Protecting Gays from the Government's Crosshairs: A Reevaluation of the Ninth Circuit's Treatment of Gays Under the Federal Constitution's Equal Protection Clause Following *Lawrence v. Texas*

By JEFFREY M. GOLDMAN*

> *The Supreme Court [in Bowers v. Hardwick] has ruled that homosexual activity is not a fundamental right protected by substantive due process . . . . [I]f 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.*
>
> —High Tech Gays v. Defense Industrial Security Clearance Office[1]
>
> *Bowers was not correct when it was decided, is not correct today, and is hereby overruled. This case . . . involve[s] two adults who, with full and mutual consent, engaged in sexual practices common to a homosexual lifestyle. Petitioners' right to liberty under the Due Process Clause gives them the full right to engage in private conduct without government intervention.*
>
> —Lawrence v. Texas[2]

THE UNITED STATES Supreme Court case *Lawrence v. Texas* arguably has made consensual, private sexual activity between gays a fundamental privacy right. As a result, two fifteen-year-old Ninth Circuit cases that epitomize the Circuit's equal protection jurisprudence must be reevaluated. This Article's purpose is twofold: (1) to criticize the Ninth Circuit's existing Equal Protection Clause jurisprudence as it relates to state action that targets gays, and (2) to explain how the

* B.A., University of Wisconsin, Madison (2001); J.D., U.C.L.A. School of Law (2004), *Order of the Coif.* The author practices litigation with Milbank, Tweed, Hadley & McCloy; however, the views expressed herein are not meant to represent the Firm's opinions or beliefs. The author wishes to thank Dylan Ruga and Milbank attorney Rick Baker for their helpful comments, and Sarah Goldman, who mercifully continues to love a frantic lawyer.

1. 895 F.2d 563, 571 (9th Cir. 1989) (citing Bowers v. Hardwick, 478 U.S. 186, 194–96 (1986)).

2. 539 U.S. 558, 560 (2003).

Ninth Circuit must reevaluate such jurisprudence in response to *Lawrence*.[3]

Under current law, state action that targets gays need only meet rational basis scrutiny. That is, a law targeting gays must be rationally related to a legitimate state interest.[4] The federal judiciary's decision to apply such a low level of scrutiny, however, generally reflects long-standing prejudices and stereotypes.[5] Furthermore, *Lawrence* may have created a fundamental right to sodomy and signaled that the federal judiciary should afford a more searching form of review to laws that discriminate against gays. Consequentially, the Ninth Circuit should seize the opportunity to reevaluate its equal protection jurisprudence and afford strict scrutiny status to laws that target gays.

Two cases, *Watkins v. United States Army*[6] and *High Tech Gays v. Defense Industrial Security Clearance Office*,[7] exemplify the Ninth Circuit's analysis of government action that targets gays. *Watkins* shows that, not withstanding the United States Supreme Court's decision in *Bowers v. Hardwick*,[8] the Ninth Circuit has been willing to classify gays as a suspect class.[9] *High Tech Gays*, however, later held that government action concerning gays need only meet rational basis review[10] and demonstrates how *Bowers* has affected (and continues to affect) the Ninth Circuit's equal protection jurisprudence.

---

3. This Article does not address whether discrimination against gays should be treated as sex-based discrimination, which receives a level of intermediate scrutiny under the Federal Constitution. It should be noted, however, that the California Constitution affords strict scrutiny under its equal protection clause to gender discriminatory laws. CAL. CONST. art. 1, § 7. Similarly, the Ninth Circuit, the circuit in which California sits, should reflect progressive attitudes towards discriminatory state action.

4. *See* Romer v. Evans, 517 U.S. 620, 634–35 (1996).

5. *See* Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of certiorari) (stating that discrimination against gays is "likely . . . to reflect deep-seated prejudice rather than . . . rationality"); Baker v. Vermont, 744 A.2d 864, 867 (Vt. 1999) (holding that the equal protection analysis of a state law forbidding gay couples to marry "does not turn on the religious or moral debate over intimate same-sex relationships, but rather on the statutory and constitutional basis for the exclusion of same-sex couples from the secular benefits and protections offered married couples"); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES (2d ed. 2002).

6. 847 F.2d 1329 (9th Cir. 1988). *But see* Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989) (en banc).

7. 895 F.2d 563 (9th Cir. 1990).

8. 478 U.S. 186 (1986) (holding there is no fundamental right to engage in private consensual sodomy).

9. *Watkins*, 847 F.2d at 1343.

10. 895 F.2d at 571.

In analyzing *Lawrence*, however, it becomes readily apparent that private, consensual, gay sexual activity should be considered a fundamental right and that, consequently, gays should be treated as a suspect class.[11] Indeed, in today's evolving world, applying anything but strict scrutiny review to state action targeting gays likely reflects either religious or social-psychological factors, neither of which are valid legal reasons to deny someone equal protection under the Constitution.[12] This issue could not be riper for revisiting in the Ninth Circuit because not only has it previously held that gays constitute a suspect class, but also because it would afford the court an opportunity to highlight the best aspects of a progressive and liberal approach to civil rights jurisprudence.[13] Moreover, as discussed *infra*, the fact that gay sodomy may be a fundamental right protected by the Fourteenth

11. *See Lawrence*, 539 U.S. 558.

12. *See, e.g.*, Hunter v. Erickson, 393 U.S. 385, 395 (1969). *See also* GRACE GANZ BLUMBERG, COMMUNITY PROPERTY IN CALIFORNIA 449–50 (4th ed. 2003) (analyzing California's gay-oriented domestic partnership laws and Vermont's gay-oriented civil union laws). Blumberg concludes that "the distinction between a Vermont civil union and a lawful marriage is merely symbolic. In law, marriage is simply the sum of its legal incidents. Of course, from the perspective of religion or social psychology, there may be other dimensions to marriage." *Id. See also* Philip Pullella, *Pope Calls Gay Marriage Part of "Ideology of Evil"*, REUTERS, Feb. 22, 2005, *available at* http://abcnews.go.com/US/wireStory?id=522276 (last accessed Apr. 9, 2005). Pope John Paul II referring to pressure on the European Union to legalize gay marriage, wrote that "[i]t is legitimate and necessary to ask oneself if this is not perhaps part of a new ideology of evil, perhaps more insidious and hidden, which attempts to pit human rights against the family and against man." *Id.*

13. *See, e.g.*, Edward Lazarus, *The Federal Appellate Decision Delaying the Recall:* Bush v. Gore's *Tragedy Repeats Itself as California's Farce*, FINDLAW'S LEGAL COMMENT., Sept. 18, 2003, at *1, *at* http://www.findlaw.com (to access this article: (1) click "Search FindLaw" tab; (2) type title of this article as referenced; (3) click "Search") (declaring the Ninth Circuit to be "the most liberal court of appeals in the country"). *But see* Timothy Wheeler, *The Great Leap Backward in the Ninth Circuit Court*, CLAREMONT INST., Sept. 18, 2003, at *1–*2, *at* http://www.claremont.org/projects/doctors/021215wheeler.html (last accessed Apr. 22, 2005). Dr. Wheeler criticizes the Ninth Circuit as

> preach[ing] a brand of in-your-face progressivism that outrages even Californians. . . . [Its] hubris is well known—it is reversed far more often than any of the other 12 federal appellate courts. It comes as no surprise that the court's Judge Stephen Reinhardt . . . was reversed by the U.S. Supreme Court 11 times in one term.

Id. Not only does the Ninth Circuit usually hand down liberal decisions, it is also

> the largest federal appeals court in the US, covering nine states (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington), plus Guam and the Northern Mariana Islands. Its judges are responsible for about 55 million Americans and more than a third of the nation's land—far more than any of the other 10 federal appellate regions.

Brad Knickerbocker, *One 9th Circuit Appeals Court, Under God?*, CHRISTIAN SCI. MONITOR, Aug. 8, 2002, at *1, *available at* http://www.csmonitor.com/2002/0808/p02s01-usju.html (last accessed Apr. 22, 2005).

Amendment's Due Process Clause fulfills one of the Ninth Circuit's requirements for gays to be deemed a suspect class under the Fourteenth Amendment's Equal Protection Clause.

Part I of this Article explains the current status of gays in the context of equal protection jurisprudence. Part II describes *Watkins*, a Ninth Circuit case holding that laws targeting gays should receive strict scrutiny, a holding that was subsequently withdrawn by the court upon rehearing. Part II also discusses and criticizes *High Tech Gays*, the next major Equal Protection Clause case heard by the Ninth Circuit after *Watkins*, which held that government action that targets homosexuals is subject to mere rational basis scrutiny. Part III discusses the Fourteenth Amendment's Due Process Clause and explains why the Ninth Circuit should rule that *Lawrence* renders *High Tech Gays* bad law when it next hears an equal protection claim that involves a law that targets gays as a class. Subsequently, Part IV proposes an alteration to the existing test used to determine whether a group constitutes a suspect or quasi-suspect class. Part V concludes by declaring that the stage is set for the Ninth Circuit to maintain its progressive reputation by declaring gays a suspect group for equal protection purposes.

I. Equal Protection Jurisprudence: Standard of Review

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution commands that "no State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike."[14] Under current law, government actors cannot arbitrarily discriminate against homosexuals.[15] To demonstrate that discrimination based on sexual orientation creates an Equal Protection Clause violation, a plaintiff must show, using a rational basis test, that

> the defendants: (1) treated him differently from others who were similarly situated, (2) intentionally treated him differently because of his membership in the class to which he belonged (i.e., homosexuals), and (3) because homosexuals do not enjoy any heightened protection under the Constitution, . . . that the

14. High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 570 (9th Cir. 1990) (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985)).

15. *See, e.g.*, Pruitt v. Cheney, 963 F.2d 1160, 1165–66 (9th Cir. 1991) (holding that the court should apply the "active" rational basis scrutiny employed by the United States Supreme Court in *Cleburne Living Center*, 473 U.S. 432, 439 (1985)); *Dubbs v. Central Intelligence Agency*, 866 F.2d 1114, 1119 (9th Cir. 1989); *High Tech Gays*, 895 F.2d at 574–78.

> discriminatory intent was not rationally related to a legitimate state interest.[16]

Moreover, differential treatment based solely on animus towards gays cannot survive rational basis scrutiny.[17] If gays, however, were treated as a suspect or quasi-suspect class, then the courts would be forced to apply a higher level of scrutiny to laws that target gays. To be a "suspect" or "quasi-suspect" class,

> homosexuals must (1) have suffered a history of discrimination; (2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and (3) show that they are a minority or politically powerless, or alternatively show that the statutory classification at issue burdens a fundamental right.[18]

If a class of people burdened are "despised or politically powerless groups," such that discrimination is "likely to reflect antipathy against those groups [then] the classifications are inherently suspect and must be strictly scrutinized."[19]

The Ninth Circuit's application of rational basis scrutiny to laws targeting gays has been largely caused by judges' unfortunate reliance on the *Bowers* holding that gay sexual activity is not a fundamental right. In 2003, however, *Lawrence* overruled *Bowers*. This decision should render moot those Ninth Circuit cases that fail to apply strict scrutiny to laws targeting gays because of their sexual orientation or

16. Schroeder v. Hamilton Sch. Dist., 282 F.3d 946, 950–51 (7th Cir. 2002) (citing Romer v. Evans, 517 U.S. 620, 634–35 (1996)); *see also* Buttino v. F.B.I., 801 F. Supp. 298, 306 n.13 (N.D. Cal. 1992) ("[T]he requirement that anti-gay discrimination be subjected only to 'rational basis' review, rather than to either 'heightened' or 'strict' scrutiny, is the object of considerable criticism.") In support of their argument, the *Buttino* court pointed to the opinions of the following: the Chief Judge of the Northern District of California, the Honorable Thelton E. Henderson in *High Tech Gays*; the concurring opinions of The Honorable William A. Norris and The Honorable William C. Canby, Jr. in *Watkins*; LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 16–33, at 1616 (2d ed. 1988); J. ELY, DEMOCRACY AND DISCONTENT 163–64 (1980); SEXUAL ORIENTATION AND THE LAW 54–61 (Harvard Law Rev., eds., 1989); and Note, *An Agreement for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 816–27 (1984). *See Buttino*, 801 F. Supp at 306 n.13.

17. *Hunter*, 393 U.S. at 395; *see also* Lawrence v. Texas, 539 U.S. 558, 574 (2003) (citing *Romer*, 517 U.S. at 634); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 181 (1980) (Stevens, J., concurring) ("If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.").

18. *High Tech Gays*, 895 F.2d at 573 (citing Bowen v. Gilliard, 483 U.S. 587, 602–03 (1987)). Also, even though *Watkins* involved the Federal Constitution's Fifth Amendment equal protection guarantees, the court's "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Id.* at 571.

19. Watkins v. United States Army, 875 F.2d 699, 712 n.4 (9th Cir. 1989) (en banc) (Norris, J., concurring).

sexual conduct.[20] While *Lawrence* does not afford gays strict scrutiny protection under the federal Equal Protection Clause, it does possibly establish one of the three elements—sodomy as a fundamental right—that must be met in the Ninth Circuit to trigger strict judicial scrutiny of government action that discriminates against gays. If the Ninth Circuit adopted this analysis of *Lawrence*, it could be the first circuit to provide gays with the strict scrutiny protection that they need and deserve. In order to better understand why the Ninth Circuit is the ideal circuit to lead this charge towards equal rights for gays, two major Ninth Circuit cases must be evaluated: *Watkins* and *High Tech Gays*.

II. Ninth Circuit Jurisprudence

A. *Watkins v. United States Army*

In 1988, for the first time ever, a Ninth Circuit majority in *Watkins v. United States Army* held that homosexuals constituted a suspect class and that strict judicial scrutiny must apply to governmental discrimination against homosexuals.[21] *Watkins* involved Army regulations that severely discriminated against gays by mandating that gay soldiers be discharged.[22] Indeed, "the discrimination against homosexual orientation [by the United States Army] under [its] regulations [at issue was]

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

21. *See* Watkins v. United States Army, 847 F.2d 1329, 1352–53 (9th Cir. 1988), *amending* 837 F.2d 1428 (9th Cir. 1988) (appeal after remand).

22. *See Watkins*, 875 F.2d at 713 n.5. The plaintiff, Watkins, had been discharged for allegedly squeezing the knee of a male soldier, although the Army failed to prove that Watkins so acted. *Id.* at 715. The Army regulation at issue at the time of *Watkins*, AR 635-200, set forth:

> 15-2 Definitions . . .
>
> a. Homosexual means a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts.
>
> b. [omitted].
>
> c. A homosexual act means bodily contact, actively undertaken or passively permitted, between soldiers of the same sex for sexual satisfaction.
>
> 15-3 Criteria
>
> The basis for separation may include preservice, prior service, or current service conduct or statements. A soldier will be separated per this chapter if one or more of the following approved findings is made:
>
> a. The soldier has engaged in, attempted to engage in, or solicited another to engage in a homosexual act unless there are further approved findings that—
>
> (1) Such conduct is a departure from the soldier's usual and customary behavior; and
>
> (2) Such conduct is unlikely to recur because it is shown, for example, that the act occurred because of immaturity, intoxication, coercion, or a desire to avoid military service; and

about as complete as one could imagine."[23] Upon rehearing *en banc*, however, the *Watkins* majority expressly, and probably unnecessarily, withdrew that prior holding.[24] Rather than reach the equal protection issue on the merits, that court simply held that the federal government was equitably estopped from engaging in sexual orientation-based discrimination.[25]

Judge Norris's concurrence in the *en banc* rehearing for *Watkins*, however, addressed the equal protection issue.[26] At the threshold, Judge Norris indicated that *Bowers* only applied to the Due Process Clause of the Federal Constitution's Fourteenth Amendment, and thus did not control the issue of whether gays constitute a suspect class under the Equal Protection Clause.[27] He ultimately determined that gays do indeed constitute a suspect class, and that laws targeting gays should be subject to strict scrutiny.[28] In making this determination, Judge Norris analyzed the factors courts typically use to determine whether gays should be classified as a suspect or quasi-suspect class: historical discrimination, immutability of characteristics, and lack of political power.[29]

1. Historical Discrimination

Judge Norris first determined that "homosexuals have historically been subject to invidious discrimination, [and] laws which burden

(3) Such conduct was not accomplished by use of force, coercion, or intimidation by the soldier during a period of military service; and
(4) Under the particular circumstances of the case, the soldier's continued presence in the Army is consistent with the interest of the Army in proper discipline, good order, and morale; and
(5) The solider does not desire to engage in or intend to engage in homosexual acts.

Id. at 713 n.5 (citing AR 635-200). The regulation also noted that all five of the above findings must occur before a soldier can be discharged from the army. *Id.* This reflected the "policy . . . to permit retention *only* of *nonhomosexual* soldiers." *Id.* Then, the regulation also provides that a soldier can be discharged for saying that he or she is a homosexual (absent evidence to the contrary) or for marrying, or attempting to marry, a "person known to be of the same biological sex . . . unless there are further findings that the soldier is not a homosexual or bisexual." *Id.* Such discharged soldiers could not reenlist under AR 601-280. *Id.*

23. *Watkins*, 875 F.2d at 716 (Norris, J., concurring in judgment).
24. *Id.* at 711.
25. *Id.*
26. *Id.* at 724–28.
27. *Id.* at 716 (stating that "nothing in *Hardwick* suggests that the state may penalize gays merely for their sexual orientation").
28. *Id.*
29. *Id.* at 728.

homosexuals as a class should be subjected to heightened scrutiny under the equal protection clause."[30] Even the government conceded that "it is indisputable that 'homosexuals have historically been the object of pernicious and sustained hostility.'"[31]

2. Immutable Characteristic

Judge Norris next determined that homosexuality was an immutable characteristic, even assuming *arguendo* that a person could reverse his or her sexual preference through "difficult and traumatic" treatment, such as "extensive therapy, neurosurgery or shock treatment."[32] More importantly, he concluded "that allowing the government to penalize the failure to change [one's sexual preference,] such a central aspect of individual and group identity[,] would be abhorrent to the values animating the constitutional ideal of equal protection of the laws."[33]

3. Politically Powerless

Lastly, Judge Norris explained why homosexuals cannot, as a group, protect their rights by appealing to the government's political branches.[34] He argued that not only have gays historically "been underrepresented in and victimized by political bodies," but also gays are "handicapped by structural barriers that operate to make effective political participation unlikely if not impossible."[35] Such barriers can be social, economic, or political pressure to conceal one's sexual preference, which in turn would lead to a gay person's failure to protest against discriminatory government action.[36] Indeed, Judge Norris contended, by outing one's self as gay, a person exposes himself or herself to the discrimination that they seek to eliminate.[37] Addition-

30. *Id.* at 719.

31. *Id.* at 724 (citations omitted).

32. *Id.* at 726; *see generally* Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 UCLA L. REV. 915, 937 (1989); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1303 (1985) (arguing that the ability to change a trait is not as important as whether the trait is a "determinative feature of personality").

33. *Watkins*, 875 F.2d at 726.

34. *Id.*

35. *Id.* at 727.

36. *Id.*

37. *Id.*; *see also* Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014 (1985) (Stevens, J., dissenting) (dissenting from the denial of certiorari by explaining that "[b]ecause of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena").

ally, general animus or outright hatred towards gays can render gay political participation ineffective.[38] Such animus was reflected in the Army's resistance to allowing gays to participate. The Army argued that its regulations were "justified by the need to maintain the public acceptability of military service, because toleration of homosexual conduct . . . might be understood as tacit approval and the existence of homosexual units might well be a source of ridicule and notoriety."[39]

Judge Norris consequently determined that gays comprised a suspect class and that strict scrutiny should be used to review sexual orientation-based discrimination.[40] The fact that the majority did not address such an important issue, knowing full well that the concurrence delved so deeply and convincingly into the equal protection claim, suggests that the majority did not necessarily mean to foreclose the possibility that homosexuals could be considered a suspect class in a later case.

B. *High Tech Gays v. Defense Industrial Security Clearance Office*

Subsequent Ninth Circuit cases brushed aside Judge Norris's rationale and applied rational basis scrutiny to equal protection claims in the context of discrimination against homosexuals.[41] In *High Tech*

38. *Watkins*, 875 F.2d at 727; *see also* INFOPLEASE, THE AMERICAN GAY RIGHTS MOVEMENT: A TIMELINE, *at* http://www.infoplease.com/ipa/A0761909.html (last accessed Apr. 22, 2005) (indicating that gays could not have held too much political sway until the second half of the twentieth century because gays did not enjoy the right to engage in sodomy until 1962, when Illinois decriminalized such acts, and discrimination based on sexual orientation was not outlawed by a state until Wisconsin did so in 1982, just a little more than twenty years ago).

39. *Watkins*, 875 F.2d at 727 (quotations and citations omitted).

40. *Id.* at 728. It should be noted that Judge Norris launches into a discussion of the conduct versus orientation dichotomy. As he states, "[T]he class of persons involved in *Hardwick*—those who engage in homosexual sodomy—is not congruous with the class of persons targeted by the Army's regulations—those with a homosexual orientation. *Hardwick* was a 'conduct' case; Watkins' is an 'orientation' case." *Id.* at 716–17. Judge Norris then added that Professor Cass Sunstein agrees with this analysis. *Id.* at 717 n.10 (quoting Cass Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1162 n.9 (1988)). The conduct/orientation paradigm highlights the high degree of connectivity between the Due Process Clause and the Equal Protection Clause as they apply to laws affecting homosexuals. Such a distinction seems to be a creature of necessity, because courts desiring to afford a stricter form of scrutiny to gay-based discrimination needed something "to hang their hat on" in the face of *Bowers*. Such a distinction is no longer necessary given that *Lawrence* overruled *Bowers*. *See* discussion *infra* Part III.B.1.

41. *See, e.g.*, Flores v. Morgan Hill Unified Sch. Dist., 324 F. 3d 1130, 1138 (9th Cir. 2003); Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1132 (9th Cir. 1997); Philips v.

Gays, a class action filed against the Defense Industrial Security Clearance Office ("DISCO") challenged "the mandatory investigation of all homosexual applicants seeking a Secret or Top Secret clearance" with the Department of Defense.[42] In particular, the government had to evaluate an application to determine whether that applicant is "eligible to access classified information or assignment to sensitive duties . . . based on all available information, the person's loyalty, reliability, and trustworthiness."[43] Such characteristics must be "such that entrusting the person with classified information or assigning the person to sensitive duties is clearly consistent with the interests of national security."[44] The plaintiffs asserted that being gay made an applicant unreliable and untrustworthy under DISCO's regulation, such that gays could not receive security clearance.[45] The Ninth Circuit reviewed the case to determine whether DISCO's policy violated the Fourteenth Amendment's Equal Protection Clause and utilized the traditional three-prong test to determine whether gays constituted a suspect class: historical discrimination, immutable characteristics, and whether gays were politically powerless or a minority. Additionally, and quite importantly, the court examined an additional, alternative

Perry, 106 F.3d 1420, 1425 (9th Cir. 1997); High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 573–74 (9th Cir. 1990).

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

43. *Id.* at 566 (citing 32 C.F.R. § 154.6(b) (1987)).

44. *Id.* (citing 32 C.F.R. § 154.6(b)).

45. *Id.* at 566–67 n.4 (citing 32 C.F.R. § 154.7). Section 154.7 of the Code of Federal Regulations, Title 32, provides:

> The criteria for determining eligibility for a clearance under the security standard shall include, but not be limited to the following: . . . (h) Criminal or dishonest conduct . . . [and] (q) Acts of sexual misconduct or perversion indicative of moral turpitude, poor judgment, or lack of regard for the laws of society.

32 C.F.R. § 154.7 § (h), (q). Furthermore, in investigating applicants,

> [t]he DIS Manual for Personnel Security Investigations (DIS 20-1-M) establishe[d] operational and investigative policy and procedural guidance for conducting personnel security investigations. According to the DIS 20-1-M, the DIS will not ordinarily "investigate allegations of heterosexual conduct between consenting adults." . . . Other *sexual conduct including homosexuality*, bestiality, fetishism, exhibitionism, sadism, masochism, transvestism, necrophilia, nymphomania or satyriasis, pedophilia and voyeurism *is considered a "relevant consideration in circumstances in which deviant conduct indicates a personality disorder or could result in exposing the individual to direct or indirect blackmail or coercion.* . . . Participation in deviant sexual activities may tend to cast doubt on the individual's morality, emotional or mental stability and may raise questions as to his or her susceptibility to coercion or blackmail."

Id. at 568 (emphasis added) (quoting DEP'T OF DEF., DIS MANUAL FOR PERSONNEL SECURITY INVESTIGATIONS 20-1-M, ¶ 4-10, at 4 (1985)).

factor that relates to the third prong: state infringement upon a fundamental right.

1. Historical Discrimination

The *High Tech Gays* court agreed that homosexuals have suffered a history of discrimination.[46] The court, however, did not believe that gays constituted a suspect class because they did not exhibit immutable traits, they were not politically powerless, and laws targeting homosexuals did not infringe upon a fundamental right.[47]

2. Immutable Characteristic

The court stated, without convincing support, that "[h]omosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes."[48] This reasoning suffers from fundamental flaws. First, reasonable minds could differ as to whether homosexuality is a behavioral characteristic or an immutable characteristic; certainly one could argue that a person does not choose to be gay, but rather is born gay.[49] Second, the court ignored the other characteristics that could

46. *Id.* at 573. It bears noting that discrimination against gays is not unique to America. Indeed, gays in other countries have suffered from similar historical discrimination. For example, Canada (provinces of which recently legalized gay marriage) used to treat gays

> [a]s mentally ill and have . . . subjected [them] to conversion "therapies," including electroshock treatment. . . . [It also employed] immigration law[s] which prohibited [gays'] entry into [Canada] and subjected those who were immigrants to the threat of deportation (1952–1977), as well as a penal law which criminalized certain forms of gay male sexual expression and rendered gay men vulnerable to indefinite incarceration as "dangerous sexual offenders" (1892–1969) . . . . [I]n the 1960's . . . approximately 150 gay federal civil servants resigned or were dismissed from their employment without just cause. Furthermore, lesbians and gay men were not permitted, until recently, to participate openly in the Armed Forces.

EGALE CANADA, HISTORY OF DISCRIMINATION AGAINST GAYS AND LESBIANS, *at* http://www.egale.ca/index.asp?lang=&menu=1&item=49 (last accessed Apr. 22 , 2005).

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

48. *Id.*

49. *See* High Tech Gays v. Def. Indus. Sec. Clearance Office, 909 F.2d 375, 377 (9th Cir. 1990) (denying rehearing en banc) (Canby, J., dissenting). While denying a rehearing, Judge Canby indicated that "[t]he Supreme Court has more than once recited the characteristics of a suspect class without mentioning immutability." *Id.* (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440–41 (1985); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976); San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)). Moreover, aliens constitute a suspect category; clearly, being an "alien" is not an immutable condition. *Id.* (citing Graham v. Richardson, 403 U.S. 365, 371–72 (1971)). Indeed,

be exhibited to satisfy the second prong: "obvious" and "distinguishing" characteristics. While one cannot always tell when an individual is gay or straight, as opposed to whether an individual is, for example, African-American, the signifiers of homosexuality can be obvious: passionately kissing a member of one's own sex, for example, would in many circumstances be a characteristic of homosexuality. Although such public displays of affection can be stifled, unlike race or gender, the stifling of one's sexuality can be considered tantamount to the suppression of one's very essence; therefore, simply because one *can* hide that he or she is gay does not necessarily render homosexuality a mutable characteristic.[50] Addressing this point, the court noted that "[t]he behavior or conduct of such already recognized classes is irrelevant to their identification."[51] Thus, even though engaging in certain sexual conduct may reveal an individual as gay, it is that very conduct

> [t]he real question is whether discrimination on the basis of the class's distinguishing characteristic amounts to an unfair branding or resort to prejudice, not necessarily whether the characteristic is immutable. . . . There is every reason to regard homosexuality as an immutable characteristic for equal protection purposes. It is not enough to say that the category is "behavioral." One can make "behavioral" classes out of persons who go to church on Saturday, persons who speak Spanish, or persons who walk with crutches. The question is, what causes the behavior? Does it arise from the kind of characteristic that belongs peculiarly to a group that the equal protection clause should specially protect? Homosexuals are physically attracted to members of their own sex. That is the source of the behavior that we notice about them. Did they choose to be attracted by members of their own sex, rather than by members of the opposite sex? The answer, by the overwhelming weight of respectable authority, is "no." Sexual identity is established at a very early age; it is not a matter of conscious or controllable choice. Can homosexuals change their orientation? Again, from everything we now know, the answer is "no." At least they cannot change it without immense difficulty. As Judge Norris has asked, what would it take to get any one of us to change his or her sexual orientation?

Id. at 377 (citing Gay Rights Coalition v. Georgetown Univ., 536 A.2d 1, 34 (D.C. 1987)); *see also* Watkins v. United States Army, 875 F.2d 699, 726 (9th Cir. 1989) (en banc) (Norris, J., concurring in judgment); A. BELL, M. WEINBERY, & F. HAMMERSMITH, SEXUAL PREFERENCE—ITS DEVELOPMENT IN MEN AND WOMEN 166–67, 190, 211, 222 (1981); LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 944–45, n.17 (1978).

50. *See* discussion *supra* note 49.

51. *High Tech Gays*, 895 F.2d at 573–74. *But see* Lawrence v. Texas, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring). Justice O'Connor stated that

> [w]hile it is true that [the law at issue] applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed towards gay persons as a class. "*After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.*"

Id. (citing Romer v. Evans, 517 U.S. 620, 641 (1996) (Scalia, J., dissenting)) (emphasis added).

that defines the person as gay; consequently, contrary to the majority's holding, homosexuals meet this second prong.

3. Target of Government Action Is Politically Powerless, a Minority, or a Fundamental Right Is Implicated

The court also noted that gays are "not without political power; they have the ability to and do 'attract the attention of the lawmakers,' as evidenced by [anti-discrimination] legislation."[52] Also, as opposed to the *Watkins* majority, who failed to address whether or not the governmental action implicated a fundamental right, the *High Tech Gays* judges relied on *Bowers* and stated that "homosexual activity is not a fundamental right."[53] The court thus concluded that gays do not satisfy the third prong's requirement that they "show that they are a minority or politically powerless, or alternatively show that the statutory classification at issue burdens a fundamental right."[54]

While the court cited several examples of laws targeting anti-gay discrimination,[55] it failed to link such legislation to efforts of gays or activist groups. It also failed to account for the fact that similar legislation was *not* enacted in several states.[56] Moreover, it completely ignored the sensible explanation of gays' lack of political power espoused in *Watkins*.[57] This unsatisfactory analysis simply ignores the fact that the enactment of anti-gay discrimination statutes does not necessarily mean that the group targeted by discrimination holds political sway. One should doubt, for example, that a court would hold that southern African-Americans in the 1960s held political power because anti-discrimination laws were passed.[58] Indeed, while gays hold a

52. *High Tech Gays*, 895 F.2d at 574 (quoting *Cleburne Living Ctr.*, 473 U.S. at 445).

53. *Id.* at 571. Note that whether private, consensual gay sexual activity constitutes a fundamental right was not listed as a determinative criteria in *Watkins*.

54. *Id.* at 573.

55. *Id.* at 574 n.10.

56. In 1990, when *High Tech Gays* was decided, less than 11.9 million Americans lived in a state with a law banning discrimination on the basis of sexual orientation. SEAN CAHILL, WHAT'S AT STAKE FOR THE GAY, LESBIAN, BISEXUAL, AND TRANSGENDER COMMUNITY IN THE 2000 PRESIDENTIAL ELECTIONS 2, *available at* http://www.thetaskforce.org/downloads/atstake2000.pdf (last accessed Jan. 19, 2005). Moreover, though the number of people protected by such statutes increased to approximately sixty-five million as of 2000, only "28 states [had] enacted either civil rights laws or hate crimes laws that address discrimination and harassment based upon sexual orientation and/or gender identity." *Id.* at 9.

57. *See* discussion *supra* Part II.A.3.

58. For example, while over "13,000 people have served in the national legislature, including the Continental Congress, the Senate, and the House of Representatives," as of 2002 only 107 African-Americans have served in the United States Congress. *See* U.S. SENATE, MINORITIES IN THE SENATE, *at* http://www.senate.gov/artandhistory/history/com-

noticeable degree of political influence in states like California or New York, gays in other states hold comparatively less political power.

Additionally, the court ignored the fact that gays could show that they are politically powerless *or* a minority.[59] According to some statistics, approximately one out of ten people is gay.[60] Even if this overestimates the gay population in America, the relatively small number of gays in America still qualifies gays as a minority group. In comparison, for example, the minority set of African-Americans constitute 12.9 percent of the United States population.[61]

Despite the holding of *High Tech Gays*, the application of rational basis scrutiny has been strongly and sensibly criticized in the Ninth Circuit. For example, although the *High Tech Gays* court denied rehearing *en banc*, Judge Canby's dissent, joined by Judge Norris, strongly disapproved of the court's refusal to apply heightened scrutiny to a government regulation that targeted homosexuals:

> We have made a grave error in failing to rehear this case en banc. A panel of this court has held that our government may discriminate against homosexuals whenever it is able to put forth a rational basis for doing so. That decision is wrong, and it will have tragic results. The case should have gone en banc because of its sheer importance. It also should have gone en banc because the panel's

mon/briefing/minority_senators.htm (last accessed Apr. 22, 2005); CONG. BLACK CAUCUS FOUND., INC., *at* http://cbcfinc.org/History.html (last accessed Jan. 19, 2005). As another example, the Civil Rights Act of 1960 and the Fourteenth Amendment to the Federal Constitution afforded federal civil rights to African-Americans, and yet access to the southern state courts to enforce such rights was so paltry that the government had to specially enact a statute authorizing citizens to bring such enforcement actions in federal court. *See* 42 U.S.C. § 1983 (2000). Moreover, that Congress did not enact section 1983 until 1979 further evidences African-Americans' lack of political power during this era, despite the fact that laws were being passed to protect their rights. *See* 42 U.S.C. § 1983; *see also* Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979).

59. *See High Tech Gays*, 895 F.2d at 573–74.

60. *See, e.g.*, FAMILY RESEARCH INST., A SPECIAL REPORT, THE NUMBERS GAME: WHAT PERCENTAGE OF THE POPULATION IS GAY? (1993), *at* www.familyresearchinst.org/FRI_AIM_Talk.html (last accessed Apr. 22, 2005) (criticizing the widely-used figure of ten percent as representing the gay population of the world, and indicating that the percentage of gay people in the world is actually quite lower). Even if the gay/straight ratio is less than nine to one, this simply supports the assertion that gays constitute a minority in this country.

61. *See* U.S. CENSUS BUREAU, RACE ALONE OR IN COMBINATION: 2000, *at* http://factfinder.census.gov/servlet/QTTable?geo_id=01000US&qr_name=DEC_2000_SF1_U_QTP5&ds_name=DEC_2000_SF1_U (last accessed Apr. 18, 2005). State action targeting African-Americans, or any racial group for that matter, triggers strict scrutiny under the Constitution's Equal Protection Clause. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

opinion skews equal protection analysis as ordained by the Supreme Court.[62]

Nevertheless, the Ninth Circuit's Equal Protection Clause jurisprudence continues in the manner suggested by *High Tech Gays* to this very day. In 2003, however, *Lawrence v. Texas* changed the landscape of Fourteenth Amendment jurisprudence. That case suggests, as discussed below, that a circuit court could hold that adults enjoy a fundamental right to engage in private, consensual sex with a member of one's own gender. If this is the case, then the Ninth Circuit now has another good reason to revisit its faulted equal protection jurisprudence as it relates to laws targeting gays: the potential deeming of sodomy as a fundamental right.

III. *Lawrence v. Texas* Renders the Reasoning of *High Tech Gays* Obsolete, Making the Equal Protection Clause Jurisprudence Ripe for Revisiting

In addition to arguing that homosexuals constitute a suspect class, it can also be argued that the right to engage in private, consensual sexual activity, including homosexual activity, may be a fundamental right protected by the Fourteenth Amendment under *Lawrence*.[63] In *Lawrence*, John Geddes Lawrence was arrested after the

62. *High Tech Gays*, 909 F.2d at 376 (Canby, J. dissenting). Judge Norris joined Judge Canby's eloquent dissent. It is worth noting that Judges Norris and Canby both wrote concurrences in *Watkins* that decried the Circuit's failure to accord gays strict scrutiny protection.

63. *See* Lawrence v. Texas, 539 U.S. 558 (2003); United States v. Extreme Assocs., 352 F. Supp. 2d 578, 591 (W.D. Pa. 2005) (indicating that *Lawrence* might have created some form of fundamental right to sexual privacy, and using *Lawrence* as a basis for striking down an obscenity prosecution). *But see* Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting) (noting that the court did not apply strict scrutiny, but rather "an unheard-of form of rational-basis review that will have far-reaching implications beyond this case[,]" and that while expressly overruling *Bowers*' outcome, the Court is not willing to "announce . . . a fundamental right to engage in homosexual sodomy") (citing Bowers v. Hardwick, 478 U.S. 186, 191 (1986)); Lofton v. Florida Dep't of Children & Families, 358 F.3d 804, 817 (11th Cir. 2004). The Eleventh Circuit in *Lofton* held that gay petitioners wishing to adopt a child that they had raised are distinguishable from gay adults who wished to engage in private, sexual conduct partially because, unlike the right at issue in *Lawrence*, adoption is a state-enacted statutory right invoking significant concerns that affect both the child and the general public. *Id.* at 809. The *Lofton* court also held that a law restricting gays from adopting children passed rational basis scrutiny, despite the fact that Florida is the only state in the nation with such a law. *Id.* at 826. Furthermore, the *Lofton* court was "particularly hesitant to infer a new fundamental liberty interest from [*Lawrence*'s] opinion whose language and reasoning are inconsistent with standard fundamental-rights analysis." *Id.* at 816. This easily distinguishable case indicates the vague nature of the language used by the *Lawrence* Court, and indicates that a court could, indeed, just as readily interpret *Lawrence* as providing a fundamental right to engage in gay sodomy.

police witnessed both him and Tyron Garner engaging in a sexual act in the privacy of Lawrence's apartment.[64] They were arrested for and convicted of violating a Texas statute prohibiting sodomy.[65] Lawrence appealed to the United States Supreme Court, claiming that the Texas law violated both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment.[66] To truly understand how the *Lawrence* opinion impacts equal protection jurisprudence, one must have a firm understanding of the Due Process Clause and why *Lawrence* all but explicitly deemed private, consensual, sodomy a fundamental right.

A. The Fourteenth Amendment's Due Process Clause Protections

The Due Process Clause prevents all three government branches from deliberately endorsing arbitrary and unreasonable legislation and intentionally depriving citizens of their rights to life, liberty, and property.[67] Importantly, the Due Process Clause's "constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement."[68] As a result, it only protects constitutional or statutory rights.[69] Though courts typically apply rational basis scrutiny when a government actor infringes upon an identified liberty or property interest, any government law or action that unduly abridges a plaintiff's fundamental rights will be met with strict scrutiny.[70]

A plaintiff can bring a substantive due process claim under two theories. First, a plaintiff must "demonstrate a deprivation of an identified liberty or property interest protected by the Fourteenth Amendment. . . . [S]econd, a plaintiff is not required to prove the deprivation of a specific liberty or property interest, but, rather, he

64. 539 U.S. at 562–63.

65. *Id.* at 563 (citing TEXAS PENAL CODE ANN. § 21.06(a) (Vernon 2003)). Section 21.06(a) provided that "[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." *Id.* Texas law also defined "deviate sexual intercourse" as "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object." *Id.* (citing TEXAS PENAL CODE ANN. § 21.01(1)).

66. *Id.* at 564.

67. *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 334–35 (1986) (holding that mere negligence on behalf of a State actor, as opposed to intentional acts, does not give rise to a due process claim).

68. Olim v. Wakinekona, 461 U.S. 238, 250 (1983).

69. Townsend v. Cramblett, No. 89–3353, 1989 WL 153979, at *4 (6th Cir. Dec. 21, 1989) (citing *Olim*, 461 U.S. at 249).

70. *See, e.g.*, Near v. Minnesota, 283 U.S. 697, 707 (1931).

must prove that the state's conduct 'shocks the conscience.'"[71] "Liberty" includes "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness in free men."[72] Indeed, the United States Supreme Court broadly defines the meaning of "liberty."[73]

Additionally, the Court has identified several fundamental rights that are within the Due Process Clause's protection. Relevant rights include freedom of speech and assembly,[74] freedom of association with others,[75] the right of privacy (itself part of the Due Process Clause's "liberty" component, which also includes the right to reproduction and marriage),[76] and the right to direct the education and upbringing of one's children.[77] The Court has determined that any state action that infringes upon any of these fundamental rights will be met with strict scrutiny.

B. From *Bowers* to *Lawrence*: Expanding the Fourteenth Amendment's Privacy Right to Gays, and Deregulating "the Sacred Precincts of Marital Bedrooms"

In 1986, the United States Supreme Court held in *Bowers* that the Constitution does not provide "a fundamental right to homosexuals to engage in acts of consensual sodomy."[78] In that case, defendant Hardwick was arrested for engaging in homosexual activity in his bedroom, in violation of a Georgia sodomy law.[79] Though Hardwick challenged the law as violating the liberty and privacy component of the Four-

71. Brown v. Hot, Sexy & Safer Prods., 68 F.3d 525, 531 (1st Cir. 1995) (citations omitted); *see also* Rochin v. California, 342 U.S. 165, 172 (1952).

72. Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

73. *Id.*

74. *See Near*, 283 U.S. at 707.

75. *See* NAACP v. Alabama, 357 U.S. 449, 460 (1958).

76. *See* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

77. *See Meyer*, 262 U.S. at 399–400.

78. Bowers v. Hardwick, 478 U.S. 186, 192 (1986).

79. *Id.* at 187–88 n.1. The statute at issue provided:

> (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another
>
> (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years . . . .

Id. Although the law applied to both heterosexual and homosexual sodomy, the Court's holding was limited to the denial of a right to engage in gay sodomy. *Id.* at 190. This was probably incorrect, as the issue should have been about "government regulation of adults in their bedrooms, not about the right to engage in homosexual activity." CHEMERINSKY,

teenth Amendment's Due Process Clause, Justice White, writing for the majority, held that homosexual activity did not pertain to matters of family and reproduction, matters with which the right of privacy was typically associated.[80]

Bowers was hotly disputed, and some scholars claimed that the 1996 case of *Romer v. Evans* implicitly overruled *Bowers*'s holding that the right to engage in gay sex was not a liberty interest.[81] The *Lawrence* Court, however, explicitly overruled *Bowers* and held that such a right is part of an individual's "liberty" protected by the Due Process Clause, although the Court did not expressly state that such a right is "fundamental."[82] Nevertheless, if gay sexual activity is "private conduct" that one has the "full right" to engage in, and it is protected as a liberty interest, it stands to reason that the Ninth Circuit could hold that the right to engage in such activity is fundamental.[83]

---

supra note 5, at 817 (citing LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1428 (2d ed. 1988)). As Tribe stated,

> [I]n asking whether an alleged right forms part of a traditional liberty, it is crucial to define the liberty at a high enough level of generality to permit unconventional variants to claim protection along with mainstream versions of protected conduct. The proper question . . . is not whether oral sex as such has long enjoyed a special place in the pantheon of constitutional rights, but whether private, consensual, adult sexual acts partake of traditionally revered liberties of intimate association and individual autonomy.

Id.

80. *Bowers*, 478 U.S. at 190–91. *But see id.* at 204 (Blackmun, J., dissenting). Justice Blackmun's dissent chastises the majority's decision to ignore the role of personal autonomy in prior due process cases, which centered on the "right to be let alone" in making "choices about the most intimate aspects of their lives." *Id.* at 199–200. He states that the Court, rather, should have paid attention "to the basic reasons why certain rights associated with the family have been accorded shelter under the . . . Due Process Clause. We protect those rights . . . because they form so central a part of an individual's life" and the "moral fact that a person belongs to himself and not others nor to society as a whole." *Id.* at 204. In essence, Justice Blackmun asserted that the fundamental right to intimate association encompasses the choice to engage in gay sodomy.

81. *See, e.g.*, JIM WINNER, BEDS WITH SHEETS BUT NO COVERS: THE RIGHT TO PRIVACY AND THE MILITARY'S REGULATION OF ADULTERY, *available at* http://faculty.lls.edu/~manheimk/ns/winner2.htm (last accessed Apr. 22, 2005) (citing Thomas C. Grey, *Gay Rights and the Courts: The Amendment 2 Controversy*, 68 U. COLO. L. REV. 373, 374 (1997)).

82. Lawrence v. Texas, 539 U.S. 558, 562 (2003).

83. *But see id.* at 590 n.2 (Scalia, J., dissenting) ("While the Court does not overrule *Bowers*' holding that homosexual sodomy is not a 'fundamental right,' it is worth noting that the 'societal reliance' upon that aspect of the decision has been substantial as well."). Indeed, the Court found that the statute at issue did not advance any legitimate government interest. *Id.* at 560. Importantly, however, given *Lawrence*'s reasoning, it seems hard to imagine a time when a government action targeting the relevant gay conduct ever could pass rational basis scrutiny. Since it is such conduct that actually defines the class of people, why debase the entire universe of gays by refusing to afford strict scrutiny protection to their right to engage in sexual conduct?

Because gay sexual conduct is arguably fundamental under *Lawrence*, *High Tech Gays* was clearly wrongly decided. Continuing its tradition of progressive thought, the Ninth Circuit can without hesitation reverse *High Tech Gays* when the opportunity arises, as *Lawrence* eliminates the reasons set forth in *High Tech Gays* for denying strict scrutiny analysis to state action that targets gays.

1. Why Private, Consensual, Sexual Activity Should Be a Fundamental Right

One of the major reasons that the Ninth Circuit should reconsider its equal protection jurisprudence is the *Lawrence* Court's express overruling of *Bowers*. Moreover, the *Lawrence* majority held that an adult's right to engage in private, consensual sexual activity is a protected liberty interest under the Fourteenth Amendment's Due Process Clause.[84] The Court seemed eager to overrule *Bowers*, as it launched into an attack on *Bowers*'s initial substantive statement of the issue presented in that case—"'whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy'"[85]—which "disclose[d] the Court's failure to appreciate the extent of the liberty at stake."[86] As in *Lawrence*, the laws in *Bowers* were

> statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.[87]

So, while the Court did not expressly state that the activity at issue constituted a "fundamental right," its language certainly seems to indicate as such. Indeed, the holding appears to use the type of hedging language that a court would use when attempting to gradually expand civil rights, serving as a primer for future federal court decisions. Also,

84. *Id.* at 567. Only Justice O'Connor, in her concurrence, addressed the Equal Protection Clause argument. *Id.* at 579–85. There she found that the law did not pass rational basis scrutiny. *Id.* at 585.

85. *Id.* at 566 (quoting *Bowers*, 478 U.S. at 190).

86. *Id.* at 567.

87. *Id.* at 567.

such language may have been necessary to receive key support from certain Supreme Court justices.

Indeed, ours is a nation particularly concerned with protecting privacy within the home; this concern is so great that it was embodied by the Fourth Amendment in the Bill of Rights.[88] Furthermore, the *Lawrence* facts presented the traditional signposts that the Court looks to when deciding whether a right is "fundamental." Fundamental rights are those that are "deeply rooted in this Nation's history and tradition,"[89] and must be "implicit in the concept of ordered liberty,"[90] so that "neither liberty nor justice would exist if [it] were sacrificed."[91] States over the past several years have repealed laws targeting gay conduct, thus establishing a tradition of protecting gay rights.[92] When sodomy laws were traditionally enforced, they were not typically in the context of private, consensual homosexual conduct.[93] Moreover, "American laws targeting same-sex couples did not develop until

88. The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

89. Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977); Washington v. Glucksberg, 521 U.S. 702, 721 (1997). *But see* County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring) (stating that "history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry"); CHEMERINSKY, *supra* note 5, at 765–66 (stating that "[s]ome argue that . . . the Court only should recognize nontextual rights that concern ensuring adequate representation and the effective operation of the political process," others argue that Lockean "natural law principles" should dictate which rights are fundamental, and yet others "maintain that the Court should recognize nontextual fundamental rights that are supported by a deeply embedded moral consensus that exists in society" (citations omitted)).

90. *Glucksberg*, 521 U.S. at 721 (citing Palko v. Connecticut, 302 U.S. 319, 325–26 (1937)).

91. *Id.*

92. *See Lawrence*, 539 U.S. at 570 (citing Jegley v. Picado, 80 S.W.3d 332 (Ark. 2002); Gryczan v. State, 942 P.2d 112 (Mont. 1997); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. App. 1996); Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992); 1993 NEV. REV. STAT. 518 (repealing NEV. REV. STAT. §201.93)).

93. *Lawrence*, 539 U.S. at 569–70. The *Lawrence* Court stated that

> 19th-century sodomy prosecutions typically involved relations between men and minor girls or minor boys, relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals. . . .The longstanding criminal prohibition of homosexual sodomy upon which the *Bowers* decision placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character.

Id.

the last third of the 20th century."[94] Thus, in placing heavy reliance on the history of sodomy laws when holding that gay sodomy is not a fundamental right,

> the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. . . . These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code."[95]

2. *High Tech Gays* and Its Progeny Should Be Overruled, and Strict Scrutiny Should Be Applied to All State Action That Targets Gays

After *Lawrence*, the Ninth Circuit should (1) hold that the right to engage in private, consensual gay sex is fundamental, and (2) consequently, hold that gays should be treated as a suspect class for equal protection purposes. Justice Scalia's dissent in *Lawrence* states that *High Tech Gays* relied on *Bowers*'s "holding that homosexual activity is not a fundamental right in rejecting—on the basis of the rational-basis standard—an equal-protection challenge to the Defense Department's" discriminatory practices.[96] *Lawrence*, however, expressly overruled *Bowers* and indicates that infringement upon private, consensual

94. *Id.* at 570. It is worth noting that such sodomy laws generally were enacted shortly before homosexuality was removed from the *Diagnostic and Statistical Manual of Mental Disorders* in 1974. *See* MINH T. NGUYEN, CIVIL RIGHTS—THE HISTORY OF GAY RIGHTS, *at* http://www.enderminh.com/minh/civilrights.aspx (last accessed Apr. 22, 2005). This indicates that the "right" to engage in gay sex may not have existed because of medical misconceptions of homosexuality as a disease. Changing conceptions of homosexuality's causes in the last half of the twentieth century may have had the following effects: (1) medical professionals realized that gays do not suffer from mental illness by virtue of being gay, and (2) legislators, feeling it permissible to legislate homosexuality if it is not a mental illness, passed anti-sodomy statutes.

95. *Lawrence*, 539 U.S. at 571 (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992)). *But see id.* at 599 (Scalia, J., dissenting) (stating that the majority's opinion means that morality legislation can no longer be legitimate, and thus laws cannot punish such criminal acts as "fornication, bigamy, adultery, adult incest, bestiality, and obscenity"). There can be no legitimate state interest in legislating people's activities in the bedroom simply because one finds such activities to be immoral. Other actions, however, such as adult incest and bestiality, can rightly be legislated because of other legitimate interests. These interests include the protection of the public's health from diseases resulting from human-animal sexual contact, the protection of a child who may be born deformed because its parents are siblings, or the protection of animals, who cannot consent to sex with a human, from abuse.

96. *Id.* at 590 n.2.

homosexual activity among mature individuals demands a degree of scrutiny higher than mere rational basis analysis.[97] Necessarily, *High Tech Gays*'s lynchpin notion—that private, consensual homosexual activity only receives rational basis protection—evaporates under *Lawrence.* Thus, *High Tech Gays*'s failure to apply heightened scrutiny must necessarily come under fire in light of *Lawrence.*

The Ninth Circuit employs a three-pronged approach to determine whether a class should be labeled "suspect." The class must have historically suffered from discrimination, the class must exhibit immutable characteristics, and either the class must be politically powerless or the state action must infringe upon a fundamental right.[98] Gays have historically suffered from discrimination.[99] Further, gays exhibit immutable characteristics.[100] Finally, after *Lawrence,* the Ninth Circuit has the chance to declare as fundamental the right to engage in gay sexual activity (indeed, the activity that defines one as "gay"). As a result, even assuming *arguendo* the debatable contention that gays hold political power or do not constitute a minority, the Ninth Circuit's third prong would be satisfied.

IV. A Proposal for Altering the "Historical Discrimination" Prong of the Test Used to Determine Whether a Group Qualifies as a Suspect or Quasi-Suspect Class

If this Article's argument is carried to its extreme, several other "groups" of people would be considered suspect classes. Pedophiles, for example, have suffered historical discrimination in the form of laws banning sexual conduct with children, their desire to have sexual contact with children is immutable, and they arguably lack political power and constitute a minority of the population. Nevertheless, one should hesitate to classify pedophiles as a suspect class, even if laws targeting pedophilic activity likely satisfy strict scrutiny review because of the clear and compelling government interest in protecting the welfare of children.

Thus, this Article proposes an alteration of the "historical discrimination" prong of the test used to determine whether a class is

97. *Id.* at 578.

98. High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990).

99. Watkins v. United States Army, 875 F.2d 699, 719 (9th Cir. 1989) (en banc) (Norris, J., concurring).

100. *Id.* at 726.

suspect or quasi-suspect. As it stands, any time a group has been the target of discriminatory laws, it can be argued that the group suffered from historical discrimination. However, altering this prong to account for *unjustifiable* historical discrimination could properly limit the classes of people that could be considered suspect or quasi-suspect. The court's analysis of unjustifiable historical discrimination would mirror the court's "active" rational basis scrutiny.[101] In other words, if the historical discrimination against a group took the form of morality legislation based solely on animus to the group, such as in *Romer*, then the discrimination would be "unjustifiable" and this prong would be met.[102] If the historical discrimination is otherwise justified, as in the case of laws targeting pedophiles for the protection of innocent children, then the historical discrimination *is* justified and that group cannot attain suspect class status.[103]

Conclusion

The next time a Ninth Circuit court hears a case challenging state action as violating the Equal Protection Clause, it must shoulder the responsibility of abandoning the rationale it employed in *High Tech Gays* and strictly scrutinize such action, as it did in the original *Watkins*. Furthermore, the Ninth Circuit should embrace the concept of "unjustifiable historical discrimination" when determining whether gays constitute a suspect class. This would be both consistent with the United States Supreme Court's active rational basis standard and nec-

101. *See supra* note 15.

102. While a conservative court might seek to use this test to find that discrimination against gays is justifiable to protect the sanctity of marriage, this Article specifically suggests that the liberal Ninth Circuit lead the charge in this field. So, the conservative court argument is inapplicable. In addition, it can be argued that "protecting the sanctity of marriage" is a proxy for animus. To posit that gay marriage would harm the sanctity of marriage" implies that being gay is somehow wrong. Thus, animus exists "behind the scenes." Moreover, the term "sanctity" replies religious concerns and the wall between church and state should be enough to bar this from being a legitimate state end. Perhaps simply "preventing divorce," or "encouraging good relations between spouses" is a legitimate end for the government, but enforcing a religious norm should not be. Finally, if the government really wanted to protect the "sanctity of marriage," it would bar all marriage between straight couples, which right now ends in divorce half of the time.

103. On several occasions, the United States Supreme Court has recognized the government's compelling interest in protecting children from harm. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 766 (1982); FCC v. Pacifica Found., 438 U.S. 726, 749–50 (1978); Ginsberg v. New York, 390 U.S. 629, 639 (1968). In particular, this interest is substantial where the government seeks to prosecute those who sexually exploit children. *See* Osborne v. Ohio, 495 U.S. 103, 109–11 (1990); New York v. Ferber, 458 U.S. 747, 761 (1982).

essary to prevent the extension of suspect class status to undeserving groups, such as pedophiles.

Jurisprudence that reflects this argument will help to cement equal rights for all American citizens—gay and straight alike—and it will prevent the government from tacitly approving the beliefs of those who feel that gays do not deserve to enjoy the same rights as everyone else. Otherwise, gays will remain firmly within the government's crosshairs, subject to laws that improperly ignore the values of freedom and autonomy upon which this country was built.