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Exorcising the Ghosts of Bowers v. Hardwick: Uprooting Invalid Precedents Symposium: The Evolution of Academic Discourse on Sexual Orientation and the Law: A Festschrift in Honor of Jeffrey Sherman

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EXORCISING THE GHOSTS OF *BOWERS V. HARDWICK*: UPROOTING INVALID PRECEDENTS

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> Plaintiff is not a member of a protected class. "To state a claim under 42 U.S.C. § 1983[1] for a violation of the Equal Protection Clause of the Fourteenth Amendment a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." *Barren*, 152 F.3d at 1194. Homosexuals are not a protected class in the Ninth Circuit. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573–74 (9th Cir. 1990).[2]
>
> Plaintiff's only cited "class-based" characteristic is his sexual orientation. . . . The Court is unaware of any authority for the proposition that sexual orientation is a classification protected under § 1985(3) . . . .[3] Be-

* Professor, New York Law School. Stephen Woods, my student research assistant, provided valuable assistance in the preparation of this paper. A faculty research grant from New York Law School supported work on this paper during the summer of 2008.

1. The full text reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (2006).

2. Sotelo v. Stewart, No. CV 03-1668-PHX-NVW, 2005 WL 2571606, at *2 (D. Ariz. Oct. 11, 2005). The pro se plaintiff, an Arizona state prison inmate described by the court as "a homosexual with very feminine characteristics," claimed to have suffered "sexual assaults, discrimination and death threats" by fellow prisoners but to have been denied protective custody by prison officials because of his sexual orientation, and sought relief under the Equal Protection Clause, invoking 42 U.S.C. § 1983. *Id.*, at *1. The court dismissed his claim because "homosexuals are not a protected class in the Ninth Circuit." *Id*, at *2. *Accord* Matthews v. Endel, No. 306-CV-00401-RLH-VPC, 2009 WL 44001, at *4 (D. Nev. Jan. 5, 2009) (dismissing prisoner equal protection claim, stating, "Because homosexuals are not a protected class under the law, Matthews' equal protection claim is proper only if he can show that Defendants' decision to send him to administrative segregation was not rationally related to a legitimate penological interest.").

3. The full text reads:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States;

> cause Plaintiff's factual allegations cannot plausibly support a claim to relief under the Constitution . . . , his claims against Defendant Country Boy shall be dismissed.[4]

> *Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.[5]

I. THE PROBLEM: THE GHOSTS OF *BOWERS V. HARDWICK*

In *Bowers v. Hardwick*,[6] the Supreme Court ruled in 1987 that the "right of privacy" that the Court had previously identified as part of substantive due process under the Fourteenth Amendment did not shelter the private, consensual sexual activity of gay[7] adults from prosecution under a Georgia criminal statute, because no fundamental right was at stake and the state legislature's inferred moral disapproval of homosexuality provided a rational basis for the law.[8] Although the Court limited its analysis to the Due Process Clause, many lower federal courts subsequently ruled that if there was no constitutional protection for the sexual activities of gay people, then governmental discrimination against gay people, a "class" defined

> or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3) (2006).

4. Murray v. State of Oklahoma, No. CIV-07-1404-C 2008 WL 740338, at * 7(W.D. Okla. Mar. 17, 2008). The pro se plaintiff claimed that a store manager and the police had conspired to violate his civil rights due to his sexual orientation, and sued under 42 U.S.C. 1983. The court found that the store was a private entity, and analyzed the claim against the store under 42 U.S.C. § 1985(3). The court dismissed the claim based, in part, on the conclusion that sexual orientation is not a classification "protected" under Section 1985(3). Protection under Section 1985(3), part of the Reconstruction-era Ku Klux Klan Act, generally applies to conspiracies to discriminate on the basis of race or other "suspect classifications" by private actors. In another example, the Denver Post reported on September 14, 2008, that a federal district court rejected an equal protection claim from a gay male victim of a bias assault who was challenging the refusal of a police officer to press charges against the perpetrator, on the basis that gay men are not a protected class under the Constitution." S. Greene, *Gay Attack Swept Under the Shrug*, DENV. POST, Sept. 14, 2008, at B1. In a similar case arising in Rochester, New York, the court confidently asserted, "Sexual Orientation is not a protected category under Section 1985." Doe v. Green, No. 07-CV-6538L, 2009 WL 37179, at *13 (W.D.N.Y. Jan. 6, 2009).

5. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

6. 478 U.S. 186 (1986).

7. The word "gay" is used throughout this article to refer to men and women whose sexual orientation is towards persons of the same sex.

8. *Bowers*, 478 U.S. at 196.

according to their sexuality, could not be unconstitutional either, whether it was challenged under the Fourteenth Amendment Equal Protection Clause (discrimination by state or local government entities) or the Fifth Amendment Due Process Clause (federal government entities).[9] The result was a number of federal circuit court decisions holding that equal protection claims by gay litigants would merit only the least demanding rationality review.

In 1996, however, the Supreme Court used the Equal Protection Clause in *Romer v. Evans*[10] to invalidate a Colorado constitutional amendment that prohibited the state from redressing discrimination claims by gay people. The Court implicitly refused to find that inferred moral disapproval by Colorado voters could justify the measure, and explicitly found all the arguments raised by the state to justify the provision to be implausible. Although the *Romer* opinion did not explicitly address the question whether sexual orientation is a "suspect classification,"[11] having concluded that the challenged amendment "defied" conventional Equal Protection analysis and was effectively a per se violation of equal protection, many subsequent lower federal court decisions have read Romer to have held that sexual orientation is not a suspect or quasi-suspect classification. Thus, the Court held that the usual very deferential "rational basis" test is the appropriate test for challenges to government policies that discriminate against gay people.[12] The *Romer* Court did not discuss *Bowers*, but Justice Scalia's

9. High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989); Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987). This line of doctrine relied on both aspects of the Bowers analysis: that no fundamental right was involved, and that legislative moral disapproval supplies a rational basis for legislation that disadvantages people on the basis of their sexuality.

10. 517 U.S. 620 (1996).

11. One of the problems in writing about this subject is the courts' inconsistent use of terminology. The phrases "suspect class" and "protected class" as well as "suspect classification" are used by courts at various times, but the choice among them suggests different modes of analysis. In the paradigmatic context of discrimination based on race, can one say that white people make up a "suspect class" or "protected class?" This is the clear implication of holdings, such as *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), that affirmative action policies preferring people of color violate Equal Protection. If, instead, one focuses on racial classifications rather than racial groups, and contends that racial classifications are suspect, no matter how they cut in particular cases, the Court's race discrimination jurisprudence becomes more comprehensible. The notion of a "suspect class" subverts the concept of Equal Protection by suggesting that *groups*, rather than *individuals*, are entitled to equal protection of the law. But that is not what the Fourteenth Amendment says. The idea of "suspect classification" is consistent with the concept of Equal Protection, by suggesting that every person is entitled not to suffer discrimination based on the particular characteristic that defines the classification implicitly or explicitly created by the government policy at issue.

12. Cook v. Gates, 528 F.3d 42, 61 (1st Cir. 2008) (citing Scarbrough v. Morgan County Bd. of Ed., 470 F.3d 250, 261 (6th Cir. 2006)); Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 866 (8th Cir. 2006); Johnson v. Johnson, 385 F.3d 503, 532 (5th Cir. 2004); Lofton v. Sec'y of the Dep't of Children & Family Serv., 358 F.3d 804, 818 (11th Cir. 2004); Veney v. Wyche, 293 F.3d 726, 731–32 (4th Cir. 2002); Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1132 (9th Cir. 1997).

dissent, citing lower court equal protection rulings, argued that the Court's holding was inconsistent with *Bowers*, an assertion to which the majority of the Court made no rejoinder.[13] The Court's failure to employ the usual vocabulary of equal protection analysis in *Romer* led lower federal courts to continue on their *Bowers*-influenced path for the most part, continuing to cite pre-*Romer* circuit court rulings as precedent in gay equal protection cases.

In 2003, the Supreme Court explicitly overruled *Bowers* in *Lawrence v. Texas*,[14] in which the Court held that the private, consensual sexual activity of gay adults came within the sphere of liberty protected by the Due Process Clause, and that the Texas Homosexual Conduct Law "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[15] The Court asserted that *Bowers* was wrong when it was decided, immediately casting doubt on the validity of lower federal court decisions that had relied upon *Bowers* from 1987 onwards to analyze Equal Protection claims brought by gay litigants.

And yet, those pre-*Lawrence* (and, indeed, pre-*Romer*) court of appeals decisions have a ghostly afterlife. These cases, and cases relying on their reasoning, are still cited by some courts to justify rejecting gay equal protection claims on the ground that "homosexuals" are not a "protected class," amidst assertions that *Bowers* was not "completely" overruled in *Lawrence*,[16] or that the Court's focus on the Due Process Clause in *Lawrence* rendered its decision irrelevant to subsequent Equal Protection analysis,[17] leaving the pre-*Lawrence* court of appeals decisions standing as binding circuit precedents. In 2008, for example, the Court of Appeals for the Tenth Circuit ruled that until *Lawrence* was decided, a government actor could claim qualified immunity from constitutional liability for anti-gay discrimination, and the panel was unwilling to take a position on whether such immunity would still pertain in cases that arose after *Law-*

13. *Romer*, 517 U.S. at 640.

14. 539 U.S. 558 (2003).

15. *Id.* at 578.

16. *Id.* at 586 (Scalia, J., dissenting). The "logic" of this, in the face of *Lawrence*'s declaration that *Bowers* was "not correct" when it was decided, might be that because the *Lawrence* court did not explicitly hold that gay people have a "fundamental right" to engage in sodomy, and did not explicitly state that it was using heightened or strict scrutiny to strike down the statute, the practical doctrinal holding of *Bowers*—that the statute was to be evaluated using the rational basis test—was intact, and the Court had merely rejected that portion of *Bowers* holding that the Georgia legislature's moral disapproval of sodomy could be a rational basis for the statute. Lower courts were apparently not persuaded by the expansive rhetoric of Justice Kennedy's opinion for the Court, since Justice Scalia assured them in his dissenting dictum that the Court had not declared "homosexual sodomy" to be a "fundamental right." *Id.*

17. *Id.* at 575.

rence was decided.[18]

This article proposes that these "ghosts" of the overruled *Bowers* decision should be exorcized and uprooted from American constitutional law by giving respectful treatment to *Romer* and *Lawrence* as the signal Supreme Court decisions on the constitutional rights of gay people and by interpreting those decisions in a manner consistent with the reasoning and holding of the Court's opinions; we should not be limited by dicta emanating from Justice Scalia's dissents in both cases, which incorrectly characterize the true import of the decisions.[19]

This article describes the development of this post-*Bowers* anti-gay equal protection jurisprudence up to the time of *Lawrence v. Texas*, recounts the lingering effects of the pre-*Lawrence* case law, identifies the "ghosts" of *Bowers*, and argues that they should be laid to rest once and for all.[20]

II. ANTI-GAY DISCRIMINATION IN THE COURTS FROM *BOWERS* TO *LAWRENCE*

The U.S. Supreme Court ruled in 2003 in *Lawrence v. Texas*[21] that states could not impose criminal penalties on an adult who engaged in private, consensual sexual activity with another person of the same sex. The petitioners in *Lawrence* were convicted in a Texas trial court of engaging in private, consensual conduct that violated the Texas Homosexual Conduct

18. Milligan-Hitt v. Bd. of Tr. of Sheridan County Sch. Dist. No. 2, 523 F.3d 1219 (10th Cir. 2008). Government actors enjoy qualified immunity from liability if their actions do not violate a constitutional right that was well established by Supreme Court or binding court of appeals precedents at the time of their action. A few weeks after *Milligan-Hitt* was decided, a different Tenth Circuit panel rejected a qualified immunity claim in a gay equal protection case arising from facts post-dating *Lawrence*, however. Price-Cornelison v. Brooks, 524 F.3d 1103 (10th Cir. 2008).

19. Some lower courts have cited Justice Scalia's dissents as a source for discerning the meaning of the majority opinions, and some have even opined that the failure of the Court to expressly contradict Scalia's dissenting statements implies that they are correct characterizations of the Court's holdings. *See, e.g.*, Sylvester v. Fogley, 465 F.3d 851, 858 (8th Cir. 2006); Cook v. Rumsfeld, 429 F.Supp.2d 385, 394 (D. Mass. 2006), *aff'd on other grounds sub nom.* Cook v. Gates, 528 F.3d 42 (1st Cir. 2008); Lofton v. Sec'y of the Dep't of Children & Family Serv., 358 F.3d 804, 816 (11th Cir. 2004).

20. After I had conceived and drafted much of this article, the Connecticut Supreme Court pointed out in its same-sex marriage ruling that federal equal protection cases that had rejected heightened scrutiny of sexual orientation discrimination claims were of little persuasive value due to their continued reliance on old precedents rooted in *Bowers*, stating:

> To a very substantial degree, *Lawrence* undermines the validity of the federal circuit court cases that have held that gay persons are not entitled to heightened judicial protection because, as we have explained, the courts in those cases relied heavily—and in some cases exclusively—on *Bowers* to support their conclusions.

Kerrigan v. Comm'n of Pub. Health, 957 A.2d 407, 467 (Conn. 2008).

21. *Lawrence*, 539 U.S. at 558.

Law,[22] which made it a misdemeanor for same-sex couples to engage in anal or oral sex, regardless of the age of the actors or whether the conduct was private or public, consensual or non-consensual.[23] The Supreme Court held that the charged conduct came within the sphere of liberty protected under the Due Process clause, and that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[24] The Court declined to rule on an alternative Equal Protection challenge to the statute, on which it had also granted certiorari,[25] although it acknowledged that a "tenable argument" based on Equal Protection could be made.[26] Justice Sandra Day O'Connor, concurring in the result, based her analysis solely on Equal Protection.[27]

On the way to reaching its decision, the Court responded to the third question on which it had granted certiorari,[28] overruling *Bowers v. Hardwick*,[29] in which it had held in 1986 that a Georgia law[30] making all oral or anal sex subject to felony prosecution did not violate the Fourteenth Amendment Due Process rights of "homosexuals."[31] After his arrest on consensual sodomy charges, Michael Hardwick sued to have the statute declared unconstitutional as a violation of the constitutional right of privacy, which had been described by the Supreme Court in prior cases con-

22. TEXAS PENAL CODE ANN. § 21.06(a) (Vernon 2003).

23. *Id.*

U.S. CONST. amend. XIV, § 1.

24. *Lawrence*, 539 U.S. at 578.

25. *Id.* at 564.

26. *Id.* at 574–75.

27. *Id.* at 579–85 (O'Connor, J., concurring). Justice O'Connor suggested that "more searching" scrutiny would apply in cases where a challenged policy "inhibits personal relationships," citing older Equal Protection cases such as *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). *Id.* at 580. While she had joined the Court's decision in *Bowers*, believing that legislators could express moral disapproval of homosexuality through criminal law without violating the Due Process Clause, she was unwilling to countenance moral disapproval as justification to forbid some individuals from engaging in conduct that was allowed to others.

28. The Court's grant of certiorari listed three questions: (1) whether the statute violated the Due Process Clause, (2) whether it violated the Equal Protection Clause; and (3) whether *Bowers v. Hardwick* should be overruled. 539 U.S. at 564.

29. 478 U.S. 186. Actually, the Court did more than merely overrule *Bowers*. It stated: "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled." 539 U.S. at 578. The way in which the Court overruled *Bowers* suggests that all subsequent lower court decisions that relied on *Bowers* as precedent must themselves be viewed as being of questionable significance as precedents.

30. GA. CODE ANN. § 16-6-2.

31. Writing for the Court in *Bowers*, Justice Byron White framed the question presented to the Court as follows: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." *Bowers*, 478 U.S. at 190.

cerning reproductive freedom.[32] A different-sex couple joined as co-plaintiffs, but the district court found that they did not have standing to challenge the statute, even though it potentially applied to their conduct, as they had never been arrested and the state showed no inclination to attempt to enforce the statute against consenting different-sex adult couples.[33] The district court dismissed Michael Hardwick's claim, relying on the Supreme Court's earlier summary affirmance of a three-judge district court ruling that had rejected a similar constitutional challenge to the Virginia sodomy law a decade earlier.[34] A divided Eleventh Circuit panel reversed,[35] finding that subsequent Supreme Court rulings had undermined whatever precedential weight the summary affirmance had, and found that the state should have to prove a compelling interest because the privacy right to sexual intimacy claimed by Hardwick was "fundamental."[36] The state successfully petitioned for certiorari, and the Supreme Court ruled, by a vote of five to four, that the Constitution did not confer upon homosexuals a "fundamental right" to engage in sodomy, characterizing the claim as "facetious" in light of the long history of criminal treatment of "homosexual sodomy."[37] Because the Court did not deem the claimed right to be "fundamental," the statute was evaluated for its "rationality." The state prevailed based on the Court's inference that the statute reflected moral disapproval of homosexual sodomy by Georgia legislators and the Court's judgment that such moral disapproval provided a rational basis for the prohibition.[38] In a footnote at the end of the opinion, the Court stated, "Respondent does not de-

32. Hardwick v. Bowers, 760 F.2d 1202, 1211 (11th Cir. 1985) (citing Eisenstadt v. Baird, 405 U.S. 438 (1972); Carey v. Population Serv. Int'l, 431 U.S. 678 (1977); Griswold v. Connecticut, 381 U.S. 479 (1965)).

33. *Hardwick*, 760 F.2d at 1206–07; *Bowers*, 478 U.S. at 188 n.2. In the oral argument before the Supreme Court, counsel for the state conceded that enforcing the statute against such couples would violate the Fourteenth Amendment. *Id.* at 218 n.10 (Stevens, J., dissenting).

34. Doe v. Commonwealth's Attorney for the City of Richmond, 425 U.S. 901 (1976), *aff'g*, 403 F.Supp. 1199 (E.D. Va.1975).

35. *Hardwick*, 760 F.2d 1202.

36. Specifically, the court stated, "The Georgia sodomy statute infringes upon the fundamental constitutional rights of Michael Hardwick. On remand, the State must demonstrate a compelling interest in restricting this right and must show that the sodomy statute is a properly restrained method of safeguarding its interests." *Id.* at 1211.

37. *Bowers*, 478 U.S. at 194 n.2.

38. *Id.* at 196. Since the statute itself did not single out homosexual sodomy but instead made all anal or oral sex a crime, regardless of the genders of the participants, the logical basis of the Court's inference that the legislature was acting out of moral disapproval of homosexuality rather than moral disapproval of anal or oral sex, was questionable. Given the historical derivation and context of sodomy laws, the legislators were more likely acting out of religious sentiments, as reflected in the Biblical citation found in Chief Justice Warren Burger's concurring opinion tracing sodomy laws to "Judeao-Christian moral and ethical standards," *id.* at 197, but the Court was not about to strike down the statute as an establishment of religion in violation of the First Amendment, an argument not advanced by Hardwick.

fend the judgment below based on the Ninth Amendment, the Equal Protection Clause, or the Eighth Amendment,"[39] and the majority opinion did not address the question whether the application of the Georgia sodomy law to Hardwick might violate his right to equal protection of the laws.[40]

Lower federal courts quickly fixed on *Bowers* (sometimes referred to in their opinions as *Hardwick*) as a precedent for rejecting Equal Protection claims by gay litigants, in many cases without bothering to discuss the factors that the Supreme Court has mentioned when it has analyzed the standard of review to apply in earlier Equal Protection cases that concerned discrimination based on other characteristics. Instead, the courts suggested that the ruling in *Bowers* precluded finding that homosexuals enjoyed class-based protection.

In one of its leading equal protection cases prior to *Bowers*, *City of Cleburne v. Cleburne Living Center*,[41] the Court reviewed various factors deemed relevant to this determination, in a nuanced manner that suggested that the characteristics that had commanded strict or heightened scrutiny were afforded that level of review for particularistic reasons, and not based on satisfying all the elements of some standardized checklist. The Court first mentioned race, alienage, and national origin, which it characterized as characteristics "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others," and emphasized that "such discrimination is unlikely to be soon rectified by legislative means," so those disadvantaged by discriminatory government policies needed the assistance of the courts to vindicate their equality rights.[42] Then the Court mentioned gender classifications, which had been given "heightened scrutiny" by the Court because, in its view, gender "generally provides no sensible ground for differential treatment," and its use "very likely reflect[s] outmoded notions of the relative capabilities of men and women."[43] Similarly, "illegitimacy," said the Court, "is beyond the individual's control and bears 'no relation to the individual's ability to participate in and contribute to society.'"[44] The Court explained that age classifications had not been subjected to heightened scrutiny because there was no "history of purposeful unequal

39. *Id.* at 196 n.8.

40. Both dissenters suggested that the statute was vulnerable to an equal protection challenge. *See id.* at 202 n.2 (Blackmun, J., dissenting), 218–20 (Stevens, J., dissenting).

41. 473 U.S. 432 (1985).

42. *Id.* at 440.

43. *Id.* at 440–41.

44. *Id.* at 441 (quoting Mathews v. Lucas, 427 U.S. 495, 505 (1976)).

treatment" or evidence that age classifications were based on "stereotyped characteristics not truly indicative" of the abilities of older people.[45] In ruling against the claim that mental disability was a characteristic that should receive heightened scrutiny, the Court emphasized that people with such a characteristic are not as capable of functioning in the world, and also pointed out that legislation concerning them is as often protective as exclusionary.[46]

Thus, it appears from *Cleburne* that the factors the Court would consider significant in evaluating characteristics to determine the level of scrutiny in an equal protection challenge would vary depending upon the characteristic, but might include whether the characteristic is relevant to a person's ability to participate in society, whether it is essentially beyond the control of the individual, whether there is a history of purposeful discrimination, whether the disadvantaged group was capable of defending its interests in the legislative process, and whether the use of the classification reflects inaccurate stereotypes, but it does not appear that a group defined by a characteristic needs a "perfect score" on a checklist involving all or even most of these considerations to merit heightened scrutiny. This process of focusing on the particular factors that are relevant to a particular characteristic is sensible, in light of the purpose for which the analysis is undertaken, which is to determine whether there is some reason to suspect that the legislature or regulator or administrator has acted with discriminatory intent. If we have no particular reason to suspect discriminatory intent when a particular characteristic is used to determine whether a particular individual is qualified to participate in some activity or enjoy some benefit, then it seems appropriate to place the burden on the complaining individual to prove discriminatory intent, and no presumption of such intent should attach to the government action. But when the government premises entitlements or prohibitions on characteristics whose nature and history would suggest the likelihood of discriminatory intent, the government should have to justify itself by presenting a non-discriminatory reason for its actions. That's what "suspect classification" analysis is all about. And, clearly, a "perfect score" on a checklist of factors that the Court has considered would leave out many classifications as to which suspicions of discriminatory intent would be appropriate.

To take obvious examples, race continues to be considered a suspect classification for equal protection purposes, to judge by recent affirmative

45. *Id.* (quoting Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976)).

46. *Id.* at 446.

action decisions,[47] even though it is clear that racial minorities have attained sufficient political influence and support from others in the legislative process to achieve the enactment of laws banning race discrimination nationally and in virtually all the states, because racial stereotypes remain a serious problem in our society.[48] Sex is considered a quasi-suspect classification, even though women make up a majority of the electorate and serve in high government offices, and even though federal, state and local laws explicitly forbid a wide range of discriminatory activity based on sex, because women remain subject to stereotyped thinking.[49] The key is that a realistic assessment of the process of public policy making in the United States must acknowledge that the use of race or sex as a criterion for government prohibitions or entitlements continues to raise suspicions about discriminatory intent, sufficient to require the government, when challenged, to justify its policy. This approach has been largely lacking in gay equal protection cases, due to the lingering effect of the ghosts of *Bowers v. Hardwick*.

Almost exactly one year after Bowers, in 1987, the D.C. Circuit invoked *Bowers* in ruling against a claim that the Federal Bureau of Investigation's categorical rejection of employment applications from gay people should be subjected to heightened scrutiny.[50] In refusing to consider Margaret Padula, a highly qualified lesbian applicant, the Bureau maintained that it was concerned with conduct, not status, so that if there was some "class" of individuals disadvantaged by its policy, it was a class defined by conduct. "It would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause," wrote the court in rejecting the equal protection claim.[51] "If the [Supreme] Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the

47. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2751 (2007); Johnson v. California, 543 U.S. 499, 535 (2005); Rothe Dev. Corp. v. Dep't of Def., 545 F.3d 1023, 1030 (Fed. Cir. 2008).

48. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2006).

49. *Id.*

50. Padula v. Webster, 822 F.2d 97, 102–03 (D.C. Cir. 1987).

51. *Id.* at 103. The D.C. Circuit had previously put off deciding the "difficult issue" whether government discrimination based on sexual orientation was unconstitutional in *Doe v. Casey*, 796 F.2d 1508, 1522 (D.C. Cir. 1986), decided shortly after *Bowers*, observing that *Bowers* had not addressed that question and that the factual posture in which the case came to the court for review did not clearly present the issue.

class criminal," the court continued.[52] The court did not mention or analyze the various criteria that the Supreme Court had considered in the past in determining whether a particular classification should be considered "suspect," meriting strict or heightened scrutiny of challenged legislation. Consequently, the court applied rationality review, and decided that it was rational for the Bureau, a national law enforcement agency, to reject applicants whose preferred form of sexual expression was theoretically illegal in half of the states, reasoning, inter alia, that the Bureau could fear that its agents, privy to confidential information of national security importance, could be vulnerable to blackmail.[53]

Next on board with this analysis was the Federal Circuit, considering a claim by a gay man who had been dismissed from the Navy because of his sexuality.[54] The court characterized the impact of *Bowers* on James Woodward's equal protection claim as "persuasive, if not dispositive."[55] The court explained:

> After *Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm. We agree with the court in *Padula v. Webster* that "there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."
>
> Accordingly, we conclude that Woodward is not a member of a class to which heightened scrutiny must be afforded nor that the Navy must have a compelling interest to justify discrimination against Woodward because of his admitted homosexuality.[56]

The court also purported to distinguish Woodward's claim from other types of equal protection claims by characterizing homosexuality as "behavioral" in nature, as distinguished from race or alienage,[57] even though Woodward had not been discharged for engaging in any prohibited conduct.

52. *Padula*, 822 F.2d at 103.

53. *Id.* at 104. In 1994 the D.C. Circuit reiterated this view en banc in *Steffan v. Perry*, stating,

> We dismiss Steffan's oblique suggestion, made only in a sketchy footnote and apparently abandoned during oral argument, that heightened scrutiny should be applied because homosexuals constitute a "suspect class" under the Supreme Court's test for identifying such classes. As we explained in *Padula*, if the government can criminalize homosexual conduct, a class that is defined by reference to that conduct cannot constitute a "suspect class." Indeed, Steffan as much as concedes the point by agreeing that the military can ban those who engage in homosexual conduct.

41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc) (citations omitted).

54. Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989).

55. *Id.* at 1075.

56. *Id.* at 1076 (citation omitted). The court then held that the policy was a rational means for the Navy to maintain "good order and morale," quoting from Naval regulations supporting the policy of requiring the dismissal of service members found to be gay that was then in effect. *Id.*

57. *Id.*

The Seventh Circuit soon employed a variation on the same reasoning in another military case.[58] The trial court had ruled that the policy under which Miriam Ben-Shalom was dismissed from the Army was unconstitutional, rejecting the Army's argument that its policy focused on conduct rather than status and finding no justification for treating gay people, a group considered to be defined by reference to a "suspect" or "quasi-suspect" classification by the trial court, differently from others who engaged in the same conduct. Even alternatively applying the deferential version of rationality review that federal courts normally employ in evaluating constitutional challenges to military regulations, the trial judge found the policy unconstitutional as lacking any rational justification.[59] The Army appealed, contending that the trial court had misconstrued its regulations as being class-based and had been inadequately deferential, while Ben-Shalom argued that heightened or strict scrutiny, as found by the trial court, would be the appropriate method of analysis. The court of appeals rejected her argument:

> Although the [Supreme] Court analyzed the constitutionality of the statute on a due process rather than an equal protection basis, *Hardwick* nevertheless impacts on the scrutiny aspects under an equal protection analysis. The majority held that the Constitution confers no fundamental right upon homosexuals to engage in sodomy. If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes. The Constitution, in light of *Hardwick*, cannot otherwise be rationally applied, lest an unjustified and indefensible inconsistency result.[60]

The court did not explain what the "unjustified and indefensible inconsistency" might be.

The Ninth Circuit soon articulated the same rationale in rejecting an equal protection challenge to the Department of Defense's method of evaluating security clearance applications from gay employees or potential

58. Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989).

59. *Id.* at 458.

60. *Id.* at 464–65. The court went on to find that under deferential rational basis review, the Army's policy was constitutional, and specifically stated its agreement with the D.C. Circuit's reasoning in *Padula v. Webster*: "We . . . find no fault with *Padula* and believe its equal protection reasoning to be as applicable to the Army as to the FBI." *Id.* at 465. The court also rejected the trial court's focus on status, stating that the military policy was phrased in terms of conduct, and that the plaintiff had admitted to being a lesbian, and thus having a desire or propensity to engage in the kind of conduct that the Supreme Court had determined in Bowers to have no constitutional protection. The court did not analyze the factors that the Supreme Court has normally discussed when it considers whether a particular classification is "suspect," apart from acknowledging that homosexuals had faced a history of discrimination. The court also failed to apprehend that the Supreme Court's historical references in *Hardwick* were totally inapposite to women's same-sex conduct, since the historical crime of sodomy could only be accomplished if one of the participants possessed a penis.

employees of federal government defense contractors.[61] "If for federal analysis we must reach equal protection of the Fourteenth Amendment by the Due Process Clause of the Fifth Amendment," wrote the court in *High Tech Gays v. Defense Industrial Security Clearance Office*:

> [A]nd if there is no fundamental right to engage in homosexual sodomy under the Due Process Clause of the Fifth Amendment, it would be incongruous to expand the reach of equal protection to find a fundamental right of homosexual conduct under the equal protection component of the Due Process Clause of the Fifth Amendment.[62]

The court stated its disagreement with the conclusion of a prior Ninth Circuit panel that *Bowers* had no relevance to analyzing a gay litigant's equal protection claim.[63]

However, subsequent to *High Tech Gays*, a different panel of the Ninth Circuit, considering a direct challenge to the military policy against service by gay people in *Pruitt v. Cheney*,[64] characterized *High Tech Gays* as having applied "active rational basis" review rather than the traditional highly deferential rationality standard of review, even though *High Tech Gays* never uses that term and the decision explicitly disavows providing constitutional protection against discrimination to gay people. Presumably, the *Pruitt* court based its characterization on *High Tech Gays*' citation of *Cleburne*, a rare case in which the Supreme Court struck down a statute on Equal Protection grounds even though it found that the classification at issue was not suspect or quasi-suspect, leading commentators to describe

61. High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 573–74 (9th Cir. 1990). To be fair, the Ninth Circuit opinion also discussed various factors that courts have analyzed to determine whether a particular classification should be considered "suspect" for equal protection purposes as an alternative basis for denying the claim for heightened scrutiny of the government policy. It decided that homosexuality was not an "immutable characteristic" and that legislatures had begun to show enough regard for gay rights to reject the claims that gay people were politically powerless. *Id.* This latter point could only cause astonishment to an objective observer in 1990, when progress towards political and legal equality for gay people was at a very early stage, and had yet to achieve any express protection under federal law or the laws of the overwhelming majority of states. Indeed, at the time, gay people were expressly excluded from various kinds of federal employment, and were deemed excludable from entry in to the United States as "sexual perverts" under the immigration laws. Some power! In a challenge to a federal policy, one would assume that the political effectiveness of the group at the federal level would be the relevant inquiry.

62. *Id.* at 571 (citations omitted). The court cited to *Bolling v. Sharpe*, 347 U.S. 497 (1954), holding that equal protection claims against the federal government are cognizable under the Due Process Clause of the Fifth Amendment, and *Bowers*. The court went on to find that the Defense Department had a rational basis for subjecting gay security clearance applicants to greater scrutiny than other applicants, citing the same fears about blackmail of individuals with access to confidential national security information that had been relied upon by the *Padula* court. Ironically, the court explicitly relied on then-recent Congressional hearing testimony about subversion of male American diplomatic staff at the Embassy in Moscow, who were targeted for seduction by female Russian agents. 895 F.2d at 575–78.

63. 895 F.2d at 573 n.9.

64. 963 F.2d 1160 (9th Cir. 1991).

what the Court was doing in that case as "active rational basis" review to distinguish it from the normally deferential type of rationality review. But the High Tech Gays court did not strike down the contested Defense Department procedures, and accepted a stereotypically-based rationale to uphold them, suggesting that the *Pruitt* panel's characterization of *High Tech Gays* was off the mark. Surely, it would have surprised the judges who served on the *High Tech Gays* panel, especially when applied in a military service case where judicial deference to professional military judgment is the norm.[65]

Subsequently, the Tenth Circuit ruled in *Jantz v. Muci* that in light of *Bowers* and the "confusion in the law" that it spawned concerning equal protection claims by gay litigants, a school superintendent would enjoy qualified immunity from a claim that he had refused to hire an applicant to be the principal of a high school because of the applicant's perceived homosexual tendencies.[66] "Plaintiff argues that *Hardwick* is inapposite because it dealt with a substantive due process analysis whereas his claim is based on the equal protection clause," wrote the court, continuing:

> For purposes of qualified immunity, however, we need not decide how *Hardwick* affects equal protection claims; we need only note that courts have reached differing conclusions on the issue.
>
> Plaintiff argues that, even though the cases interpreting *Hardwick* have reached differing results on the level of scrutiny applied to classifications based on homosexual conduct or status, each court applied at least the minimal rational basis test of *Moreno* and *Cleburne*. We agree, and prior to *Hardwick* we twice applied rational basis review to classifications which disparately affected homosexuals. The Supreme Court, however, held in *Hardwick* that the community's notions of morality were sufficient to provide a rational basis for the statute. Although the *Hardwick* Court did not deal with an equal protection claim, for qualified immunity purposes we think its holding, and the general state of confusion in the law at the time, cast enough shadow on the area so that any

65. In a much later case, *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130 (9th Cir. 2003), yet another panel of the Ninth Circuit cited *High Tech Gays* as crucial to rejecting a qualified immunity claim in a sexual orientation discrimination case arising in the public school context during the 1990s. "The plaintiffs are members of an identifiable class for equal protection purposes because they allege discrimination on the basis of sexual orientation," wrote the court, *id.* at 1134–35 (citing High Tech Gays, 895 F.2d 563, 570–71), and in a parenthetical, characterized *High Tech Gays* as "finding that homosexuals are not a suspect or quasi-suspect class, but are a definable group entitled to rational basis scrutiny for equal protection purposes." *Id.* at 1137.

66. Jantz v. Muci, 976 F.2d 623, 630 (10th Cir. 1992). A government official whose performance of a discretionary act is challenged on constitutional grounds enjoys "qualified immunity" from the claim unless her conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). According to the Tenth Circuit in *Jantz*, this means that "the plaintiff must demonstrate that the unlawfulness of the conduct was 'apparent' in the light of pre-existing law." 976 F.2d at 627 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

> unlawfulness in Defendant's actions was not "apparent" in 1988. . . . Therefore, we hold that Defendant is entitled to qualified immunity.67

The Sixth Circuit was the next to weigh in, considering the City of Cincinnati's appeal from a trial court decision invalidating a charter amendment recently adopted by voter initiative, repealing the city's ban on sexual orientation discrimination by prohibiting the city from adopting such a ban.[68] Plaintiff Equality Foundation argued, among other things, that the charter amendment violated equal protection of the laws. The trial judge had decided that sexual orientation is a "quasi-suspect classification," based on his conclusion that it is an immutable characteristic, and he had dismissed the relevance of *Bowers* to this determination, going on to declare the charter amendment unconstitutional in the face of heightened scrutiny.[69] Reversing, a Sixth Circuit panel ruled that sexual orientation, for all practical purposes of public anti-discrimination policy, was a status determined and identified by behavior, thus making the lack of constitutional protection for such behavior determinative. "Since *Bowers*," wrote the court, "every circuit court which has addressed the issue has decreed that homosexuals are entitled to no special constitutional protection, as either a suspect or a quasi-suspect class, because the conduct which places them in that class is not constitutionally protected."[70] The court continued:

> Those persons who fall within the orbit of legislation concerning sexual orientation are so affected not because of their orientation but rather by their conduct which identifies them as homosexual, bisexual, or heterosexual. Indeed, from the testimony developed by the record (including that of the plaintiffs' expert psychologist, Dr. John Gonsiorek, who attested that most people either engage in sexual behavior which is consistent with their sexual orientation or engage in no sexual activity at all), this court concludes that, for purposes of these proceedings, it is virtually impossible to distinguish or separate individuals of a particular orientation which predisposes them toward a particular sexual conduct from those who actually engage in that particular type of sexual conduct.[71]
>
> . . . .
>
> Therefore, *Bowers v. Hardwick* and its progeny command that, as a matter of law, gays, lesbians, and bisexuals cannot constitute either a "suspect class" or a "quasi-suspect class," and, accordingly, the district

67. 976 U.S. at 629–30.

68. Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261 (6th Cir. 1995). The charter amendment at issue was, with minor variations, identical to the text of Colorado Amendment 2, enacted on the same election day and subsequently invalidated on Equal Protection grounds in *Romer*.

69. Equal. Found. v. City of Cincinnati, 860 F.Supp. 417 (S.D. Ohio 1994).

70. 54 F.3d at 266.

71. *Id.* at 267.

> court's application of the intermediate heightened scrutiny standard to the constitutional analysis of the Amendment was erroneous.[72]

Thus, by the time the Supreme Court came to decide *Romer* in 1996, numerous circuit courts of appeals had rejected equal protection claims by gay litigants based at least in part on the reasoning that by denying constitutional protection to "homosexuals" who engage in "sodomy" under the Due Process Clause in *Bowers*, the Supreme Court had precluded gay people, a category the lower courts saw as being defined by particular conduct in which some gay people engage,[73] from obtaining protection from discrimination using an equal protection argument, since moral disapproval of homosexuality would always suffice as a rational justification for disfavored treatment of homosexuals.

In *Romer*, the Court confronted directly whether a state policy that specifically discriminated based on the "homosexual status" or "conduct" of individuals violated the Equal Protection Clause. Colorado voters had added Amendment 2 to their state constitution in 1992. Amendment 2 specified that neither the state nor any of its subdivisions could adopt any policy that would protect gay people from discrimination or treat gay people as a "protected class" for purposes of state law.[74] After briefly describing its normal mode of analyzing Equal Protection claims—"if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end"[75]—the Court stated, "Amendment 2 fails, indeed defies, even this conventional inquiry."[76] And the Court did not bother to describe the "conventional inquiry" any further. That is, it did not discuss whether sexual orientation should be considered a "suspect classification" or whether gay people should be considered a "suspect class," or whether it

72. *Id.* at 268.

73. The courts routinely conflate "homosexual conduct" with "sodomy," even though there was no evidence in any of these cases that all gay people necessarily engaged in the specific conduct that the Court had found unprotected in Bowers. The *Bowers* Court was dealing with the constitutionality of a specific statute that applied only to specified sexual acts, not broadly to all same-sex conduct of a sexual nature, and thus would not have covered some of the conduct that the Sixth Circuit might see as relevant to determining whether somebody is a member of the conduct-defined "class."

74. The full text states:

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

Romer v. Evans, 517 U.S. 620, 624 (1996) (quoting the COLO. CONST. art. II, § 30b(1992)).

75. 517 U.S. at 631.

76. *Id.* at 632.

was appropriate to subject Amendment 2 to "strict scrutiny" or "heightened scrutiny," even though these would at the time be considered questions of first impression for the Supreme Court, which had never previously decided a gay plaintiff's Equal Protection claim on the merits. Adhering sub silentio to the practice of avoiding deciding constitutional issues whose resolution is unnecessary to the case, the Court instead explained why Amendment 2 failed to survive rationality review.

The Court explained that Amendment 2 failed the "rational relation to some legitimate end" criterion for two reasons. First, it imposed "a broad and undifferentiated disability on a single named group," and, second, "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects."[77] In other words, the Court concluded that the only plausible explanation for the enactment of a sweeping denial of any protection whatsoever for people because of their gay identity or conduct was animus against gay people. If this was the explanation for the provision, it could not stand under the Court's existing precedents, which had ruled out disparate treatment due to official animus against a group on the ground that bare animus, as such, is not a legitimate justification for differential treatment.[78] The Court succinctly reviewed various arguments that had been made in support of Amendment 2 and found them implausible in light of the broad sweep of the provision.[79]

Thus, *Romer*'s precedential holding is that animus against gay people, presumably founded on some sort of moral disapproval of homosexuality of the type described by the Court in *Bowers*, will not suffice to sustain a state policy that explicitly virtually excludes gay people from the struggles of ordinary politics by disempowering the political branches of government from adopting any policies to protect them from discrimination. This means that a state policy that treats people adversely due to their sexual orientation requires at least some sort of non-discriminatory, non-moralistic justification in order to be found constitutional, and that a plaintiff's assertion that he or she has been subjected to discrimination on the basis of sexual

77. *Id.*

78. See, for example, *U.S. Department of Agriculture v. Moreno*, the case cited by the Court on this point. 413 U.S. 528 (1973). In *Moreno*, the Court struck down a provision of the federal food stamp program that disqualified individuals residing in households with other adults to whom they were not legally related or married. According to its legislative history, the provision had been adopted specifically to prevent "hippie communes" from qualifying for food stamps. The Court held that moral disapproval of "hippie communes" could not be a legitimate purpose for a provision that directly undercut the two avowed overall purposes of the statute: alleviating hunger and subsidizing American agriculture by increasing demand for its products. *Id.* at 533–35.

79. *Romer*, 517 U.S. at 626, 635.

orientation cannot simply be dismissed based on the assertion that "homosexuals are not a protected class." Amendment 2 provided that gay people would not constitute a "protected class" for any purpose or in any context in Colorado and the Supreme Court found that assertion to be unconstitutional on its face, commenting that the state could not treat any of its citizens as "stranger[s] to its laws."[80]

In the first Equal Protection decision involving a gay plaintiff to be announced after *Romer*, *Nabozny v. Podlesny*,[81] the Seventh Circuit could not apply *Romer* directly, because the events underlying the case had occurred before *Romer* was decided. The court had to determine whether public school officials enjoyed qualified immunity against an equal protection claim brought by a gay male former high school student, who asserted that school officials did not take action to protect him against sexually-charged attacks by fellow male students in the same way that they had demonstrably taken action to protect female students against similar attacks by male students. The claim could be characterized as both a sex discrimination claim and a sexual orientation discrimination claim, and the court held that as of the date of its ruling the claim would be potentially viable under either theory. For purposes of the qualified immunity determination, the relevant time period for considering the claim was 1988, shortly after *Bowers* was decided. The defendants argued that in light of *Bowers*, a school official in 1988 could believe that denying equal treatment to gay students did not raise any constitutional issue.

The Seventh Circuit panel found that Jamie Nabozny, the plaintiff, could maintain the equal protection claim in spite of *Bowers*. The court said that reliance upon *Bowers* in this connection was "misplaced," because Bowers was only about the "criminalization of sodomy," and said that the defendants could not rely on *Bowers*' "rational basis analysis" for their immunity claim because they had not cited "sodomy" or any other "rational basis" for their conduct, their contention on the motion to dismiss being that they had not engaged in any discrimination at all.[82] The court observed that it was established as long ago as the 19th century that unequal treatment against members of minority groups without reason, or completely arbitrary discrimination, violates the guarantee of equal protection of the laws.[83]

80. *Id.* at 635.

81. 92 F.3d 446 (7th Cir. 1996). The *Nabozny* ruling was issued just two months after the opinion in *Romer* was announced. In subsequent litigation, Nabozny won a trial verdict on the issue of liability and the defendants settled the case for monetary damages of nearly $1 million.

82. 92 F.3d at 458.

83. The court observed:

Thus, in the absence of any asserted justification for treating harassment of a gay student or a male student differently from harassment of a non-gay or female student, the school officials could not claim qualified immunity because, in the view of the Seventh Circuit panel, the question in Nabozny's claim of sexual orientation discrimination was not whether gay people could be considered a "protected class," but rather whether any justification could be imagined by the court for treating gay people unequally with respect to the issues at stake in the case.[84]

The court conceded, however, that *Romer* would have made this outcome easier to reach, saying that it "bolsters" the court's analysis "to some extent."[85] Perhaps more significantly, however, the court stated, "Of course *Bowers* will soon be eclipsed in the area of equal protection by the Supreme Court's holding in *Romer*."[86] Simply put, a Supreme Court holding that the Equal Protection Clause invalidated a state policy that discriminated based on sexual orientation would preclude a court from automatically dismissing a gay person's Equal Protection claim, as *Romer* must stand for the proposition, at the very least, that a state actor must have a reason other than animus or moral disapproval for discriminating based on sexual orientation. The question that *Romer* leaves open is whether applying the Court's "conventional analysis," sexual orientation might be found to be a suspect or quasi-suspect classification, requiring a higher level of justification for the state to sustain its policy against constitutional attack.

The Seventh Circuit's suggestion that *Romer* would soon eclipse *Bowers* as an Equal Protection precedent was not completely fulfilled, however. As noted above, some of the circuit courts read *Romer* as having done what it had not done: a "conventional" equal protection analysis leading to the conclusion that government actions discriminating based on sexual orientation were subject only to rationality review because sexual orientation was not a suspect or quasi-suspect classification. And, having so read *Romer*,

> As early as 1886 the Supreme Court held that if the law 'is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.'

Id. (quoting Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886)).

84. 92 F.3d at 458. Indeed, the court indicated that for purposes of deciding the motion to dismiss on grounds of qualified immunity, it did not have to determine the suspect or quasi-suspect classification issue, since the defendants' position was that they had not discriminated based on sexual orientation. The court noted that the circuit had previously used rational basis review in *Ben-Shalom* and said that the rational basis standard was "sufficient" for purposes of deciding this motion. *Id.*. And, one could hardly imagine that the school officials could articulate a reason why it is appropriate to allow male students to sexually harass other male students, while forbidding them from harassing female students, which was the essence of the case.

85. *Id.* at 458 n.12.

86. *Id.*

these courts treated the question as having been decided and, in some cases, seemed to have forgotten the most basic lesson of *Romer*: that anti-gay discrimination violates the Constitution if the actor does not have a non-discriminatory, non-animus-based rational justification for his or her actions.

The Sixth Circuit's reactions to *Romer* were difficult to categorize, as different panels seemed to strike out in different directions. In *Stemler v. City of Florence*, the circuit court dealt with a woman's claim that police officers violated her Equal Protection rights through selective enforcement of traffic laws, arresting her based on an inaccurate statement by another person that she was a lesbian who was attempting to abduct the informant's girlfriend.[87] The events happened before *Romer* was decided, but the court determined that the situation involved arbitrary application of a neutral law, and thus did not implicate the question of what level of scrutiny to apply if it were determined that the plaintiff was arrested due to her perceived sexual orientation, since her sexual orientation had nothing to do with the law under which she was charged.[88] A qualified immunity defense could not be raised because it was well-established that arbitrary enforcement of neutral laws violates the Equal Protection Clause,[89] and police officers involved with the arrest had placed great emphasis in their comments to each other at the scene of a traffic stop on their belief that Stemler was a lesbian, presumably to lend credence to the informant's false claim that she was abducting his girlfriend.[90] Stemler was later acquitted by a jury of drunken driving charges when it appeared that the physical evidence against her was fabricated and that a key police report document was likely forged.

The police officers in *Stemler* claimed qualified immunity from any constitutional liability, relying on *Bowers* for the proposition that arbitrary treatment of gay people by the police raises no constitutional issue. After observing that *Bowers* was a due process, not an equal protection, case, the court stated, "It is inconceivable that *Bowers* stands for the proposition that the state may discriminate against individuals on the basis of their sexual orientation solely out of animus to that orientation," and cited *Romer*, even though its decision post-dated the arrest at issue.[91] The court insisted that

87. 126 F.3d 856 (6th Cir. 1997).

88. *Id.* at 870.

89. *Id.* at 867.

90. The court found that "the record evidence could support a finding, that the defendant officers chose to arrest and prosecute her for driving under the influence because they perceived her to be a lesbian." *Id.* at 873. The full story of the case is rather complicated, and the reader should look to the court's opinion for the bloody details since they would just be a distraction here from the point for which the case is being discussed.

91. *Id.*

Stemler's actual or perceived sexual orientation was irrelevant to the constitutional analysis, so long as the action taken against her was arbitrary. "[T]he principle would be the same if Stemler had been arrested discriminatorily based on her hair color, her college bumper sticker (perhaps supporting an out-of-state rival) or her affiliation with a disfavored sorority or company," the court asserted, contending that any government action taken based on group animus, regardless of the group, was constitutionally objectionable.[92] The court disclaimed the need to determine whether sexual orientation is a suspect classification because a "selective enforcement" claim could be sustained so long as the plaintiff showed that the police officer acted for reasons not relevant to the offense with which the plaintiff was charged. The court contended that:

> [W]hile almost every statute can be shown to have some conceivable rational basis, thereby surviving an equal protection challenge unless it is shown to discriminate against a group accorded heightened scrutiny, it will often be difficult to find a rational basis for a truly discriminatory application of a neutral law.[93]

This final comment may have foreshadowed the circuit's approach in its pending reconsideration of the *Equality Foundation* case, which had been remanded by the Supreme Court for reconsideration in light of *Romer*.[94] The Cincinnati city charter amendment at issue in that case was almost identical to Colorado Amendment 2 in its operative wording, and the arguments that the circuit court had accepted to justify it under rationality review prior to *Romer* were substantive arguments that the *Romer* Court had rejected in connection with Amendment 2, so it was not surprising that the Supreme Court granted the pending certiorari petition and returned the case to the Sixth Circuit for reconsideration. However, in a dissent from the Court's action, Justice Scalia argued that the two provisions presented sharply different issues because Cincinnati Measure 3 had purely local effect while Amendment 2 was a statewide enactment.[95] His dissenting analysis was adopted wholeheartedly by the 6th Circuit in its decision on remand, once again upholding the Cincinnati measure. The Sixth Circuit's decision managed to suggest that, despite *Romer*, *Bowers* remained the relevant Supreme Court precedent for deciding this Equal Protection challenge because, as the Sixth Circuit saw things, sexual orientation was not a discernable characteristic for Equal Protection analysis, apart from the po-

92. *Id.* at 874.

93. *Id.*

94. Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997), *on remand from* 518 U.S. 1001 (1996).

95. 518 U.S. at 1001 (Scalia, J., dissenting).

tentially criminal conduct which defined the class.

The Sixth Circuit panel arrived at its conclusion through willful misrepresentation of the *Romer* Court's handling of the Equal Protection analysis. Asserting that the *Romer* Court had invalidated Amendment 2 by applying "'rational relationship' strictures to that enactment," the Sixth Circuit then stated that the *Romer* Court "resolved that the Colorado state constitutional provision did not invade any fundamental right and did not target any suspect class or quasi-suspect class."[96] Of course, as shown above, the *Romer* Court did nothing of the sort, having refrained from engaging in "conventional analysis" of the Equal Protection claim because of its conclusion that Amendment 2 was an animus-based enactment that could not be sustained under any version of Equal Protection.

The Sixth Circuit went on to state:

> In so ruling, the Court, *inter alia*, (1) reconfirmed the traditional tripartite equal protection assessment of legislative measures; and (2) resolved that the deferential "rational relationship" test, that declared the constitutional validity of a statute or ordinance if it rationally furthered any conceivable valid public interest, was the correct point of departure for the evaluation of laws which uniquely burdened the interests of homosexuals.[97]

The *Romer* Court did neither of these things. It mentioned the "conventional" analysis in passing, but did not state any position on whether or how it would apply in a conventional gay rights case, and certainly did not make any assertions about the "rational relationship test" being the "correct point of departure for the evaluation of laws which uniquely burdened the interests of homosexuals." The *Romer* Court refrained from making any overt comment about how anything other than Amendment 2 should be analyzed for Equal Protection purposes.

The most frequently litigated question invoking Equal Protection for gay plaintiffs in federal courts during the 1990s was whether the policy that Congress adopted for the Armed Forces in 1993, the so-called "don't ask, don't tell" policy, violated the right of service members to Equal Protection under the Fifth Amendment Due Process Clause. There was considerable controversy about whether this policy was based on sexual orientation, as such, or on conduct. If, as the government argued in numerous cases defending the policy, it was based solely on conduct of a type that the Armed Forces had a right to prohibit by virtue of *Bowers*, it was hard to see how a viable Equal Protection claim could be raised. However, there was a plausible argument that the policy was not solely based on conduct, because a

96. 128 F.3d at 294.

97. *Id.* (footnote ommited).

service member could avoid adverse consequences by showing that even though he or she had engaged in prohibited conduct, the conduct was not consistent with their heterosexual orientation and was due to unusual circumstances, usually intoxication. Interestingly, given the government's emphasis on conduct in defending the policy, *Bowers* was not invariably expressly invoked by the courts in rejecting challenges to the policy, although they frequently invoked earlier court of appeals decisions which had, in turn, explicitly relied upon *Bowers*. Discussion of the military cases is complicated by the policy of judicial deference to Congress and the military on personnel matters, a policy that courts frequently invoked in support of their conclusion that there should be no heightened scrutiny of military policies.

The two most prominent pre-*Romer* challenges to the "don't ask, don't tell" military policy that was enacted by Congress in 1993 were brought by individuals, Navy Lieutenant Paul Thomasson and Air Force Captain Richard Richenberg. In both cases, the service member was processed for discharge under the then-new policy after stating that they were gay, without any evidence that they had engaged in conduct that violated the military sodomy law.[98] Ruling on their Equal Protection claims, the Fourth and Eighth Circuits rejected arguments for heightened scrutiny. The Fourth Circuit *Thomasson* court never mentioned *Bowers*, citing *Steffan*, which concerned an earlier "mandatory discharge" version of the policy, as its authority for the proposition that discrimination against a class composed of persons defined by homosexual acts did not merit heightened scrutiny, but clearly relying on *Bowers*' determination that homosexual conduct did not enjoy constitutional protection.[99] The Eighth Circuit *Richenberg* court

98. Under the policy, individuals who state that they are gay will be presumed at least to have a propensity to engage in homosexual conduct, even in the absence of evidence that they have done so, and the burden is placed upon the individuals to show that they do not have such a propensity if they wish to remain in the service. Thomasson refused to discuss his sexual conduct, stating that nobody had charged him with sexual misconduct and he did not intend to "degrad[e]" himself by discussing the subject. Thomasson v. Perry, 80 F.3d 915, 921 (4th Cir. 1996). The opinion in *Richenberg* does not reflect a similar refusal, but merely that Richenberg was discharged based solely on the statement he was gay, as he had provided no evidence to rebut the presumption about his sexual propensities. Richenberg v. Perry, 97 F.3d 256, 260 (8th Cir. 1996).

99. 80 F.3d at 929. The court stated:

> The statutory classification here is not suspect, nor does it burden any fundamental right. Section 654(b) is aimed at service members who engage in or have a propensity to engage in homosexual acts. A class comprised of service members who engage in or have a propensity or intent to engage in such acts is not inherently suspect. *See Steffan*, 41 F.3d at 684 n.3 (classification comprised of persons who engage in acts that the military can legitimately proscribe is not suspect). Similarly, there is no fundamental constitutional right on the part of a service member to engage in homosexual acts and there is a legitimate military interest in preventing the same. Heightened scrutiny of this statute would involve the judiciary in an inventive constitutional enterprise, and it would frustrate the elected branches of government in their efforts to deal with this question. Rational basis is accordingly the suitable standard of review.

denied heightened scrutiny, citing the *Thomasson* opinion with approval and citing prior decisions that had explicitly relied on *Bowers* in rejecting the claim that sexual orientation is a suspect classification.[100]

The Second Circuit's decision in *Able v. United States*[101] was the major post-*Romer* challenge to the military policy during the period prior to *Lawrence*. *Able* was a test case assembled by LGBT public interest litigation groups in the belief that *Romer* would lead to a new receptivity by the federal courts to gay Equal Protection claims, and that the "don't ask, don't tell" military policy was also vulnerable to a First Amendment challenge by making statements an explicit basis for discharge. However, the plaintiffs did not argue that the policy should be subjected to heightened scrutiny. Rather, they contended that, as in *Romer*, the policy was based on animus and stereotyping, and thus "irrational" and not necessary to achieve the "unit cohesion" and "order" that Congress had identified in the statute as its goals for enacting the policy.[102]

A federal district judge agreed with the plaintiffs as to the irrationality of the policy, while observing in dicta that a traditional doctrinal analysis of the question should lead to heightened scrutiny for government policies that discriminate based on sexual orientation.[103] However, the court of appeals had already held at a previous stage in the case that the policy focused on conduct rather than status.[104] Rather than get into an argument about whether heightened scrutiny would be appropriate, the appeals court instead focused most of its opinion on the deference that courts must give to military policy judgments in constitutional cases. "[W]hile we are not free to disregard the Constitution in the military context, we owe great deference to Congress in military matters," the court wrote, continuing, "[a]lthough deference does not equate to abdication of our constitutional role in considering whether there is substance to the government's justification for its action, courts are ill-suited to second-guess military judgments

Id. at 928.

100. "Richenberg argues that we should apply heightened scrutiny because homosexuality is a suspect classification. We reject this contention for the reasons stated by the Fourth Circuit in *Thomasson*." 97 F.3d at 260 (citation omitted).

101. 155 F.3d 628 (2d Cir. 1998).

102. *See* 10 U.S.C. § 654(a)(6) (1994).

103. 155 F.3d at 634.

104. *See* Able v. United States, 88 F.3d 1280, 1297–99 (2d Cir. 1996). In defending the policy, the government has consistently argued that the intent of the policy is to exclude from the military anybody with a "propensity" to engage in "homosexual conduct," thus making the policy conduct-based rather than status-based. The proviso that a person who can demonstrate that the homosexual conduct in which they actually engaged did not truly reflect their heterosexual sexual orientation undermines this argument, because it suggests that ultimately only persons with a particular sexual orientation were subject to discharge, regardless of their actual conduct.

that bear upon military capability or readiness."[105] The court arguably abdicated its role of providing meaningful judicial review, however, by accepting at face value the assertions by military officials in the hearings that led to enactment of the policy that it was necessary to dismiss known homosexuals in order to preserve unit cohesion and good order, or at least by finding it "rational" for members of Congress to have done so, without asking whether there was any objective basis for such statements or putting any burden on the government to provide one. The court apparently saw this bland acceptance of assertions in the legislative history as consistent with a traditional rational basis approach combined with the heightened deference for congressional and military judgments in policy matters that Supreme Court precedent commanded.

Even though *Romer* (and *Palmore v. Sidoti*,[106] a much earlier case supporting the contention that animus-based legislation is constitutionally suspect) suggests that where animus may be at play the courts should not uncritically accept the government's articulated reason for a policy, this court was willing to do so in the name of deference to Congressional and military judgment when it perceived that national defense was at issue. Courts deciding equal protection cases in a civilian context were not so constrained. In *Quinn v. Nassau County Police Department*,[107] for example, a trial court in the Second Circuit pointed out that the military cases turn on the courts' judgment that the military environment differs from a civilian context, not on a view that gay people are not in general entitled to protection against governmental discrimination under the Equal Protection Clause. The *Quinn* court pointedly noted that "these Courts recognized that government action in a civil rather than a military setting cannot survive a rational basis review when it is motivated by irrational fear and prejudice towards homosexuals."[108] As in many other cases, the defendant in *Quinn* did not assert that discrimination against gay people was lawful but rather took the position that it had not discriminated. Thus, as the defendant had not articulated any justification for discrimination and the court could not imagine any constitutionally acceptable justification, the plaintiff won because the preponderance of the evidence supported his claim of discrimination.

In a case decided shortly before the Supreme Court's decision in *Law-*

105. 155 F.3d at 634 (citations omitted).
106. 466 U.S. 429 (1984).
107. 53 F. Supp. 2d 347 (E.D.N.Y. 1999).
108. *Id.* at 357.

rence, *Flores v. Morgan Hill Unified School District*,[109] a Ninth Circuit panel relied upon *High Tech Gays* yet again for the proposition that "homosexuals are not a suspect or quasi-suspect class," but did not characterize *High Tech Gays* as using "active rational basis" review for gay discrimination claims, instead describing the circuit precedent as holding that homosexuals "are a definable group entitled to rational basis scrutiny for Equal Protection purposes."[110] This was enough, however, to reject a qualified immunity claim by school administrators who were charged with failing to accord gay students the same protection against categorical harassment that the school district provided for other groups of students. The defendants did not offer any justification for such disparate treatment, instead arguing (futilely, in light of the plaintiffs' factual allegations) that they had provided equal treatment to gay students and, thus, their motion for summary judgment on qualified immunity grounds was rejected.

III. *LAWRENCE V. TEXAS* AND BEYOND

On June 26, 2003, the Supreme Court explicitly overruled *Bowers v. Hardwick* in *Lawrence v. Texas*, stating that "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and is now overruled."[111] However, the Court's decision was not ideally articulate in making clear whether it was overruling *Bowers*' determination that the action of engaging in homosexual sodomy did not involve the exercise of a fundamental right of sexual privacy, coextensive with the privacy right that had been developed in the contraception/abortion line of cases, or rather whether it was overruling *Bowers*' assertion that the assumed legislative moral disapproval of homosexual conduct could provide a rational basis for sustaining a criminal statute that did *not* implicate a fundamental right. This uncertainty was compounded by the Court's failure to make explicitly clear whether it was applying some form of heightened or strict scrutiny to the challenged Texas statute. Instead, after reciting the narrow factual setting for this case—private consensual non-commercial adult homosexual conduct—the Court stated its holding with a rhetorical flourish not grounded in the kind of doctrinal language used in some of its earlier Due Process or Equal Protection cases:

> The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their

109. 324 F.3d 1130 (9th Cir. 2003).
110. *Id.* at 1137.
111. 539 U.S. 558, 578 (2003).

> private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey*, [] at 847, 112 S.Ct. 2791. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.[112]

The first sentence above seems borrowed from European Human Rights Law, as the European Convention on Human Rights specifically provides that individuals are entitled to respect for their private life,[113] a phrase not characteristic of American constitutional law. The next two sentences are conclusions presented without direct justificatory argument or explicit reference to the doctrinal question of the appropriate level of judicial scrutiny. The quote from *Casey* is a broadly general assertion of principle, once again bereft of any reference to the level of scrutiny issue. And the final sentence, upon which subsequent lower court rulings were to place great weight in their conclusion that this was a "rational basis" holding, merely states that in the balance between the individual's interest and the state's interest, the state has presented no legitimate interest to place on the scales. In that sense, the final sentence evokes such prior lower court decisions as *Quinn* or *Nabozny*, where the courts noted that the state had articulated no justification for treating gay people worse than others, as it was the state's position, belied in those cases by the evidence, that the state was not treating gay people worse than others.[114] Significantly, this final sentence of the paragraph clearly implies that the one justification actually advanced by the state in its briefs and oral argument—the Texas legisla-

112. *Id.* The citation to *Casey* is no real help in clarifying the matter because that decision poses similar problems of doctrinal clarity, leaving unanswered the question whether a pregnant woman has a fundamental right to terminate her pregnancy, rather speaking in terms of a liberty interest subject to varying degrees of regulation at various times during the process of pregnancy.

113. Article 8 of the European Convention provides:

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Convention for the Protection of Human Rights and Fundamental Freedoms, *as amended by* Protocol No. 11, Council of Europe, Nov. 4, 1950, 312 E.T.S. 155.

114. The state actually attempted to make the same argument in *Lawrence*, contending that the statute penalized acts, not status, and therefore did not discriminate based on sexual orientation because two heterosexuals of the same sex would violate the statute if they engaged in anal or oral sex. Justice O'Connor's concurrence refuted this argument by observing that the conduct at issue "is closely correlated with being homosexual," 539 U.S. at 583 (O'Connor, J., concurring), and in the Court's opinion, Justice Kennedy described the conduct at issue as "sexual practices common to a homosexual lifestyle." *Id.* at 578.

ture's moral disapproval of homosexual sodomy—was not "legitimate."[115]

Thus, the Court's actual statement of its holding took no explicit position about whether the defendants were asserting a fundamental right. Rather, it ruled that in the absence of any legitimate justification, the state's criminal statute could not be applied to the conduct charged against the defendants. This was not necessarily a ruling that the statute was facially unconstitutional, or unconstitutional in all its potential applications, since the statute, as written, applied broadly to all instances of same-sex anal or oral intercourse, whether in private or public, whether consensual or coerced, whether involving payment or not, whether involving minors or only adults, and the Court expressly disclaimed ruling on its application in any context other than that presented by the plaintiffs. In light of the overall tone and rhetoric of the opinion, one might even conclude that the Court was only rejecting the application of the statute in cases involving a romantic relationship, although one might construe the text to extend to a "one-night stand" that had the potential to blossom into something deeper in terms of personal commitment.

These ambiguities made it possible for Justice Scalia to assert in his dissent that, in fact, the Court had not really overruled *Bowers* in its entirety, just those aspects of *Bowers* directly relevant to sustaining the application of Georgia's criminal law to "homosexuals" who were engaging in "sodomy," to use Justice White's idiosyncratic formulation of the issue in *Bowers*.[116]

The Court had granted certiorari on the question whether the Texas Homosexual Conduct Law violated the defendants' right to Equal Protection, but the Court decided not to answer that question. Justice Kennedy wrote that although an Equal Protection argument was "tenable," the Court preferred to decide the case by overruling *Bowers*, because *Bowers*' continued existence as a precedent "is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[117] Kennedy did not cite any cases for this point, but the opinion might be read as referring to the pre-*Lawrence* Equal Protection case law relying on *Bowers* to reject gay Equal Protection claims. This suggests that invalidation of

115. Interestingly, the state asserted that it was not treating gay people differently than others, because heterosexuals were also prohibited from engaging in same-sex sodomy. Justice O'Connor took on and demolished this argument in her concurring opinion. *Id.* at 583 (O'Connor, J., concurring).

116. *Id.* at 586 (Scalia, J., dissenting). Scalia characterized the final sentence of the Court's holding this way after quoting it: "overruling *Bowers* to the extent it sustained Georgia's antisodomy statute under the rational basis test." *Id.* Then he observes that the Court does not declare that "homosexual sodomy" is a "fundamental right" under the Due Process Clause. *Id.*

117. *Id.* at 574–75 (majority opinion).

Texas' Homosexual Conduct Law using the Due Process Clause was intended by the Court to signal that discrimination on the basis of sexual orientation, if premised on moral disapproval of homosexual conduct, was similarly unconstitutional. Regardless of the state's argument, noted above, that the law targeted conduct rather than status and thus did not discriminate on its face based on the sexual orientation of the participants, it had been conceded at oral argument in *Bowers* in 1986 that any attempt to enforce the sodomy law against consensual private sodomy involving heterosexuals would violate the right of sexual privacy that the Court had been constructing in its reproductive rights cases leading up to that decision, as Justice Stevens noted in his *Bowers* dissent.[118] Thus, Justice Kennedy's assertion that holding the law unconstitutional under the Due Process Clause would also "advance" the case against sexual orientation discrimination is significant for subsequent Equal Protection analysis. Indeed, Kennedy's approach at least implies that Due Process and Equal Protection are merely two sides of the same coin, an implication confirmed by the Court's Fifth Amendment Due Process jurisprudence, holding, essentially, that equal protection of the law is an integral component of substantive due process, thus subjecting the federal government to the identical equal protection requirement that applies to the states explicitly through the Fourteenth Amendment Equal Protection Clause.[119]

A practical application of this idea later emerged in two federal Court of Appeals opinions dealing with constitutional challenges to the "don't ask, don't tell" policy. Under the policy, gay people can serve in the military so long as they refrain from doing or saying anything that might lead anybody to realize that they are gay, and potential recruits are not asked to disclose their sexual orientation.[120] However, the policy imputes to gay people a propensity to engage in "homosexual conduct," so if they do or say anything that would give rise to the inference that they are gay, they are subject to discharge unless they can prove that they lack such a propensity. One of the pillars supporting this policy is Article 125 of the Uniform Code of Military Justice, which makes sodomy illegal in the military, regardless of the sex of the participants.[121] Another is the implication from the find-

118. Bowers v. Hardwick, 478 U.S. 186, 217–18 (1986) (Stevens, J., dissenting).

119. Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that although the Fourteenth Amendment Equal Protection Clause does not bind the government of the District of Columbia, that government is nonetheless bound by the obligation of equal protection of the laws by virtue of the Due Process Clause of the Fifth Amendment); *see also* United States v. Sperry Corp., 493 U.S. 52 (1989); Immigration & Naturalization Serv. v. Pangilinan, 486 U.S. 875 (1988); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975).

120. 10 U.S.C. § 654 (2006).

121. Article 125 provides:

ings section of the enacting statute, that homosexuality is incompatible with military service, not because gay people are not capable of performing the tasks required of military personnel, but because their presence is seen as endangering morale and good order due to the presumed fears and prejudices of non-gay personnel subjected to their presence.[122] Every pre-*Lawrence* attempt to challenge this policy using Equal Protection arguments has ultimately foundered on the conclusions that sexual orientation is not a suspect classification and that the rational basis test is easily satisfied by the testimony of military commanders during the congressional hearings in 1993 that the policy is necessary for military operations, and, of course, on the problem that the policy focused on individuals deemed to have a propensity to engage in conduct that violates military penal law.

Challengers to the policy have also argued that it violates the Due Process Clause because it burdens the privacy rights of gay service members by subjecting them to expulsion based on their sexual identity and engagement in private, consensual sexual activity. Prior to *Lawrence*, this argument could not make any headway because of *Bowers*. If the conduct at issue was subject to criminal penalties under the UCMJ, it was difficult to argue that persons with a "propensity" to engage in such conduct could claim constitutional protection against the military personnel policy on Due Process grounds. Once *Bowers* had been overruled, however, courts had to confront the loss of a major pillar supporting the policy, and the continued validity of Article 125 of the UCMJ was called into question.

The specialized appellate courts concerned with military justice responded to this new state of affairs by acknowledging that *Lawrence* required a de facto revision of Article 125 to take account of the liberty interest identified by the Supreme Court. This required a case by case determination whether Article 125 can be constitutionally applied to a particular set of facts. This revisionist interpretation is articulated in a 2004 ruling by the U.S. Court of Appeals for the Armed Forces, *United States v. Marcum*,[123] an appeal of a court martial conviction that included a count for "non-forcible sodomy." Article 125, as noted above, on its face forbids all acts of sodomy by military personnel. In this case, the appellant, a male

> (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.
>
> (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

Id. § 925.

122. *Id.* § 654(a)(15) ("The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.").

123. 60 M.J. 198 (C.A.A.F. 2004).

technical sergeant serving in a supervisory capacity, had been convicted of private non-forcible same-sex sodomy with a lower-ranking adult service member in his chain of command. He argued that this private consensual conduct should be held protected under *Lawrence*, thus invalidating the application of Article 125 to his case.

The court set out a middle ground between the contending views about whether *Lawrence* was a fundamental rights case or a rational basis case. Focusing on the Supreme Court's recital in its key paragraph of the precise factual scenario that it was addressing, the Marcum court treated *Lawrence* as an "as applied" holding, concluding that there was no need to rule on the facial validity or invalidity of Article 125. Instead, the court said:

> What *Lawrence* requires is searching constitutional inquiry. This inquiry may require a court to go beyond a determination as to whether the activity at issue falls within column A—conduct of a nature to bring it within the liberty interest identified in *Lawrence*, or within column B—factors identified by the Supreme Court as outside its *Lawrence* analysis. The Court's analysis reached beyond the immediate facts of the case presented. This is reflected by the Court's decision to rule on the grounds of due process as opposed to equal protection. "Were we to hold the statute invalid under the Equal Protection Clause," the Supreme Court noted, "some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants."[124]

The *Marcum* court examined the particular circumstances presented by a military environment and the appellant's place in that environment and in relation to the service member with whom he engaged in sex. Due to the differences in their rank, and the appellant's supervisory authority over his sexual partner, there were "special circumstances" to figure into the analysis that derived from the Supreme Court's itemization of the factual elements that were not present in the *Lawrence* case. Most significantly, the supervisory status creates a doubt whether true consent could be found, due to the influence the appellant would have over the life and career of his subordinate. Additionally, a sexual relationship could lead to suspicion of favoritism towards the sexual partner in command decisions, undermining the chain of command and the professional detachment that a superior officer should have toward his subordinates. In other words, in the context of the hierarchical military structure, there were good reasons to seek to deter officers from having sex—whether sodomy or any other form of sexual activity—with the service members under their command. And it was on that basis that the *Marcum* court found that the appellant's conduct was not

124. *Id.* at 205 (citing Lawrence v. Texas, 539 U.S. 558, 575(2003)).

protected by *Lawrence*.

What is most important about this analysis from the point of view of the "don't ask, don't tell" policy and its logical reliance on Article 125 for its justification, is that it undermines the argument that all those having a "propensity" to engage in homosexual conduct must be separated from the service, because such "propensity" might be channeled into sexual conduct that would invoke none of the reasons to find *Lawrence* inapplicable as articulated by the *Marcum* court. If the service member engages in consensual sodomy with a civilian, in a private location far from the military base, at a time when the service member is off duty, none of the specific concerns arising from a military environment are implicated. Thus, the policy is shown to be overly broad, going further than required to preserve the interests identified by Congress when it was enacted, and significantly burdening the liberty interest of individual service members.

So held a panel of the Ninth Circuit in *Witt v. Department. of Air Force*,[125] as the facts presented by plaintiff Margaret Witt challenging her discharge exactly fit the pattern articulated above. She alleged that she had conducted a discrete homosexual relationship with a civilian woman in the privacy of a residence hundreds of miles away from the military facility where she worked, and had never spoken about her homosexuality to anybody on the base or in the military, even when she was contacted and confronted with allegations that she was carrying on a homosexual relationship, to which she refused to respond. She never "told," but she was discharged based on the military's conclusion that the allegations it had received about her being a lesbian who had a relationship with another woman were true, as they were. The federal district court dismissed her complaint, ruling she had failed to state a valid constitutional claim, relying upon pre-*Lawrence* Ninth Circuit decisions upholding the validity of the military policy.[126]

Witt argued on appeal that the prior Ninth Circuit rulings, each of which had evaluated the constitutionality of the military policy using the rational basis test, were effectively overruled by *Lawrence*, because, according to her argument, *Lawrence* had recognized a fundamental right for homosexuals to engage in sodomy, and the military policy unjustifiably burdened that right. The Ninth Circuit panel was not willing to go quite so

125. 527 F.3d 806 (9th Cir. 2008).

126. Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1136 (9th Cir.1997) (rejecting an Equal Protection Clause challenge to DADT under rational basis review); Philips v. Perry, 106 F.3d 1420, 1425–26 (9th Cir.1997) (same); Beller v. Middendorf, 632 F.2d 788, 805–12 (9th Cir.1980) (rejecting procedural due process and substantive due process challenges to a Navy regulation forbidding homosexual service in the Navy).

far. Having determined that the *Lawrence* opinion was "ambiguous" on the appropriate level of review, the court said that "we analyze *Lawrence* by considering what the Court actually did, rather than by dissecting isolated pieces of text. In so doing, we conclude that the Supreme Court applied a heightened level of scrutiny in *Lawrence*."[127]

The court supported this conclusion by arguing first that the result in *Lawrence* was inconsistent with rational basis review, and the overruling of *Bowers* signaled that *Bowers* had either inappropriately used that level of scrutiny or incorrectly applied it. In selecting between these two possibilities, the Witt court opted for the former, seizing upon Justice Kennedy's observation that the *Bowers* court had failed to "appreciate the extent of the liberty interest that was at stake."[128] By holding that the conduct at issue fell within the sphere of the liberty interest that had been staked out in prior sexual privacy cases, the *Lawrence* court had taken a route that was "inconsistent with rational basis review."[129] Further, argued the *Witt* court, citing in support of its decision prior cases that had all used at least heightened scrutiny, the *Lawrence* court was indicating that heightened scrutiny was the correct methodology to evaluate laws burdening private, consensual homosexual conduct. Finally, the last sentence of the *Lawrence* court's holding spoke of the failure of the state to "justify" its intrusion into the liberty of the petitioner, which was also inconsistent with rational basis review, because the state bears no burden of justification in a rational basis case, where the Court has placed the burden on the challenger to show that there is no rational justification for the statute.

However, the *Witt* court, noting that because *Lawrence* had not used the strict scrutiny vocabulary of "narrow tailoring" or "compelling state interest," took the position that this was not a fundamental rights case. It looked for guidance to an appropriate method of judicial review at *Sell v. United States*,[130] a case decided shortly before *Lawrence*. In *Sell*, the Court confronted a due process challenge to the practice of forcible administration of anti-psychotic drugs to criminal defendants in order to render them competent to stand trial. The Witt court found to be "instructive" the *Sell* Court's use of a methodology intermediate between strict scrutiny and rational basis. The *Sell* Court found the petitioner's liberty interest to be "significant," the state's interest to be "legitimate" and "important," and held that under the circumstances it was up to the state to "justify" its "intrusion

127. 527 F.3d at 816.
128. *Id.* at 817 (quoting *Lawrence*, 539 U.S. at 567).
129. 527 F.3d at 817.
130. 539 U.S. 166 (2003).

into the individual's recognized liberty interest."[131] The parallelism with the Court's terminology in *Lawrence* suggested a similar approach in *Witt*, where the plaintiff's liberty interest is at least "significant."

The key step in the analysis, of course, is to place the burden on the government to "justify" its intrusion into the individual's liberty interest. Once that burden has been placed on the government to "justify" its policy, a court may not simply dismiss a claim plausibly invoking that liberty interest. The *Sell* court identified several specific factors for analysis in carrying out this balance of interests, three of which struck the *Witt* court as relevant to the challenge to the military policy:

> We hold that when the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*, the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest. In other words, for the third factor, a less intrusive means must be unlikely to achieve substantially the government's interest.[132]

Further, the court held that, as in *Lawrence* itself, the challenge was to the policy as applied to the facts of the particular case. Just as *Lawrence* made clear that it was not considering the application of the Texas statute to non-consensual or public acts, the *Witt* court made clear that on remand the district court should focus on whether the military policy could constitutionally be applied to Major Witt's situation. While acknowledging that prior Ninth Circuit cases had rejected the idea of case-by-case determination of the constitutionality of dismissing a particular service member for homosexuality, the Witt court held case-by-case adjudication to be consistent with the approach that had been taken by the military appeals court in *Marcum*, at once acknowledging that *Lawrence* had some application in the military context but limiting its protection to cases in which the individual's conduct must be constrained due to the special circumstances of military life. The *Witt* court acknowledged that on the first factor, the military did have a significant interest, as identified in the preamble of the statute enacting "don't ask, don't tell," in maintaining good order and morale, so the question to be determined on remand was whether the government could satisfy the other two factors, showing that discharging Major Witt would advance those goals and was necessary to do so. In a footnote, the court suggested that under the facts Witt had alleged, it seemed unlikely that the government could meet that burden.[133]

131. *Id.* at 176–86.
132. *Witt*, 527 F.3d at 819.
133. *Id.* at 821 n.11.

Having found that heightened scrutiny applied to Witt's due process claim, the court summarily rejected her Equal Protection claim, based on the observation that *Lawrence* had declined to address the petitioners' Equal Protection claim, and thus the Ninth Circuit's prior rulings rejecting Equal Protection challenges to the military policy had not been affected by *Lawrence*.[134] This brief paragraph reasserts the formalistic distinction between due process and equal protection that is completely undermined by the prior Fifth Amendment Due Process analysis. That is, it seems clear that the due process and equal protection claims are factually and logically intertwined, at least when they are raised in the context of a challenge to a federal government policy where both kinds of claims are derived from the exact same words in the Constitutional text, the Due Process Clause in the Fifth Amendment. Since *Lawrence* was a challenge to a state law arising under the Fourteenth Amendment, where the text articulates two distinctly separate clauses for due process and equal protection restrictions on state action, the Court might naturally treat the two kinds of claims as analytically distinct. It seems less plausible to do so in a Fifth Amendment case.[135]

Shortly after the *Witt* ruling, the First Circuit ruled on a facial challenge to the military policy in a "test case" brought by a group of former military members, *Cook v. Gates*.[136] The *Cook* panel essentially agreed with the *Witt* court that heightened scrutiny should apply to a challenge to

134. One member of the Ninth Circuit panel argued in partial dissent that in fact *Lawrence* had been a fundamental rights case, and that *Romer* had left open the level of scrutiny to be applied in future equal protection claims brought by gay litigants, merely holding that Colorado Amendment 2 was unconstitutional because the Court could imagine no legitimate policy justification for it because it made a defined group of citizens unequal for the sake of making them unequal. This partially dissenting judge would have held that strict scrutiny applies to the military policy under both due process and equal protection theories, having concluded that sexual orientation should be considered a "suspect classification" using the traditional multi-factorial analysis to determine whether governmental discrimination against a particular group should be subjected to strict scrutiny. *Id.* at 822–27 (Canby, J., concurring in part and dissenting in part).

135. Indeed, the Ninth Circuit itself made a similar point in *High Tech Gays* when it used *Bowers* as a precedent to reject an Equal Protection challenge to the Defense Department's security screening process, observing that it would be anomalous if the same language from the Fifth Amendment that failed to protect homosexual conduct from criminal prosecution could be pressed into service to strike down a government policy that discriminates against persons because they engage in homosexual conduct. The very idea of due process and equal protection being distinct concepts as opposed to an overarching concept of fundamental fairness is exploded by the reasoning of both *High Tech Gays* and *Witt*.

136. 528 F.3d 42 (1st Cir. 2008). The plaintiffs had purported to bring both an as-applied and facial challenge, but the district court found the complaint deficient in factual allegations necessary for an as-applied challenge, and that aspect of the case dropped out. The plaintiffs also asserted a First Amendment claim, asserting that the policy unconstitutionally imposed a penalty on speech, but this was rejected in line with prior precedents holding that speech was merely the means of discovering the identity giving rise to a propensity to engage in conduct, so the consequences attached to "telling" were not due to telling but rather to what the telling had revealed about the speaker.

the military policy, but concluded, as a matter of law, that the government had met its burden of justification by reference to the legislative history of the 1993 statute, which enunciated congressional findings that the policy was necessary to achieve good order and morale in the military. Unlike the *Witt* court, the *Cook* court devoted extensive discussion to Supreme Court precedents compelling lower federal courts to extend significant deference to the fact-finding of Congress in matters of national security. Since this was a facial test case attack on the statutory policy, rather than an individual attack on its application in a particular case, the court saw no need for fact-finding about whether it was necessary to discharge a particular military member in order to achieve the goals that Congress had articulated. The court also noted *Witt's* reliance on the *Sell* decision for guidance on how to apply heightened scrutiny, but questioned its utility in the context of a military case, commenting, "Although we find *Sell* instructive in the sense that it illustrates the Supreme Court's application of an intermediate level of scrutiny, we do not find *Sell* especially helpful in analyzing this statute regulating military affairs."[137]

Turning to the plaintiff's Equal Protection claim, the *Cook* court asserted that *Lawrence* had not altered the rational basis analysis that the *Cook* court attributed to *Romer v. Evans*. Since the *Lawrence* Court refrained from analyzing the petitioners' Equal Protection claim, the *Cook* court asserted that *Lawrence* could not be argued to have changed the standard for Equal Protection review.

Thus, twice in 2008 federal circuit courts of appeal had ruled that *Lawrence* did not change the equal protection calculus of *Romer*, and that *Romer* had not established a requirement of heightened or strict scrutiny in Equal Protection claims raised by gay litigants, but both had in essence recognized Equal Protection-like claims against the federal government using a due process theory requiring heightened scrutiny of policies that burdened an individual's liberty interest in homosexual identity and conduct. Since federal Equal Protection claims are derived from the Due Process Clause of the Fifth Amendment, this was, in effect, a roundabout way of achieving heightened scrutiny of what is both an equal protection and a due process claim.

Judge William Canby, dissenting in *Witt*, argued that *Romer* had left open the question of what standard of judicial review courts should employ in ordinary sexual orientation discrimination cases. He also rejected the continuing precedential value of earlier Ninth Circuit cases rejecting "sus-

137. *Id.* at 60 n.10.

pect classification" status for sexual orientation, as they derived from *High Tech Gays*, which grounded its reasoning in the now-overruled *Bowers* decision. Reviewing the factors that the Supreme Court has used to identify suspect classifications, he concluded without equivocation that sexual orientation should be deemed a suspect classification. He referenced his own earlier dissenting decisions on this point, which he summarized by asserting:

> [H]omosexuals have "experienced a history of purposeful unequal treatment [and] been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."[138]. They also "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are [ ] a minority."[139] In short, they are a group deserving of protection against the prejudices and power of an often-antagonistic majority.[140]

However, despite these developments showing a possible recent drift away from the pre-*Lawrence, Bowers*-rooted approach to gay Equal Protection claims, the effect of *Bowers* lingers on, as evidenced by the quotations from recent trial court opinions that preface this article, and was evident in a recent Tenth Circuit ruling on a sexual orientation discrimination claim by a lesbian who was denied a position as a public school administrator, arguably because the school superintendent thought that the community would have moral objections to a lesbian in that position.[141] The complicating factor in the case was that the superintendent's action came a few weeks before the Supreme Court announced its decision in *Lawrence*, leading the court of appeals to conclude that because *Bowers* had not yet then been overruled and an old *Bowers*-rooted Tenth Circuit decision had rejected a claim of heightened scrutiny for anti-gay discrimination (ironically, in another case where an applicant for a school administrator position was rejected due to a school superintendent's belief that he was gay),[142] the school superintendent was immune from any liability for violating the Equal Protection rights of the lesbian applicant. Although the trial court had concluded that the superintendent's action had violated the plaintiff's right to equal protection, but the action was barred on grounds of immunity, the Tenth Circuit panel affirmed the immunity ruling but abstained

138. *Witt*, 527 F.3d at 824–25 (quoting Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976)).

139. 527 F.3d at 825 (quoting Lyng v. Castillo, 477 U.S. 635, 638 (1986)).

140. 527 F.3d at 825. Judge Canby's analysis was similar to that of the California Supreme Court in *In re Marriage Cases*, 183 P.3d 384, 441–42 (Cal. 2008), in which the court found sexual orientation to be a suspect classification under the California Constitution, in the context of a successful challenge to a statute that limited the definition of marriage to the union of a man and a woman.

141. Milligan-Hitt v. Bd. of Tr. of Sheridan County Sch. Dist., 523 F.3d 1219 (10th Cir. 2008).

142. Jantz v. Muci, 976 F.2d 623 (10th Cir.1992).

from pronouncing on the correctness of the trial court's determination that the action was unconstitutional under post-*Lawrence* law, since it found that only pre-*Lawrence* law was relevant to the trial court's decision.[143] Thus, at least in the Tenth Circuit, it seems that public officials may still enjoy qualified immunity when they rely on the moral disapproval of the community to discriminate against gay people.[144]

CONCLUSION

Although *Bowers v. Hardwick* was not an Equal Protection case, many lower federal courts cited and relied on it as authority for holding that Equal Protection claims by gay litigants were entitled, at best, to rationality review, and some have dismissed such claims outright on the assertion that gay people are not a "protected class" for constitutional purposes. Now that *Bowers* has been overruled in Lawrence v. Texas, and indeed discredited as having been wrongly decided in the first instance, it is past time for Equal Protection rulings by the circuit courts relying on Bowers to be discarded as precedents, even when they have not been specifically overruled by later decisions of the same circuit. Although the Supreme Court has not clearly spoken on the question whether gay Equal Protection claims should invoke heightened scrutiny by the courts, the combination of the Court's rulings in Romer v. Evans and Lawrence v. Texas provide the basis for concluding that the earlier *Bowers*-rooted opinions are no longer plausible interpretations of the constitutional rights of gay people to fair treatment by government actors. Surely, in the wake of *Lawrence*, there can be little question that discrimination on the basis of private homosexual conduct or on the status of having a homosexual sexual orientation presents at least an actionable claim under the Fifth or Fourteenth Amendments, and the Court's actual ruling in *Romer*, as noted in the 2008 military rulings by the First

143. At the time of its opinion, the 10th Circuit's refusal to rule on whether the superintendent's action was unconstitutional violated the procedure established by the Supreme Court for determining qualified immunity in Saucier v. Katz, 533 U.S. 194 (2001). Under *Saucier*, a court was first to determine whether the official's action was unconstitutional, and only then, if it was found to be unconstitutional, to decide whether its unconstitutionality was sufficiently established to overcome qualified immunity. The Court subsequently decided, in Pearson v. Callahan, 129 S.Ct. 808 (2009), that a court confronting a qualified immunity defense can proceed directly to the question whether the claimed constitutional right is sufficiently established, without opining on the merits, in effect endorsing the procedure the 10th Circuit followed in deciding the immunity question in *Milligan-Hitt*.

144. However, another Tenth Circuit panel subsequently found that when a government defendant implausibly denies having discriminated, and thus provides no explanation for its actions, the defendant will not be shielded by qualified immunity from a sexual orientation discrimination claim that is facially valid, Price-Cornelison v Brooks, 524 F.3d 1003 (10th Cir. 2008), so the circuit was taking a position, consistent with *Jantz*, that the state must have at least a rational basis for treating gay people differently from non-gay people, a point not quite understood by some trial judges.

and Ninth Circuits, can leave little doubt that gay Equal Protection claims are entitled to at least heightened (if not strict) scrutiny from the courts.