S. 186 (1986) (Georgia statute criminalizing sodomy challenged as applied to homosexuals).

101. *Hardwick*, 478 U.S. at 187-88. Georgia's anti-sodomy statute provided:

(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . .

(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. . . .

*Id.* at 188 n.1 (quoting GA. CODE ANN. § 16-6-2 (1984)).

102. *Id.* at 188.

103. *Id.*

104. *See id.* at 194-96 n.8. *See supra* notes 72-91 and accompanying text for discussion of fundamental rights. The plaintiff brought suit against the attorney general of Georgia charging that, as a practicing homosexual, he was in imminent danger of arrest. *Hardwick*, 478 U.S. at 188. The plaintiff claimed that homosexual activity was a private association beyond the reach of state regulation. *See id.* at 189-91.

105. *Hardwick*, 478 U.S. at 190. The Court examined the relationship between the claimed right and the general right to privacy. *See id.* at 190-91; *see supra* notes 80-88 and accompanying text for discussion of the right to privacy. None of the rights explicated in the privacy cases bear any resemblance or relation to the plaintiff's claimed right. *Hardwick*, 478 U.S. at 190-91. The privacy cases do not stand for the notion that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription. *Id.* at 191.

The Court observed that the fourteenth amendment's due process clause does have substantive content, subsuming rights not explicitly mentioned in the clause itself. *Id.* at 191. Such discovered rights are substantially protected from federal or state proscription or regulation. *Id.* However, the language of the due process clause appears to focus only on the processes by which life, liberty or property is taken. *Hardwick*, 478 U.S. at 191.

106. *See Hardwick*, 478 U.S. at 190. The Court found that the right to engage in homosexual conduct is neither deeply rooted in our Nation's history nor implicit in our concept of liberty. *Id.* at 191-92 (relying on the tests in *Palko v. Connecticut* and *Moore v. East Cleveland*). *See supra* notes 73-74 and accompanying text for discussion of these tests. The Court explained that proscriptions against homosexual conduct have ancient roots: until 1961, all 50 states outlawed sodomy. *Hardwick*, 478 U.S. at 191. *See also Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 525 (1986) [hereinafter *Survey of the Right to Privacy*].

Today, 23 states and the District of Columbia continue to provide criminal penalties

Therefore, the Court found that the presumed belief of the Georgia electorate that homosexuality is immoral was a rational basis for criminalizing such conduct.<sup>107</sup>

The federal appellate courts have generally held that gay plaintiffs are not members of a suspect or quasi-suspect class.<sup>108</sup>

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for sodomy performed in private between consenting adults: ALA. CODE § 13A-6-65(a)(3) (1989); ARIZ. REV. STAT. ANN. §§ 13-1411, 13-1412 (1989); ARK. CODE ANN. § 5-14-122 (Michie 1987); D.C. CODE ANN. § 22-3502 (1989); FLA. STAT. ANN. § 800.02 (West 1976); GA. CODE ANN. § 26-2002 (Harrison 1989); IDAHO CODE § 18-6605 (1979); KAN. STAT. ANN. § 21-3505 (1988); KY. REV. STAT. ANN. § 510.100 (Michie 1990); LA. REV. STAT. ANN. §§ 14:89, 14:89.1 (West 1986); MD. ANN. CODE art. 27, §§ 553-54 (1987); MICH. COMP. LAWS ANN. §§ 750.158, .338, .338 (a)-(b) (West 1968); MINN. STAT. ANN. § 609.293 (West 1987); MISS. CODE ANN. § 97-29-59 (1972); MO. ANN. STAT. § 566.090 (Vernon 1979); MONT. CODE ANN. § 45-5-505 (1989); NEV. REV. STAT. ANN. § 201.190 (Michie 1986); N.C. GEN. STAT. § 14-177 (1990); OKLA. STAT. ANN. tit. 21, § 886 (West 1983); R.I. GEN. LAWS § 11-10-1 (1981); S.C. CODE ANN. § 16-15-120 (Law Co-op. 1977); TENN. CODE ANN. § 39-2-612 (1982); UTAH CODE ANN. § 76-5-403 (1978). A Texas trial court recently held that Texas's sodomy statute was unconstitutional. *Morales v. Texas*, No. 461-898 (200th J. Dist. Mar. 15, 1991) (per Davis, J.; final judgment granting permanent injunction against enforcement of TEX. PENAL CODE ANN. § 21.06 (Vernon 1989)). See also London, *Gay Groups Turn to State Courts to Win Rights*, N.Y. Times, Dec. 21, 1990, at B6, col. 3.

The Court in *Hardwick* concluded that plaintiff's claim was, at best, facetious. *Hardwick*, 478 U.S. at 194. The Court also declined to take a broad view as to its authority to "discover" new fundamental rights embedded in the due process clause. *Id.* The Court observed that there has been a repudiation of much of the substantive gloss that the Court had placed on the due process clause of the fifth and fourteenth amendments. *Id.* at 194-95. The Court warned that "there should be . . . great resistance to expand the substantive reach of those clauses, particularly if it requires redefining the category of rights deemed to be fundamental." *Id.* at 195. Otherwise, the Court "necessarily takes to itself further authority to govern the country without express constitutional authority." *Id.* The Court comes nearest to illegitimacy when it creates constitutional law that has little or no cognizable roots in the language or design of the Constitution. *Id.* at 194.

107. *Hardwick*, 478 U.S. at 196. The Court observed that the law is constantly based on notions of morality. *Id.* Majoritarian sentiments about the morality of homosexuality were an adequate basis for the law. See *id.*

108. See *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) (Army reserve sergeant barred from reenlistment as she was an admitted homosexual), *cert. denied*, 110 S. Ct. 1296 (1990). In *Ben-Shalom*, the Court found that homosexuals do not constitute a suspect or quasi-suspect class. *Id.* See also *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 110 S. Ct. 1295 (1990); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987); *Baker v. Wade*, 769 F.2d 289, 291 (5th Cir. 1985) (plaintiff sought declaratory relief from a Texas statute proscribing "deviate sexual intercourse with another individual of the same sex"); *Dronenburg v. Zech*, 741 F.2d 1388, 1397-98 (D.C. Cir. 1984) (27 year old Navy petty officer discharged for engaging in homosexual conduct with a 19 year old recruit; official Navy policy called for the administrative discharge of any personnel engaging in such conduct). The court in *Dronenburg* did not determine whether homosexuals are a suspect or quasi-suspect class, but observed that the Navy simply had to prove its policy was rationally related to a permissible end. *Id.*; cf. *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984) (Army serviceman discharged after Army learned that in the enlisting process, serviceman had falsely rep-

With respect to disabilities suffered by homosexuals, the District of Columbia Circuit observed that the Supreme Court affords suspect or quasi-suspect status only when it is "plainly unjustifiable" to discriminate invidiously against a particular class.<sup>109</sup> As homosexual conduct is not a fundamental right under the due process clause and can be criminalized,<sup>110</sup> state sponsored discrimination against the gay class cannot consistently be considered invidious and unjustifiable.<sup>111</sup> The court noted that discrimination is rarely more apparent than when conduct which defines a class is made criminal.<sup>112</sup>

The circuit courts have generally recognized that homosexuals have suffered from a history of discrimination.<sup>113</sup> The Sev-

resented that he had never engaged in homosexual activities). The court found that a classification based on choice of sexual partners is not suspect; even if heightened scrutiny were required, the classification was valid because of the Army's compelling interest. *Id.*; see *infra* notes 109-26 and accompanying text for discussion of these cases.

109. *Padula*, 822 F.2d at 103 (rejected applicant for FBI special agent position challenged refusal to hire her because of her homosexuality). In *Padula*, the court observed that the Supreme Court's standard for determining whether a classification is justifiable is unclear. *Id.* See *supra* note 68 for discussion of disabilities suffered by classes seeking strict or heightened scrutiny.

110. *Padula*, 822 F.2d at 103; *Ben-Shalom*, 881 F.2d at 464; See also *Woodward*, 871 F.2d at 1076.

111. *Padula*, 822 F.2d at 103. "It would be quite anomalous [sic] . . . to declare status defined by conduct . . . as deserving of strict scrutiny under the equal protection clause." *Id.* See also *Ben-Shalom*, 881 F.2d at 464 (if homosexual conduct may constitutionally be criminalized, homosexuals are not a suspect or quasi-suspect class); *Woodward*, 871 F.2d at 1076 (after *Hardwick*, it cannot logically be asserted that discrimination against gays is constitutionally infirm); compare pre-*Hardwick* decisions: *Baker*, 769 F.2d at 292 (strong objection to homosexual conduct prevailing in Western culture for the past seven centuries); *Dronenberg*, 741 F.2d at 1391-92 (citing *Doe v. Commonwealth's Attorney for Richmond*, 425 U.S. 901 (1976) (Virginia statute criminalizing private consensual homosexual conduct upheld), *summarily aff'g* 403 F. Supp. 1199 (E.D. Va. 1975)). In *Dronenberg*, the Court observed that if a statute proscribing homosexual conduct in a civilian context is sustainable, then such a regulation is certainly sustainable in a military context. *Id.* at 1392.

The invalidation of such classifications by lower courts in the face of contrary Supreme Court precedent might imperil the lower courts' legitimacy as impartial non-political entities. See *Homosexuality as a Suspect Classification*, *supra* note 45, at 1297.

112. *Padula*, 822 F.2d at 103. See also *Woodward*, 871 F.2d at 1076 (approving the rationale of *Padula*).

113. *Ben-Shalom*, 881 F.2d at 465 (homosexuals have suffered a history of discrimination, though perhaps now less in degree); see *Padula*, 822 F.2d at 104 (homosexuality generates dislike and disapproval among many); cf. *Baker*, 769 F.2d at 292 (Western culture has strongly objected to homosexual conduct for seven centuries). Furthermore, violence against homosexuals may be increasing. See, e.g., Goleman, *Homophobia: Scientists Find Clues to its Roots*, N.Y. Times, July 19, 1990, C1, col. 1 (Science Desk); Gelman, *Bias Crimes Up Slightly This Year*, *Newsday*, May 15, 1990, at 27.

enth Circuit found that homosexuals are not politically powerless.<sup>114</sup> The Federal Circuit found that homosexuality differs fundamentally from those traits that define currently recognized suspect and quasi-suspect classes.<sup>115</sup> Homosexuality is primarily a behavioral trait<sup>116</sup> whereas blacks and women exhibit immutable characteristics.<sup>117</sup>

The circuit courts that have reviewed the status of gay classifications have uniformly held that classifications based on sexual preference are reviewed under a rational basis scrutiny.<sup>118</sup> A

114. *Ben-Shalom*, 881 F.2d at 466 (homosexuals have proven that they are not without growing political power).

115. *Woodward*, 871 F.2d at 1076 (naval reservist discharged from active duty because of acknowledged homosexuality).

116. *Id.* In *Woodward*, the court recognized that suspect classes have immutable characteristics whereas homosexuality is behavioral in nature. *Id.* (citing *Bowen v. Gilliard*, 483 U.S. 587 (1987) (observing that a class is not suspect or quasi-suspect if its members do not exhibit obvious, immutable, or distinguishing characteristics)). See *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984) (plaintiff argued that homosexuality is an immutable characteristic; the court observed that classifications based on choice of sexual partners is not suspect); cf. *Ben-Shalom*, 881 F.2d at 464 (FBI agent's declaration that she was a lesbian can be reasonably viewed as reliable evidence of a desire and propensity to engage in such conduct; exceptions to such an assumption will arise, but such an admission is compelling evidence that plaintiff has in the past and is likely to again engage in such conduct); *Padula*, 822 F.2d at 102 (plaintiff did not claim that she did not engage in homosexual conduct; conduct was presumed). In *Padula*, the court did not address whether homosexuals who do not engage in homosexual activity are members of a suspect or quasi-suspect class. *Id.*

Some authorities, however, consider homosexuality to be an immutable characteristic or, if not immutable, at least extremely difficult to alter. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1616 (2d ed. 1988). See *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1, 34 (D.C. 1987) (private Catholic university refused to recognize and financially support homosexual student organization; there is no scientific agreement as to the origins of sexual orientation although sexual orientation may have multiple roots). In *Gay Rights Coalition*, the court observed that it is generally agreed that individual sexual orientation develops at least by adolescence. *Id.* (citing A. BELL, *SEXUAL PREFERENCE - ITS DEVELOPMENT IN MEN AND WOMEN* 186-87, 211, 222 (1981)). Homosexuality is as deeply ingrained as heterosexuality. *Id.* (A. BELL, *supra*, at 190, 211, 222). There is no reliable evidence that adult homosexual orientation can be "cured." *Id.* (A. BELL, *supra*, at 217). See also *supra* note 15.

117. *Woodward*, 871 F.2d at 1076. The Court observed that the conduct or behavior of members of recognized suspect or quasi-suspect class has no relevance to the identification of those groups. *Id.* See *Padula*, 822 F.2d at 102 (the immutability of the group's identifying trait is also to be considered); *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270, 1273 (10th Cir. 1984) (statute provided for the dismissal or suspension of teachers for engaging in "public homosexual conduct"; classification based on choice of sexual partners is not suspect as "only four members of the Supreme Court have viewed gender as a suspect classification"), *aff'd*, 470 U.S. 903 (1985).

118. See *Ben-Shalom*, 881 F.2d at 464 (deferential standard of review held applicable); *Woodward*, 871 F.2d at 1076 (Navy need not have a compelling interest to justify

number of legitimate governmental interests have been observed. The Federal Circuit found that the Navy's interest in maintaining order, morale, discipline, and mutual trust and confidence among service members was legitimate.<sup>119</sup> The District of Columbia Circuit found that the FBI's need to have its agents able to work in all fifty states<sup>120</sup> and its need to maintain security were also legitimate interests.<sup>121</sup> The Fifth Circuit observed that the implementing of morality is a permissible state interest.<sup>122</sup>

The same courts have given substantial deference to the parties implementing these classifications in finding a rational relationship to a legitimate state interest.<sup>123</sup> For example, the

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discrimination against gay plaintiff); *Padula*, 822 F.2d at 104 (government laws or practices must, if challenged, pass the rational basis test); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (standard of review is whether the statute is rationally related to a legitimate state end); *Dronenburg v. Zech*, 741 F.2d 1388, 1397-98 (D.C. Cir. 1984) (Navy's policy must be rationally related to a permissible end); cf. *Rich*, 735 F.2d at 1229 (declined to determine the level of scrutiny as Army's interest compelling); see also *Homosexuality as a Suspect Classification*, *supra* note 45, at 1287.

119. *Woodward*, 871 F.2d at 1076-77 (citing *Dronenburg*, 741 F.2d at 1398). Other legitimate interests include insuring the integrity of the system of rank and command; and recruiting and retaining members of the naval services. *Id.* The court upheld the claims court grant of summary judgment to the Navy. *Id.* See also *Ben-Shalom*, 881 F.2d 465; *Rich*, 735 F.2d at 1229.

120. *Padula*, 822 F.2d at 104. The Court noted that the FBI is a national law enforcement agency. *Id.*

121. *Id.* FBI agents perform counterintelligence duties that involve highly classified matters relating to national security. *Id.*

122. *Baker*, 769 F.2d at 292.

123. See *Padula*, 822 F.2d at 101, 104 (FBI policy considered an applicant's sexual orientation as being relevant to employment; sexual orientation may affect an employee's susceptibility to compromise or breach of trust). In *Padula*, the Court found that excluding homosexuals from the FBI was rationally related to protecting security and maintaining a flexible work-force. See *id.* The criminalization of homosexual conduct paired with general public disapproval of homosexuality exposes many homosexuals, even "open" homosexuals, to risks of blackmail; homosexuals may want to protect their partners if not themselves. See *id.*; cf. *Doe v. Casey*, 796 F.2d 1508, 1512 (D.C. Cir. 1986) (CIA employee was discharged after he voluntarily admitted to a superior that he was a homosexual). In *Doe*, the District of Columbia Circuit recognized that an agency (the CIA) promulgating a regulation would have to justify why such a classification was warranted as being "necessary or advisable in the interests of the United States" — the standard required under the governing statute. *Id.* at 1522. The court reversed and remanded the district court's grant of summary judgment as the basis for the CIA's discharge was unclear. *Id.* at 1521.

See also *Baker*, 769 F.2d at 292. In *Baker*, the court found that the criminalization of homosexual conduct was related to the permissible state interest of implementing morality, as Western culture has strongly objected to such conduct for the past seven centuries. See *id.* The Fifth Circuit's *en banc* opinion reversed the district court's ruling that

Federal Circuit observed that the military is a unique, specialized society<sup>124</sup> and found that the policy of discharging all homosexuals was rationally related to the Navy's interests.<sup>125</sup> Further, special deference is afforded to the military in matters involving decisions on morale, discipline, composition and the like.<sup>126</sup>

#### IV. THE COURT'S ANALYSIS

In *High Tech Gays v. Defense Industrial Security Clearance Office*,<sup>127</sup> the Ninth Circuit held that gays are not a suspect or quasi-suspect class; thus the proper standard for reviewing their equal protection claim was the rational basis standard.<sup>128</sup> The court found that DoD regulations *vis-a-vis* investigations of homosexuals were rationally related to permissible ends.<sup>129</sup> The equal protection component of the fifth amendment's due process clause was not violated.<sup>130</sup>

TEX. PENAL CODE ANN. § 21.06 (Vernon 1989) was unconstitutional. *Id.* at 293.

124. *Woodward v. United States*, 871 F.2d 1068, 1077 (Fed. Cir. 1989), *cert denied*, 110 S. Ct. 1295 (1990).

125. *Id.* at 1076-77 (relying on the rationale in *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984)). In *Dronenburg*, the court observed that legislation may implement morality. *Dronenburg*, 741 F.2d at 1398. But it may be argued that naval regulations, unlike legislative acts, must be rationally related not to morality for its own sake but to a further end which the Navy is entitled to pursue because of the Navy's assigned function. *Id.*

The court observed that the effects of homosexual conduct within a naval or military unit are almost certain to be harmful to morale and discipline. *Id.* Such conduct may make personal dealings uncomfortable, enhance the possibility of homosexual seduction, raise questions about the even-handedness of superiors' dealings with lower ranks, and generate dislike and disapproval among many who find homosexuality morally offensive. *Id.* The court observed that the Navy is not required to produce social science data or results of controlled experiments to prove what common sense and common experience demonstrate. *Id.* Requiring discharge for homosexual conduct is a rational means of achieving the Navy's legitimate interests. *Id.*

126. *Woodward*, 871 F.2d at 1077 (noting that a court should not substitute its view for the professional judgment of the Armed Forces).

127. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir.), *reh'g en banc denied*, 909 F.2d 375 (1990). The Ninth Circuit reviewed *denovo* the district court's grant of summary judgment to the plaintiffs. *Id.* at 570. *See High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1379 (N.D. Cal. 1987). *Denovo* is defined: anew; afresh; a second time. BLACK'S LAW DICTIONARY 392 (5th ed. 1981).

128. *High Tech Gays*, 895 F.2d at 571.

129. *Id.* at 576.

130. *Id.* at 575-76. The court observed the general rule that "legislation . . . will be sustained if the classification drawn by the statute is rationally related to a legitimate [governmental] interest." *Id.* at 575 (citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985)).

The court first acknowledged that the plaintiffs were entitled to equal protection under the “equal protection component” of the fifth amendment’s due process clause.<sup>131</sup> However, the court observed that under *Bowers v. Hardwick*, the fifth amendment’s due process clause does not afford homosexuals a fundamental right to engage in homosexual conduct.<sup>132</sup> Therefore, the court determined that it would be incongruous to find a fundamental right of homosexual conduct under equal protection analysis,<sup>133</sup> as equal protection guarantees provided by the fifth amendment are simply a component of the fifth amendment’s due process clause.<sup>134</sup> Accordingly, the court found that the plaintiffs were not entitled to heightened scrutiny under the “impingement of a fundamental right” prong of equal protection claims.<sup>135</sup>

The court proceeded to review whether homosexuals constitute a suspect or quasi-suspect class, which would require appli-

131. *Id.* at 570. The Ninth Circuit analyzed the plaintiffs’ claim as if the court was analyzing a fourteenth amendment equal protection claim. *Id.* at 570-71.

132. *Id.* (citing *Bowers v. Hardwick*, 478 U.S. 186, 194-96 (1986)). Specifically, homosexual sodomy can be criminalized without violating due process. *Id.* (citing *Hardwick*, 478 U.S. at 194-96).

133. *Id.* at 571. The court noted *Hardwick’s* admonition that there should be great resistance to expanding the substantive reach of the due process clause. *Id.* See *supra* note 106.

The Ninth Circuit observed that the Supreme Court has never held homosexuality to a heightened standard of review. *Id.* at 572. However, prior decisions of the Ninth Circuit had so held. *Id.* at 572-73 (citing *Hatheway v. Secretary of Army*, 641 F.2d 1376, 1378 (9th Cir.) (gay Army lieutenant convicted of sodomy by a general court-martial under Article 125 of the Uniform Code of Military Justice), *cert. denied*, 454 U.S. 864 (1981) and *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980) (Navy regulations prohibited Navy personnel from engaging in homosexual acts; following administrative discharge and review by the Secretary of the Navy for admitting to homosexual acts, enlisted personnel challenged constitutionality of regulations and proceedings)). In *Hatheway*, the court applied heightened scrutiny review as the “classification penalize[d] the exercise of a fundamental right.” *Hatheway*, 641 F.2d at 1382, 1382 n.6. The court in *Hatheway* did not reach the question of whether homosexuals were a suspect or quasi-suspect class. *Id.* In *Beller*, the court found that, under a substantive due process claim, the classification should be reviewed under a standard somewhere between the rational relation and strict scrutiny standards. *Beller*, 632 F.2d at 807-09.

These pre-*Hardwick* decisions were based on Supreme Court precedent which, at the time, suggested that some forms of government regulation of private consensual homosexual behavior may face substantial constitutional challenge. *High Tech Gays*, 895 F.2d at 572 n.7 (citing *Beller*, 632 F.2d at 810). These prior decisions were overruled by *Hardwick*. *Id.* at 572. Therefore, neither *Beller* nor *Hatheway* is binding authority regarding heightened scrutiny for classifications based on homosexuality. *Id.*

134. *High Tech Gays*, 895 F.2d. at 571.

135. *Id.*

cation of a heightened level of scrutiny.<sup>136</sup> Initially, the court observed that homosexuals cannot be accorded suspect or quasi-suspect status as homosexual conduct can be criminalized.<sup>137</sup> Further relying, in part, on the test for suspectness articulated in *San Antonio School District v. Rodriguez*,<sup>138</sup> the court found that homosexuals have suffered a history of discrimination.<sup>139</sup> However, homosexuals have political clout as state legislation has addressed discrimination against homosexuals.<sup>140</sup>

The court also observed that homosexuality is not an immutable characteristic but is behavioral.<sup>141</sup> Therefore, homosexuality is fundamentally different from the traits associated with race, gender, or alienage.<sup>142</sup> Thus, the Ninth Circuit found that homosexuals do not qualify as a suspect or quasi-suspect class<sup>143</sup> and regulations which discriminate against gays are reviewed using rational basis scrutiny.<sup>144</sup>

Applying rational review, the court found that ensuring national security was a permissible goal for the DoD.<sup>145</sup> Further, the DoD's investigatory policy<sup>146</sup> and resulting procedures *vis-a-*

136. *Id.* at 571-74.

137. *Id.* at 571.

138. *Id.* at 573 (citing *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987) (the "saddled with disabilities" test was not addressed)); *See supra* notes 65-71 and accompanying text for discussion of *Rodriguez*.

139. *High Tech Gays*, 895 F.2d at 573.

140. *Id.* at 574 n.10 (citing WIS. STAT. ANN. §§ 111.31-395 (West 1988) (barring employment discrimination on the basis of sexual orientation); CAL. CIV. CODE § 51.7 (West 1984) (barring violence against persons or property based on sexual orientation); MICH. COMP. LAWS ANN. § 333.20201(2)(a) (West 1984) (barring denial of care in health facilities on the basis of sexual orientation)).

141. *High Tech Gays*, 895 F.2d at 573.

142. *Id.* The behavior of already recognized suspect or quasi-suspect classes is irrelevant to their identification. *Id.* at 573-74.

143. *Id.* at 571, 574.

144. *Id.* at 570-71.

145. *See id.* at 578 (citing *Department of Navy v. Egan*, 484 U.S. 518, 529 (1988) (employee was removed for cause from a submarine facility after the Navy denied him a required security clearance; on appeal to the Merit Systems Protection Board, the Board, in reversing the Navy's decision, found that it had authority to review the merits of the underlying security clearance determination and that the Navy had failed to show its determination was reasonable)). In *Egan*, the Court found that both the DoD and agency heads have a legitimate interest in national security and in protecting classified information. *See Egan*, 484 U.S. at 528-29.

146. *High Tech Gays*, 895 F.2d at 576-77. The court observed that the DoD's policy was essentially as follows: The head of a government agency who must bear the responsibility for protecting classified information in his custody should have the final say in

*vis* homosexuals<sup>147</sup> were rationally related to this end. The DoD proffered sufficient evidence<sup>148</sup> that hostile intelligence services target homosexuals to obtain classified information.<sup>149</sup> The

deciding whether to repose his trust in an employee who has access to such information. *Id.* at 578 (citing *Egan*, 484 U.S. at 529). Consequently, those with sufficient expertise must try and predict who is vulnerable to counterintelligence efforts. *See id.* at 577. The court found that in predicting who is vulnerable to foreign intelligence activities, it is rational to try and determine what groups will be targeted. *See id.* Once it is determined who is targeted, applications for security clearances are designed to elicit the information necessary for determining if the applicant has characteristics of the targeted groups. *See id.* Expanded investigations of applicants falling within a targeted group help determine whether they are susceptible to coercion or vulnerable to hostile intelligence efforts. *Id.* The counterintelligence service's reasons for targeting the group, even if based on continuing ignorance or prejudice, are irrelevant. *Id.* at 578.

The court recognized that attempting to define an individual's future actions and the actions of outside and unknown influences is an inexact science at best. *Id.* at 577-78. A court must afford special deference to the executive branch when adjudicating matters involving their decisions on protecting classified information. *Id.* at 576.

The DoD's other justifications for its policies, that homosexuals may be emotionally unstable and that homosexual conduct may be criminal, were not addressed. *Id.* at 578 n.13. The Ninth Circuit deemed it unnecessary to do so as the targeting of homosexuals by foreign intelligence agencies is sufficient justification for the expanded investigations. *Id.*

147. *See supra* notes 38-41 and accompanying text for the DoD's policies relating to homosexual applicants. As discussed *supra* note 146, expanded investigations help determine if the applicant is susceptible to coercion, blackmail, or vulnerable to counterintelligence efforts. *High Tech Gays*, 895 F.2d at 576.

148. *High Tech Gays*, 895 F.2d at 576 (discussing the cross-motions for summary judgment). The court found that the DoD had met its burden of persuasion. *Id.*

On a motion for summary judgment, the moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) (nonprofit corporation, a "citizens' lobby," alleged that certain statements in petitioner's magazine were false and derogatory). Once the moving party satisfies this burden, the opponent must marshal specific facts showing that a genuine issue for trial remains. FED. R. CIV. P. 56(e).

If the nonmoving party has the burden of persuasion at trial, the party moving for summary judgment may satisfy its burden of production under Rule 56 by submitting affirmative evidence negating an essential element of the nonmoving party's claim or by demonstrating to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986) (wrongful death action alleged to have resulted from exposure to asbestos products manufactured by defendants).

In a review of a grant of summary judgment, an appellate court views the materials on file in the light most favorable to the nonmoving party. *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986) (California Franchise Tax Board served withholding notices on an Employee Welfare Benefit Plan in an attempt to collect delinquent personal income taxes of fund participants; the Plan sought declaratory judgment prohibiting the service of these notices as the Employee Retirement Income Security Act of 1974 preempted the statute under which the Franchise Tax Board served the notices).

149. *High Tech Gays*, 895 F.2d at 576-77. *See supra* note 15 enumerating the DoD's proffered evidence demonstrating that homosexuals are targeted by hostile intelligence agencies.

plaintiffs failed to show that the DoD did not have a rational basis for its expanded security investigations of homosexuals.<sup>150</sup> Therefore, the Ninth Circuit reversed the district court's order granting summary judgment to the plaintiffs and remanded to the district court for entry of summary judgment in favor of the DoD.<sup>151</sup>

## V. CRITIQUE

In *High Tech Gays*,<sup>152</sup> the Ninth Circuit found that homosexual conduct was not a fundamental right under the equal protection component of the fifth amendment's due process clause,<sup>153</sup> which was consistent with Supreme Court precedent established in *Bowers v. Hardwick*. In the instant case, the Ninth Circuit properly explained that it is not possible to infer that the equal protection component of the fifth amendment's

150. *High Tech Gays*, 895 F.2d at 575. The Ninth Circuit observed that plaintiffs' proffered evidence did not raise genuine issues as to any fact material to the alleged constitutional violation but merely raise an issue as to the alleged irrationality of the KGB's opinion regarding homosexual behavior. *Id.* at 578. The plaintiff's evidence did not adequately address whether homosexuals, in fact, are targeted by counterintelligence agencies. *Id.*; see *supra* note 15 enumerating plaintiff's proffered evidence demonstrating that the DoD's policies are irrational. For example, the Senate subcommittee hearings cited by the plaintiffs involved a limited number of cases and was not a study of all significant cases involving homosexuals. *High Tech Gays*, 895 F.2d at 575. Further, one of the cases pointed out that homosexuals are targeted by the KGB. *Id.* The court dismissed the depositions of Richard Olinger because of the limited agenda of the conferences he attended. *Id.* at 575-76.

The court dismissed the plaintiff's first amendment claim as the plaintiffs did not allege that any gay person had been denied a security clearance or had been subjected to an expanded investigation based solely, as a distinct abstract ground, on membership in a gay organization. *Id.* at 580.

151. *High Tech Gays*, 895 F.2d at 581.

152. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir.), *reh'g en banc denied*, 909 F.2d 375 (1990).

153. *High Tech Gays*, 895 F.2d at 571. See *supra* note 110-11 and accompanying text for appellate decisions agreeing that homosexual sodomy is not a fundamental right.

The Ninth Circuit appeared to heed the Supreme Court's warning in *Hardwick*: that court's are most vulnerable and come nearest to illegitimacy when they deal with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution, especially where they redefine the category of rights deemed to be fundamental. *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986). See also *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 110 S. Ct. 1295 (1990). The court in *Woodward* observed that "[i]f it is in any degree doubtful that the Supreme Court should freely create new constitutional rights, . . . it is certain that lower courts should not do so." *Id.* at 1075 (emphasis added) (citing *Dronenburg v. Zech*, 741 F.2d 1388, 1296 (D.C. Cir. 1984)). See *supra* notes 108-26 and accompanying text for discussion of appellate court decisions.

due process clause could independently protect homosexual activity when the same due process clause itself does not recognize homosexuality as a fundamental right.<sup>154</sup>

The Ninth Circuit aligned itself with other circuits in finding that gays do not constitute a suspect or quasi-suspect class.<sup>155</sup> The court recognized the contradiction that would arise were a heightened class status granted: a state could constitutionally criminalize homosexual sodomy<sup>156</sup> while state courts adjudicating equal protection claims would be compelled to invalidate such classifications.<sup>157</sup> The possibility of such an implausible contradiction was sufficient to deny heightened scrutiny to homosexuals.

Through application of the *Rodriguez* tests,<sup>158</sup> the Ninth Circuit determined that it would have denied heightened scrutiny irrespective of *Hardwick*. The court conceded that homosexuals have suffered a history of discrimination,<sup>159</sup> but relied in part on gay's political clout in denying them heightened scrutiny.

154. See *supra* notes 131-35 and accompanying text; notes 100-07 and accompanying text for discussion of *Bowers v. Hardwick*. This finding was also consistent with and explained the post-*Hardwick* decisions by other circuits. See *supra* notes 109-12 and accompanying text. Other circuits have simply noted that as homosexual conduct can be criminalized, homosexuals cannot be afforded heightened scrutiny. *Id.*

The Ninth Circuit appeared to reject the district court's holding that some forms of homosexual conduct are protected as fundamental rights under the general right of privacy. See *High Tech Gays*, 895 F.2d at 571; see *supra* note 18 and accompanying text.

155. See *supra* note 108 and accompanying text.

156. See *supra* notes 100-07 and accompanying text for discussion of *Bowers v. Hardwick*.

157. See *supra* notes 110-12 and accompanying text for background discussion of this recognized incongruity.

158. See *supra* notes 65-71 and accompanying text; notes 138-41 and accompanying text for the Ninth Circuit's application of *Rodriguez*.

159. See *supra* note 138-39 and accompanying text. This finding was consistent with findings of other courts that have dealt with the issue. See *supra* note 113 and accompanying text. Such a proposition hardly needs further discussion except to make a few brief observations: The courts and the legislatures generally do not look favorably upon gay interests. See *Survey of the Right to Privacy*, *supra* note 106, at 524. See, e.g., *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270 (10th Cir. 1984) (state statute providing for the dismissal or suspension of teachers for engaging in public homosexual conduct upheld), *aff'd*, 470 U.S. 903 (1985).

Further, as of this writing, private consensual sodomy is still a criminal offense in 23 states and the District of Columbia. See *supra* note 106 for states still outlawing consensual adult sodomy. Finally, violence against gays appears to be increasing. See *supra* note 113.

tiny.<sup>160</sup> However, women have been afforded heightened status despite the fact that they have more political power than gays.<sup>161</sup> This suggests that, at least in the context of homosexual classifications, there is no correlation between lack of political power and whether a class is afforded heightened scrutiny.<sup>162</sup>

Further, the Ninth Circuit's broad observation that homosexuality is behavioral and not immutable is questionable.<sup>163</sup> While consistent with circuits that have considered the issue,<sup>164</sup> this observation is contrary to medical and psychological research which suggests that sexual preference may be established at an early age.<sup>165</sup> As some homosexuals may be born gay or develop their sexual orientation during their formative years, the court made too broad a conclusion in declaring that homosexual-

160. See *supra* note 140 and accompanying text. The court recognized that political powerlessness is a characteristic of prior classes who had been granted heightened scrutiny. *Id.*

161. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 909 F.2d 375, 378 (9th Cir. 1990) (Canby, J., dissenting) (homosexuals are regarded by the national parties as "political pariahs") *denying reh'g to* 895 F.2d 563. Judge Canby observed that "[o]ne can easily find examples of major political parties openly tailoring their position to appeal to black voters, and to female voters. One cannot find comparable examples of appeals to homosexual voters." *Id.*

162. Further, the general problem with this part of the *Rodriguez* test is that it is malleable; any court could likely point to a group as having political power and thus disqualify them from suspect class status. See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 466 (1954) (majority found that retarded people were not politically powerless) (Brennan, J., observed that the only discrimination the Court would remedy is the discrimination they alone were "perspicacious enough to see").

163. See *supra* note 141 and accompanying text.

164. See *supra* notes 116-17 and accompanying text. Whether the disposition to homosexuality is an acquired behavioral trait or an inborn (and in a sense, an immutable characteristic), the appellate courts' general approach has been to focus on the outward behavioral manifestations of homosexual orientation regardless of, what may be termed, the "cause" of homosexuality. *Id.*

As the court observed in *Ben-Shalom*, the classifications do not classify based merely upon *status* as a homosexual, but upon a reasonable inference about probable conduct in the past and future. *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), *cert denied*, 110 S. Ct. 1296 (1990). The government does not have to ignore the practical reality of the situation, nor be required to police soldiers' personal relationships for evidence of homosexual conduct in order to enforce its regulations. See *id.*

The Ninth Circuit did not directly address the district court's conclusion that the statute impinged upon homosexual orientation. See *supra* note 18. Perhaps the court did not address the scope of the classification as the DoD policy was rational regardless of whether the classification affected homosexual orientation. However, the court's observation that homosexuality is behavioral indicates a likely rejection of the district court's finding; the classifications simply did not impinge upon what may be termed "homosexual orientation." See *supra* note 141 and accompanying text.

165. See *supra* note 116 and accompanying text.

ity is behavioral and not immutable.

It appears that gays, or at least some classes of gays, would substantially satisfy the requirements for heightened class status if the court were required to rely solely on the *Rodriguez* tests. Nonetheless, the court did arrive at the proper finding *vis-a-vis* class status: the *Rodriguez* tests appear to be irrelevant where the Supreme Court has held that states can engage in the ultimate discrimination — criminalizing the particular conduct that defines the class. As a state can criminalize homosexual conduct without violating the due process clause, it is but an intellectual exercise in the review of similar classifications to determine whether homosexuality is an innate characteristic or whether homosexuals have political power.<sup>166</sup> Irrespective of the proper answer to these issues, the Supreme Court has found that such discrimination is constitutional.<sup>167</sup> In the instant case, the alleged discrimination was considerably less severe than criminalizing homosexual conduct. Therefore, the Ninth Circuit should have recognized that *Rodriguez* was inapplicable in reaching its decision to deny heightened scrutiny to homosexuals.

#### The Ninth Circuit's brief recognition of the DoD's interest

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166. The post-*Bowers* federal appellate court opinions may have implicitly recognized this proposition. See *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-66 (7th Cir. 1989) (if homosexual conduct may constitutionally be criminalized, then homosexuals are not entitled to greater than rational basis scrutiny), *cert. denied*, 110 S. Ct. 1296 (1990); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (agreeing with the rationale in *Padula v. Webster*), *cert. denied*, 110 S. Ct. 1295 (1990); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (if the Supreme Court is unwilling to invalidate laws that criminalize the behavior that defines the class, it is not an option for a lower court to conclude that state sponsored discrimination against the class is invidious). However, these decisions also applied various parts of the *Rodriguez* tests. See *supra* notes 114-17.

Alternatively, *High Tech Gays* and the other federal appellate court decisions could signify a general decline in the utility of the *Rodriguez* tests. With respect to homosexual classifications, it is unclear how much weight the courts ultimately afford application of the *Rodriguez* tests.

167. See *supra* notes 104-11 and accompanying text for a discussion of *Bowers v. Hardwick*. While the Court in *Hardwick* did not address the issue of *why* gays engage in such conduct, the Court impliedly found that it does not matter as long as a state has a rational basis for the law. The presumed beliefs of the majority of the Georgia electorate that homosexuality is immoral was sufficient. Had the Court thought immutability important, it likely would have addressed the issue as anti-sodomy statutes do not make exceptions for those immutably disposed to homosexuality.

Likewise, the amount of political power that gays have was also irrelevant to the Court's holdings in *Hardwick*. Therefore, the question of whether homosexuals have political clout is only important to the extent gays can assert their interests in the state, local and federal legislatures.

in national security as compelling is consistent with other circuits.<sup>168</sup> Finding that being the rationale for the classification was sound is consistent with the outcomes in other circuits, a seeming *fait accompli*<sup>169</sup> although some courts have warned against thinking so.<sup>170</sup>

## VI. CONCLUSION

The Ninth Circuit placed itself in accord with other circuits with respect to the class status of homosexuals for equal protection purposes. The rationality standard is appropriate as there is no constitutional basis for affording heightened scrutiny. Gays will have to rely upon the legislature to advance their interests as classifications affecting them will usually withstand the rational review standard as evidenced by this ruling.

Having decided that the lowest standard is constitutionally required, there remains the question as to the overall merit of the national security policy.<sup>171</sup> As the Ninth Circuit recognized in *Beller v. Middendorf*:

Upholding the challenged regulations as constitutional is distinct from a statement that they are

168. See *supra* note 145 and accompanying text. It is beyond question that the government has a substantial interest in national security.

169. See *supra* notes 146-50 and accompanying text. As the plaintiffs failed to prove homosexuals were not targeted, their only alternative was to prove the articulated policy erroneous. They had to show that the DoD's policy was not rationally related to its interests or that there was some fallacy in the DoD's justification. See *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 576 (9th Cir. 1990) (discussing the DoD's two-step analysis).

For example, the court implied that the DoD, in predicting who is vulnerable to foreign intelligence activities, rationally tries to determine who is targeted. *Id.* at 577. Any plaintiff challenging DoD classifications would have difficulty rebutting the contention that it is rational to try and determine who is targeted. The consequences of such a rebuttal would likely mean that the government could not use any information received regarding groups targeted by such foreign agencies.

As the activity of intelligence networks in east-block countries declines, the DoD's rationale for expanded investigations may decline in validity or importance; however, intelligence activities by foreign intelligence services may be expanding. See, e.g., *CIA Chief Says Soviet Spying is on Rise*, *Los Angeles Times*, Nov. 30, 1989, at 6, pt. A.

170. See, e.g., *Padula v. Webster*, 822 F.2d 97, 103-04 (D.C. Cir. 1987) (simply because homosexual conduct can be criminalized does not mean that any negative state action is constitutionally authorized; laws or government practices must be justified in terms of some government purpose).

171. See *supra* notes 35-41 for discussion of the DoD's investigatory policy *vis-a-vis* homosexuals.

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wise. The latter judgment is neither implicit in our decision nor within our province to make. . . .<sup>172</sup>

*Thomas A. Johnson\**

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172. 632 F.2d 788, 812 (9th Cir. 1980) (Kennedy, J.) (*See supra* note 133). An analysis of whether the regulations in question strike the proper balance between the need to protect national security and the need to prevent unwarranted infringements on individual liberties is beyond the scope of this Note.

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