

***Lawrence* and the Morality of “Don’t Ask, Don’t Tell” after *Lofton*, *Witt*, and *Cook*: The Law Before and After Repeal**

Anthony Marroney Noto[†]

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[†] J.D. Candidate, 2011, Seton Hall University School of Law; M.A., 2008, New York University; B.A., 2007, New York University. I would like to thank Professors Marc Poirier and Cathy McCauliff for their invaluable insight and assistance throughout the writing process, and I thank my colleague and mentor Jack M. Tracy II for his support and guidance. I would also like to thank the *Seton Hall Circuit Review* members for their hard work and dedication. I give special thanks to my family and my amazing husband, Marco Noto, for their continued love and support.

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I. INTRODUCTION

*Today, by repealing the discriminatory Don't Ask, Don't Tell policy, we also honor the service and sacrifice of all who dedicate their lives to protecting the American people. We honor the values of our nation and we close the door on a fundamental unfairness.*¹

Throughout history, societies have relied on morality to establish law. Morality is often considered the cornerstone of a civilized society, and as such, it is fairly natural that throughout human experience, laws have been based, either implicitly or explicitly, on moral judgments. From Hammurabi's Code to the Ten Commandments, mankind has combined morality and reason to establish a rule of law with the purpose of defining the outer limits of human behavior. Yet as we learn more about the human condition, our understanding of reason and morality are redefined. As our understanding grows, we, as a society, reinvent the law to keep up with societal changes. The law, therefore, is a living collection of humanity's evolving understanding of itself.

There are various types of laws that use morality as a component, and the Supreme Court has developed a long line of jurisprudence creating a particularly useful taxonomy that will be adopted as the analytical framework for this paper. As evidenced by morality-based jurisprudence, there are four main types of morality-based legislation: pure, composite, embedded, and inert.² Pure moral rationale means that there is no other means of justification than moral judgment, and the moral judgment is explicit in the law.³ Composite morality justification combines morality with another explicit aim such as public health or welfare.⁴ An embedded morality justification is one in which there is an

¹ 156 CONG. REC. H3873-4024 (daily ed. May 27, 2010) (statement of Speaker Pelosi).

² Suzanne Goldberg, *Morals-Based Justifications for Lawmaking Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1244 (2004).

³ *Id.*

⁴ *Id.* at 1245.

explicit non-moral justification asserted, but the implicit justification is morality.⁵ Finally, an inert moral rationale is a justification that relies on the police power or other legitimate basis of government action to take a moral position, but "does not actually rely on morality [for] its analysis."⁶

Since 1969, society has struggled with its evolving understanding of homosexuality and morality.⁷ In 1986, the Supreme Court entered the fray when it decided *Bowers v. Hardwick*.⁸ This case, concerning the validity of a Georgia sodomy statute, gave the Supreme Court the opportunity to add its reasoning to the understanding of homosexuality. The Court decided that there was no right to homosexual sodomy protected by the Constitution, and that the Georgia law was therefore valid.⁹ *Bowers* was part of a national practice of discrimination against homosexuals, which included a policy of discrimination against gays and lesbians in the military, later modified by the statute commonly referred to as "Don't Ask, Don't Tell" (DADT).¹⁰ Yet in 2003, *Lawrence v. Texas*,¹¹ a case concerning a Texas sodomy statute similar to the one at issue in *Bowers*, not only overruled *Bowers*, but also held that consensual sexual relations between two adults, even adults of the same sex, present a liberty interest protected by the Constitution.¹²

Prior to *Lawrence*, DADT faced its fair share of failed constitutional challenges,¹³ but *Lawrence* gave new credence to such challenges.¹⁴ The problem with *Lawrence* is that it was elusive in its

⁵ *Id.*

⁶ *Id.* at 1246.

⁷ See generally DAVID CARTER, STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION (St. Martin's Press, 1st ed. 2004). In 1969, at a bar known as the Stonewall Inn in Greenwich Village, New York, NY, police conducted an early morning raid of one of the most prominent hangouts for homosexuals in the city. *Id.* Instead of docilely accepting their arrest in the face of these raids, the patrons of the Stonewall fought back against the police and attracted a group that began to riot. *Id.* That group continued to riot intermittently until it became a more organized effort to promote the idea that homosexuals should be able to live openly without fear of being arrested. *Id.*

⁸ 478 U.S. 186 (1986).

⁹ *Id.* at 190, 196.

¹⁰ 10 U.S.C. § 654 (2006).

¹¹ 539 U.S. 558 (2003).

¹² *Id.* at 578.

¹³ See, e.g., *Holmes v. California Army Nat'l Guard*, 124 F.3d 1126, 1135 (9th Cir. 1997) (holding that homosexuals were *not* a suspect class deserving heightened scrutiny, and therefore applying rational basis review and finding DADT rational); *Able v. United States*, 155 F.3d 628, 636 (2d Cir. 1998) (holding that DADT did not violate Equal Protection).

¹⁴ See, e.g., *Hensala v. Dep't of the Air Force*, 343 F.3d 951, 956 (9th Cir. 2003) (discharged soldier arguing that the military recoupment policy violates federal law after *Lawrence*); *Loomis v. United States*, 68 Fed. Cl. 503 (2005) (discharged servicemember

holding, which was most likely deliberate,¹⁵ and this vagueness has left lower courts to struggle with its meaning, particularly the standard of review.¹⁶ This uncertainty led numerous courts to attempt to extract the meaning of *Lawrence* and the liberty interest or interests announced therein.¹⁷ In addition, such confusion is particularly relevant to a constitutional challenge to DADT where a court must determine how *Lawrence* applies. Inherent in such a challenge is the amount of deference the Court should grant Congress when it is exercising its Article I power to raise and support armies.¹⁸

Considering these important questions, three circuit courts have come to three very different results. The Eleventh Circuit, in *Lofton v.*

arguing that following *Lawrence*, his discharge was unconstitutional), *appeal dismissed voluntarily*, 193 F. App'x 965 (Fed. Cir. 2006); *Walker v. Barbour*, 2009 U.S. Dist. LEXIS 19855, *1–2 (S.D. Miss. Mar. 12, 2009) (“plaintiff argue[d] that the Mississippi marriage statute; Defense of Marriage Act; . . . the Don’t Ask Don’t Tell Act; and barring of a person convicted of felonies from military service are unconstitutional and violate[] the 4th, 5th, 9th and 14th amendments [sic] . . .”). See also Jeffrey S. Dietz, *Getting Beyond Sodomy: Lawrence and Don’t Ask, Don’t Tell*, 2 STAN. J. CIV. RTS. & CIV. LIBERTIES 63 (2005); Pamela Glazner, *Constitutional Doctrine Meets Reality: Don’t Ask, Don’t Tell in Light of Lawrence v. Texas*, 46 SANTA CLARA L. REV. 635 (2006).

¹⁵ See, e.g., Lawrence H. Tribe, *The Fundamental Right That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004).

¹⁶ Tribe, *supra* note 15 (arguing that *Lawrence* announced a fundamental right, but due to the politics of the court and the necessity to gain a majority, the court did not dare call it fundamental). See also *Witt v. Dep’t of Air Force*, 527 F.3d 806, 814–16 (9th Cir. 2008) (discussing the difficulty courts have had interpreting *Lawrence* and the standard of review it requires); William N. Eskridge, Jr., *Lawrence’s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021 (2004); Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004) (arguing that the privacy right announced in *Lawrence* does not follow earlier reproduction rights cases, but rather announces a new liberty interest for sexual intimacy for gay couples that is limited to private conduct); Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103 (2004) (arguing that *Lawrence* is heavy on the rhetoric and light on clarity, *Lawrence* is capable of providing a holistic due process and equal protection analysis to determine the cultural weight of the individual dignity involved); Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431 (2005); Nelson Lund and John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555 (2004) (arguing that *Lawrence* is an example of judicial hubris; the decision and its liberty interest will be extremely limited to near identical circumstances); Marc Spindelman, *Colloquium: The Boundaries of Liberty after Lawrence v. Texas: Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615 (2004); Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27 (2003).

¹⁷ See, e.g., *United States v. Marcum*, 60 M.J. 198, 203 (C.A.A.F. 2004) (noting that other courts have grappled with standard of review required by *Lawrence*, whether it be rational basis review, or strict scrutiny); *United States v. Stirewalt*, 60 M.J. 297 (C.A.A.F. 2004); *United States v. Humphreys*, 2005 CCA LEXIS 401 (N-M. Ct. Crim. App. Dec. 29, 2005); *United States v. Smith*, 66 M.J. 556 (C.G. Ct. Crim. App. 2008).

¹⁸ See *Cook v. Gates*, 528 F.3d 42, 57–60 (1st Cir. 2008). But see *Witt*, 527 F.3d at 821.

Secretary of the Department of Children and Family Services,¹⁹ a case regarding adoption by homosexuals in Florida, did not apply a heightened standard of review.²⁰ The court found that the Supreme Court identified no new fundamental right in *Lawrence*.²¹ The Ninth Circuit, in *Witt v. Department of the Air Force*,²² a case of military discharge under DADT, decided that *Lawrence* required some form of heightened review.²³ The court also found that *Lawrence* identified a distinct liberty interest²⁴ that should be weighed using a three-factor balancing test.²⁵ The balancing test announced in *Witt* has since become the standard for heightened scrutiny post *Lawrence*.²⁶ The Ninth Circuit also stated that although deference should be given to Congress in regulating the military, Congress is still subject to the limitations of due process.²⁷ Finally, in another military discharge case arising under DADT, *Cook v. Gates*,²⁸ the First Circuit held that *Lawrence* identified a protected liberty interest and required a standard of review between rational basis and strict scrutiny.²⁹ The *Gates* court, however, relied heavily on judicial deference to Congress to sustain the government’s asserted interest under DADT.³⁰

The resulting three-way split has left lower courts with an assortment of case law interpreting *Lawrence*. Through close analysis of the split as applied to DADT, it becomes apparent that *Witt* provides the best framework following the *Lawrence* decision. *Witt* questions the validity of morality-based legislation generally,³¹ which shows both a closer reading of *Lawrence* and Justice Stevens’s dissent in *Bowers*, as

¹⁹ 358 F.3d 804 (11th Cir. 2004).

²⁰ *Id.* at 817.

²¹ *Id.*

²² 527 F.3d 806 (9th Cir. 2008).

²³ *Id.* at 816, 818. *See also id.* at 822 (Canby, J. dissenting) (noting that he would have strict scrutiny apply to “Don’t Ask, Don’t Tell”).

²⁴ *Id.* at 818.

²⁵ *Id.* at 820 (adopting the three-factor test articulated by the Supreme Court in *Sell v. United States*, 539 U.S. 166 (2003) as the proper test under intermediate scrutiny).

²⁶ *Witt*, 527 F.3d at 819.

²⁷ *Id.* at 821.

²⁸ 528 F.3d 42 (1st Cir. 2008).

²⁹ *Id.* at 56.

³⁰ *Id.* at 60.

³¹ The court states in *Lawrence* that “Justice Stevens’s analysis, in [its] view, should have been controlling in *Bowers* and should control here.” *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). In his dissent in *Bowers*, Justice Stevens stated that, “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice[.]” *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) (indicating that morality based justifications alone are an insufficient basis on which to uphold the law). *See also* Goldberg, *supra* note 2, at 1243.

well as a greater understanding of the higher value of social harmony over legislated morality for morality's sake.³² Despite the repeal of DADT passed by the Senate,³³ and signed by the President,³⁴ the repeal does not take effect until the President, Secretary of Defense, and Joint Chiefs of Staff certify to Congress their acceptance *and* the Department of Defense issues new regulations to enforce the nondiscrimination policy.³⁵ In this interim period, DADT is still in effect, and the analysis herein is still applicable to challenges under DADT and challenges to past applications of DADT that prevent a servicemember from reenlisting in the armed forces.³⁶

Part II of this Comment establishes the legal background necessary to analyze the implications of *Lawrence* on "Don't Ask, Don't Tell" and Uniform Code of Military Justice (UCMJ) Article 125, Sodomy. This section recounts the history of DADT, the law as it stood before *Lawrence*, the *Lawrence* decision, and the resulting three-way split. Part III analyzes the morality of DADT within the taxonomy of Supreme Court jurisprudence and seeks to establish that DADT was no longer constitutional after *Lawrence*, as demonstrated in *Witt*. In this section, I argue that because the Court in *Lawrence* made Justice Stevens's dissent in *Bowers* controlling, morality alone is an insufficient basis on which to legislate. Therefore, if DADT were based only on morality, it would no longer survive even rational basis review.³⁷ Alternatively, even if DADT

³² ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY, 1 (Clarendon Press, 1st ed. 1993). George introduces his work with the following, "Laws cannot make men moral. Only men can do that; and they can do it only by freely choosing to do the morally right thing for the right reason. Laws can command outward conformity to moral rules, but cannot compel the internal acts of reason and will which make an act of external conformity to the requirements of morality a moral act." *Id.* at 1. Though he goes on to defend the Pre-Liberal notion that legislating morality is not unjust, he draws a line when such moral legislating undermines the harmony of society. *Id.* at 90. "The values of interpersonal harmony and friendship helps to bring into focus the moral requirement that the benefits and burdens of communal life (including legal rights and duties) be distributed *fairly* and with due regard for the particular needs and abilities of different persons." *Id.*

³³ Carl Hulse, *Senate Repeals Ban Against Openly Gay Military Personnel*, N.Y. TIMES, Dec. 18, 2010, http://www.nytimes.com/2010/12/19/us/politics/19cong.html?_r=1&scp=3&sq=don%27t%20ask&st=cse.

³⁴ Aaron Gell, *Obama Signs Don't Ask, Don't Tell Repeal*, N.Y. OBSERVER, Dec. 22, 2010, <http://www.observer.com/2010/politics/obama-signs-dont-ask-dont-tell-repeal-watch>.

³⁵ S. 4023, 111th Cong. § 2(b) (2010).

³⁶ *Id.* at § 2(c). The bill, as passed by the Senate, is silent as to whether the military will change policy to accept reenlistment of members previously discharged under DADT, despite the military's general policy preventing those with other-than-honorable and dishonorable discharge from reenlisting. *Id.*

³⁷ Morality is the crux of Justice Scalia's dissent in *Lawrence*, in which he argues that based on the majority's holding, other laws based on morality, such as laws against

is a law that combines morality and utilitarian purpose, *Cook* and *Witt* both call for heightened review. Under *Witt*, DADT would likely be unconstitutional when applying intermediate scrutiny. *Cook*’s deference to Congress can be discounted following cases in the military courts that explicitly question such blind deference.³⁸ *Lofton*’s analysis of *Lawrence* can be discounted as obiter dictum because the Eleventh Circuit found that *Lawrence* was not controlling in that case.³⁹ Therefore, *Witt*’s three-factor test is the best interpretation of the heightened scrutiny that *Lawrence* requires.

DADT has been abandoned because it was bad public policy. Furthermore, DADT could no longer pass constitutional muster before its repeal, regardless of whether its justification was purely moral or not. If during this interim enforcement period the conditions for repealing DADT are not met, and Congress is unwilling to act to remove the policy, the Court could grant certiorari and strike down “Don’t Ask, Don’t Tell.” Furthermore, the Court could apply the Ninth Circuit’s reasoning in *Witt* for any application of DADT to an individual. The courts could also use the *Witt* framework to reinstate any member of the military discharged during this interim period,⁴⁰ or to reinstate a member of the military that was discharged in the past under the policy and prevented from reenlisting based on a previous DADT discharge.⁴¹

II. LEGAL BACKGROUND

Lawrence v. Texas has been problematic to lower courts and lawyers due primarily to its unclear language and rationale. Before

“bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity . . .” are all drawn into question. *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

³⁸ See, e.g., *United States v. Marcum*, 60 M.J. 198, 203 (C.A.A.F. 2004).

³⁹ *Lofton v. Sec’y. of Dep’t. of Childr and Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004) (finding that “the holding of *Lawrence* does not control the present case. Apart from the shared homosexuality component, there are marked differences in the facts of the two cases.”).

⁴⁰ Senate Bill 4023 not only conditions the repeal of DADT on certain factors, *supra* note 34, but it also explicitly states that the repeal is not effective until 60 days after the last of the conditions is satisfied. S. 4023, 111th Cong. § 2(b) (2010). During this minimum 60 day period, servicemembers could still be discharged because DADT is still in effect. *Id.* at § 2(c).

⁴¹ Timothy J. Gibbons, FLA. TIMES UNION, Aug. 12, 2010, <http://jacksonville.com/news/military/2010-08-12/story/kings-bay-sailor-being-discharged-because-hes-gay>. Seaman Jarod McIntosh, like others dismissed under DADT, received a less-than-honorable discharge, which prevents reenlistment in the armed services under the various regulations of the service branches. *Id.* See also, Army Reg. 601–210 (2007).

Congress began to review “Don’t Ask, Don’t Tell,”⁴² *Lawrence* provided a basis for courts to challenge DADT, and cases following *Lawrence* provided Congress with greater impetus to act.⁴³ Even though Congress has now passed a repeal of Don’t Ask, Don’t Tell,⁴⁴ the *Lawrence* decision is critical to our understanding of the zone of privacy, the ability of Congress to regulate the military through other policies such as Article 125,⁴⁵ and possible challenges to DADT during the interim period before the policy is fully repealed.⁴⁶

A. “Don’t Ask, Don’t Tell”

The law commonly known as “Don’t Ask, Don’t Tell” is the product of a compromise between former President Clinton, the military, and Congress.⁴⁷ But military policy regarding sodomy has been around long before Clinton. Since the Revolutionary War era, military policy called for the discharge of those found guilty of sodomy.⁴⁸ The idea of screening homosexuals per se emerged in 1942, after the psychiatric community labeled homosexuality a mental illness, and the military took notice by issuing the first regulations outright banning homosexuals from serving.⁴⁹ The military asked enlisting troops about their sexual

⁴² President Barack Obama announced in his January 2010 State of the Union address his intent to have DADT repealed. Since that time, Senator Kirsten Gillibrand has introduced an amendment to the federal budget to curb the financing of the investigations and dismissals under DADT. Celeste Katz, *Sen. Kristen [sic] Gillibrand Will Propose Budget Amendment to Cut Funding For ‘Don’t Ask, Don’t Tell,’* N.Y. DAILY NEWS, Feb. 7, 2010, http://www.nydailynews.com/ny_local/2010/02/07/2010-02-07_gilly_says_dont_fund_dont_ask.html. In addition, top defense officials, including Secretary of Defense Robert Gates and Admiral Mike Mullen, chairman of the joint chiefs of staff, testified before a Senate panel on Feb. 2, 2010 that they will begin the process of determining how, not if, “Don’t Ask, Don’t Tell” should be repealed to minimally effect the military’s current operations. Elisabeth Bumiller, *Top Defense Officials Seek End to ‘Don’t Ask, Don’t Tell,’* N.Y. TIMES, Feb. 2, 2010, <http://www.nytimes.com/2010/02/03/us/politics/03military.html>.

⁴³ Anna Stolley Persky, *Don’t Ask, Don’t Tell: Don’t Work? Courts and Congress Raise New Challenges to Policy on Gays in the Military*, ABA JOURNAL, Oct. 1, 2008, http://www.abajournal.com/magazine/article/dont_ask_dont_tell_dont_work.

⁴⁴ Hulse, *supra* note 33; S. 4023, 111th Cong. (2010).

⁴⁵ See *infra* Part III.B.2.

⁴⁶ S. 4023, 111th Cong. § 2(b) (2010) (conditioning the repeal of DADT on several factors and stating that the repeal of DADT is not effective until sixty days after the last of the conditions is met).

⁴⁷ Remarks Announcing the New Policy on Homosexuals in the Military, 1 PUB. PAPERS 1111 (July 19, 1993).

⁴⁸ RANDY SHILTS, CONDUCT UNBECOMING: GAYS & LESBIANS IN THE U.S. MILITARY VIETNAM TO THE PERSIAN GULF 11 (St. Martin’s Press, Griffin ed. 2005). Unfortunate Lt. Gotthold Frederick Enslin “became the first known soldier to be dismissed from the U.S. military for homosexuality [sodomy]” in 1778. *Id.* at 11.

⁴⁹ *Id.* at 16–17.

orientation before they joined the military, and those admitting to their homosexuality were not allowed to join.⁵⁰ Anyone later discovered or even alleged to be homosexual was usually discharged by the armed forces.⁵¹

Yet on the campaign trail, candidate Clinton stated that, once elected, he would lift the ban on homosexuals from serving in the military.⁵² After taking office, President Clinton began the long process that would result in DADT by directing the Secretary of Defense to submit a draft Executive Order "ending discrimination on the basis of sexual orientation in determining who may serve in the Armed Services"⁵³ Congress responded to President Clinton's executive order by commencing various hearings to review military policy regarding the service of homosexuals; this Congressional action diminished the chances of President Clinton's success to overturn the policy banning homosexuals from serving.⁵⁴ In July 1993, President Clinton proposed a compromise policy, which allowed homosexual applicants to the military to avoid answering questions about their sexual orientation upon entry, but after joining the armed forces, these homosexual servicemen and women could be separated from the military for admitting to being a "practicing" homosexual or for committing homosexual sexual acts.⁵⁵ The House and Senate Armed Forces Committees proposed to codify the President's policy,⁵⁶ and the Act became law in November 1993. DADT was not the first law Congress passed regulating sodomy in the military, but it was the first to expressly regulate sodomy by explicitly targeting homosexuals.

On December 18, 2010, the United States Senate passed a bill repealing DADT, which had already been passed by the House.⁵⁷

⁵⁰ *Id.* at 17.

⁵¹ *Id.*

⁵² Curtis Wilkie, *Harvard Tosses Warmup Queries to Clinton On Eve of N.H. Debate*, BOSTON GLOBE, Oct. 31, 1991, at 22.

⁵³ Memorandum on Ending Discrimination in the Armed Forces, 1 PUB. PAPERS 23 (Jan. 29, 1993).

⁵⁴ Assessment of the Plan to Lift the Ban on Homosexuals in the Military: Hearings Before the Military Forces and Personnel Subcomm. of the House Comm. on Armed Services, 103rd Cong., 1st Sess. (1993); Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. on Armed Services, 103rd Cong., 1st Sess. (1993); Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the House Comm. on Armed Services, 103rd Cong., 1st Sess. (1993).

⁵⁵ Remarks Announcing the New Policy on Homosexuals in the Military, 1 PUB. PAPERS 1111 (July 19, 1993).

⁵⁶ S. Rep. No. 103-112, at 270 (1993); H.R. Rep. No. 103-200, at 287 (1993) reprinted in 1993 U.S.C.C.A.N. 2073 at 2074.

⁵⁷ Hulse, *supra* note 33.

President Obama has signed the bill into law.⁵⁸ The language of the bill conditions the repeal of DADT on various factors,⁵⁹ and there will be at least a sixty-day lag before the policy can become effective.⁶⁰ This interim period leaves in doubt the current status of homosexual military members and the implications should they out themselves.⁶¹ This means that until DADT is fully repealed, new Department of Defense regulations are issued, and servicemembers can no longer be discharged under the policy, there is still a legal basis for challenging the application of DADT. Additionally, for those servicemembers already discharged who seek to reenlist once DADT is fully repealed, their reenlistment may be barred due to their discharge status as a direct result of their discharge for violating DADT. Those servicemembers still have a constitutional claim against their discharge status under *Witt*. This is particularly important because the repeal passed by Congress is explicit in that it does not create a cause of action.⁶²

B. UCMJ Article 125, Sodomy

Article 125 is a military code provision in the UCMJ that prohibits sodomy, similar to the Georgia law that *Lawrence* struck down in the civilian sphere.⁶³ Article 125 defines sodomy as an “unnatural carnal copulation with another person of the same or opposite sex”⁶⁴ Like DADT, Article 125 punishes sexual conduct in the military; but unlike DADT, it does not specifically target homosexuals.⁶⁵ In addition, Article 125 does not have the same mandatory separation element.⁶⁶ While the

⁵⁸ Gell, *supra* note 34.

⁵⁹ S. 4023, 111th Cong. § 2(b) (2010) (conditioning repeal of DADT on the receipt and acceptance of the report by the Secretary of Defense, written certifications of the President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff accepting the policy change, and the issuance of new regulations by the Department of Defense).

⁶⁰ *Id.* (stating that the repeal is not effective until 60 days after the last of the listed conditions is satisfied).

⁶¹ Rowan Scarborough, *Gay Troops Advised to Wait Before Coming Out*, WASHINGTON TIMES, Dec. 20, 2010, <http://www.washingtontimes.com/news/2010/dec/20/gay-service-members-advised-to-wait-before-coming-/>.

⁶² S. 4023, 111th Cong. § 2(e) (2010) (stating that this bill does not create a private cause of action).

⁶³ 10 U.S.C. § 925 (2006).

⁶⁴ *Id.* “It is considered unnatural carnal copulation for a person to take into [his or her] mouth or anus the sexual organ of another person or of an animal; or to place [his or her] sexual organ into the mouth or anus of another person or of an animal; or to have carnal copulation in any opening of the body, except the sexual parts, with another person; or to have carnal copulation [in any opening of the body of] an animal.” *Manual for Courts-Martial, United States* (hereinafter MCM) pt. IV, para. 51(c) (2008 ed.).

⁶⁵ *Id.*

⁶⁶ *Id.*

definition of sodomy in Article 125 would constitute homosexual conduct in violation of DADT if committed by a practicing homosexual, Article 125 applies to both heterosexuals and homosexuals alike, punishing all acts within the policy’s purview.⁶⁷ The application of Article 125 is important because if *Lawrence* protects consensual intercourse between adults conducted in private, then this could affect the constitutionality of Article 125.⁶⁸

C. *The Law Before Lawrence v. Texas*

Before *Lawrence* was decided in 2003, laws criminalizing homosexual sodomy were constitutionally permissible under *Bowers*.⁶⁹ Decided in 1986, at a time when homosexuality was at the furthest fringes of society,⁷⁰ *Bowers* determined that because there was not a history and tradition of a right protecting homosexual sodomy, states were free to criminalize such conduct.⁷¹ This meant that in order to successfully challenge laws prohibiting sodomy, the Court would not only have to find that such a right exists under substantive due process of the Fourteenth Amendment, but would also have to either overrule *Bowers* or find a credible way to distinguish it.

Because most cases challenging DADT come as substantive due process claims under the Fourteenth Amendment,⁷² courts must first determine which standard of substantive due process review should apply. The three different standards of constitutional review under the Due Process Clause have evolved out of Supreme Court jurisprudence over the past century.⁷³ The minimal level of review is rational basis review: “[a]ll laws challenged under either due process or equal protection must meet at least rational basis review.”⁷⁴ Under this standard, the Court will uphold the law “unless the challenger proves that

⁶⁷ *Id.* Both sections (a) and (b) of Article 125 begin with “[a]ny person,” which indicates that the statute would apply to any member of the military, hetero- or homosexual. 10 U.S.C. §§ 925(a) and (b) (2006).

⁶⁸ See *infra* Part III.B.2.

⁶⁹ *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

⁷⁰ See generally SHILTS, *supra* note 48.

⁷¹ *Bowers*, 478 U.S. at 190, 196.

⁷² See, e.g., *Witt*, 527 F.3d at 809. Major Witt complains that DADT is unconstitutional under substantive due process. *Id.* at 809. Major Witt also complains that DADT violates equal protection under the law. *Id.*

⁷³ The renowned footnote 4 in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) is generally attributed as the catalyst for the consideration of fundamental rights targeting “discrete and insular minorities.” From this was born the Court’s categorization of rights, and the corresponding levels of scrutiny. See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 539 (3d ed., 2006).

⁷⁴ CHEMERINSKY, *supra* note 73, at 540.

the law does not serve any conceivable legitimate purpose or that it is not a reasonable [or rational] way to attain the end.”⁷⁵

Intermediate scrutiny is the middle tier, and under this standard, the challenged law will be upheld if it is “substantially related to an important government purpose.”⁷⁶ Under this standard of review, the government’s goal must be something more than merely legitimate: it must be important. Unlike rational basis review, under intermediate scrutiny, the government usually bears the burden proof.⁷⁷

Finally, the most exacting standard of review is strict scrutiny. This standard articulates that a law will be upheld only if it is “necessary to achieve a compelling government purpose.”⁷⁸ The law must further be “narrowly tailored to further compelling governmental interests.”⁷⁹ This most exacting standard is a least restrictive means test. Unless the government can prove that its goal is compelling and used the least restrictive means, the law will fail.⁸⁰

D. *Lawrence v. Texas*

The most effective means of analyzing *Lawrence*, as it pertains to any discussion of DADT and the *Lofton*, *Witt*, and *Cook* circuit split, is to consider the opinion from the two different vantage points utilized by lower courts: what did the *Lawrence* court say or not say, and what cases did the Court rely on in *Lawrence*. Courts have utilized the former method to find that *Lawrence*’s language does not specifically define a new fundamental right,⁸¹ while other courts have used *Lawrence*’s language as articulating a new liberty interest.⁸² Courts that have utilized the latter method have only done so to place *Lawrence* within the context of other fundamental rights cases to determine that *Lawrence* must be placed within this category if the decision is to make any sense.⁸³

In *Lawrence*, police in Harris County, Texas, responding to a weapons disturbance, entered John Geddes Lawrence’s home and witnessed him and another man, Tyson Garner, “engaging in a sexual

⁷⁵ *Id.*

⁷⁶ *Id.* (emphasis omitted) (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Lehr v. Robertson*, 463 U.S. 248, 266 (1983)).

⁷⁷ *Id.* at 541.

⁷⁸ *Id.* (emphasis omitted) (citing *Adarand Constructors v. Peña*, 515 U.S. 200 (1995); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Sherbert v. Verner*, 374 U.S. 398 (1963)).

⁷⁹ *CHEMERINSKY*, *supra* note 73, at 542 (citing *Grutter v. Bollinger*, 509 U.S. 306, 326 (2003)).

⁸⁰ *Id.*

⁸¹ *See, e.g., Lofton v. Sec’y of Dep’t of Childr and Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004).

⁸² *See, e.g., Witt v. Dep’t of the Air Force*, 527 F.3d 806, 817 (9th Cir. 2008).

⁸³ *Id.* at 816.

act.”⁸⁴ Both men were arrested, tried, and convicted under a Texas sodomy statute that criminalized “any contact between any part of the genitals of one person and the mouth or anus of another person.”⁸⁵ The two men challenged their convictions under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the Supreme Court granted certiorari.⁸⁶ The case challenged the sodomy statute on three bases: Equal Protection, Due Process, and whether *Bowers* is no longer good precedent.⁸⁷

1. The Court’s Language

Justice Kennedy began the opinion explaining the nature of the liberty interest at issue, noting that liberty protects us from unwarranted governmental intrusions.⁸⁸ This protection is key to the notion of a zone of privacy. And the liberty at issue here, wrote Justice Kennedy, is not just individual liberty but also liberty in “its spatial and more transcendent dimensions.”⁸⁹ Before expounding on its reasoning, the Court concluded that the proper query is “whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution[,]” thereby bypassing the Equal Protection question, and directly implicating the decision in *Bowers*.⁹⁰ The Court then reframed the issue in *Bowers*, saying that the *Bowers* court considered the issue in too narrow a scope and that the law at issue in *Bowers* and in *Lawrence* had greater implications “upon the most private human conduct, sexual

⁸⁴ *Lawrence v. Texas*, 539 U.S. 558 562–63 (2003).

⁸⁵ *Id.* (citing TEX. PENAL CODE ANN. § 21.06(a) (2003)).

⁸⁶ *Id.* at 563–64.

⁸⁷ *Id.* at 564. (“1. Whether Petitioners’ criminal convictions under the Texas ‘Homosexual Conduct’ law—which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples—violate the Fourteenth Amendment guarantee of equal protection of laws? 2. Whether Petitioners’ criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protect by the Due Process Clause of the Fourteenth Amendment? 3. Whether *Bowers v. Hardwick* . . . should be overruled?”).

⁸⁸ *Id.* at 562. (“Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person in both its spatial and more transcendent dimensions.”).

⁸⁹ *Id.* at 562.

⁹⁰ *Lawrence*, 539 U.S. at 564.

behavior, and in the most private of places, the home.”⁹¹ The Court explicitly noted that the *Bowers* court “fail[ed] to appreciate the extent of the liberty at stake.”⁹²

After noting these deficiencies, the Court counseled “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 to an institution the law protects.”⁹³ Though this edict seems to lay out a clear standard for courts and state legislatures, namely that the State should not regulate the intimate relationships between persons absent injury to another or abuse of a legally protected institution, the implication of this statement on the relationships of homosexuals and State regulation thereof is less clear.⁹⁴ Whether marriage would constitute a legally protected institution that would warrant regulation of same-sex unions was never directly addressed by the Court.

The Court then acknowledged that the liberty interest is further buttressed when it occurs within the confines of a private home.⁹⁵ The Constitutional liberty is at its strongest, and the State’s regulatory authority at its weakest, when the relationship in question shows no sign of injury to another, or threat to a legally protected institution.⁹⁶ The liberty interest is particularly strong when it finds expression in the privacy of the *home*, which has traditionally been recognized as one of the greatest domains of privacy from State intrusion.⁹⁷

⁹¹ *Id.* at 567. Justice Kennedy also notes here, “[t]he 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.” *Id.* This statement indicates the Court’s unwillingness to enter the contentious debate about same-sex marriage, even while finding that the underlying sexual act cannot constitutionally sustain criminal conviction.

⁹² *Id.* (holding that by reasoning “that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”).

⁹³ *Id.*

⁹⁴ It is unclear if the Court meant that it would be acceptable to criminalize adultery but not fornication because the former is within the confines of the legally protected institution of marriage and the latter is not. It seems, based on context in the sentence, that the legally protected institution to which Justice Kennedy is alluding could only be marriage, because the court is explicitly discussing state laws that define the meaning of a relationship.

⁹⁵ *Lawrence*, 539 U.S. at 567.

⁹⁶ *Id.*

⁹⁷ *Id.* Justice Kennedy, in this portion of the opinion, is looking to the Court’s jurisprudence regarding the Bill of Rights, where the constitutional guarantees of privacy in the home are readily apparent. *Id.* at 567. The Third Amendment, which prevents the government from quartering soldiers in peoples’ homes without consent of the owner, is one instance of a respected zone of privacy regarding one’s home. U.S. CONST. amend. III. The Fourth Amendment’s guarantee against unreasonable searches and seizures is a

The Court's full articulation of the liberty interest protected by the Constitution in *Lawrence* is, "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."⁹⁸ As evidenced by this language, the Court was exceedingly vague in declaring specifically what the Constitution protects. The holding of the opinion defined the liberty interest as intimate conduct, but intimate conduct is never fully defined, and the Court never suggested that *all* intimate conduct was protected by the constitution.⁹⁹ Especially when considering DADT and Article 125 of the UCMJ, the Court's holding has led lower courts to struggle with the boundaries of the liberty interest in *Lawrence*, which has in turn led to great difficulty in discerning what protections the decision intended to confer in situations not exactly identical to the one in *Lawrence*.

The Court's reasoning regarding why the Texas sodomy law did not pass Constitutional muster is even more confusing; "[t]he Texas statute furthers no legitimate interest which can justify its intrusion into the personal and private life of the individual."¹⁰⁰ The Court's terminology, "no legitimate interest," is a hallmark of rational basis review, yet typically under this standard, a law such as the one in question would have been considered rationally justified and thereby upheld. This language has created confusion with respect to whether the Court was applying its traditional rational basis review, or whether it was applying a form of heightened scrutiny. This is significant because only rights that are considered "fundamental," and therefore assuredly protected *in toto* by the Constitution, are reviewed under heightened scrutiny. Consequently, lower courts have pondered whether the right expounded in *Lawrence* is really a fundamental right, because the Court never expressly called it such. The significance of identification as a "fundamental" right is that it requires the greatest constitutional

similar instance of respecting the privacy, though this time of the individual. U.S. CONST. amend. IV. The Fifth Amendment right to remain silent, fundamentally, is a right to keep private information private. U.S. CONST. amend. V. These provisions taken together demonstrate a zone of privacy like that articulated by the Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁹⁸ *Lawrence*, 539 U.S. at 567. It is unclear, however, if this "right" is the right to choose with whom to have intercourse, or if it means the right for persons of the same sex to form an intimate bond like a heterosexual relationship.

⁹⁹ If Justice Kennedy really intended to implicate all intimate conduct in the decision, others sexually regulated acts, such as incest, statutory rape, and other sexual crimes would no longer be constitutionally permissible.

¹⁰⁰ *Id.* at 578.

protection and the strictest standard of scrutiny, which in and of itself is usually outcome determinative.¹⁰¹

In addition to finding that the Texas law furthered no legitimate interest, the Court also stated that the government made no showing that its “interest in circumscribing personal choice is somehow more *legitimate* or urgent.”¹⁰² The use of the words “legitimate” and “urgent” reflects terminology reminiscent of heightened scrutiny. The lower courts, among others, struggle to answer the question whether the Court intended to implicate the traditional rubric of Due Process review when using this specific language in *Lawrence*, or if the Court intended to create a new standard.¹⁰³

The Court said,

[t]he present case does *not* involve minors. It does *not* involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does *not* involve public conduct or prostitution. It does *not* involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.¹⁰⁴

By defining the liberty interest in the negative, the Court established that there are acts *not* protected by the liberty interest, including intercourse with minors, coercive intercourse or intercourse with a high possibility of coercion, public intercourse, prostitution, or the formal recognition of homosexual unions.¹⁰⁵ Then the Court said, “[t]he case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.”¹⁰⁶ This positive reinforcement helps establish that when the sexual conduct is between two consenting adults, their actions are protected.

The Court established the above parameters based on the history of sodomy prosecutions in western civilization. The Court noted that “there is no longstanding history in this country of laws directed at homosexual

¹⁰¹ See Gerald Gunther, The Supreme Court, 1971 Term—Foreword: *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). But see Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

¹⁰² *Lawrence*, 539 U.S. at 577 (emphasis added).

¹⁰³ See, e.g., *United States v. Marcum*, 60 M.J. 198, 203 (C.A.A.F. 2004) (noting that other courts have struggled with standard of review required by *Lawrence*, whether it be rational basis review, or strict scrutiny) (citing *Standhardt v. Superior Court of Arizona*, 77 P.3d 451, 457 (Ariz. Ct. App. 2003); *Fields v. Palmdale School Dist.*, 271 F. Supp. 2d 1217, 1221 n. 7 (C.D. Cal. 2003)).

¹⁰⁴ *Lawrence*, 539 U.S. at 578 (emphasis added).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

conduct as a distinct matter."¹⁰⁷ It then explained that sodomy prosecutions typically entailed sex with minors, rape, coercion, or bestiality.¹⁰⁸ The Court then contrasted the *Bowers* decision with the emerging trend of increasing tolerance for lesbian, gay, bisexual, and transgender (LGBT) rights in the West, and noted that as part of this greater Western history and tradition, *Bowers* cannot stand.¹⁰⁹ This seems to have altered the scope of the "history and tradition" inquiry, which is usually outcome determinative as *Bowers* readily demonstrates.¹¹⁰ By redefining the scope of the inquiry and broadening it to consider the Western world's evolving history and tradition, the Court has either altered the way this analysis will be conducted in future Due Process inquiries, or it has created an aberration, enabling the Court to reach its ultimate conclusion.

Justice Scalia vociferously dissented and seized on the fact that the Court never called the right at issue "fundamental,"¹¹¹ arguing that if the right were "fundamental," the Court would have been required to apply its traditional strict scrutiny standard.¹¹² Instead, as Justice Scalia indicated, the Court overruled *Bowers* and struck down the Texas law without challenging the central legal conclusion in *Bowers*, that there was no fundamental right to homosexual sodomy.¹¹³ Justice Scalia also argued that *Washington v. Glucksberg*¹¹⁴ established the fact that "only fundamental rights which are 'deeply rooted in this nation's history and tradition' qualify for anything other than rational basis scrutiny under the

¹⁰⁷ *Id.* at 568.

¹⁰⁸ *Id.* at 569 ("[Nineteenth] 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."). Each of the specific categories the court details become the very exceptions to the protection of the liberty interest the court lays out later. *Id.*

¹⁰⁹ *Id.* at 568.

¹¹⁰ See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 190–91 (1986). As the Court in *Lawrence* later determined, the Court's definition of the history and tradition in *Bowers* was too narrow, and the narrowness of its definition of history and tradition was its precedential infirmity. *Lawrence*, 539 U.S. 567. In *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937), the court stated that those things deeply rooted in our nation's history and traditions are those "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702 (1997) reaffirmed this principle in the modern string of fundamental rights cases.

¹¹¹ *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).

¹¹² *Id.*

¹¹³ *Id.* This part of Justice Scalia's dissent has provided grounds for many courts, including the *Lofton* court, to find that the right is therefore not fundamental and no heightened scrutiny should apply. See *infra* Part II.E.1. See also *Muth v. Frank*, 412 F.3d 808, 817 (7th Cir. 2005).

¹¹⁴ 521 U.S. 702 (1997).

doctrine of ‘substantive due process.’”¹¹⁵ Justice Scalia challenged what he viewed as the Court’s redefinition of history and tradition in *Lawrence*. He argued that legislatures have always been able to legislate with morality, and morality legislation should be left to the prerogative of the state governments.¹¹⁶ This issue of morality legislation is likely one of the major reasons for the Court’s split between majority and dissent in this decision.

2. The Court’s Actions

Although the language of the Court was both confusing and problematic, the Court’s actions in *Lawrence*, as well as its justifications for those actions, demonstrate the Court’s intent to solidify *Lawrence* as part of the history of privacy-rights cases. As part of its effort to reframe the issue in *Bowers* and to establish the Due Process protection of the right in *Lawrence*, the Court relied on a series of fundamental rights cases to solidify its Constitutional footing in *Lawrence*, placing *Lawrence* squarely within the privacy-rights line of cases. The cases the Court relied on, other than *Romer v. Evans*,¹¹⁷ are cases in which the Court established a fundamental right, imbued with the greatest protection the Constitution affords.¹¹⁸

The Court began its consideration with *Griswold v. Connecticut* and stated that *Griswold* “established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship.”¹¹⁹ Decided in 1965, *Griswold* set the stage for future cases in which the Court would look to the penumbras of Constitutional guarantees to define an area of personal liberty and autonomy, the zone of privacy, upon which the State may not encroach.¹²⁰ This line of reasoning

¹¹⁵ *Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting) (emphasis in original) (quoting *Glucksberg*, 521 U.S. at 721) (citing *Palko*, 302 U.S. 319 (1937)).

¹¹⁶ *Id.* at 589–90.

¹¹⁷ 517 U.S. 620 (1996). Although *Romer* is an Equal Protection case, and not a Due Process case, it is significant here for two reasons. First, it represents the first major victory for the LGBT community in the Supreme Court. See, e.g., Gayle L. Pettinga, *Rational Basis With Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987). Second, it is often considered a case where the Court applied “rational basis with bite,” laying some groundwork for the ambiguous standard of scrutiny used in *Lawrence*. See, e.g., *id.*

¹¹⁸ These cases are *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973); *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977); and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

¹¹⁹ *Lawrence*, 539 U.S. at 565.

¹²⁰ *Griswold*, 381 U.S. at 484 (“The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”).

continued through *Eisenstadt v. Baird*,¹²¹ where the Court held that individuals, whether married or single, have the right to be free of government intrusion "into matters so fundamentally affecting a person as the decision whether to bear or beget a child."¹²²

Through this line of case law, the Court determined that "[o]ur obligation is to define the liberty of all, not to mandate our own moral code."¹²³ The Court's statement regarding morality in *Casey* and its decision to overrule *Bowers* directly challenges the ability of religious groups to legislate their own morality. Morality is often the explicit, or at least an implicit, reason that opponents to LGBT rights use to justify regulatory policy.

Morality's place in the law was specifically addressed in *Lawrence*. When the *Lawrence* Court overruled *Bowers*, it held that Justice Stevens's dissent should have been controlling and that his analysis would apply to the case at bar.¹²⁴ In his dissent in *Bowers*, Justice Stevens said, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."¹²⁵ Justice Stevens's dissent in *Bowers* may be an indication of what the Court actually meant when it struck down the Texas law: morality is an insufficient basis on its own to uphold a law that violates a constitutional liberty. Justice Stevens even goes so far as to say that a *legitimate* interest cannot be justified by "a habitual dislike for, or ignorance about, the disfavored group."¹²⁶

This reasoning is profound because it leads to the very heart of the *Lawrence* case and the Texas statute in question: the moral judgments of society and their enactment into law. Not only did the above reasoning allow the Court to strike down the Texas sodomy law, but it is also of extreme import in other contemporary battles waged over LGBT rights, including the legitimacy of "Don't Ask, Don't Tell." When morality is removed as a basis for legislation, biases against the LGBT community are reduced to constitutionally violative restrictions on substantive due process and equal protection.

¹²¹ 405 U.S. 438 (1972). This case is also an Equal Protection case, where a fundamental right for married couples is extended, under the guaranty of equal protection, to unmarried couples. *Id.* at 453.

¹²² *Id.* at 453.

¹²³ *Casey*, 505 U.S. at 850.

¹²⁴ *Lawrence*, 539 U.S. at 578 ("Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here.").

¹²⁵ *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting).

¹²⁶ *Id.* at 219.

E. The Three-Way Circuit Split

In the wake of *Lawrence*, many courts have been called upon to clarify its meaning and hone its standards.¹²⁷ Three such cases dealing explicitly with homosexuality have made their way to the courts of appeal, *Lofton v. Secretary of the Department of Children and Family Services*,¹²⁸ *Witt v. Department of the Air Force*,¹²⁹ and *Cook v. Gates*.¹³⁰ This comment focuses only on these three cases because they center specifically on the treatment of homosexuals after *Lawrence*. Furthermore, these cases establish a three-way circuit split over the standard of review required by *Lawrence*,¹³¹ the constitutional test to be applied for heightened scrutiny,¹³² and the amount of deference that should be given to Congress when it regulates the military.¹³³ These cases help answer the lingering questions about how the *Lawrence* and *Bowers* morality standard would apply to DADT, and the reasons for heightened scrutiny.

1. *Lofton v. Secretary of the Department of Children and Family Services*, Eleventh Circuit

Although *Lofton* did not deal with DADT, the case considered whether a Florida statute that prevented homosexuals from adopting children was constitutional following *Lawrence*.¹³⁴ The court began its analysis by asking “whether *Lawrence* announced a new fundamental right to private sexual intimacy.”¹³⁵ Similar to Justice Scalia’s dissent in *Lawrence*, the Eleventh Circuit focused on the fact that the Supreme Court had never called the right in *Lawrence* “fundamental.”¹³⁶ This was of great importance because if the right were fundamental, there could be

¹²⁷ See, e.g., *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008) (striking down a Texas law that makes it a crime to sell or promote sexual devices following *Lawrence*); *Williams v. Att’y Gen. of Ala.*, 378 F.3d 1232 (11th Cir. 2004) (upholding an Alabama law prohibiting the sale and promotion of sex toys under a *Lawrence*-based constitutional challenge).

¹²⁸ 358 F.3d 804 (11th Cir. 2004).

¹²⁹ 527 F.3d 806 (9th Cir. 2008).

¹³⁰ 528 F.3d 42 (1st Cir. 2008).

¹³¹ In *Lofton*, 358 F.3d at 817, the court determines that no heightened review shall apply, while in *Witt* and *Cook*, both courts establish a heightened standard of review. *Witt*, 527 F.3d at 813; *Cook*, 528 F.3d at 56.

¹³² The *Witt* court establishes that the *Sell* test will be the applicable test under intermediate scrutiny, while the *Cook* court declines to apply that test. *Witt*, 527 F.3d at 818; *Cook*, 528 F.3d at 45 n.1.

¹³³ The *Witt* court determines that deference to Congress does not require abdication, whereas the court in *Cook* does. *Witt*, 527 F.3d at 821; *Cook*, 528 F.3d at 60.

¹³⁴ *Lofton*, 358 F.3d at 806–07.

¹³⁵ *Id.* at 815.

¹³⁶ *Id.* at 817.

no question as to the standard of scrutiny required by the Court.¹³⁷ Because the *Lawrence* court never used this key term, the Eleventh Circuit explained that it was "hesitant to infer a new fundamental liberty interest from an opinion whose language and reasoning are inconsistent with standard fundamental-rights analysis."¹³⁸ The court had two major contentions regarding the use of the term "fundamental right."¹³⁹ Because of what the court found as *Lawrence*'s narrow holding in articulating the right and the standard of review required, the Eleventh Circuit did not find any need to apply a heightened standard of review.¹⁴⁰ Notably, the precedential value of the Eleventh Circuit's decision in *Lofton* is discounted by the fact that the court expressly found that *Lawrence* did not control the case at bar.¹⁴¹ If *Lawrence* was not controlling precedent in *Lofton*, then the court's discussion of *Lawrence* reduces to mere dicta.

2. *Witt v. Department of the Air Force*, Ninth Circuit

Witt was a dramatic departure from *Lofton* and established a clear split between the Ninth and Eleventh Circuits. Major Margaret Witt was literally the face of the United States Air Force, prominently featured in Air Force recruitment and promotional materials.¹⁴² She received numerous medals and commendations, and she was very well regarded by colleagues and superiors alike.¹⁴³ The case arose because Major Witt was in a relationship with a civilian woman for over five years while she was on active duty in the Air Force.¹⁴⁴ The two women, however, never had sexual relations while Major Witt was on duty or while she was present on the grounds of any Air Force base.¹⁴⁵ The two women shared a home that was located approximately 250 miles away from McChord Air Force Base, where Major Witt was stationed.¹⁴⁶ During her entire

¹³⁷ *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

¹³⁸ *Lofton*, 358 F.3d at 816.

¹³⁹ *Id.* (quoting *Glucksberg*, 521 U.S. at 720–21) ("First, the *Lawrence* opinion contains virtually no inquiry into the question of whether the petitioners' asserted right is one of 'those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.' Second, the opinion notably never provides the 'careful description of the asserted fundamental liberty interest' that is to accompany fundamental-rights analysis.").

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Witt v. Dep't of the Air Force*, 527 F.3d 806, 809 (9th Cir. 2008).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 809–10.

military career, Major Witt kept her sexual orientation a secret from her fellow servicemen and women.¹⁴⁷

In July of 2004, just a year after *Lawrence* was decided, Major Witt was notified that she was under investigation based on allegations of homosexuality.¹⁴⁸ Major Witt refused to make any contact with the investigating officer or the Air Force chaplain who contacted her about her homosexuality.¹⁴⁹ By November 2004, formal separation proceedings began, and Major Witt, one year short of twenty years of service and a full Air Force pension, was told that she would no longer receive any pay or points towards promotion during the proceedings.¹⁵⁰

After Witt received a notice of discharge action and requested an administrative hearing, the military board “found that Major Witt had engaged in homosexual acts and had stated that she was a homosexual in violation of DADT.”¹⁵¹ The Secretary of the Air Force acted on the board’s recommendation in July of 2007, “ordering that Major Witt receive an honorable discharge” from the Air Force.¹⁵² Major Witt was not yet separated from the military when her complaint was filed in federal court.¹⁵³

Major Witt argued, *inter alia*, that DADT violates substantive due process based on the holding in *Lawrence*.¹⁵⁴ The Ninth Circuit began its analysis by noting that in order to analyze Witt’s substantive due process claim, it must first determine the proper level of scrutiny required by *Lawrence*.¹⁵⁵ The court then observed that, despite the Air Force’s arguments that this issue has been settled by other courts of appeals, the only court to squarely address the issue was the Eleventh Circuit in *Lofton*, which did not apply any form of heightened review.¹⁵⁶ The Ninth Circuit also noted that another court, the U.S. Court of Appeals for the Armed Forces, considered a challenge to UCMJ Article 125 implicating *Lawrence* and applied a heightened standard of review.¹⁵⁷ Although both of these decisions presented persuasive authority, neither was binding, and the court proceeded to split from the Eleventh Circuit.¹⁵⁸

¹⁴⁷ *Id.* at 810.

¹⁴⁸ *Witt*, 527 F.3d at 810.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 812.

¹⁵⁴ *Witt*, 527 F.3d at 811.

¹⁵⁵ *Id.* at 813.

¹⁵⁶ *Id.* at 815.

¹⁵⁷ *Id.* at 816 (referencing *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004)).

¹⁵⁸ *Marcum* and its progeny will be considered in a subsequent section for the parallel value of their analyses on the consideration of the liberty interest in *Lawrence* and its

The Ninth Circuit decided that it would be more useful to analyze *Lawrence* under the rubric of what the Court did, rather than what it said, because the court had no desire to deal with the subjectivity of linguistic analysis and parse the language of the opinion to divine its true meaning.¹⁵⁹ The court reasoned that linguistic analysis of the ambiguous text in *Lawrence* would lead to a dissection of isolated passages without their proper context, which would lead to the problem of relying on key words in isolation as the basis of a judicial decision.¹⁶⁰ Relying on the *Lawrence* court's actions allowed the Ninth Circuit to fit Major Witt's case into the privacy rights line of cases discussed in *Lawrence*.

The court first noted that the *Lawrence* court overruled *Bowers*, and could not have done so applying rational basis review because rational basis review would have required the Court to determine that the law in question in *Lawrence* "lacked 'any reasonably conceivable state of facts that could provide a rational basis for the classification,'" and any theoretical justification would prove sufficient.¹⁶¹ For the Court to have overruled *Bowers* and simultaneously strike down the Texas sodomy statute, something more than rational basis review was required. Had the Court applied mere rational basis review, a paradigm of judicial restraint, the Court never would have overruled *Bowers* or considered the liberty interest of Mr. Lawrence.¹⁶²

Second, the court noted that the cases relied on by the Supreme Court—other than *Romer v. Evans*—were all cases that applied heightened scrutiny.¹⁶³ For the Supreme Court to rely on a long line of cases that applied heightened scrutiny, it would be counterintuitive that the case at bar would then be considered under the low bar of rational basis review. It also seems to suggest that the Court was reframing the issue in *Lawrence* to place the case within the privacy-rights framework.

implications on military policy. The decision in *Marcum*, however, is not being considered as part of the circuit split at issue in the Comment primarily because the Court of Appeals for the Armed Forces falls outside of the fold of the regular courts of appeals because it is an Article I tribunal exercising worldwide appellate jurisdiction over members of the U.S. Armed Forces on active duty and other persons subject to the UCMJ. CRS, *Supreme Court Appellate Jurisdiction Over Military Court Cases*, 1 (Oct. 6, 2008).

¹⁵⁹ Witt, 527 F.3d at 816.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)).

¹⁶² *Id.* ("We cannot reconcile what the Supreme Court did in *Lawrence* with the minimal protections afforded by traditional rational basis review.").

¹⁶³ These cases were *Casey*, 505 U.S. 833 (1992); *Carey*, 431 U.S. 678 (1977); *Roe*, 410 U.S. 113 (1973); *Eisenstadt*, 405 U.S. 438 (1972); and *Griswold*, 381 U.S. 479 (1965). See discussion of these cases *supra*, Part II.D.2.

Third, the Ninth Circuit discussed the Supreme Court's rationale, analysis, and holding in *Lawrence*, which are inconsistent with rational basis review.¹⁶⁴ Had rational basis been the standard of review, the Court would not have been required to "identify a legitimate interest to 'justify' the particular intrusion of liberty at issue in *Lawrence*; regardless of the liberty involved, any hypothetical rationale for the law would do."¹⁶⁵ Although the discussion of a legitimate interest is a quintessential notion of rational basis review, and as such is a strong indication of the standard of review a court is applying, legitimate under rational basis review means nearly anything that can substantiate the law.¹⁶⁶ Even a reason created post hoc is sufficient.¹⁶⁷

Finally, the court indicated a reluctance to apply strict scrutiny because the decision in *Lawrence* did not conclude the right was "fundamental," nor did the "Supreme Court discuss narrow tailoring or a compelling state interest"¹⁶⁸ In a footnote, the court indicated its agreement with the *Lofton* court that strict scrutiny should not be the relevant standard, but then concluded that some form of heightened scrutiny did apply, thereby parting ways with the Eleventh Circuit.¹⁶⁹

The court then turned to *Sell v. United States*,¹⁷⁰ another recent Supreme Court case that considered a substantive due process claim, because *Sell* contained a level of "scrutiny that resembles and expands upon the analysis performed in *Lawrence*."¹⁷¹ The Ninth Circuit found that in *Sell*, the Supreme Court "recognized a 'significant' liberty interest . . . and balanced that liberty interest against the 'legitimate' and 'important' state interest"¹⁷² Because the phrasing of its analysis

¹⁶⁴ *Witt*, 527 F.3d at 817.

¹⁶⁵ *Id.*

¹⁶⁶ See discussion *supra*, Part II.E.1.

¹⁶⁷ *Witt*, 527 F.3d at 817.

¹⁶⁸ *Id.* at 817–18.

¹⁶⁹ *Id.* at 818 n.6. Here it is important to note also that Judge Canby, writing in dissent, would hold that strict scrutiny should apply because the Supreme Court, though it did not call the right at issue in *Lawrence* fundamental, treated it as such. *Id.* Judge Canby notes, "the important individual values of liberty [the Supreme Court] recognizes . . . require strict scrutiny of governmental encroachment on that right." *Id.* at 823 (Canby, J., dissenting).

¹⁷⁰ 539 U.S. 166 (2003). *Sell* was a case involving a man with a long history of delusional disorder who was deemed incompetent to stand trial. *Id.* at 170. *Sell* was ordered to be hospitalized and prescribed antipsychotic medication by the medical staff. *Id.* at 170–71. *Sell* did not want to take the medication, and the court ordered that he be given the medicines involuntarily, and that this might also improve his competence to stand trial. *Id.* at 171. The Supreme Court's *Sell* test was used to determine when the medication could be forcibly given under the Constitution. *Id.* at 186.

¹⁷¹ *Witt*, 527 F.3d at 818.

¹⁷² *Id.* (quoting *Sell*, 539 U.S. at 178).

and rationale so closely resembled that of *Lawrence*, the court stated that the *Sell* test should be controlling for the intermediate level of scrutiny demanded by *Lawrence*.¹⁷³

The court then determined that because DADT “attempts to intrude upon the personal and private lives of homosexuals[] in a manner that implicates the rights identified in *Lawrence*, the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest[,]” with no less intrusive alternative.¹⁷⁴ The court found that the government advanced an important interest, namely management of the military, which requires deference to Congress under its Article I powers to “raise and support [an] arm[y].”¹⁷⁵ Most importantly, however, the Ninth Circuit said, “[n]otably, ‘deference does not mean abdication.’”¹⁷⁶ Here, the court is referring to the fact that Congress, even when regulating the military, is still subject to the requirements of due process.¹⁷⁷ The court did not discuss the second or third criteria because it found the record lacking and would remand the case to determine if the government met the latter two criteria.¹⁷⁸

After making the above findings, the Ninth Circuit held that heightened scrutiny analysis is only for an as-applied constitutional challenge to DADT and not facial challenges.¹⁷⁹ The court made this determination to “avoid making unnecessarily broad constitutional judgments.”¹⁸⁰ Thus, the court remanded the case to develop the record, and determine whether less intrusive means than DADT would “achieve substantially the government’s interest.”¹⁸¹ The court also noted that the “Air Force attempts to justify [DADT] by relying on congressional findings regarding ‘unit cohesion’ and the like, but that does not go to

¹⁷³ *Id.* at 818–19 (quoting *Sell*, 539 U.S. at 180–81) (emphasis in original) (The *Sell* test is comprised of three relevant factors: “First, a court must find that *important* governmental interests are at stake Courts, however, must consider the facts of the individual case in evaluating the Government’s interest Special circumstances may lessen the importance of that interest Second, the court must conclude that [the policy] will *significantly further* those concomitant state interests Third, the court must conclude that [the policy] is *necessary* to further those interests. The court must find that any alternative, less intrusive [policies] are unlikely to achieve substantially the same results”).

¹⁷⁴ *Id.* at 819.

¹⁷⁵ *Id.* at 821.

¹⁷⁶ *Id.* (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)).

¹⁷⁷ *Witt*, 527 F.3d at 821 (citing *Weiss v. United States*, 510 U.S. 163, 176 (1994)).

¹⁷⁸ *Id.* at 821.

¹⁷⁹ *Id.* at 819.

¹⁸⁰ *Id.* at 819 (quoting *Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 447 (1985) (internal citations omitted)).

¹⁸¹ *Id.* at 821.

whether the application of DADT specifically to Major Witt significantly furthers the government's interest"¹⁸² This final pronouncement is one of the most significant conclusions of the decision because the court questioned the government's reliance on congressional findings as a justification for the policy. Specifically, the court questioned whether the policy of DADT furthered the purported interest of unit cohesion, etc.¹⁸³ By questioning Congress's findings, the court was pitting the constitutional protections of due process against the Article I power of Congress to regulate the military.

After the Ninth Circuit issued its decision, the government filed a petition for hearing en banc, which the en banc panel denied.¹⁸⁴ Judge O'Scannlain, joined by Judges M. Smith and Bea, dissented from the denial of rehearing en banc.¹⁸⁵ In his scathing dissent, Judge O'Scannlain noted the following: the creation of a circuit split by the panel,¹⁸⁶ the failure of the panel to even consider whether *Lawrence* was controlling in the matter,¹⁸⁷ the authority of the Supreme Court alone to carve out rights receiving intermediate level scrutiny,¹⁸⁸ and the deference that should be given to Congress in making such important policy choices as DADT.¹⁸⁹ This dissent, like the First Circuit's opinion in *Cook*, argued that Congress was well within its constitutional powers in regulating the military, and that Congress's decision should not lightly be disturbed.¹⁹⁰ Judge Kleinfeld, a second dissenter from the denial of rehearing en banc, concurred in Judge O'Scannlain's reasoning, but called for even greater deference to the president and Congress in regulating the military.¹⁹¹ Both of these arguments for deference would effectively negate heightened scrutiny because deference means any interest put forth by the Congress is sufficient to uphold the law.

¹⁸² *Id.*

¹⁸³ In the Congressional hearings for DADT, General H. Norman Schwarzkopf made the following statement: "In my years of military service, I have experienced the fact that the introduction of an open homosexual into a small unit immediately polarizes that unit and destroys the very bonding that is so important for the unit's survival in time of war." S. Rep. No. 103-112, at 280 (1994). General Colin Powell also made a similar statement, that open homosexuality in units "involves matters of privacy and human sexuality that, in our judgment, if allowed to exist openly in the military, would affect the cohesion and well-being of the force." *Id.* at 281.

¹⁸⁴ *Witt v. Dep't of the Air Force*, 548 F.3d 1264, 1265 (9th Cir. 2008) (O'Scannlain, J., dissenting).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 1267.

¹⁸⁸ *Id.* at 1273.

¹⁸⁹ *Id.* at 1275-76.

¹⁹⁰ *Witt*, 548 F.3d at 1275-76 (O'Scannlain, J., dissenting).

¹⁹¹ *Id.* at 1276-77 (Kleinfeld, J., dissenting).

Chief Judge Kozinski, also writing in dissent from the denial of rehearing en banc, wrote,

When we stand against the combined might of the other branches of government, we should ensure that our own authority is at its maximum. En banc rehearing—whatever the outcome—would have shown that we gave this matter the sustained attention it merits. Moreover, there is strength in numbers: The conclusions of an en banc court would reflect many more points of view and could not easily be dismissed as outliers.¹⁹²

This passage expounds several important points. First, Chief Judge Kozinski noted that ruling against DADT pits the judiciary against the other two branches of government.¹⁹³ Second, the only means by which the court of appeals can give its reasoning maximum authority is through en banc review, in which an eleven-judge panel, and not just a three-judge panel, decides the merits of the case.¹⁹⁴ Finally, and most importantly, Chief Judge Kozinski noted that any conclusion reached by an en banc court can hardly be dismissed as an outlying decision, having received the utmost attention of the entire court of appeals.¹⁹⁵ This point is crucial if the *Witt* decision is setting the stage for a constitutional challenge in front of the Supreme Court, which would pay greater deference to a decision reached by an en banc court of appeals than just a three judge panel. As Chief Judge Kozinski indicated, "Major Witt's case compellingly illustrates the sometimes arbitrary and destructive operation of the 'Don't Ask, Don't Tell' policy."¹⁹⁶ For this very reason, if nothing else, the Ninth Circuit should have reviewed the case en banc.

After remand, District Court Judge Ronald B. Leighton determined that as applied to Major Witt, DADT was not constitutional.¹⁹⁷ The court's narrow inquiry, as directed by the Ninth Circuit, was "whether

¹⁹² *Id.* at 1280 (Kozinski, J., dissenting).

¹⁹³ *Id.*

¹⁹⁴ In other circuits, en banc typically means that all the circuit judges sit and decide the case. FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURT OF APPEALS* 108 (Stanford University Press, 1st ed. 2007). Yet, because the Ninth Circuit is so large, the panel usually only seats eleven judges, pursuant to PUB. L. NO. 95-486 (stating that for circuit courts with more than 15 judges, an *en banc* hearing may consist of "such number of members of its en banc courts as may be prescribed by rule of the court of appeals."). See *Compassion in Dying v. Washington*, 85 F.3d 1440 (9th Cir. 1996); *Campbell v. Wood*, 20 F.3d 1050, 1051 (9th Cir. 1994); *United States v. Penn*, 647 F.2d 876 (9th Cir. 1980). The Fifth Circuit, with 17 judges, could adopt a similar procedure, but has only done so once in *Louisiana v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1986) (en banc).

¹⁹⁵ *Witt*, 548 F.3d at 1280 (Kozinski, J. dissenting).

¹⁹⁶ *Id.*

¹⁹⁷ *Witt v. Dep't of the Air Force*, No. 06-5195RBL, mem. op. at 13 (W.D. Wash. Sept. 24, 2010).

the specific application of DADT to Major Witt significantly furthers the government's interest, and whether less intrusive means would substantially achieve the government's interest."¹⁹⁸ The government's purpose in promulgating DADT, as evidenced in the Congressional findings of the statute, was to promote high unit morale, good order, and unit cohesion.¹⁹⁹ The court noted that the only evidence that Major Witt's reinstatement would adversely affect unit morale or cohesion was contained in surveys and polls that indicated that some "persons in the 446th AES who would prefer that gays and lesbians not serve openly within their unit but such preferences are not outcome determinative here."²⁰⁰ The fact that some servicemembers may dislike serving alongside gays and lesbians "is off-set by the known negative impact of DADT upon the military: the loss of highly skilled and trained military personnel once they have been outed and the concomitant assault on unit morale and cohesion caused by their extraction from the military."²⁰¹ After determining that dismissal from service was not the least intrusive means to achieve the government's interest, the final order of the court was that Major Witt "should be reinstated at the earliest possible moment."²⁰²

3. *Cook v. Gates*, First Circuit

Although the First Circuit in *Cook v. Gates*²⁰³ agreed with much of the reasoning set forth in *Witt*, it departed from the Ninth Circuit in certain respects. The First Circuit declined to apply the three-factor intermediate scrutiny test and the required deference to Congress,²⁰⁴ creating a split with the Ninth Circuit on these issues. The First Circuit, however, agreed with the Ninth Circuit that heightened scrutiny should apply to cases implicating the interests developed in *Lawrence*, and thus the First Circuit joined the Ninth Circuit in its split with the Eleventh Circuit on this point.²⁰⁵

The First Circuit noted that there are many courts that have read *Lawrence* to require only rational basis review²⁰⁶ while others have

¹⁹⁸ *Id.* at 2 (citing *Witt*, 527 F.3d at 821).

¹⁹⁹ *Id.* at 5 (citing 10 U.S.C. §§ 654(a)(14-15) (2006)).

²⁰⁰ *Id.* at 12.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ 528 F.3d 42 (1st Cir. 2008).

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 56.

²⁰⁶ *See, e.g.,* *Sylvester v. Fogley*, 465 F.3d 851, 858 (8th Cir. 2006); *Muth v. Frank*, 412 F.3d 808, 818 (7th Cir. 2005); *Williams v. Att'y Gen. of Ala.*, 378 F.3d 1232, 1238 (11th Cir. 2004); *Lofton v. Sec'y of the Dep't of Childr & Family Servs.*, 358 F.3d 804

viewed *Lawrence* as requiring strict scrutiny.²⁰⁷ Finally, a third, smaller group of courts have viewed *Lawrence* as requiring some other form of scrutiny that rests between strict scrutiny and rational basis.²⁰⁸ The First Circuit falls within the ambit of the third category, recognizing that *Lawrence* protected a liberty interest and applied a balancing test which sets the review standard somewhere between strict scrutiny and rational basis.²⁰⁹

The court found four reasons why *Lawrence* can be read as protecting a liberty interest. First, the court noted that the *Lawrence* court relied upon fundamental rights cases in its analysis.²¹⁰ These fundamental rights cases placed the liberty interest in *Lawrence* with the constitutional zone of privacy. Second, the language of the Court in *Lawrence* revolved around notions of freedom and liberty, extending this notion of liberty to adult, consensual sexual activity.²¹¹ Third, the Court overruled *Bowers* and held the Justice Stevens's dissenting opinion in *Bowers* should now be controlling.²¹² Finally, if *Lawrence* had applied mere rational basis review, the Supreme Court would have sustained the Texas criminal law and not overturned it.²¹³

The court refuted the three main reasons other courts have held that *Lawrence* review was merely rational basis review. First, even though

(11th Cir. 2004); Witt v. U.S. Dep't of the Air Force, 444 F. Supp. 2d 1138, 1143 (W.D. Wash. 2006), *aff'd in part, rev'd in part, remanded to* 527 F.3d 806 (2008), *rehearing en banc denied* 548 F.3d 1264 (2008); United States v. Extreme Assocs., Inc., 352 F. Supp. 2d 578, 591 (W.D. Pa. 2005); Conaway v. Deane, 401 Md. 219, 310 (2007); State v. Lowe, 861 N.E.2d 512, 517 (Ohio 2007); State v. Limon, 122 P.3d 22, 29 (Kan. 2005); Ex parte Morales, 212 S.W.3d 483, 493 (Tex. App. 2006); Martin v. Zihlerl, 269 Va. 35, 42 (2005); State v. Clinkenbeard, 123 P.3d 872, 878 (Wash. App. 2005).

²⁰⁷ See, e.g., Williams v. Att'y Gen. of Ala., 378 F.3d at 1252 (11th Cir. 2004) (Barkett, J., dissenting); Doe v. Miller, 298 F. Supp. 2d 844, 871 (S.D. Iowa 2004), *rev'd on other grounds*, 405 F.3d 700 (8th Cir. 2005); Hudson Valley Black Press v. IRS, 307 F. Supp. 2d 543, 548 (S.D.N.Y. 2004); Fields v. Palmdale Sch. Dist., 271 F. Supp. 2d 1217, 1221 (C.D. Cal. 2003). See also Donald H. J. Hermann, *Pulling the Fig Leaf Off the Right of Privacy: Sex and the Constitution*, 54 DEPAUL L. REV. 909, 969 (2005); Tribe, *supra* note 15, at 1917.

²⁰⁸ See, e.g., Witt v. Dep't of the Air Force, 527 F.3d 806 (9th Cir. 2008); United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004). See also, Donald L. Beschle, *Lawrence Beyond Gay Rights: Taking the Rationality Requirement for Justifying Criminal Statutes Seriously*, 53 DRAKE L. REV. 231, 276 (2005); John G. Culhane, *Writing on, Around and Through Lawrence v. Texas*, 38 CREIGHTON L. REV. 493 (2005); Nancy C. Marcus, *Beyond Romer and Lawrence: The Right to Privacy Comes out of the Closet*, 15 COLUM. J. GENDER & L. 355 (2006); Jerald A. Sharum, Comment, *Controlling Conduct: The Emerging Protection of Sodomy in the Military*, 69 ALB. L. REV. 1195, 1202 (2006).

²⁰⁹ Cook v. Gates, 528 F.3d 42, 56 (1st Cir. 2008).

²¹⁰ *Id.* at 52.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

Lawrence did not call the right “fundamental,” several other Supreme Court cases²¹⁴ all described the substantive due process rights in terms of either “liberty interests” or “protected liberty,” and not as “fundamental.”²¹⁵ Second, the court stated that the argument that *Lawrence* did not rely on an analysis of the nation’s history and tradition is “based on the mistaken premise that the only history relevant to the substantive due process inquiry is a history demonstrating affirmative government action to protect the right in question.”²¹⁶ The court argued that *Lawrence*’s thorough historical analysis is consistent with Supreme Court precedent in the area.²¹⁷ Third, the argument that because the majority did not respond to Justice Scalia’s assertion that the Court had failed to recognize a protected liberty interest, thereby affirming that assertion, is but one possible explanation for the majority’s silence. The majority may have been relying on the fact that the opinion stood for itself, “and that there was little to be gained by debating Justice Scalia on this point.”²¹⁸

The First Circuit held that *Lawrence* is “another in this line of Supreme Court authority that identifies a protected liberty interest and then applies a standard of review that lies between strict scrutiny and rational basis.”²¹⁹ *Lawrence*, as the First Circuit saw it, “balanced the strength of the state’s asserted interest in prohibiting immoral conduct against the degree of intrusion into the petitioners’ private sexual life”²²⁰ The court held that even under heightened scrutiny, a facial challenge to DADT must fail because facial challenges are the most demanding constitutional challenges, the *Lawrence* court was explicit in limiting the liberty interest, noting that it does not protect all forms of sexual intimacy, the court found that a facial challenge to DADT must fail.²²¹

The court then turned its analysis to an as-applied challenge to the law under the due process clause. The court found that the government’s asserted interests were significant enough to overcome the intrusion on the protected liberty interest because of the force of judicial deference to

²¹⁴ *Cruzan v. Dir. of Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990); *Washington v. Harper*, 494 U.S. 210, 223 (1990); *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982); *Parham v. J.R.*, 442 U.S. 584, 600 (1979).

²¹⁵ *Cook*, 528 F.3d at 53 (citing *Casey*, 505 U.S. at 851; *Cruzan*, 497 U.S. at 278; *Youngberg*, 457 U.S. at 315).

²¹⁶ *Id.*

²¹⁷ *Id.* (citing *Roe*, 410 U.S. at 132–41).

²¹⁸ *Id.* at 54.

²¹⁹ *Id.* at 56.

²²⁰ *Id.*

²²¹ *Cook*, 528 F.3d at 56.

Congress when regulating the military as applied.²²² The court indicated two primary reasons for such deference. First, institutional competence, as Congress is best equipped, through its committee hearing and informational gathering processes, to determine what policies best serve the armed forces.²²³ Second, constitutional power, as Congress, under Article I, is the branch of government expressly granted the power and authority to "raise and support armies" as well as "make all laws necessary and proper to that end."²²⁴ The court held that "where Congress has articulated a substantial government interest for a law, and where the challenges in question implicate that interest, judicial intrusion is simply not warranted."²²⁵ Due to these reasons, as-applied challenges to DADT must also fail.²²⁶

The court's final point on as-applied challenges was that Congress's interest is substantial, and judicial deference prevents judicial overstep.²²⁷ This point breaks with the decision in *Witt*, forming the second point of departure from the Ninth Circuit in the three-way circuit split. This reasoning is also suspect following the line of military court cases that do not rely on such deference.²²⁸ Finally, now that DADT is being repealed and Congress's interest has changed, there likely would have been a different outcome in *Cook*.

III. THE MORALITY OF "DON'T ASK, DON'T TELL" AND ITS SIGNIFICANCE IN THE CONTEXT OF *LAWRENCE*, *LOFTON*, *WITT*, AND *COOK*

The morality of DADT is not important per se, but it is important in order to resolve its classification as a purely moral-based law or as composite or embedded. The Supreme Court's taxonomy regarding morality-based legislation, which defines each category of morality-based laws, is useful because it allows us to fit the decision in *Lawrence* together with the standard of scrutiny applied in *Witt* and *Cook* to determine whether DADT would pass constitutional muster.²²⁹ If DADT is purely moral-based, a law justified only by morality, then there is no reason to even apply *Witt* and *Cook*'s heightened review.²³⁰ If the law is

²²² *Id.* at 57.

²²³ *Id.*

²²⁴ *Id.* (internal quotations omitted) (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

²²⁵ *Id.* at 60.

²²⁶ *Id.* at 60.

²²⁷ *Cook*, 528 F.3d at 60.

²²⁸ See *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004).

²²⁹ Goldberg, *supra* note 2, at 1244.

²³⁰ *Id.*

morally embedded or composite, wherein morality is an implicit or explicit judgment in the law, then a successful challenge would require heightened review.²³¹ This framework could also, at least theoretically, apply to other laws beyond DADT like UCMJ Article 125.

The three-way circuit split between *Lofton*, *Witt*, and *Cook* poses three distinct challenges to future courts considering the application of *Lawrence* to DADT or other morality-based legislation. First, if we presume DADT is based on morality alone, it would fail the lowest standard of review, rational basis review. The Court in *Lawrence* explicitly stated that Justice Stevens's dissent in *Bowers* would be controlling, where he stated that morality is not enough to uphold a law.²³² Second, there are viable arguments that DADT has practical or utilitarian objectives in addition to morality, which means that the only way to challenge the policy, or one like it, would be under heightened review. *Witt* and *Cook* both determined that *Lawrence* requires heightened review.²³³ Under intermediate scrutiny, as articulated under the *Witt* court's test, DADT would again fail.²³⁴ The *Cook* court's deference to Congress was erroneous because such deference negates intermediate scrutiny, which the court held was necessary following *Lawrence*, and even military courts do not grant such unquestioning deference to Congress.²³⁵ Finally, *Lofton* should be accorded less weight in determining the standard of review required by *Lawrence* because the Eleventh Circuit expressly determined that *Lawrence* was not controlling in that case.²³⁶

A. "Don't Ask, Don't Tell" as a Purely Moral-Based Law

If we begin with the presumption that DADT is strictly moral-based, that is, a purely moral law, then the only justification for the law is that it represents the moral edict of the governing majority. If the Court truly intended in *Lawrence* to make Justice Stevens's *Bowers* dissent controlling, then DADT fails rational basis review. In his dissent, Justice Stevens states that morality is not a sufficient basis on which to uphold a law.²³⁷ If morality is not enough, then a law based solely on

²³¹ *Id.*

²³² *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting).

²³³ *Witt v. Dep't of the Air Force*, 527 F.3d 806, 818 (9th Cir. 2008); *Cook*, 528 F.3d at 56.

²³⁴ *Witt*, 527 F.3d at 818-20.

²³⁵ *Cook*, 528 F.3d at 57-59.

²³⁶ *Lofton*, 358 F.3d at 817.

²³⁷ *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting) ("the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . .").

morality does not have a legitimate or rational basis, which is a necessary component for the law to be upheld. Morality, then, should not serve as a legitimate sole basis for any legislation, not just DADT.

B. "Don't Ask, Don't Tell" as a Morally Composite or Embedded Law

The next two questions after determining that DADT or another law would fail rational basis review if it is based on morality alone are: 1) Is the law based on something more than pure morality?; and 2) If the law has utilitarian or practical policy goals beyond morality, can it still be successfully challenged under substantive due process? If the law does have a basis beyond pure morality, then the only method of a successful challenge would be through heightened review. Thus, the analysis turns on whether the law is pure moral legislation or not.

1. Is DADT Morally Composite or Embedded?

The first place to look to determine whether DADT is a composite or embedded law is in the policy and the Congressional deliberations. In a Senate Report from the Armed Forces Committee, the Congressional record shows that Congress contemplated the implications of DADT on the constitutional rights of homosexuals.²³⁸ The report concluded that even "if the Supreme Court should reverse its ruling in *Bowers* and hold that private consensual homosexual acts between adults may not be prosecuted in civilian society, this would not alter the committee's judgment as to the effect of homosexual conduct in the armed forces."²³⁹ This finding is important because it indicates that even if the Supreme Court found that consensual sexual relations between homosexuals were protected by the Constitution, Congress would still find that those committing homosexual sexual acts in the military must be separated. For this assertion to be sustainable, it must mean that DADT is based on something more than pure morality.

Another place to look for possible utilitarian justifications are the Congressional findings articulated in the law, the most important of which are found in subsections 13 and 15 of 10 U.S.C. § 654(a). In subsection 13, Congress finds that "[t]he prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service."²⁴⁰ The phrasing of this subsection leaves no doubt that Congress is alluding to a longer tradition of criminalizing homosexual conduct, in the military as

²³⁸ S. Rep. No. 103-112, at 287 (1993); H.R. Rep. No. 103-200, at 286 (1993).

²³⁹ *Id.*

²⁴⁰ 10 U.S.C. § 654(a)(13) (2006).

well as in the civilian world, directly following the reasoning of *Bowers*.²⁴¹ The use of the phrase “unique conditions of military service,”²⁴² however, indicates that there is at least something about service in the armed forces that warrants this regulation. This finding likely reflects a practical goal served by the law.

In subsection 15, Congress finds that “[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.”²⁴³ This subsection expressly establishes Congress’s utilitarian justification for the policy that was hinted at in subsection 13, which is the belief that homosexuality is a risk to morale, good discipline, and unit cohesion. This justification demonstrates a clearly composite morality basis for the law; it states as its purpose the protection of morale, discipline, and unit cohesion, which are all practical utilitarian goals, yet the law also makes a moral judgment regarding homosexuality as something inconsistent with the military. The moral judgment that open homosexuality is subversive, as well as the military’s general regulation of sexual conduct between servicemembers, demonstrate that DADT is based on something more than pure morality.

The policy aspect of DADT is designed to establish criteria for when members of the armed forces are to be separated from the military, following regulations to be issued by the Secretary of Defense.²⁴⁴ Under the policy provisions of the statute, there are three different reasons for which servicemembers can be separated from the military.²⁴⁵ It is important to note that there is also an excuse for homosexual conduct contained within the policy.²⁴⁶ This listed excuse is important because

²⁴¹ *Bowers*, 478 U.S. at 192 (noting that laws limiting homosexual rights have ancient roots).

²⁴² 10 U.S.C. § 654(a)(8)(A) (2006).

²⁴³ *Id.* at § 654(a)(15).

²⁴⁴ *Id.* at § 654(b).

²⁴⁵ *Id.* (“(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts (2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect (3) That the member has married or attempted to marry a person known to be of the same biological sex.”).

²⁴⁶ To be excused, the servicemember must prove that: “(A) such conduct is a departure from the member’s usual and customary behavior; (B) such conduct, under all the circumstances, is unlikely to recur; (C) such conduct was not accomplished by use of force, coercion, or intimidation; (D) under the particular circumstances of the case, the member’s continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and (E) the member does not have a propensity or intent to engage in homosexual acts.”) 10 U.S.C.

the criteria present justifications for otherwise "unlawful" conduct, but dissecting each and noting their combination of moral judgments and utilitarian elements, another purpose of the law becomes more apparent: preventing repeat sexual activity in the military, particularly of the homosexual variety.

The first criterion, that the conduct was outside customary behavior,²⁴⁷ depicts Congress's reluctance to define homosexuality in terms of a single act. This is interesting considering the nature of the policy and the specific "risks" it seeks to prevent. Although Congress claimed in DADT that all homosexual acts are a risk to morale, good discipline, and unit cohesion, it seems odd that a one-time act of indiscretion poses less of a risk, exonerating the servicemember. This excuse provision is in stark contrast to UCMJ Article 125, which does not contain such an excuse.²⁴⁸ The excuse provision in DADT exposes a utilitarian goal of the law, to punish repeat conduct and not just one-time offenses. Congress, it would seem, recognizes that sexual activity will occur in the military, but so long as it only happens once and presumably within the bounds of Article 125, it is forgiven under the statute. Yet if the person happens to be an acknowledged homosexual, he or she is separated from the military due to his or her propensity to commit a repeat act. The utilitarian goal is therefore the prevention of repeated sexual acts that cause disruption, and the moral judgment is that homosexual conduct has a greater propensity to cause disruption than heterosexual conduct.

The second criterion, that the conduct is unlikely to recur,²⁴⁹ is a mirror image of the first excuse, and therefore warrants limited discussion. It is unlikely that anyone who successfully proves the first criterion could not also prove the second. The presumption in this criterion is that if one is a "practicing" homosexual, homosexual acts will recur.²⁵⁰

§§ 654(b)(1)(A)–(E) (2006). Under 10 U.S.C. § 654(b)(1) there is a list of five criteria, and if all five are satisfied, the homosexual act or acts can be excused. *Id.*

²⁴⁷ 10 U.S.C. § 654(b)(1)(A) (2006).

²⁴⁸ *Id.* at § 925.

²⁴⁹ *Id.* at § 654(b)(1)(B).

²⁵⁰ DOD Directive 1332.40 § E2.3.1.2 (1997) ("In considering whether a member has rebutted this presumption [that he or she is unlikely to engage in homosexual acts], the military considers: (1) whether the member has engaged in a homosexual act; (2) the member's credibility; (3) testimony from others about the member's past conduct; (4) the nature and circumstances of the member's statement; and (5) any other evidence relevant to whether the member is likely to engage in a homosexual act."). As is evident reading the directive, the primary factor the military considers to determine if one is likely to engage in a future homosexual act is whether someone has done so in the past. The only case, so far, that has considered these "retention" criteria was *Kindred v. United States*,

The third criterion fits within the ambit of other sexually regulated conduct such as rape. If the servicemember's homosexual act was accomplished through use of force or coercion,²⁵¹ just like forcible intercourse in civilian life, courts should not exonerate that behavior just because it is unlikely to recur or because it was outside normal behavior. In turn, that member's separation from the armed forces is both reasonable and justified. Because there is an injury to another, which the Court decried in *Lawrence*, the State has a greater interest in regulating such conduct than the individual does in exercising his or her liberty interest.

The fourth criterion, that "the member's continued presence in the armed forces is consistent with the interests of the armed forces,"²⁵² seems to be the most subjective and utilitarian of the criteria. If the military has deemed homosexuality and homosexual conduct as risks to morale, discipline, and unit cohesion, it seems contradictory to determine that it is in the military's best interest to *retain* someone who committed such an act. This provision, as it reads, seems to suggest that the military is willing to overlook the indiscretion of some soldiers and not others, based merely on the military's needs and the servicemember-in-question's ability to satisfy those needs overrides the moral disapproval of that person's conduct.

The fifth criterion, delineating "propensity or intent to engage in homosexual acts,"²⁵³ seems primarily aimed at character, which is really intended to indicate the likelihood of one to engage in the restricted conduct. This is significant because it is possible that in a separation proceeding, an open or "practicing" homosexual is most likely to be found to have a propensity or intent to engage in homosexual acts, no matter how celibate he or she might be, just do to his or her openness. For this reason, this criterion is the least utilitarian, and the one most embedded with morality.

Another section of DADT relevant to understanding the policy justifications is 10 U.S.C. § 654(f)(3), which defines "homosexual act." Included within this definition is "(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and (B) any bodily contact which a reasonable person would understand to demonstrate a propensity

41 Fed. Cl. 106 (1998), where the court reversed a determination of a Naval Court dismissing *Kindred* under DADT because the lower court had failed to consider whether the retention criteria had been met.

²⁵¹ 10 U.S.C. § 654(b)(1)(C) (2006).

²⁵² *Id.* at § 654(b)(1)(D).

²⁵³ *Id.* at § 654(b)(1)(E).

or intent to engage in an act described in subparagraph (A).”²⁵⁴ The broad language of this provision makes almost any act between two persons of the same sex a homosexual act for which they can be separated from the military. This is particularly interesting when compared to Uniform Code of Military Justice Article 125, Sodomy,²⁵⁵ which defines sodomy as any “unnatural carnal copulation with another person of the same or opposite sex or with an animal”²⁵⁶ If one compares the two definitions side by side, they demonstrate that heterosexual and homosexual servicemembers alike are punished for certain sexual behavior in the military. This presents a common utility of preventing sexual activity between servicemembers. The difference between the two policies is that where both laws punish soldiers for their conduct, homosexuals were, and possibly still are, almost automatically separated from the military for their conduct under DADT, whereas their heterosexual counterparts are not under Article 125. Article 125 does not contain a separation provision like DADT.²⁵⁷ This difference between the two policies then leads to the conclusion that what is really driving the policy behind “Don’t Ask, Don’t Tell” is morality with some embedded or composite justifications.

Considering DADT in light of morality-based classifications, we see that DADT relies heavily on embedded and composite justification. Though the explicit aims of DADT were to prevent the risks that homosexuality poses to unit cohesion, morale, and good discipline, inherent in DADT was the moral judgment that homosexuality is somehow wrong, and this moral judgment therefore becomes a justification for the policy. If one reads the target of homosexuality as an explicit moral judgment, then the law would be composite, yet if the law is read as an implicit moral judgment, it would be a moral-embedded law. Because DADT contains provisions that could be read either way, it may be either or both, indicating that some form of heightened review would be necessary for DADT to be unconstitutional.

2. *Marcum* Proves that *Lawrence*’s Liberty Interest Applies to UCMJ Article 125 Challenges

Article 125, which prohibits sodomy, and is similar to the laws that *Lawrence* struck down, is useful to rebut the First Circuit’s argument in *Cook* that courts should give significant deference to Congress’s power to regulate the military and dismiss such cases. First, because Article

²⁵⁴ *Id.* at § 654(f)(3).

²⁵⁵ *Id.* at § 925.

²⁵⁶ *Id.*

²⁵⁷ 10 U.S.C. §925.

125 is a military measure and part of the UCMJ, a parallel to DADT can easily be drawn in terms of Congress's power to regulate the military. Second, the line of cases interpreting military policy regarding sexual conduct under Article 125 demonstrates the way military courts, including the Court of Appeals for the Armed Forces, consider the application of the policy after *Lawrence*. If the military courts, with their close link to the armed services, are willing to deem certain applications of Article 125 unconstitutional after *Lawrence*, then there is no clear reason for granting the deference to Congress under DADT that the First Circuit argues for in *Cook*.

Under Article 125, military courts have applied *Lawrence* primarily because the conduct prohibited under this article, sodomy, is so closely associated with the *Lawrence* decision. *United States v. Marcum*²⁵⁸ is the leading case in this discussion. In this case, a servicemember asserted that his conviction under Article 125 must be set aside following *Lawrence*.²⁵⁹ The court began by stating, "Constitutional rights generally apply to members of the armed forces unless by their express terms, or the express language of the Constitution, they are inapplicable."²⁶⁰ Considering the extent of the liberty interest protected in *Lawrence*, the court noted that many other courts have grappled with the standard of review *Lawrence* requires.²⁶¹ The court noted that the use of strict scrutiny would prove dispositive in a facial challenge to Article 125.²⁶² Like the circuit courts in *Lofton*, *Witt*, and *Cook*, the *Marcum* court said that because the Supreme Court did not indicate whether the right was "fundamental," it refuses to presume the existence of such a right and apply strict scrutiny.²⁶³ The court held that *Lawrence* requires "searching constitutional inquiry," which may require a court to inquire beyond categorical determinations of whether the interest at issue is within the interest articulated in *Lawrence* or whether it is part of the exceptions listed in *Lawrence*.²⁶⁴ The court ruled that under this test Marcum's conduct was outside the *Lawrence* liberty interest because the person with whom Marcum had sexual relations was a person within his chain

²⁵⁸ 60 M.J. 198 (C.A.A.F. 2004).

²⁵⁹ *Id.* at 200.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 204.

²⁶² *Id.* This statement by the court seems to indicate two possible reasons Article 125 would not survive strict scrutiny. First, the law may not be narrowly tailored, or in other words, it is *not* the least restrictive means. Second, the purpose of the law may not be compelling. It might not be compelling because it is not necessary, or it might not be compelling because it is based on a moral judgment and not genuine utility.

²⁶³ *Id.* at 205.

²⁶⁴ *Marcum*, 60 M.J. at 205.

of command.²⁶⁵ This lent an air of coercion to the relationship, creating a situation where consent might not easily be refused and therefore removing the acts from *Lawrence*'s protection.²⁶⁶ This determination in *Marcum* was consistent with the *Lawrence* court's determination that the right does not involve "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused."²⁶⁷

After establishing this heightened standard of review, the *Marcum* court developed a three-question test for future military courts to use when considering whether the sexual conduct in question is protected by the liberty interest in *Lawrence*.²⁶⁸ As the Court of Appeals for the Armed Forces, reviewing decisions from the courts of the various military branches, this test would become binding precedent as well as the basis for almost all constitutional challenges to Article 125 after *Lawrence*.²⁶⁹ Some courts have found servicemembers' conduct protected within *Lawrence*'s liberty interest,²⁷⁰ but this has not been the majority of cases.²⁷¹

What these cases indicate is that courts, even military courts, are sustaining challenges to military policy and Congressional authority after *Lawrence*. On the one hand, military courts have upheld policies like a Coast Guard policy prohibiting romantic relationships²⁷² and regulations for the Corps of Cadets.²⁷³ On the other hand, they have also held that "the government cannot claim a heightened interest in controlling the specific sexual acts between [servicemembers] merely because those acts

²⁶⁵ *Id.* at 208.

²⁶⁶ *Id.*

²⁶⁷ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

²⁶⁸ *Marcum*, 60 M.J. at 206–07 (internal citations omitted) ("First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*? Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?").

²⁶⁹ See, e.g., *United States v. Stirewalt*, 60 M.J. 297 (C.A.A.F. 2004); *United States v. Smith*, 66 M.J. 556 (C.G. Ct. Crim. App. 2008); *United States v. Humphreys*, 2005 CCA LEXIS 401 (N-M. Ct. Crim. App. 2005).

²⁷⁰ *Humphreys*, 2005 CCA LEXIS 401 at *11; *United States v. Barber*, 2004 CCA LEXIS 391, *22–23 (Army Ct. Crim. App. Oct. 7, 2004).

²⁷¹ *Smith*, 66 M.J. at 561; *Stirewalt*, 60 M.J. at 304.

²⁷² *Stirewalt*, 60 M.J. at 304 (citing Coast Guard Personnel Manual, para. 8.H.2.f. (1988) (Unacceptable Romantic Relationships)).

²⁷³ *Smith*, 66 M.J. at 561 (citing *Regulations for the Corps of Cadets*, Article 4–5–05 entitled *Sexual Misconduct*). The Corps of Cadets in this case refers to the U.S. Coast Guard Academy Corps of Cadets, which is the student body of the academy. The regulations cited are those by which cadets must live while at the academy.

took place in a barracks room”²⁷⁴ and the fact that court-martialing a soldier may decrease his unit’s morale is an insufficient basis for dismissing him.²⁷⁵ These cases indicate that even military courts are prepared to question Congress like the court did in *Witt*; however, it remains unclear whether “unit cohesion” would satisfy the *Sell* test as a constitutionally valid justification for DADT. It is also dubious whether separation from the military significantly furthers the government’s interest in unit cohesion or “whether less intrusive means would achieve substantially the government’s interest.”²⁷⁶ If unit cohesion was really the reason for DADT, then how does separating a decorated officer, like Major Witt, improve unit cohesion? The First Circuit should have followed the military courts’ questioning of Congress’s justification rather than relying on legislative deference.

Another important fact to consider when contemplating Article 125 is that the seminal decision in *Marcum* was decided in 2004, before either *Witt* or *Cook* were decided. The significance of the timing of these cases is that *Marcum*’s three-prong test interpreting the liberty interest in *Lawrence* is still binding precedent on any of the lower military courts. Because *Marcum* was decided before *Witt* and *Cook*, the *Marcum* court did not have the benefit of the persuasive reasoning of the Ninth or First Circuits’ decisions.

The pertinent question is whether the same heightened scrutiny that applied in *Witt* and *Cook* could be applied in the Article 125 context. The *Marcum* court explicitly stated that strict scrutiny would prove dispositive in a facial challenge to Article 125, but did not hold that such a standard applied.²⁷⁷ Instead, the court found that *Lawrence* required a searching constitutional inquiry, which is not language typical of mere rational basis review.²⁷⁸ This vagueness might mean that the standard of heightened scrutiny that both the *Witt* and *Cook* courts call for would also prove dispositive in a challenge to Article 125, particularly in light of the *Sell* test adopted by the court in *Witt*. Also, the fact that *Marcum* is binding on military courts does not mean that it is binding on other courts, particularly federal district courts, where a case challenging the validity of Article 125 could be brought. This means that even though

²⁷⁴ *Humphreys*, 2005 CCA LEXIS 401 at *7.

²⁷⁵ *Id.* at *10.

²⁷⁶ *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008). See also Major Joel P. Cummings, *Is Article 125, Sodomy a Dead Letter in Light of Lawrence v. Texas and the New Article 120?*, 2009 ARMY L. 1 (2009); Jerald A. Sharum, Comment, *Controlling Conduct: The Emerging Protection of Sodomy in the Military*, 69 ALB. L. REV. 1195, 1231–33 (2006).

²⁷⁷ *United States v. Marcum*, 60 M.J. 198, 204 (C.A.A.F. 2004)

²⁷⁸ *Id.* at 205.

DADT has been repealed by Congress, though enforcement of the repeal is still unclear, the line of reasoning from *Lawrence* to *Witt* to *Cook* would still be relevant in the context of Congress’s regulation of private, consensual sexual acts that occur in the military between servicemembers or between a servicemember and civilian through the operation of the UCMJ Article 125. *Witt* and *Cook*, following *Lawrence*, are useful as a basis for challenging the constitutionality of other acts of Congress regulating the military in addition their direct applicability to DADT.

3. “Don’t Ask, Don’t Tell” Would Fail Heightened Review under *Witt*

Because *Cook*’s deference can be discounted following *Marcum* and its progeny, and because it seems clear that DADT has at least some utilitarian policy justifications, it is still possible that DADT could have been constitutional. For that reason, it is necessary to consider how DADT would have fared under heightened review. Although both *Cook* and *Witt* found that *Lawrence* required more than just rational basis review, only *Witt* provided a clear test for the intermediate scrutiny it found applicable. The dispositive element of this test for DADT is that there must be no “alternative, less intrusive [policy likely] to achieve substantially the same results”²⁷⁹

Applying this standard of review to DADT demonstrates that DADT would again fail to pass constitutional muster. There are likely hundreds of less intrusive alternatives to DADT’s separation procedures that achieve the government’s objectives as articulated in the Congressional findings, the most obvious of which is Article 125. Once DADT is fully repealed, the sexual conduct DADT sought to prevent would be prevented under Article 125 by punishing homosexuals in the same way it punishes heterosexuals. This means that DADT, even with composite or embedded justifications, still fails under heightened review, which *Witt* and *Cook* both called for. This, however, leaves doubt as to whether Article 125 is still constitutional, or whether the military will recommend changes to Article 125 now that DADT has been repealed.²⁸⁰

²⁷⁹ *Witt*, 527 F.3d at 819 (quoting *Sell*, 539 U.S. at 180–81).

²⁸⁰ S. 4023, 111th Cong. § 2(a)(2)(D) (2010) (noting that the Secretary of Defense issued a memorandum asking for recommendations for changes to the UCMJ based on the repeal of DADT).

IV. CONCLUSION

When *Lawrence* was decided, it “offered a possibility wherein the moral views of the majority could not control the sexual lives of individuals.”²⁸¹ *Lawrence* created the promise of a more potent liberty interest that could defend the gay community against the animus and stigma of the moral majority while promoting individual autonomy and the dignity our Constitution guarantees.²⁸² Because *Bowers* was the only contemporary Supreme Court case that sustained a law on morality rationale alone,²⁸³ it makes sense that the Court overruled it in *Lawrence*. *Lawrence* offered a path towards full acceptance of homosexuality in society.

Although full acceptance has yet to manifest itself, social trends are moving away from the “second class” status attributed to homosexuals.²⁸⁴ In recent months, two cases decided in federal court in Massachusetts determined that the Defense of Marriage Act, commonly referred to as DOMA, is unconstitutional under the Fifth Amendment,²⁸⁵ as well as the Tenth Amendment and the Spending Clause.²⁸⁶ In addition, a federal district court judge in California ruled in August 2010 that a constitutional amendment to the California state constitution that made same-sex marriages illegal was a violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.²⁸⁷ And relevant

²⁸¹ Jonathan M. Black, *Tenth Annual Review of Gender and Sexuality Law, Constitutional Chapter: Sexual Privacy After Lawrence v. Texas*, 10 GEO. J. GENDER & L. 297, 330 (2009).

²⁸² See generally Marcus *supra* note 208.

²⁸³ *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986). Sodomy laws should not be invalidated because the majority belief that sodomy is immoral is an inadequate rationale to support such laws. *Id.*; see also Goldberg *supra* note 2, at 1284 (discussing the history of Supreme Court cases relying on morality justifications, and noting that *Bowers* is the only case to rely exclusively on morality as its basis).

²⁸⁴ For the first time in American history, more people said they supported same-sex marriage rights than the number saying they were opposed, 49 percent to 46 percent. Gary Langer, *Changing Views on Gay Marriage, Gun Control, Immigration and Legalizing Marijuana*, ABC NEWS April 30, 2009, <http://abcnews.go.com/PollingUnit/Obama100days/story?id=7459488&page=1&page=1>.

²⁸⁵ *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 397 (D. Mass. 2010) (Judge Joseph Tauro found that “irrational prejudice *never* constitutes a legitimate government interest,” and for that reason, he ruled that DOMA “violates the equal protection principles embodied in the Fifth Amendment to the United States Constitution.”) (emphasis in original).

²⁸⁶ *Massachusetts v. U.S. Dep’t of Health and Human Serv.*, 698 F. Supp 2d 234, 253 (D. Mass. 2010) (Judge Tauro, who decided the sister case in *Gill*, determined that DOMA also violates the Tenth Amendment to the constitution as well as the spending clause).

²⁸⁷ *Perry v. Schwarzenegger*, No. C09-2292VRW, 2010 U.S. Dist. LEXIS 78817, at *217 (N.D. Cal. Aug. 4, 2010).

to the discussion herein, a federal district court judge in California ruled that Don't Ask, Don't Tell violates the First and Fifth Amendments, and issued a permanent injunction barring its applicability, which was ultimately stayed by the Ninth Circuit.²⁸⁸ Most importantly, Congress acted to repeal DADT,²⁸⁹ and President Obama signed the bill into law.²⁹⁰

Cases like *Witt* and *Cook*, which raise the Constitutional bar for laws that have no basis other than moral judgment against homosexuality, prove that there is hope for complete and genuine equality.²⁹¹ In the wake of *Romer*, *Lawrence*, and *Witt*, it might be more difficult to defend laws that restrict homosexual rights, whether concerning service in the military or the recognition of marriage equality for LGBT persons. These cases, which may be the basis of a future Supreme Court challenge, provide a framework that creates some optimism about protection of LGBT rights.

If the Court truly meant what it said in *Lawrence* and what it did when it overruled *Bowers* and made Justice Stevens's dissent controlling, then the following points can be deduced. First, absent injury to another or an institution the law protects, the state should not regulate a person's exercise of liberty.²⁹² Second, that liberty interest is further bolstered when it takes place within the home.²⁹³ Finally, and most significantly, morality is an insufficient basis on which to uphold a law.²⁹⁴

The application of these principles to the failed policy known as "Don't Ask, Don't Tell" is as follows: if DADT was based on morality alone, then the law would fail under rational basis review because the government's interest is not legitimate. If DADT was a composite or moral-embedded law, then only heightened scrutiny could overcome and enable the Court to strike the law down. Fortunately, as we have seen,

²⁸⁸ Log Cabin Republicans v. United States, No. CV 04-08425-VAP, 2010 U.S. Dist. LEXIS 93612, at *3 (C.D. Cal. Sept. 9, 2010), *rev'd*, No. 10-56634, 2010 U.S. Dist. LEXIS 22655 (9th Cir. Nov. 1, 2010). The First Amendment claim in this case was unique in that the law was challenged on the fact that gay and lesbian servicemembers cannot tell anyone about their sexuality in their profession, which the court ruled was an unconstitutional infringement of their right to free speech. *Id.*

²⁸⁹ Hulse, *supra* note 33.

²⁹⁰ Gell, *supra* note 34.

²⁹¹ See, e.g., Christopher A. Scott, Case Note, *Cook v. Gates: Don't Ask, Don't Tell Remains a Legal Option for the Military, But the End May Be in Sight*, 18 L. & SEX. 183, 194 (2009); Genevra Williams, Case Note, *Gays in the Military – The Ninth Circuit Court of Appeals Fails to Subject "Don't Ask, Don't Tell" to a Strict Scrutiny Test: Witt v. Department of the Air Force*, 74 J. AIR L. & COM. 143, 148 (2009).

²⁹² *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

²⁹³ As part of the constitutional guarantee to privacy, the home is nearly sacrosanct. See, e.g. U.S. CONST. amends. III, IV, V, XIV.

²⁹⁴ *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting).

Witt and *Cook* provide us with a model for an analysis using heightened review, extracted from the Court's own decision in *Lawrence*. *Cook*'s deference is questionable following *Marcum* and its progeny, and *Lofton* can be discounted because the Eleventh Circuit explicitly says that *Lawrence* was not controlling in that case,²⁹⁵ making its discussion of *Lawrence* obiter dictum.

Of the courts to address DADT after *Lawrence*, only the *Witt* court succeeded in understanding and appreciating the full liberty interest at stake in *Lawrence* and applying it to the case at bar. The First Circuit was mistaken in its unequivocal grant of deference to Congress. It failed to acknowledge the practical implications such deference would have on the holding that heightened scrutiny must apply. If courts give deference to Congress's determinations like the court did in *Cook*, there is no point in applying heightened scrutiny because any interest Congress asserts is sufficient to uphold the law, meaning that challenges will unequivocally fail. Only the Ninth Circuit in *Witt* correctly applied heightened scrutiny to its logical conclusion by not abdicating its decision to Congress by upholding the Fourteenth Amendment.

DADT was abandoned because it was a failed policy, with numerous servicemembers attesting to its failures. Yet the current interim period leaves servicemembers in doubt as to the applicability of the law and the status of their rights while DADT is still in effect.²⁹⁶ This case law provides them a constitutional claim against any application of DADT as well as a claim against any past application of DADT that prevents someone from reenlisting in the armed forces. Regardless of whether DADT's basis was morality or morality plus, *Witt* provides a framework and a standard of review that any court could follow to strike down the law. And *Witt* does not even consider the moral duty we owe to our national security or the moral duty we owe to the men and women who choose to serve to protect us all. If the Supreme Court truly wanted to take a stand and show how far it has come in its understanding of the human condition, it should hold that LGBT individuals are a protected class, and any laws curtailing LGBT rights must be considered under the most searching constitutional scrutiny—strict scrutiny. Now that Congress has acted to repeal DADT, it is time for the Court to do something about the ongoing discrimination

²⁹⁵ *Lofton v. Sec'y of the Dep't of Childr And Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004) ("the holding of *Lawrence* does not control the present case. Apart from the shared homosexuality component, there are marked differences in the facts of the two cases.").

²⁹⁶ *Scarborough*, *supra* note 61.

against homosexuals by deeming them a protected class under the constitution.