The Road Not Taken: Able v. United States, Equal Protection, Due Deference, and Rational Basis Review

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NOTES & COMMENTS

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INTRODUCTION

In Able v. United States, the Second Circuit missed an opportunity to clarify the current state of rational basis review as applied to Equal Protection challenges.\(^1\) The Court relied on the principle of due deference to the Military and as a consequence, failed to clarify when and where it is appropriate to apply the rational basis review used in cases such as City of Cleburne v. Cleburne Living Center, Romer v. Evans, and Palmore v. Sidoti.\(^2\) More importantly, it also failed to grant our gay service persons their Fourteenth Amendment right to equal protection of the law.

Lieutenant Colonel Jane Able,\(^3\) Petty Officer Robert Heigl, First Lieutenant Kenneth Osborn, Sergeant Steven Spencer, Lieutenant Richard von Wohld and Seaman Werner Zehr, six gay service persons who had served honorably in the Military for many years, challenged the controversial “Don’t Ask, Don’t Tell” policy (the “Act” or the “Policy”).\(^4\) The plaintiffs argued that the new statute

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\(^1\) 155 F.3d 628 (2d Cir. 1998).

\(^2\) See infra notes 113-207 and accompanying text.

\(^3\) “Jane Able” is a Lieutenant Colonel in the Army Reserve; the name is a pseudonym. See Able v. United States, 88 F. 3d 1280, at 1284, n.1 (2d Cir. 1996).

\(^4\) See 10 U.S.C. § 654 (1994). The Act states: “Policy. A member of the armed forces shall be separated from the armed forces under regulations . . . if one or more of the following findings is made . . . 1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act, . . . unless . . . that the member has demonstrated that — a) such conduct is a departure from member’s usual . . . behavior; b) such conduct . . . is unlikely to recur; c) such conduct was not accomplished by use of force . . . ; d) . . . the member’s continued presence in the armed forces is consistent with the interests of the armed forces . . . e) the member does not have a propensity or intent to engage in homosexual acts. 2) That the member has stated he or she is a homosexual . . . unless . . . the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. 3) That the member has married or attempted to marry a person known to be of the same biological sex.” 10 U.S.C. § 654(b).
violated both their right to equal protection under the Fourteenth Amendment and their right to free speech under the First Amendment.\(^5\)

Initially, the plaintiffs sought and obtained an injunction that prevented the Military from initiating discharge proceedings against them.\(^6\) The Second Circuit upheld this injunction.\(^7\) On March 30, 1995, the District Court held that Section (b)(2) of the Act violated the First and Fourteenth Amendments, but that the plaintiffs lacked standing to contest section (b)(1).\(^8\) On appeal, the Second Circuit vacated and remanded that decision, instructing the District Court to rule on the constitutionality of section (b)(1) and to hold further proceedings with respect to section (b)(2).\(^9\) The District Court subsequently held the entire Act unconstitutional.\(^10\) The Second Circuit in turn overruled this decision.\(^11\)

This Comment explores the equal protection challenge in \textit{Able}. As groundwork to the discussion of \textit{Able}, Part One reviews the history of Equal Protection.\(^12\) Because so much of Equal Protection analysis hinges on the levels of scrutiny, Part One also provides a brief review of those levels and their application; particularly as

\(^6\) Id. at 1045-46.
\(^7\) See \textit{Able} v. United States, 44 F.3d 128, 133 (2d Cir. 1995).
\(^8\) See \textit{Able} v. United States, 880 F. Supp. 968, 980 (E.D. N.Y. 1995). The District Court declined plaintiffs argument with respect to § 654(b)(1) of the Act for lack of standing. \textit{Id.} at 970. Section (b)(1) states that a member will be separated from the Military if the member has “engaged, attempted to engage, or solicited another to engage, in homosexual acts . . . .” 10 U.S.C. § 654(b)(1). “The six plaintiffs have ‘stated’ in their complaint that they are ‘homosexuals.’ That is the only thing that they have done that is before the court. Under the state of the pleadings the court thus does not consider the case to draw into question the validity of any subsection of the Act other than (b)(2).” \textit{Able}, 880 F. Supp. at 972. Section (b)(2) states that a member will “be separated . . . if one or more of the following findings is made . . . [t]hat the member has stated that he or she is a homosexual or bisexual, or words to that effect. . . .” 10 U.S.C. § 654(b)(2).
\(^9\) See \textit{Able} v. United States, 88 F. 3d 1280, 1300 (2d Cir. 1996).
\(^11\) 155 F. 3d 628, 636 (2d Cir. 1998).
\(^12\) See U.S. CONST. amend. XIV ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws"). \textit{See also infra} notes 19-38 and accompanying text.
applied to the Military.\textsuperscript{13} Part Two discusses \textit{Able}, focusing on a comparison of the Second Circuit\textsuperscript{14} and Eastern District of New York\textsuperscript{15} decisions, as well as discussing three relevant Equal Protection decisions: \textit{Romer v. Evans}, \textit{City of Cleburne v. Cleburne Living Center}, and \textit{Palmore v. Sidoti}.\textsuperscript{16} Part Three contains a brief discussion of homosexuals as a suspect class.\textsuperscript{17} This comment concludes that although the class should indeed be expanded, \textit{Romer v. Evans}, \textit{City of Cleburne v. Cleburne Living Center}, and \textit{Palmore v. Sidoti} clearly speak to the principle that even with the most minimum level of judicial scrutiny, the Act does not pass constitutional muster. Instead, even giving due deference to the Military, the Act only serves to further an illegitimate purpose.\textsuperscript{18} Additionally, the Second Circuit missed an opportunity to clarify the legitimate purpose prong of rational basis review.

\section*{I. History and Tradition}

\subsection*{A. Equal Protection}

Granting equal protection of the law to our gay service persons is consistent with both our current and historical understanding of the meaning of “equal protection of the laws.” Although today, equal protection of the laws means that the law will treat in an equal manner those who are similarly situated,\textsuperscript{19} there are conflicting views as to whether this was the original purpose of the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{13} See infra notes 39-79 and accompanying text.
\item \textsuperscript{14} See \textit{Able}, 155 F.3d 628 (2d Cir. 1998).
\item \textsuperscript{15} \textit{Able}, 968 F. Supp. 850 (E.D.N.Y. 1997).
\item \textsuperscript{16} See infra notes 119-65 and accompanying text.
\item \textsuperscript{17} \textit{Infra} notes 208-13 and accompanying text.
\item \textsuperscript{18} See, e.g., \textit{City of Cleburne, Tex. v. Cleburne Living Center}, 473 U.S. 432 (1985) (holding a zoning ordinance violated the Equal Protection Clause because it had no legitimate purpose); see also infra notes 166-207 and accompanying text.
\item \textsuperscript{19} See id. at 439.
\end{enumerate}
\end{footnotesize}
Equal Protection Clause. Some argue that the drafters of the Clause primarily intended to bolster existing Constitutional guarantees that were not being enforced by the States. Others claim the Clause’s primary impetus was racial, while others believe that the Clause was intended to deal with a broad panoply of discrimination. Support can be found for all these positions in both the broad language of the Clause and in the legislative history. Ultimately, the Clause is a product of prevailing social theories, and “[t]he right to protection [that] has deep roots in the English legal tradition.” Although mainstream theories of the intent of the drafters of the Equal Protection Clause differ widely, all share one distinctive characteristic[, they all . . . r]ead[] the Clause as guaranteeing the protection of equal laws . . .”

“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” The Fourteenth Amendment was passed as part of the sweeping Reconstruction Amendments in the era immediately following the Civil War. It was intended as a “unifying force” that would be the cornerstone of the Reconstruction Program. The Equal Protection Clause incorporated the prevailing

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20 E.g., Steven J. Heyman, The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment, 41 DUKE L. J. 507 (1991). “The principal aim of the Fourteenth Amendment was not to create new rights, but rather to incorporate into the Federal Constitution the fundamental rights that individuals already possessed under general constitutional theory, but that the states had failed to enforce adequately.” Id. at 509. See also Earl A. Maltz, The Concept of Equal Protection of the Laws - A Historical Inquiry, 22 SAN DIEGO L. REV. 499 (1985). “While varying substantially in detail, mainstream theories of the intent of the drafters of the Equal Protection Clause generally fall into two classes. In the first class are ‘race-focused’ theories. The other groups include what might be called open-ended theories.” Id. at 500.

21 See Heyman, supra note 20, at 509.

22 See Maltz, supra note 20, at 500-501.

23 E.g., Heyman, supra note 20, at 546-50.

24 See id. at 513.

25 See Maltz, supra note 20, at 499:

26 U.S. CONST. Amend. XIV.

27 See generally Maltz, supra note 20; Heyman, supra note 20.

28 See Maltz, supra note 20, at 503.

29 See id.
political theory of the social contract. Under this theory, citizens of a state granted allegiance to a state and relinquished certain rights that they had in nature, but in exchange the sovereign authority had an obligation to protect them. Historically, only outlaws and slaves were denied the right of equal protection.

"Protection and allegiance are reciprocal . . . [i]t is the duty of the government to protect; of the subject to obey." The discussion of allegiance and duty seem particularly salient in a discussion of Military regulations. The Clause grants the right to equal protection under the law. It has been argued that once government chooses to grant protection, it must grant the protection on an impartial basis, although it is under no obligation to grant that protection initially. This fails to recognize that in 1866 "equality" was understood to mean — at its most fundamental level, "being fully recognized as a freeman and a citizen." As the District Court in Able noted, "Voting, taking public office, serving on juries, and serving in the Military are the primary acts of public citizenship. In this court's judgment, equal protection forbids the government to erect barriers to the full participation of the plaintiffs in this case as American citizens."

B. The Levels of Scrutiny

There are three recognized levels of scrutiny: rational basis,

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30 *Id.* at 507; *see also* Heyman, *supra* note 20, at 563-64.
31 *See* Heyman, *supra* note 20, at 513-14.
32 *See* Maltz, *supra* note 30, at 509.
33 *See* Heyman, *supra* note 20, at 546 (quoting Senator Alvin Stewart of Nevada during the 39th Congress, 1866).
34 The mission of the Military necessitates "the subordination of the desires and interests of the individual to the needs of the service." *Orloff v. Willoughby*, 345 U.S. 83, 92 (1953). Based on the theory behind the Equal Protection Clause, as payment for this level of allegiance, the very least the Military can provide its members is a guarantee that members equally situated will be treated equally with regard to Military laws.
35 U.S. CONST. amend. XIV.
36 *See* Heyman, *supra* note 20, at 563.
37 *Id.*
38 *See* Able, 968 F. Supp. at 864.
These levels guide the court’s analysis of a Constitutional challenge, not whether the court should analyze the challenge. In recent years, there have been indications from the Supreme Court that there are, in fact, more than the three basic levels of scrutiny. However, the Supreme Court has not explicitly acknowledged this expansion.

The first of the three levels, and the most government friendly, is rational basis review. Generally, under rational basis review, a law will be upheld if it is rationally related to a legitimate government purpose. This level is applied in all cases where there is no fundamental right being infringed and where the injured party is not a member of a “suspect class.” The Supreme Court has been loath to

39 The levels are applied to all cases where there is an assertion of an Equal Protection or Due Process violation. The levels, in effect, tell the court how to evaluate the claim. What basis of review is applied will depend on several factors; one such factor is the right that is being asserted. Is it a “fundamental right,” i.e., one that is so basic to our system and way of life that violating it, is a violation of the very fabric of our society, then strict scrutiny is applied. The level applied by the court will also depend on who the plaintiff is. For example, a claim of racial or religious discrimination will also trigger strict scrutiny, partly because these are considered “immutable” characteristics which have been historically discriminated against, but, also because of the perception of a certain level of political powerlessness. Gender based claims trigger intermediate scrutiny. If you are a member of group that is not considered politically powerless, or as having an immutable characteristic, or are asserting a right that is not deemed fundamental, the court will use rational basis. E.g., Cleburne, 473 U.S. at 439-41.

40 E.g., id. at 440.

41 For example, in United States v. Virginia, Justice Ginsburg applied an “exceedingly persuasive” standard in an Equal Protection challenge to gender based classifications at the Virginia Military Institute. 518 U.S. 515 at 531-34. Gender classifications had normally called for intermediate scrutiny. See Cleburne, 473 U.S. at 439-40. Further, it has been noted that in certain cases the court actually applies rational basis with a bite. See, e.g., Jeffrey Shaman, Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny, 45 OHIO ST. L.J. 161 (1984).

42 See generally Romer v. Evans, 517 U.S. 620 (1996); Cleburne, 473 U.S. at 432.

43 E.g., Cleburne, 473 U.S. at 439-41; San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973). There are many criteria applied to determine whether someone is a member of a “suspect class.” The Supreme Court has said that “immutable characteristics” are important in determining whether someone is a member of a “suspect class.” Thus, issues of race, national origin, gender, and parentage are suspect and, therefore, require heightened scrutiny. See generally Fullilove v. Kluczinski, 448 U.S. 448, 496-97 (1980) (Powell, J., concurring). Whether someone is a member of a “suspect
expand the recognized "suspect" classes.\footnote{44} A rational basis analysis based on the Equal Protection Clause requires, first asking whether the law is drawing unequal distinctions between those who are similarly situated, and second if the government's reasons for drawing these distinctions is rationally related to a legitimate government purpose.\footnote{45}

The other two levels, intermediate and strict scrutiny, as their names imply, call for more stringent analysis. In cases calling for intermediate scrutiny, a government regulation must be substantially related to an important government purpose for it to be upheld. Generally, intermediate scrutiny is applied in cases involving gender and parentage.\footnote{46} Finally, under strict scrutiny, a law will be upheld only if it is necessary to achieve a compelling government purpose.\footnote{47} Traditionally, this level has only been applied in cases of race classifications and national origin — what have been termed "immutable characteristics" — or where a fundamental right is infringed.\footnote{48} Strict scrutiny has been described as "strict in theory and fatal in fact" because in most cases where it is applied, the government regulation is found unconstitutional.\footnote{49}

In equal protection claims the court relies on the three levels of scrutiny to determine what method of analysis to apply.\footnote{50} The applicable level is determined by examining the claimed injury and class will also be determined by the class' ability to protect itself through the political process; for example, aliens cannot vote and are thus not able to protect themselves via voting. See, e.g., Graham v. Richardson, 403 U.S. 365, 367 (1971). The Court has also looked to whether the class has a history of discrimination. See, e.g., Fullilove, 448 U.S. at 496.

\footnote{44} See generally Erwin Chemerinsky, Constitutional Law: Principles and Policies 530 (1997).

\footnote{45} See generally id. at 528.

\footnote{46} Id. at 429.

\footnote{47} See, eg., Bush v. Vera, 517 U.S. 952 (1996) (using strict scrutiny to hold a Texas redistricting plan unconstitutional because the new district lines were drawn with race as the predominant motivating factor); also Chemerinsky, supra note 44, at 529.

\footnote{48} See Chemerinsky, supra note 44, at 529; e.g., Cleburne, at 439-41.


\footnote{50} See generally Chemerinsky, supra note 44, at 527-31.
the nature of the person injured. In other words, the court reviews the claim through the eyes of the injured party. Only once it has determined what level of analysis to apply does it turn to look at the justification of the injuring party, the government. In evaluating Equal Protection claims regarding the Military, the court has always reversed its methodology. Instead of looking to the needs and claims of the injured party, it looks to the justifications of the entity doing the injury, the Military. In that way it has consistently applied only rational basis review to Military regulations.

C. The Lack of Scrutiny Applied to the Military: Due Deference

These three levels are the norm, but when applied to the Military, the Supreme Court has consistently set aside these classifications and only applied the most deferential rational basis review regardless of the right which is being curtailed. In Goldman v. Weinberger, then Justice Rehnquist quoted Rostker v. Goldberg stating that “judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.”

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51 Id. at 528. “[A]ll equal protection issues can be broken down into three questions: What is the classification? What level of scrutiny should be applied? Does the particular government action meet the level of scrutiny?” Id. The first of these questions is implicitly about the injured party in terms of how is the government treating someone differently from the way it is treating someone else.

52 Id.

53 See infra notes 80-207 and accompanying text.

54 E.g., Kahn v. Anderson, 255 U.S. 1 (1921) (holding that the Military could curtail the right to trial by jury); Burns v. Wilson, 346 U.S. 137 (1953) (limiting the availability of Habeas Corpus and Fourteenth Amendment protections in the Military); see also cf. 28 U.S.C §§ 867, 1259 (citing special proceedings regarding the right of appeal and the right to petition for certiorari); Kelly E. Henriksen, Gays, The Military, and Judicial Deference: When the Courts Must Reclaim Equal Protection as Their Area of Expertise, 9 ADMIN. L. J. AM. U. 1273 (1996).

55 E.g., Kahn, 255 U.S. 1; Burns, 346 U.S. 137. See also 28 U.S.C § 867, 1259 (citing special proceedings regarding the right of appeal and the right to petition for certiorari).

56 Goldman v. Weinberger, 475 U.S. 503, 508 (1986) (holding the Free Exercise Clause of the First Amendment, as applied to the Military, was not a prohibition
Although the Court has indicated, as Chief Justice Earl Warren stated, that those who serve in the Military "may not be stripped of their basic rights," it has been relatively hard-pressed to hold the Military accountable when it does strip its members of their rights.

The Court has many justifications for abdicating its "duty . . . to say what the law is" when dealing with the Military. First and foremost is the separation of powers argument which looks to the Constitution. The Court has also cited what has been termed the "majoritarian" argument, which places the Court as second class citizen to the "duly elected" branches of government. The special nature of the Military has also been cited as a justification for due deference. This special nature includes the need for discipline in the Military, the Military's traditional mode of operation which demands that its soldiers subjugate themselves as individuals for the

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57 Earl Warren, The Bill of Rights and the Military, 37 N.Y.U. L. REV. 181, 188 (1962) (discussing Burns v. Wilson, 346 U.S. 137 (1953)). Then Chief Justice Warren stated that since the Court in Burns had indicated that "court martial proceedings could be challenged through habeas corpus actions brought in civil courts, if those proceedings had denied the defendant fundamental rights" when viewed in their entirety, the various opinions in Burns stood for "the proposition that our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." Id. See also Chappell v. Wallace, 462 U.S. 296, 305 (1983) (stating "this Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.").

58 See Chappell, 462 U.S. at 305 (holding enlisted Military personnel were unable to maintain an action for damages against a superior officer for violation of his constitutional rights when those rights were violated in course of Military service).

59 See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). "It is emphatically the province and duty of the judicial department to say what the law is." Id. at 177.

60 See, e.g., Able, 155 F.3d 628.


63 See, e.g., Able, 155 F.3d at 632; Goldman, 475 U.S. at 507.

64 See, e.g., Able, 155 F.3d 628.
good of the unit, the need for readiness at a moments notice, and unit moral. Although there is a consensus that some level of deference is due to the Military, it can be argued that deference does not mean the Military should have free rein.

The separation of powers argument is rooted in Article 1, section 8 of the Constitution, which states that Congress has the power “[t]o make Rules for the Governing and Regulation of the land and naval Forces” and “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . .” Congress, of course has been given a host of other powers and duties under the Constitution. Since Marbury v. Madison the Court has been able, and to varying degrees willing, to review Congress’ exercise of those powers. Historically, the only area where the court

65 See, e.g., Goldman, 475 U.S. at 507.
66 See, e.g., Able, 155 F.3d 628.
67 Id.
68 E.g., Warren, supra note 57 at 188. “When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question.” Id. See also Henriksen, supra note 54.
69 See, e.g., U.S. CONST. art. 1, § 8 (Commerce Clause, Tax and Spend, Naturalization).
70 5 U.S. (1 Cranch) 137 (1803).
71 For example, during the New Deal era, almost every important piece of legislation passed under the rubric of the Commerce Clause was overturned. E.g., Carter v. Carter Coal Co., 298 U.S. 238 (1936) (holding unconstitutional the Bituminous Coal Conservation Act of 1935); A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) (holding the National Industrial Recovery Act unconstitutional). In 1937, for many reasons — not the least of which was presidential threat, this pattern changed. See ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS (1941) (discussing President Roosevelt’s “court packing” plan); see also Wickard v. Filburn, 317 U.S. 111 (1942) (upholding the Agricultural Adjustment Act). For over 50 years after President Roosevelt’s re-election in 1936 and his “court packing plan” in 1937, no Commerce Clause legislation was declared unconstitutional — until United States v. Lopez, 514 U.S. 549 (1995) (holding unconstitutional the Gun Free School Zones Act). See CHEMERISKY, supra note 44 at 194.

The Executive Branch has also not been immune from judicial power. See United States v. Nixon, 418 U.S. 683 (1974) (holding President Nixon had to produce tapes of his conversations while in office in order to comply with the terms of a subpoena issued to him as part of a criminal trial).
has consistently stepped aside has been the area of Congress’ powers in the realm of the Military.\textsuperscript{72}

Similar to the separation of powers argument, the majoritarian view, which argues that because Congress is duly elected, and the Court is not, Congress is in a better position to decide what is best for the people and can answer to the people via the political process.\textsuperscript{73} However, this argument appears the most skewed when applied to the decidedly counter majoritarian Military, where the leaders are appointed, not elected. As such the probability of abuse is potentially at its zenith. Professor Erwin Chemerinsky, discussing the majoritarian view, argues “The function of a judge is to give concrete meaning and application to our constitutional values. Once we perceive this to be the judicial function . . . then we are led to wonder why the performance of this function is conditioned upon legislative failure in the first place.”\textsuperscript{74} With regard to gays in the Military, the long-standing argument has been that our values do not include homosexuality.\textsuperscript{75} But, as discussed earlier, our long standing values do include the concept of equal protection of the law.\textsuperscript{76} Further, as Professor Chemerinsky argued, if one “defines ‘democratic’ . . . to reflect the actual nature of decision making,” it can be seen that the branches of government actually occupy different spaces on the “continuum” of the democratic process and that all the branches, to

\textsuperscript{72} See generally Able, 155 F.3d at 632-33 (discussing the long history of due deference to the Military).


\textsuperscript{74} Id. at 85 (quoting, Fiss, The Supreme Court 1978 Term - - Foreword: The Forms of Justice, 93 HARV. L. REV. 1, 9).

\textsuperscript{75} See, e.g., Romer v. Evans, 517 U.S. 620 (1996) (Scalia, J., dissenting). “The Court’s opinion contains grim, disapproving hints that Coloradans have been guilty of ‘animus’ or ‘animosity’ toward homosexuality, as though that has been established as un-American . . . I had thought that one could consider certain conduct reprehensible — murder, for example . . . and could exhibit even ‘animus’ toward such conduct. Surely that is the only sort of ‘animus’ at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in Bowers [v. Hardwick] . . . Coloradans are, as I say, entitled to be hostile toward homosexual conduct . . . .” Id. at 644 (emphasis supplied).

\textsuperscript{76} Supra notes 19-38 and accompanying text.
varying degrees, are accountable to the electoral process. The Court has cited the special nature of the Military, the need for discipline, the call for soldiers to subjugate themselves as individuals, the need for readiness at a moments notice, and the need for unit moral as reasons for supporting the doctrine of due deference to the Military. For example, in Orloff v. Willoughby, the Court reasoned that “the Military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.” This begs the question, at what point does the Military’s blatant flouting of the Constitution stop being a “legitimate Army matter” and become a judicial matter? It is well established that interpreting the Constitution and securing that the government comports with its principles are indeed matters for the judiciary.

II. CONFUSED STANDARDS: ABLE V. UNITED STATES

The Second Circuit in Able chose to use as its model for rational basis review the Heller v. Doe standard. There “the equal protection guarantee of the Constitution is satisfied when the government differentiates between persons for a reason that bears a rational relationship to an appropriate governmental interest.”

77 Chemerinsky, supra note 73, at 77-78.
78 See 345 U.S. 83, 94 (1953) (holding unless there is a showing that someone is being held in the Military unlawfully, the plaintiff can not use a habeas corpus proceeding in order for the Court to compel his discharge).
79 See Marbury v. Madison, 5 U.S. (1 Cranch) 137.
80 509 U.S. 312 (1993). Heller involved a Kentucky statute, which required clear and convincing evidence for involuntary civil commitments to institutions, based on mental retardation. This is in contrast to a reasonable doubt standard that is imposed for involuntary commitment based on mental illness. The Supreme Court held that the Kentucky statute did not violate the Equal Protection Clause under rational basis review because of the differences between people who were mentally retarded and those who were mentally ill; as well as because there were differences in the treatment of both types of persons. Id.
81 See Able, 155 F.3d at 631. It is highly questionable whether discriminating
contrast, the Second Circuit stated that the protection afforded by the Equal Protection Clause is "that all persons similarly situated should be treated alike."\(^8^2\) This is the language from *Cleburne*\(^8^3\) where the court used rational basis with teeth. The Court, however, pointed out that if persons are not similarly situated, the government is free to treat them differently.\(^8^4\) The Court made further use of *Heller* and stated that the plaintiffs had to negate every conceivable rationale the government might have for supporting this legislation whether or not the government had ever mentioned it in the course of litigation.\(^8^5\)

The standard articulated in *Heller* is an impossible one to meet. The burden of proof is made even more difficult by placing it squarely on the shoulders of the plaintiffs.\(^8^6\) The Court correctly noted that "Under the rational basis test, the government 'has no obligation to produce evidence to sustain the rationality of a statutory classification'."\(^8^7\) Nonetheless, this argument fails to recognize that the issue is not solely about the rationality of the legislation, but also includes the legitimacy of the legislation's purpose. As *Romer* and *Cleburne* made amply clear, an illegitimate purpose is not to be borne.\(^8^8\)

### A. Those Similarly Situated?

As part of its discussion of rational basis, the Second Circuit in *Able* discussed at great length the due deference owed to the Military.\(^8^9\) The Court detailed the traditional reasons for giving deference to the Military stating that "[o]ur review of Military regulations . . . is far more deferential than constitutional review of

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\(^8^2\) *Id.*

\(^8^3\) 473 U.S. 432 at 439.

\(^8^4\) *See Able*, 155 F.3d 628 at 631.

\(^8^5\) *Id.* at 632.

\(^8^6\) *See id.*

\(^8^7\) *Id.* (quoting *Heller v. Doe*, at 320).


\(^8^9\) *See Able*, 155 F.3d 628.
similar laws or regulations designed for civilian society. The Court noted that other rights, which are constitutionally guaranteed in a civilian setting, are restricted in the Military setting. For example, the right to trial by jury is not available in the Military; the right of appeal is curtailed in the Military setting; and there are special regulations regarding writs of certiorari. Further, both the availability of Habeas Corpus and Fourth Amendment protections are curtailed. Finally, the Court noted that the First Amendment’s privileges have also been curtailed in the Military. The Court concluded that although they were “not free to disregard the Constitution . . . we owe great deference to Congress in military matters.”

This body of cases makes clear that those in the Military are not to be afforded the same protections as civilians. However, the Second Circuit’s use of these cases disregards a well-established prong of the equal protection test, that is, that the test is to be applied to those similarly situated. In this way, the equal protection of a homosexual serviceperson is to be judged against that of a heterosexual serviceperson, not a homosexual civilian. Furthermore, persons of equal rank in the Military are equally situated, regardless of their sexual orientation.

The Act, as written, does not prohibit the presence of

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90 Id. at 633.
91 Id. at 632-33.
92 U.S. CONST. art. III, § 2.
93 See Kahn v. Anderson, 255 U.S. 1, 9 (1920) (holding the specifics of a court marshal are within the discretion of the executive branch, and therefore not subject to judicial review).
95 See id. at 633 (citing to Burns v. Wilson, 346 U.S. 137, 138-40 (1953); United States v. Stuckey, 10 M.J. 347 (C.M.A. 1981); United States v. Middleton, 10 M.J. 123, 126-27 (C.M.A.1981)).
97 Id. at 634.
98 Id. at 631.
homosexual servicepersons, only homosexual conduct. Homosexual conduct is defined to include physical contact a "reasonable person would understand to demonstrate a propensity or intent to engage in an act . . . [either] actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires." The Eastern District of New York, in a decision authored by Senior District Judge Eugene Nickerson, pointed out that there are many forms of sexual conduct that are proscribed in the Military, proscriptions which apply equally to all service persons, regardless of sexual orientation. Among these are sodomy, which is defined to mean both anal and oral sex, i.e., sodomy, fellatio, and cunnilingus. Furthermore, under Military law, rape is punishable by death, regardless of the sex of the parties involved. Conduct unbecoming an officer, midshipmen, or cadet is punishable. Such conduct has been interpreted to include sexual misconduct, adultery, and fraternization. Also, sexual harassment is punishable in the

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102 See Article 125, Uniform Code of Military Justice, 10 U.S.C. § 925 (a) (1998) (stating that it is punishable for any person to engage in sodomy, which is defined as "unnatural carnal copulation with another person of the same [sex] or opposite sex or with an animal."). In United States v. Hall, 34 M.J. 695 (A.C.M.R. 1991), United States v. Henderson, 34 M.J. 174 (C.M.A. 1994) and United States v. Gates, 40 M.J. 354, 355 (C.M.A. 1994), it became established that "sodomy" included not only anal sex, but fellatio and cunnilingus as well.
103 See Art. 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (1998) (providing that any person who forces someone, without their consent to have sex "is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.").
105 See, e.g., United States v. Czekala, 38 M.J. 566 (A.C.M.R. 1993); United States v. Boyett 37 M.J. 872 (A.C.M.R. 1993). Fraternization is defined as "personal or intimate relationships 'that contravene the customary bounds of acceptable senior-subordinate relationships' and 'improper relationships and social interaction between officer members as well as enlisted members'." See Able, 968 F. Supp. at 856 (quoting Department of the Navy, OPNAV Instruction No. 5370.2A § 4(b) (Mar. 14, 1994). This conduct is equally proscribed to homosexual service persons under § 4(c) of same regulation and further by the Marine Corps Manual 1100.4. Id.
Military.\textsuperscript{106}

As the district court pointed out, there are a very large number of existing regulations governing interpersonal contact in the Military. All of these regulations apply equally to all service persons, regardless of gender or sexual orientation.\textsuperscript{107} Therefore, the only conduct that is not covered by the existing regulations, which one could then presume is the conduct that is to be covered by the Act, is kissing or handholding, off base, with a person not in the Military.\textsuperscript{108} The District Court found itself at a loss as to how handholding endangered the mission of the armed forces.\textsuperscript{109} If the District Court was correct in its analysis, the Act is not regulating conduct, but status amongst those equally situated. This sort of “classification of persons undertaken for its own sake, [is] something the Equal Protection Clause does not permit.”\textsuperscript{110}

The equal protection sought by plaintiffs is not that of homosexual civilians, but that of heterosexual service persons. In the long line of cases cited by the Second Circuit as justification for its holding, it failed to take this into consideration.\textsuperscript{111} In particular, the First Amendment cases, all relied on civilian standards as their yardstick of rights.\textsuperscript{112} However, the yardstick in this case should not be a civilian standard, but a Military one. Thus, a homosexual serviceperson should be afforded the same protection of sexual orientation that a heterosexual service person is granted.

\begin{itemize}
\item \textsuperscript{106} See Able, 968 F. Supp. at 856 (citing, e.g., Article 93, U.S. Naval Regulation, 1990, Article 1166 (amended Jan. 1993); Marine Corps Order No. 5300.10A (July 17, 1989)).
\item \textsuperscript{107} Id. at 855-56.
\item \textsuperscript{108} See id. at 857.
\item \textsuperscript{109} See id.
\item \textsuperscript{110} See Romer v. Evans, 517 U.S. 620, 635 (1996).
\item \textsuperscript{111} E.g., Able v. United States, 155 F.3d 628 (2d Cir. 1998).
\item \textsuperscript{112} See, e.g., Goldman v. Weinberger, 475 U.S. 503, 515 (1986). “Our cases have acknowledged that in order to protect our treasured liberties, the military must be able to command service members to sacrifice a great many of the individual freedoms they enjoyed in the civilian community and to endure certain limitations on the freedoms they retain.” Id.
\end{itemize}
B. Rationally Related to a Legitimate Government Purpose?

In Able, the United States Government argued that it was justified in enacting the “don’t ask, don’t tell” policy because it “promotes unit cohesion, enhances privacy and reduces sexual tension.” The Government further argued that the District Court failed to grant Congress and the Military the appropriate deference in deciding eligibility requirements for Military service “and that, under the correct standard, § 654 is constitutional.” Plaintiffs argued that under Romer, Cleburne, and Palmore the policy is motivated by an illegitimate purpose and therefore cannot stand. They further argued that the purpose of the Act is not rationally related to its ends. In a formalistic analysis, the Second Circuit concluded that plaintiffs reliance on Cleburne, Romer, and Palmore was misplaced because those cases did not use traditional rational basis review and because they did not deal with the Military.

1. City of Cleburne, Texas v. Cleburne Living Center

In Cleburne, a corporation was denied a permit for the operation of a group home for the mentally retarded because of a city zoning ordinance; they challenged the action in Federal District Court claiming the ordinance violated the Equal Protection Clause. The ordinance required a special permit for the operation of a group home for the mentally retarded. The District Court had found that the City’s permit requirements were based on fears about “the negative attitude of the majority of property owners[,]” and its location — first,
across the street from a high school, which might engender taunting from the students, and second, on a flood plane, which might endanger the residents of the group home.\textsuperscript{122} The District Court held the ordinance constitutional.\textsuperscript{123}

The Fifth Circuit Court of Appeals applied intermediate scrutiny\textsuperscript{124} and affirmed in part and reversed in part.\textsuperscript{125} The Fifth Circuit held that mental retardation was relevant to many legislative actions, as such strict scrutiny was not appropriate.\textsuperscript{126} However, in light of the history of “unfair and often grotesque mistreatment” of the retarded, discrimination against them was “likely to reflect deep-seated prejudice.”\textsuperscript{127} Further, the mentally retarded lacked political power and their condition was immutable.\textsuperscript{128} Therefore, the mentally retarded were a quasi-suspect class and intermediate scrutiny was applicable.\textsuperscript{129} Under that standard of review, the ordinance was held unconstitutional because it did not “substantially further any important governmental interests.”\textsuperscript{130}

The Supreme Court granted certiorari and affirmed in part and vacated in part,\textsuperscript{131} holding that mental retardation was not a quasi-suspect class that called for a more heightened standard of review than normal.\textsuperscript{132} The Court stated that because of the inherent nature of mental retardation, the state interest “in dealing with and providing

\textsuperscript{122}See id. at 448-49.
\textsuperscript{123}Id. at 437. The District Court used rational basis review because “no fundamental right was implicated and [because] mental retardation was neither a suspect nor quasi-suspect classification . . . .” Id.
\textsuperscript{124}726 F.2d 191, 198 (1984).
\textsuperscript{125}Id. at 203. The Fifth Circuit reversed the District Court with respect to the ordinance’s constitutionality. Id. at 202. However, the Court held that the Cleburne Living Center — who had brought the suit on behalf of itself and its potential residents — had failed to show an injury to its interests or those of its unidentified, potential members and therefore lacked standing. Id. at 202-03.
\textsuperscript{126}Id. at 198.
\textsuperscript{127}Id. at 197-98.
\textsuperscript{128}Id. at 198.
\textsuperscript{129}726 F.2d 191, 198 (1984).
\textsuperscript{130}Id. at 200.
\textsuperscript{131}See 473 U.S. 432 (1985).
\textsuperscript{132}Id. at 442.
for them is plainly a legitimate one.\textsuperscript{133} The Court added that “The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. Furthermore, some objectives — such as ‘a bare . . . desire to harm a politically unpopular group,’ — are not legitimate state interests.”\textsuperscript{134} The Court further went on to hold that there was no evidence which showed a rational basis for believing that a group “home . . . posed any special threat to the city’s legitimate interests . . .”\textsuperscript{135} Therefore, it held the ordinance unconstitutional according to the standards of rational basis review.

\textit{2. Palmore v. Sidoti}

In \textit{Palmore},\textsuperscript{136} petitioner and respondent — both White — lived, married, and were divorced in Florida. Petitioner, “the mother[,] was awarded custody of their 3-year-old daughter.”\textsuperscript{137} The next year, respondent filed a petition for custody of their daughter, seeking to modify the prior custody judgment because of changed circumstances, namely, because petitioner was living with a Black man who she later married.\textsuperscript{138} The Florida Trial Court, holding that the child’s best interest would be served by the parental qualifications of the father, awarded him custody.\textsuperscript{139} The Court reasoned that although respondent’s racial animosity towards petitioner’s choice in partners was “not sufficient to wrest custody from the mother[,]” growing up in a racially mixed household would damage the child.\textsuperscript{140} The Florida District Court of Appeal affirmed.\textsuperscript{141}

\textsuperscript{133} \textit{Id.} at 442.
\textsuperscript{134} \textit{Id.} at 446-47.
\textsuperscript{135} \textit{Id.} at 448.
\textsuperscript{136} 466 U.S. 429 (1984).
\textsuperscript{137} \textit{Id.} at 430.
\textsuperscript{138} \textit{Id.}
\textsuperscript{139} \textit{Id.} at 431.
\textsuperscript{140} \textit{Id.}
\textsuperscript{141} See 426 So. 2d 34 (1982). As the Supreme Court points out, the Florida District Court “affirmed without opinion.” \textit{Palmore}, 466 U.S. at 431.
However, the United States Supreme Court held that the effects of racial prejudice could not justify a "racial classification removing an infant child from . . . its mother . . ."142 The Court stated:

The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudice, but neither can it tolerate it. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. 'Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.'143

3. Romer v. Evans

At issue in Romer144 was a Colorado state constitutional amendment — adopted by state referendum — precluding the state or any of its agencies from enacting, adopting, or enforcing any statute, regulation, ordinance, or policy which granted homosexuals any sort of minority status, quota preferences, protected status, or allowed for any claim of discrimination against them.145 Plaintiff's brought suit to enjoin the enforcement of the ordinance and to have it declared invalid.146 The District Court "granted a preliminary injunction to stay enforcement of the amendment" which the Supreme Court of

143 Id. (quoting Palmer v. Thompson, 403 U.S. 217, 260-261 (1971) (White, J., dissenting)).
145 Id. at 623-24.
146 Id. at 625.
The amendment's objective was to repeal existing statutes, regulations, ordinances, and policies which prohibited discrimination based on sexual orientation, as well as having the long term effect of prohibiting any Colorado governmental entity from adopting similar protective measures in the future. As such the amendment was subject to strict scrutiny under the Equal Protection Clause of the United States Constitution because it infringed on the fundamental rights of homosexuals to participate in the democratic process. This right to participate in the democratic process was and is not a recognized fundamental right. On remand, the District reasoned that the amendment "was not necessary to support any compelling state interest" and even had it been, "it was not narrowly tailored to meet that interest" it therefore permanently enjoined the State from enforcing the amendment. The Supreme Court of Colorado subsequently affirmed this decision.

The United States Supreme Court also affirmed the decision, but not for the reasons proffered by the Colorado Supreme Court. The Court held that the Colorado amendment was invalid because it violated the Equal Protection Clause of the Fourteenth Amendment, and that the amendment served to isolate homosexuals in both "the private and governmental spheres." However, the Court refused to apply strict scrutiny. The Court further held that the amendment

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147 Id.
149 See id. at 1285.
150 See id.
151 See Romer, 517 U.S. at 650 n.3 (Scalia, J., dissenting). "[The Colorado] Amendment . . . does not deny the fundamental right to vote, and the Court rejects the Colorado court's view that there exists a fundamental right to participate in the political process." Id.
153 See id. at 1350.
154 See id. at 628, 635-36.
155 See id. at 631-32.
removed "specific" legal protection from homosexuals. These legal protections included the right to redress from injuries caused by discrimination and it further served to make reinstatement of these laws a near impossibility. The Court reasoned that even if homosexuals could find redress in anti-discrimination laws of general applicability, the Colorado amendment’s strictures on specific legal protections imposed special disabilities only on homosexuals. Last, the Court held that the amendment did not bear a rational relationship to a legitimate governmental purpose.

The State of Colorado had stated as its reasons for enacting the amendment that the amendment did not discriminate, it only put homosexuals on the same level as heterosexuals, by removing special protection, respect for citizens’ freedom of association, and conserving its limited resources to battle discrimination against other groups. The U.S. Supreme Court stated that the amendment imposed "a broad and undifferentiated disability on a single named group" and that it identified "persons by a single trait." The state gave as its primary rationale "respect for other citizens’ freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality." As the Court emphatically stated, "It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit."

\[156\text{Id. at 629-30.}\]
\[157\text{Id.}\]
\[158\text{Id. at 630-31.}\]
\[159\text{See Romer, 517 U.S. 620, 635.}\]
\[160\text{Id. at 626.}\]
\[161\text{Romer, 882 P.2d 1335, 1340-41; Romer, 517 U.S. 620, 635.}\]
\[162\text{Romer, 517 U.S. 620, 632.}\]
\[163\text{Id. at 633.}\]
\[164\text{See id.}\]
\[165\text{See id.}\]
4. The Applicability of These Cases to Able

The Second Circuit in Able stated that these cases were not applicable for several reasons. First, Cleburne differed from traditional rational basis, in that it "forced the government to justify its discrimination."\(^{166}\) This reasoning overlooks the similarities in the two cases. Just as in Cleburne where the Court noted that the state’s interest is a legitimate one,\(^{167}\) in Able there is no dispute that the Military has a legitimate interest in regulating conduct. However, as the Court went on to say in Cleburne, "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational and further, objectives — such as 'a bare . . . desire to harm a politically unpopular group,'— are not legitimate state interests."\(^{168}\) Members of the highest levels of the Military have publicly stated that homosexual service persons now serve and have always served in the Military with honor.\(^{169}\) If this is the case, the Military’s response to their legitimate interest is hugely attenuated. Also, as previously discussed, there are a battalion of Military regulations which govern conduct and which are generally applicable.\(^{170}\) Again, since this is the case, the Military’s response to homosexual service persons then becomes arbitrary and irrational. Viewed in this light the only reason left for the regulation is a desire to harm, in this case, a group which is unpopular with the rank and file of the Military.

The court further stated that Romer, Cleburne, and Palmore did not occur in the Military setting “where constitutionally mandated deference to Military assessments and judgments gives the judiciary far less scope to scrutinize the reasons, legitimate on their face, that the Military has advanced to justify its actions.”\(^{171}\) There is also a

\(^{166}\) See Able, 155 F.3d at 634.

\(^{167}\) See Cleburne, 473 U.S. at 442.

\(^{168}\) Id. at 446-47.


\(^{170}\) Supra notes 89-112 and accompanying text.

\(^{171}\) Able, 155 F.3d at 634.
constitutionally mandated power which States have.\textsuperscript{172} Romer in particular, involved an act that was put in place by popular vote, yet that was overcome.\textsuperscript{173} The Military had stated that it is justified in keeping open homosexuals out of the Military because the presence of an open homosexual in a small unit disrupts “unit cohesion[;]” causes “sexual tension[;]” and that exclusion of open homosexuals “promotes personal privacy.”\textsuperscript{174} As the District Court noted, “unity in a fighting group is an important government interest\textsuperscript{175} ... [b]ut that fact does not end the court’s inquiry. The court must still consider whether the Act seeks to further that interest in a legitimate way.”\textsuperscript{176} In their Post-Trial Brief to the District Court, the state argued that the presence of an open homosexual in a small unit would cause concern in non-homosexual service persons because of their “moral precepts and ethical values.”\textsuperscript{177} In their respective testimonies before Congress on the policy, Generals Schwarzkopf and Powell stated that homosexuals had, and continue to serve in good standing and as good Americans in the Military, but that the presence of open homosexuality caused “the negative reaction of service members who disapprove of homosexual[s].”\textsuperscript{178} As the Supreme Court in Cleburne clearly stated, the bolstering of personal prejudices is an illegitimate governmental purpose, regardless of the legitimacy of the original interest.\textsuperscript{179}

In addition, the rationales given by the city in Cleburne, by the father in Palmore and by the state in Romer are surprisingly similar to the rationale given by the Military for the Act. In Cleburne the Supreme Court accepted the District Courts holding regarding the

\textsuperscript{172} U.S. CONST. art. IV; U.S. CONST. amend. X; U.S. CONST. amend. XI.
\textsuperscript{173} 517 U.S. 620.
\textsuperscript{174} Able, 155 F.3d at 634.
\textsuperscript{176} Id.
\textsuperscript{177} Id. (citing to Plaintiff’s (then Defendant’s) Post-Trial Brief, at 10).
\textsuperscript{178} Id. at 859 (citing to Philips v. Perry, 106 F.3d 1420, 1435 (9th Cir. 1997) (Fletcher, J., dissenting) upholding the “don’t ask, don’t tell” policy).
\textsuperscript{179} See 473 U.S. 432. The Court acknowledged the state’s legitimate interest in the mentally retarded, yet held the ordinance unconstitutional. Id.
city's rationale. The city claimed it was concerned about the attitude of the neighborhood residents and the safety of the group home residents. In *Palmore* there was concern over the child's emotional well being. Finally, in *Romer* the State of Colorado cited respect for heterosexual citizen's freedom of association. The Military has cited unit morale. It has cited the inability of heterosexual service persons to accept homosexuals. The Military has pointed to its inability to protect homosexual service persons from the bias of heterosexuals. The Court in *Cleburne*, *Palmore*, and *Romer* found similar justifications insufficient as a constitutional matter. Similarly, the justifications the Military gives for the Act should be found insufficient as a constitutional matter.

The District Court points out that the arguments regarding sexual tension and privacy interests may be valid points for a policy which excludes homosexuals from serving altogether but that is not the policy Congress adopted. The government has offered no reasons why an openly homosexual service person in good standing would be more likely to make an untoward advance than an openly heterosexual service member to another of the opposite sex. This is particularly true in light of the existing regulations governing conduct. As the District Court further pointed out, since the policy does not exclude homosexuals from serving, it can be inferred that there are homosexuals serving in the Military. In light of this, the policy tends to breed suspicion and tension rather than dissipate it, because those with homophobic tendencies would then be constantly looking over their shoulders lest anyone might be looking at them in

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180 *Id.* at 448-49.
181 *Id.*
182 466 U.S. 429.
183 *Romer*, 517 U.S. at 633.
185 See 10 U.S.C. § 654 (generally stating that the act targets conduct and not status).
186 See *Able*, 968 F. Supp. at 855, 857.
187 See supra notes 89-112 and accompanying text.
an objectionable way.\textsuperscript{188}

The Circuit Court went on to state that Romer, Cleburne and Palmore were not applicable because they involved restrictions based on status not conduct,\textsuperscript{189} and that as it had previously held and as the government maintains, the “don’t ask, don’t tell” policy prohibits conduct, not status.\textsuperscript{190} Exactly what kind of conduct it seeks to curtail is questionable. There is a Military regulation governing sodomy,\textsuperscript{191} which as previously noted,\textsuperscript{192} is applicable to all service personnel equally. Further, there are regulations governing fraternization,\textsuperscript{193} regulations governing conduct unbecoming an officer,\textsuperscript{194} in short, practically all interpersonal conduct is regulated in the Military. In light of this, the District Court concluded that the only conduct left to regulate, and thus the only conduct which the policy could possibly be regulating would be hand holding or kissing, while off duty, with a person not in the Military.\textsuperscript{195} It is difficult to imagine how this conduct impairs the Military mission. What would be a more plausible explanation is that the policy is a thinly veiled regulation of status and not of conduct, as the government maintains.

Last, plaintiffs argued that the ends of the “don’t ask, don’t
tell” policy “are not rationally related to [its] prohibition[s] . . . on conduct.196 The Circuit Court concluded that they were not at liberty to question the judgment of Congress or its findings.197 In short, they would not substitute their “judgment for that of Congress.”198 However, as the District Court stated:

For the United States government to require those self-identifying as homosexuals to hide their orientation and to pretend to be heterosexuals is to ask them to accept a judgment that their orientation is in itself disgraceful and they are unfit to serve. To impose such a degrading and deplorable condition for remaining in the Armed Services cannot in fairness be justified on the ground that the truth might arouse the prejudice of some of their fellow members.

The plaintiffs are American citizens. They wish to serve their country in positions of responsibility and potential danger. This country includes people of many different kinds and beliefs. But as Chief Justice Marshall said in a different context, ‘we are one people.’ Americans are one people both in war and in peace. It is not within our constitutional tradition for our government to designate members of one societal group as pariahs.199

While it is true that the judiciary is not “duly elected” and that the Constitution has mandated a government of enumerated powers,200 it is equally true that the judiciary is part of our system of checks and balances. The courts have a duty equal to that of the elected branches of government in upholding the Constitution, and because they are somewhat insulated from the whims of the masses,201 they have a

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196 Able, 155 F.3d at 634.
197 Id. at 635-36.
198 Id. at 636.
200 See U.S. CONST. arts. I-III.
201 See U.S. CONST. art. III, § 1 (“The judges, both of the supreme and inferior
unique ability to do just that, particularly when other branches fall prey to mob rule. In light of Able, it would appear that had President Harry Truman not eliminated racial discrimination in the armed forces, the Military might still be segregated — if Congress had a few legislative findings to back up its position, and if Military leaders felt that integration would injure moral — regardless of the civil rights cases heard by the Court in the 1950’s and 60’s. "[I]t is essential that there be maintained in the armed services of the United States the highest standards of democracy, with equality of treatment and opportunity for all those who serve in our country's defense." Our Constitution dictates equal protection of the law. The Court has held that this is true for those equally situated. Homosexual service members are equally situated to heterosexual service members. As such, any military regulation, regardless of the legislative findings, which differentiates based solely on sexual orientation can not stand as Constitutional.

III. HOMOSEXUALS AS SUSPECT OR QUASI-SUSPECT CLASS

It is anyone's guess whether classifying homosexuals as a
suspect or quasi-suspect class would have engendered a different response from the Second Circuit. After all, the Court has upheld other Military legislation that impinges on Constitutional protections. But, as the Eastern District of New York in Able noted, homosexuals have a “bleak history” of discrimination, both “in this country and elsewhere.” “Because of the immediate and severe opprobrium often manifested against homosexuals or one so identified publicly, members of this group are particularly powerless to pursue their rights openly in the public arena.”

This is highlighted by the fact that there are currently only three openly gay members of Congress, and in the uproar over the nomination of the openly gay James Hormel to the position of Ambassador to Luxembourg. When Senator Dick Armey (R-TX) can refer to Senator Barney Frank (D-MA) as “Barney fag” in the halls of Congress, the Court should recognize that with political power or not, there is an ingrained level of bias that our law can not continue to sanction.

In addition, simply because there is dispute as to whether homosexuality is an immutable trait does not put an end to the question of suspect classification. For example, alienage, which has traditionally been thought worthy of heightened scrutiny, is not immutable in light of naturalization laws. Further, religion, another classification deemed worthy of heightened scrutiny, is not immutable in this age of born-again Christians and religious conversion. Today, even gender can be changed. As such, the bright line distinction of immutability fades. The Court should at the very least begin to

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208 See supra notes 89-112 and accompanying text.
209 968 F. Supp. 850, 862.
210 Id. at 863 (quoting Justice Brennan’s dissent from denial of writ of certiorari in Rowland, 470 U.S. at 1014).
212 See Derrick Z. Jackson, Clinton Tests Lott on Gay Ambassador, BOST. GLOBE, Jan. 15, 1999, at A19 (discussing Senator Trent Lott’s open opposition to Mr. Hormel’s nomination).
reconsider the wisdom of its current three tiered approach to equal protection analyses. While the Court’s caution regarding expanding the suspect classes is arguably prudent, to deny access to a group of persons who fit the established criteria makes one question the Court’s reasons for the denial. These questions go beyond the issue of sexual orientation and whether as an individual one finds homosexuality morally reprehensible.

IV. CONCLUSION

While it is arguable whether homosexuals should indeed be classified as a suspect or quasi-suspect class, and thus afforded heightened scrutiny, it seems clear that the “don’t ask, don’t tell” policy does indeed violate the Equal Protection Clause. The only real question remaining is whether the courts will do anything about it.214

214 On September 29, 1999 the European Court of Human Rights decided two cases in which they found the United Kingdom’s (U.K.) ban on homosexuals in the military violated articles 8 and 14 of the European Convention on Human Rights. See Press Release Issued by the Registrar, Judgments in the Cases of Lustig-Prean & Beckett v. the United Kingdom and Smith & Grady v. the United Kingdom, European Court of Human Rights, Sept. 27, 1999 (visited Oct. 2, 1999) <http://www.dhcour.coe.fr/eng/PRESS/New%20Court/Lustig-Prean%20epresse.htm>. Article 8 of the Convention provides for respect as to private and family lives and Article 14 deals with discrimination. See id. at 2, 3. In order to uphold the regulation, the U.K. needed to present “convincing and weighty reasons.” Id. at 2. The U.K. cited reasons that by now should sound familiar, “the . . . core argument was that the presence of homosexuals in the armed forces would have a substantial and negative effect on morale and consequently, on the fighting power and operational effectiveness of the armed forces.” Id. Just as with the “don’t ask, don’t tell” policy, the U.K. did not base its objections on homosexual’s inability to be good soldiers. Id. The Court noted its recognition “that certain difficulties could be anticipated with a change in policy (as was the case with the presence of women and racial minorities in the past) . . . any such difficulties were essentially conduct-based and could be addressed by a strict code of conduct and disciplinary rules.” Id.

The New York Times recently reported that on January 12th, in response to the decision of the European Court of Human Rights, the government of Great Britain announced the end of their long standing ban on openly gay homosexuals serving in the armed forces. Sarah Lyall, British Under European ruling, End Ban on Openly Gay Soldiers, N.Y. TIMES, Jan. 13, 2000, at A1. As the article noted “The change brings Britain into line with almost all other NATO nations, including France, Canada, and Germany.” Id. Almost all, that is, except the United States. It is interesting to note that
It is telling to note that the government has not maintained that the policy does not violate the Equal Protection Clause, only that under an extremely deferential standard the courts should not question the statute.\(^{215}\)

*Romer, Cleburne, and Palmore* left us without any real standards to apply, or at least no test *per se* as to when the Courts, while applying a rational basis standard, should inquire further into the governments proffered reasons for enacting the legislation. One thing is clear from these cases, an illegitimate end can never justify a legitimate means. One can begin to draw parallels between these three cases. For example, in both *Cleburne* and *Romer* there was discussion that analogized plaintiffs’ positions to the traditional basis for suspect and quasi-suspect classification. Further, although, in these cases the Court was loath to expand the classes, there were many similarities between the plaintiffs’ positions and those of plaintiffs that have traditionally been placed in the suspect and quasi-suspect classes. As such, it is now up to the courts to begin to clarify a standard. The Second Circuit missed an opportunity not only to do the right thing with regard to the “don’t ask, don’t tell” policy, but to try to forge some order out of chaos. Ultimately, the Second Circuit missed an opportunity to walk through the door opened by the Supreme Court in *Romer, Cleburne* and *Palmore*. By failing to apply these cases and continuing to give the Military an inordinately high level of deference, the court has not only failed to clarify when and where it is appropriate to apply the basis of review used in *Romer, Cleburne*, and *Palmore*, but it also has failed to afford our gay service persons the equal protection of the law guaranteed to them by the Fourteenth Amendment.

*Celena R. Mayo*

Great Britain is lifting the ban by putting in place a series of regulations which, much like the existing U.S. regulations — exclusive of the “don’t ask, don’t tell” policy — govern “all manner of social and sexual relations, whether heterosexual or homosexual.” *Id.* And includes “sexual harassment; overt displays of affection . . .; and taking sexual advantage of subordinates.” *Id.*

\(^{215}\) See *Able*, 155 F.3d at 631. The government merely contended that given sufficient deference to congressional findings, the Act is constitutional. *Id.*