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Quasi-Suspect Status for Homosexuals in Equal Protection Analysis: Equality Foundation of Greater Cincinnati v. City of Cincinnati

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QUASI-SUSPECT STATUS FOR HOMOSEXUALS IN
EQUAL PROTECTION ANALYSIS: EQUALITY
FOUNDATION OF GREATER CINCINNATI
V. CITY OF CINCINNATI

INTRODUCTION

Gays, lesbians, and bisexuals have suffered from
discrimination in this country since before the creation of the
Constitution. All thirteen original states had anti-sodomy laws
when the Bill of Rights was ratified, and until 1961, all fifty
states outlawed sodomy. Most courts have been reluctant to
extend heightened scrutiny to laws that discriminate on the basis
of sexual orientation because those courts have defined sexual
orientation on the basis of conduct, rather than status. Thus,
courts have held that if the conduct may be criminalized, it
cannot be constitutionally protected.

The district court in Equality Foundation of Greater Cincinnativi
City of Cincinnati (Equality I) advanced the fight to provide
gays, lesbians, and bisexuals with protection from discrimination.
It held that homosexuals constitute a quasi-suspect class for
purposes of equal protection analysis, thus requiring the
application of intermediate scrutiny in any equal protection
challenge of a law that discriminates against homosexuals on the
basis of their sexual orientation. Although the Supreme Court
has considered claims challenging laws that discriminate on the
basis of homosexual conduct, the Court has never addressed the

2. Id. at 192-93. In 1961, Illinois decriminalized private, adult, consensual sexual
conduct when it adopted the American Law Institute's Model Penal Code. Id. at 193
n.7. Since then, many states have decriminalized sodomy, but many others have
upheld their anti-sodomy laws. See, e.g., ARIZ. REV. STAT. ANN. § 13-1411 (1993);
ARK. CODE ANN. § 5-14-122 (Michie 1993); FLA. STAT. ANN. § 800.02 (West 1994); KY.
4. Id.
6. Id. at 440.

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question of whether homosexuals constitute a suspect or quasi-
suspect class. Thus, the lower courts are in need of guidance.8

This Comment discusses the purposes of the Equal Protection
Clause, how the district court in Equality I and the Sixth Circuit
Court of Appeals in Equality Foundation of Greater Cincinnati,
Inc. v. City of Cincinnati (Equality II)9 applied the Equal
Protection Clause to sexual orientation, and how these decisions
comport with the current state of the law. This Comment also
considers the future for homosexuals under the Equal Protection
Clause.

I. EQUAL PROTECTION

The Equal Protection Clause of the Fourteenth Amendment of
the United States Constitution provides that no state shall “deny
to any person within its jurisdiction the equal protection of the
laws.”10 Courts have interpreted this provision to mean that all
persons “similarly situated” should be treated alike.11 The Equal
Protection Clause may be viewed as “a tool for overturning those
injurious legislative acts, judicial decisions, and executive or
administrative choices that are motivated by racial or other
unacceptable types of bias.”12 It also

aims to break down legally created or legally reenforced
systems of subordination that treat some people as second-
class citizens . . . . When the legal order that both shapes and
mirrors our society treats some people as outsiders or as
though they were worth less than others, those people have
been denied the equal protection of the laws.13

The Constitution gives Congress the power to enforce the
Equal Protection Clause through legislation.14 However, the
absence of congressional direction has required that the courts
develop standards for evaluating the validity of legislation

(Brennan, J., dissenting from denial of certiorari.).
9. 54 F.3d 261 (9th Cir. 1995).
11. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985); see also
12. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-21, at 1515 (2d ed.
1988).
13. Id.
14. U.S. CONST. amend. XIV, § 5. “The Congress shall have power to enforce, by
appropriate legislation, the provisions of this article.” Id.
challenged on equal protection grounds by applying different levels of scrutiny to these laws.\textsuperscript{15}

A. Rational Basis Review

Generally, courts presume that social and economic regulation is valid and must be sustained if the classification drawn by the statute is rationally related to a legitimate state interest or purpose.\textsuperscript{16} This minimal standard of review almost guarantees that the regulation will be upheld and reflects the recognition by courts that a legislature must have some freedom to establish classifications to deal with state or local problems.\textsuperscript{17} Also, the Constitution presumes that most legislative problems will be corrected at the ballot box.\textsuperscript{18} However, such a deferential standard is sometimes undesirable. In such cases, the courts will apply a higher standard of review.

B. Strict Scrutiny

The courts will apply a strict scrutiny standard of review when legislation is inconsistent with “elemental constitutional premises.”\textsuperscript{19} Such inconsistency occurs when legislation is considered “presumptively invidious”\textsuperscript{20} because it infringes on a “fundamental right”\textsuperscript{21} or disadvantages a “suspect class.”\textsuperscript{22} Strict scrutiny requires that legislation be narrowly tailored to serve a compelling governmental interest in order to be constitutionally valid.\textsuperscript{23}

Statutes affecting fundamental constitutional rights—those rights that the courts have either held to be included in the Constitution itself or have recognized as fundamental—are subject to strict scrutiny.\textsuperscript{24} These rights are considered “implicit in the concept of ordered liberty”\textsuperscript{25} or “deeply rooted in this

\textsuperscript{15} Cleburne, 473 U.S. at 439-40.
\textsuperscript{16} Id. at 440; 16A Am. Jur. 2d Constitutional Law § 750 (1994).
\textsuperscript{17} Plyler v. Doe, 457 U.S. 202, 216 (1982).
\textsuperscript{18} Cleburne, 473 U.S. at 440.
\textsuperscript{19} Plyler, 457 U.S. at 216.
\textsuperscript{20} Id.
\textsuperscript{21} Id. at 216-17.
\textsuperscript{22} Id. at 216.
\textsuperscript{23} Cleburne, 473 U.S. at 440.
\textsuperscript{24} See Plyler, 457 U.S. at 216-17.
Nation's history and tradition." The Supreme Court has found that such fundamental rights include the right to vote, the right to free speech, and the right to interstate travel.

Courts will also apply strict scrutiny to legislation that disadvantages a suspect class. A classification that is "more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective" may be deemed suspect. Courts have applied strict scrutiny to legislation that discriminates on the basis of race, ethnic or national origin, and, in some circumstances, alienage.

The Supreme Court has found that, although some classifications do not meet all the criteria necessary to be labeled "suspect" and are therefore not entitled to strict scrutiny, they are nevertheless entitled to greater scrutiny than rational basis review. Thus, the courts created intermediate scrutiny.

C. Intermediate Scrutiny

Legislation that discriminates against a "quasi-suspect" class or infringes upon an important, but not necessarily

31. Id. at 216 n.14. "Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish." Id.
34. Id. at 372, 376.
35. See, e.g., Plyler, 457 U.S. at 223-24. The Supreme Court rejected the argument that illegal aliens are a suspect class but, rather than applying rational basis review, applied intermediate scrutiny to a Texas law excluding illegal aliens from public schools. Id. at 219 n.19, 223-24.
36. The term "quasi-suspect" is of fairly recent origin and, although it has been used by the lower courts, has not been widely used by the Supreme Court. The term was first used in a Supreme Court opinion by Chief Justice Burger, who used it in his dissent in Plyler. 457 U.S. at 244 (Burger, C.J., dissenting).
fundamental, right\textsuperscript{37} is subject to intermediate scrutiny.\textsuperscript{38} The Supreme Court created this intermediate standard of review because strict scrutiny and rational basis review left an unsatisfactory gap in the potential treatment of laws challenged under the Equal Protection Clause.\textsuperscript{39} Before the Court created the intermediate scrutiny standard, a law was either practically guaranteed to be upheld under rational basis review or practically guaranteed to be struck down under strict scrutiny.\textsuperscript{40} “[J]udges are understandably reluctant to constrain themselves with a method that leaves them no choice between total affirmation and total negation.”\textsuperscript{41}

Intermediate scrutiny requires that legislation be substantially related to an important governmental interest in order to be constitutionally valid.\textsuperscript{42} The Supreme Court has applied intermediate scrutiny to laws that discriminate on the basis of gender\textsuperscript{43} and illegitimacy.\textsuperscript{44}

The Supreme Court has never explained why certain factors are important in determining which groups deserve quasi-suspect status,\textsuperscript{45} but some of the factors courts have considered include: the group’s status as a “discrete and insular minorit\textsuperscript{y}”;\textsuperscript{46} the personal immutability of certain characteristics;\textsuperscript{47} the risk that the classification serves to stereotype and stigmatize;\textsuperscript{48} and the political powerlessness of the group.\textsuperscript{49} When a group’s characteristics indicate that the group is both likely to suffer

\footnotesize
37. Courts have determined that the denial of the ability to exercise certain important rights may disempower individuals and lead to the creation of a permanent underclass. See TRIBE, supra note 12, § 16-33, at 1612 & n.15; see, e.g., City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (shelter); Plyler, 457 U.S. 202 (1982) (education); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (medical services); United States Dept. of Agriculture v. Murry, 413 U.S. 508 (1973) (food); Shapiro v. Thompson, 394 U.S. 618 (1969) (welfare benefits).
40. See discussion infra Part IA-B.
41. TRIBE, supra note 12, § 16-33.
42. Cleburne, 473 U.S. at 441.
45. See TRIBE, supra note 12, § 16-33, at 1614.
discrimination and unlikely to have the power to overcome such discrimination, courts are inclined to extend more protection than rational basis review would provide. However, courts are very reluctant to expand suspect status to classifications other than race and national origin. Thus, such groups become quasi-suspect.

II. THE EQUALITY I AND EQUALITY II DECISIONS

The district court in Equality I held that sexual orientation is a quasi-suspect classification entitled to intermediate scrutiny. The Sixth Circuit in Equality II promptly reversed this decision, finding it "novel."

A. Factual Setting

In 1991 and 1992, the Cincinnati City Council enacted two ordinances prohibiting discrimination against certain groups. The Equal Employment Opportunity Ordinance (EEO), enacted in 1991, prohibits discrimination based on sexual orientation in city employment. The Human Rights Ordinance (HRO), enacted in 1992, prohibits discrimination based on sexual orientation in private employment, public accommodations, and housing. The HRO expressly prohibits using the ordinance to create "affirmative action program eligibility" and provides criminal and civil penalties for HRO violations. The HRO also contains a severability clause, so that any provision found invalid

50. See supra notes 46-49.
51. See supra notes 32-34.
54. Id. at 421.
55. Id. The EEO prohibits discrimination based on any sexual orientation: heterosexual, gay, lesbian, or bisexual. It also prohibits discrimination based on race, color, sex, disability, religion, national or ethnic origin, age, HIV status, Appalachian regional ancestry, and marital status. Id.
56. Id. Like the EEO, the HRO prohibits discrimination based on any sexual orientation: heterosexual, gay, lesbian, or bisexual. It also prohibits discrimination based on the other classifications enumerated in the EEO. See supra note 54.
58. Id. at 421 n.2. HRO § 914-11 provides for a fine of $100 per day up to a maximum of $1000 for "substantial non-compliance" with an order to stop offensive practices. Id. HRO § 914-13 provides that failure to comply with an order to stop unlawful discriminatory practices is a fourth degree misdemeanor. Id.
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may be stricken without affecting the validity of the remaining provisions.59

After the legislature enacted the HRO, a group of Cincinnati residents formed “Take Back Cincinnati,” later renamed “Equal Rights Not Special Rights.”60 The group proposed an amendment to the Charter of the City of Cincinnati, known as Issue 3,61 and gathered enough voter signatures to put the amendment to a vote.62 The proposed amendment provided that “[n]o special class status may be granted based upon sexual orientation, conduct or relationships” and prohibited the enactment, enforcement, or administration of any ordinance, regulation, policy, or rule that would afford gays, lesbians, or bisexuals protected status as a minority group.63 The amendment passed by a majority vote of sixty-two percent at the next general election.64

In response to the passage of Issue 3, the plaintiffs, Equality Foundation of Greater Cincinnati, Inc. and a number of gays, lesbians, and bisexuals, filed suit against the City of Cincinnati.65 They challenged the constitutionality of the amendment on several grounds, alleging that it violated their rights to equal protection, free speech, free association, and redress of grievances.66 The plaintiffs further alleged that Issue 3 was unconstitutionally vague.67 This Comment addresses only the equal protection claims.

59. Id. at 421-22 n.3.
60. Id. at 422.
61. Id.
62. Id.
63. Id. The amendment provides in full:

The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment.

This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

64. Id. The vote took place on November 2, 1993. Id.
65. Id. at 422-23.
66. Id. at 422.
67. Id.
The plaintiffs claimed that Issue 3 violated equal protection under any standard of review because it was not rationally related to any legitimate governmental purpose.\(^{68}\) The plaintiffs also claimed that homosexuals constitute a suspect or quasi-suspect class, thus requiring the court to examine the equal protection challenge to Issue 3 under a heightened level of scrutiny.\(^{69}\)

**B. The District Court Decision**

The district court in *Equality I* concluded that Issue 3 violated the plaintiffs’ constitutional right to equal protection. Thus, it held Issue 3 void.\(^{70}\) The court applied strict scrutiny because it found that the amendment violated the plaintiffs’ fundamental right to equal access to the political process.\(^{71}\) The court also found that sexual orientation constitutes a quasi-suspect class.\(^{72}\) The court further stated that the amendment failed not only under strict scrutiny, but also under rational basis review.\(^{73}\)

**1. Fundamental Rights**

The court concluded that Issue 3 violated the plaintiffs’ right to equal protection because it denied them equal access to the political process.\(^{74}\) The court reached this conclusion because it found that Issue 3 excluded homosexuals, lesbians, and bisexuals from the political process by making it especially difficult for them to obtain legislation on their behalf.\(^{75}\) Thus, Issue 3 violated their fundamental right to participate equally in the political process.\(^{76}\)

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68. Id.
69. Id.
70. Id. at 442-43.
71. Id. at 430.
72. Id. at 436.
73. Id. at 441, 444.
75. Equality I, 860 F. Supp. at 429. The court found that the Cincinnati Charter is essentially a constitution and as such is the supreme law of the city, surpassing all other laws. With the adoption of Issue 3, gays, lesbians, and bisexuals must amend the charter in order to obtain any legislation on their behalf. Id. at 428-29.
76. Id. at 430; see also Order, 838 F. Supp. at 1238-42.
The court first found that Issue 3 "singles out persons of 'homosexual, lesbian or bisexual orientation' for unique treatment not imposed upon any other segment of the community." It also concluded that "Issue 3 completely cuts-off gay[s], lesbians and bisexuals from the normal and accessible avenues of political action and political participation, and requires them to seek a charter amendment any time they want or require any rule, regulation, ordinances or policy on their behalf."

The court subjected Issue 3 to strict scrutiny because it found that equal access to the political process is a fundamental right. The court based this conclusion on the decision of the Colorado Supreme Court in Evans v. Romer (Evans I). That court stated: "The right of citizens to participate in the process of government is a core democratic value which has been recognized from the very inception of our Republic up to the present time." The court in Equality I concluded that "any legislation that disadvantages an independently identifiable group of people by making it more difficult for that group to enact legislation in its behalf, 'fences' that group out of the political process, and thereby violates their fundamental rights." Because the effect of Issue 3 was to require gays, lesbians, and bisexuals to amend the city charter in order to obtain legislation on their behalf, the court concluded that Issue 3 violated their fundamental right to equal access to the political process.

2. Quasi-Suspect Status

The court further found that homosexuals, lesbians, and bisexuals are a quasi-suspect class; therefore, intermediate scrutiny must be applied in evaluating the constitutionality of laws that discriminate against them. The court noted that the Supreme Court has not articulated a bright-line rule or specific test for determining whether a group should be accorded suspect

78. Id.
79. Id. at 430; see also Order, 838 F. Supp. at 1238.
80. 854 P.2d 1270 (Colo.) (granting preliminary injunction against enforcement of Issue 3-type amendment to Colorado Constitution), cert. denied, 114 S. Ct. 419 (1993).
81. Id. at 1276.
82. Equality I, 860 F. Supp. at 430; see also Order, 838 F. Supp. at 1241-42.
84. Equality I, 860 F. Supp. at 496.
or quasi-suspect status; instead, it considers several factors. The district court found that the most important factors in determining whether gays, lesbians, and bisexuals constitute a quasi-suspect class are:

1. whether an individual's sexual orientation bears any relationship to his or her ability to perform, or to participate in, or contribute to, society;
2. whether the members of the group have any control over their sexual orientation;
3. whether sexual orientation is an immutable characteristic;
4. whether that group has suffered a history of discrimination based on [its members'] sexual orientation; and
5. whether the class is "politically powerless."

First, the court concluded that sexual orientation has no effect on a person's ability to perform in, participate in, or contribute to society. The court relied on the decision in Cammermeyer v. Aspin, which noted that "there is no study showing [homosexuals] to be less capable or more prone to misconduct [than heterosexuals]." The court also relied on the American Psychological Association's conclusion that homosexuals' ability to perform is not impaired by their sexual orientation. The court further noted that if homosexuals were so impaired, the act of "coming out" of the closet would not exist because the impairment would "betray their status" as homosexuals.

85. Id. at 434.  
86. Id. at 436; see also City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985); Mathews v. Lucas, 427 U.S. 495, 505 (1976); Frontiero v. Richardson, 411 U.S. 677, 686 (1973).  
88. Equality I, 860 F. Supp. at 436; see also Cleburne, 473 U.S. at 442; Frontiero, 411 U.S. at 686.  
93. Id. at 922.  
95. Id.
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The court then found that a person's sexual orientation is beyond that person's control and is unamenable to change.96 The court relied on the testimony of a psychologist,97 who stated that sexual orientation is an involuntary status that develops at a young age, perhaps around the ages of three to five years,98 and that it is unethical to attempt to change a person's sexual orientation.99 The psychologist also testified that sexual orientation and sexual conduct are distinct concepts and that sexual conduct is not necessarily a good indicator of sexual orientation.100 Finally, counsel for the defendants admitted during closing arguments that "sexual orientation is not something that you choose."101 The court therefore concluded that sexual orientation and sexual conduct are separate and independent concepts.102

The court also concluded that "gays, lesbians and bisexuals have suffered a history of invidious discrimination based on their sexual orientation."103 The court based this conclusion on evidence that gays, lesbians, and bisexuals have been mischaracterized as mentally ill and as pedophiles, blacklisted from government service, and "subjected to arrest and censorship" simply because of their sexual orientation.104

Finally, the court reasoned that although gays, lesbians, and bisexuals are not completely politically powerless, they "do suffer significant political impediments."105 The court found that gays, lesbians, and bisexuals, as a political minority, must form coalitions to obtain legislation on their behalf, but are thwarted in this endeavor because many heterosexuals dislike or fear them and thus refuse to associate with them.106 To demonstrate the

96. Id.
97. Id. (testimony of Dr. John Gonsiorek).
98. Id.
99. Id.
100. Id. at 437; see, e.g., Cammermeyer v. Aspin, 850 F. Supp. 910, 919 (W.D. Wash. 1994).
102. Id. at 437.
103. Id. at 436; see also Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of certiorari); High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990), reh'g denied, 909 F.2d 375 (1990); Dahl v. Secretary of the U.S. Navy, 830 F. Supp. 1319, 1324 n.7 (E.D. Cal. 1995).
105. Id. at 437.
106. Id. at 438.
extent of the discrimination that homosexuals face, the court noted that thirty-eight other initiatives similar to Issue 3 had been proposed in other parts of the country and thirty-four of those initiatives were passed by majority vote.\textsuperscript{107} The court concluded that this pervasive general hostility toward homosexuals makes it very difficult for them to participate in the legislative process.\textsuperscript{108}

The court thus determined that gays, lesbians, and bisexuals qualify for quasi-suspect status and that courts must therefore apply intermediate scrutiny to laws that discriminate on the basis of sexual orientation.\textsuperscript{109} Consequently, Issue 3 would have to be substantially tailored to effect an important governmental interest to be constitutionally valid.\textsuperscript{110}

However, the court determined that Issue 3 failed to meet even the lowest level of scrutiny because it was not rationally related to the legitimate governmental interests offered by the city.\textsuperscript{111} The governmental interests proposed by the city included: (1) “not regulating private conduct any more than necessary” by repealing regulations that would give the plaintiffs “protected status”;\textsuperscript{112} (2) “saving scarce resources, both public and private”;\textsuperscript{113} (3) “not imposing a uniform, doctrinaire view concerning the moral relevance of homosexual behavior on all segments of the community”;\textsuperscript{114} (4) giving “legal effect to Cincinnati’s collective notion of morality”;\textsuperscript{115} (5) “protecting and nurturing the nuclear family”;\textsuperscript{116} and (6) “advanc[ing] democracy and political integrity” by preserving the citizens’ “ability to define and limit the powers of their elected representatives.”\textsuperscript{117}

\textsuperscript{107} Id. at 439.
\textsuperscript{108} Id.
\textsuperscript{109} Id. at 440. The court did not explain why it chose to designate sexual orientation as a quasi-suspect class rather than a suspect class. Race and ethnic origin are perhaps the only true “suspect” classes; all other similar classifications are labeled quasi-suspect because they deserve heightened scrutiny even though courts do not consider them to be as inherently suspect as race or ethnic origin. See supra notes 32-34 and accompanying text; see also supra text accompanying note 51.
\textsuperscript{110} Equality I, 860 F. Supp. at 440.
\textsuperscript{111} Id. at 441.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
The court acknowledged that some of the governmental purposes advanced might be legitimate, but stated that:

[We can conceive of no legitimate governmental purpose rationally related to a law which prohibits a minority group from ever obtaining anti-discrimination legislation on its behalf, unless it undertakes the massive and unmitigated—and likely insurmountable—burden of amending the city charter. Such a law implies nothing more than a "bare desire to harm an unpopular group" based on who the members of that group are. The purpose not only to permit discrimination, but also to encourage it, is inherent in the very concept of such a law. As such it is constitutionally defective.]

The court also found that Issue 3 gave effect to private prejudices. It noted that although the "Constitution cannot control private prejudices, 'neither can it tolerate them.'" The court concluded that because of its "sweeping scope," Issue 3 gave effect to private prejudice, at least indirectly. Thus, the court found Issue 3 unconstitutional and declared it void.

C. The Sixth Circuit Decision

On appeal, the United States Court of Appeals for the Sixth Circuit reversed the district court's decision in *Equality I*. The court rejected the theory that Issue 3 discriminated against homosexuals based on their status. It found that:

[No law can successfully be drafted that is calculated to burden or penalize, or to benefit or protect, an unidentifiable group or class of individuals whose identity is defined by subjective and unapparent characteristics such as innate desires, drives, and thoughts. Those persons having a homosexual "orientation" simply do not, as such, comprise an identifiable class.]

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118. *Id.* at 443 (quoting United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)).
119. *Id.* at 444.
120. *Id.* (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)).
122. *Id.*
123. *Id.* at 449.
125. *Id.* at 267.
126. *Id.*
The court concluded that because homosexuals “are not identifiable ‘on sight’ unless they elect to be so identifiable by conduct . . . , they cannot constitute a suspect class or a quasi-suspect class.”¹²⁷

After explaining why it is constitutionally permissible to discriminate against homosexuals on the basis of conduct,¹²⁸ the court concluded that Issue 3 was constitutional even if homosexuals are a “status-defined class.”¹²⁹ The court found that Issue 3 “imposes no punishment or disability . . . but rather merely removes previously legislated special protection against discrimination.”¹³⁰

The Sixth Circuit also held that Issue 3 did not deny homosexuals a fundamental right to participate equally in the political process.¹³¹ Moreover, the court found that no such fundamental right exists and that the district court “erroneously fashioned this innovative right.”¹³² The court concluded that homosexuals can still vote and, if they do not like Issue 3, they may attempt to repeal it.¹³³

Because the court found that Issue 3 did not implicate a suspect or quasi-suspect class and did not burden a fundamental right, it applied rational basis review.¹³⁴ It determined that the trial court erred when it held that Issue 3 was not rationally related to any legitimate state interest.¹³⁵ In fact, the court found that Issue 3 “potentially furthered a litany of valid community interests.”¹³⁶ These valid community interests included encouraging “enhanced associational liberty on the part of Cincinnati residents respecting the sexual orientation issue by eliminating exposure to the punishment mandated by the Human Rights Ordinance against certain persons who elected to disassociate themselves from homosexuals.”¹³⁷ Other such interests cited by the court included “returning the municipal

¹²⁷ Id. (emphasis added).
¹²⁸ Id.; see also Bowers v. Hardwick, 478 U.S. 186 (1986).
¹²⁹ Equality II, 54 F.3d at 267 n.4.
¹³⁰ Id.
¹³¹ Id. at 268.
¹³² Id.
¹³³ Id. at 269.
¹³⁴ Id. at 270.
¹³⁵ Id.
¹³⁶ Id.
¹³⁷ Id.
government to a position of neutrality on the issue and reducing governmental intrusion into the private beliefs of citizens.

III. THE CURRENT STATE OF THE LAW

On October 10, 1995, the United States Supreme Court heard oral arguments in Romer v. Evans. Romer involves a Colorado state constitutional amendment that is very similar to Cincinnati's Issue 3 in that it prohibits the enactment, adoption, or enforcement of any law or ordinance that would protect homosexuals from discrimination. In Evans v. Romer (Evans II), the Colorado Supreme Court had applied strict scrutiny and held that the amendment interfered with the fundamental right of homosexuals to equal participation in the political process. The United States Supreme Court must now decide whether the Colorado Supreme Court erred in this holding.

The petitioners' and respondents' briefs in Romer demonstrate the problem with framing the issue in sexual orientation discrimination cases. The petitioners' brief claims that the amendment merely precludes homosexuals from obtaining special rights, while the respondents' brief states that the amendment excludes homosexuals from equal participation in the political process. The Supreme Court will have to decide which formulation of the issue is proper.

Although the Supreme Court is presently considering whether laws that prohibit the enactment, adoption, or enforcement of laws to protect homosexuals from discrimination violate a fundamental right to equal participation in the political process, the Court has never addressed the question of whether gays,

138. Id.
139. Id.
142. Id. at 1343.
144. See Petitioners' Brief, supra note 143, at *3.
145. See Respondents' Brief, supra note 143, at *2.
lesbians, and bisexuals should be accorded suspect or quasi-suspect status for the purpose of equal protection analysis.146

In Rowland v. Mad River Local School District,147 Justice Brennan dissented from the denial of a writ of certiorari.148 The case involved a high school teacher who told her secretary and other teachers that she was bisexual and was subsequently fired because of her admission.149 The Court of Appeals for the Sixth Circuit had reversed a jury decision in favor of the plaintiff, holding that no equal protection claim could be made because there was “no evidence of how employees with different sexual preferences were treated.”150

Justice Brennan suggested that homosexuals might deserve suspect or quasi-suspect status.151 Considering the factors the Court has used to determine whether a group deserves suspect or quasi-suspect status, Brennan found that homosexuals “constitute a significant and insular minority of this country’s population,” and that homosexuals are “particularly powerless to pursue their rights openly in the political arena.”152 He also concluded that “it is fair to say that discrimination against homosexuals is ‘likely ... to reflect deep-seated prejudice rather than ... rationality.’”153 Brennan noted that, in dealing with state action discriminating against members of a group on the basis of their status as such, the Supreme Court has traditionally subjected such action to strict or heightened scrutiny.154

146. See supra note 8 and accompanying text.
148. Id.
149. Id. at 1010.
150. Id.
151. Id. at 1014.
152. Id.
154. Id. Justice Brennan cited Gay Alliance of Students v. Matthews, in which a homosexual student group was refused equal access to state university facilities. Id. at 1015 n.9. The court in Gay Alliance invalidated the law on First Amendment grounds, applying an intermediate scrutiny test and finding that the infringement of the homosexual students’ rights to expression and association was not supported by any “substantial governmental interest.” Gay Alliance of Students v. Matthews, 544 F.2d 162, 167 (4th Cir. 1976). Justice Brennan also cited a case in which a criminal statute prohibiting private homosexual conduct was found to infringe on constitutional rights to privacy and equal protection under a “compelling state interest” test. Rowland, 470 U.S. at 1015 n.9 (citing New York v. Onofre, 415 N.E.2d 936 (N.Y. 1980), cert. denied, 451 U.S. 987 (1981)). Further, Justice Brennan cited a case in the military context that noted a split of authority as to whether private consensual
Justice Brennan further noted that the lower courts are in “some disarray” on the questions of whether constitutional rights are infringed in sexual preference cases and whether there exists a compelling state interest to permit their infringement.\textsuperscript{155} He concluded that the answers to these questions are of “national importance” and “cannot any longer be ignored.”\textsuperscript{156} However, eleven years later, the Supreme Court has yet to address these questions.

As the district court in \textit{Equality I} noted, the circuit courts of appeals that have considered whether sexual orientation should be accorded suspect or quasi-suspect status have decided that it should not.\textsuperscript{157} Many of these courts have based their decisions on the theory that \textit{Bowers v. Hardwick}\textsuperscript{158} precludes such a finding because \textit{Hardwick} held that homosexuality is conduct that may be criminalized and, therefore, cannot be constitutionally protected.\textsuperscript{159}

\textbf{A. The Hardwick Decision}

In \textit{Hardwick}, the Supreme Court held that there is no fundamental constitutional right to engage in homosexual sodomy and that laws that discriminate on the basis of such sexual conduct are constitutional.\textsuperscript{160} The Court reasoned that sodomy has historically been criminalized and is still a criminal offense in many states.\textsuperscript{161} In denying the plaintiff’s claim, the Court noted that all thirteen original states had anti-sodomy laws when the Bill of Rights was ratified, so that “to claim that a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’\textsuperscript{162} or ‘implicit in the concept of ordered liberty’\textsuperscript{163} is, at best, facetious.”\textsuperscript{164}

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homosexual activity is constitutionally protected, but held that the military had a “compelling interest” in regulating homosexual conduct. \textit{Id.} (citing Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984)).

\textsuperscript{155} \textit{Rowland}, 470 U.S. at 1015-16.

\textsuperscript{156} \textit{Id.} at 1018.


\textsuperscript{158} 478 U.S. 186 (1986).

\textsuperscript{159} \textit{Equality I}, 860 F. Supp. at 439.

\textsuperscript{160} \textit{Hardwick}, 478 U.S. at 191.

\textsuperscript{161} \textit{Id.} at 190, 192-94.

\textsuperscript{162} \textit{Id.} at 191, 194 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

\textsuperscript{163} \textit{Id.} at 192, 194 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).

\textsuperscript{164} \textit{Id.} at 194.
B. The Lower Courts' Decisions

Many lower courts have held that the decision in Hardwick bars any equal protection claim by homosexuals. For example, in Padula v. Webster, the Court of Appeals for the District of Columbia held that the decision in Hardwick poses an "insurmountable barrier[]" to the claim that homosexuals constitute a suspect or quasi-suspect class. In Padula, the plaintiff challenged Federal Bureau of Investigation hiring policies as unconstitutional because the FBI failed to hire her after she confirmed their suspicion that she was a lesbian. The plaintiff claimed that sexual orientation encompasses both status and conduct and that homosexuality should be recognized as a suspect or quasi-suspect class. The court declined to find that homosexuals constitute a suspect or quasi-suspect class, noting that:

It would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause. More importantly, in all those cases in which the Supreme Court has accorded suspect or quasi-suspect status to a class, the Court's holding was predicated on an unarticulated, but necessarily implicit, notion that it is plainly unjustifiable (in accordance with standards not altogether clear to us) to discriminate invidiously against the particular class. If the Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious.

In High Tech Gays v. Defense Industrial Security Clearance Office, the Ninth Circuit held that laws that discriminate on the basis of homosexuality are not subject to heightened scrutiny. The court based its decision, in part, on the Supreme Court's ruling in Hardwick that homosexual activity is not a fundamental right, concluding that "if there is no

165. 822 F.2d 97 (D.C. Cir. 1987).
166. Id. at 102.
167. Id. at 99.
168. Id. at 102.
169. Id. at 103 (citations omitted).
170. 895 F.2d 563 (9th Cir.), reh'g denied 909 F.2d 375 (1990).
171. Id. at 573.
fundamental right to engage in homosexual sodomy under the Due Process Clause of the Fifth Amendment, it would be incongruous to expand the reach of equal protection to find a fundamental right of homosexual conduct under the equal protection component of the Due Process Clause of the Fifth Amendment."

In reversing the district court’s decision that homosexuals constitute a quasi-suspect class, the Ninth Circuit noted that the Supreme Court has never subjected laws that discriminate on the basis of homosexuality to a heightened standard of review. The court concluded that homosexuals do not constitute a suspect or quasi-suspect class because, although homosexuals have suffered a history of discrimination, homosexuality is not an immutable characteristic because it is behavioral and, therefore, can be controlled or changed. It also based its decision on the conclusion that homosexuals do not lack political power because they can vote and thus have a voice in government.

In Ben-Shalom v. Marsh, the Seventh Circuit upheld an Army regulation that discriminated against homosexuals on the theory that the regulation was based on homosexual conduct, not status. In Ben-Shalom, the Army discharged the plaintiff after she admitted that she was a lesbian in violation of an Army regulation. The Seventh Circuit reversed the district court’s decision that homosexuals constitute a suspect class and that the regulation was therefore subject to strict scrutiny. The court held that, even if a classification based on sexual orientation would invoke heightened scrutiny, the regulation at issue did not because it expressly classified homosexuality on the basis of conduct. The court found that the Army could properly infer that “[p]laintiff’s lesbian acknowledgement, if not an admission of [lesbian] practice, at least can rationally and reasonably be

172. Id. at 571 (citation omitted).
173. Id. at 573.
174. Id. Homosexuality “hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes.” Id.
175. Id. at 574 (noting that a number of states have enacted antidiscrimination statutes to protect homosexuals).
177. Id. at 464.
178. Id. at 457.
179. Id. at 464.
180. Id.
viewed as reliable evidence of a desire and propensity to engage in homosexual conduct."\textsuperscript{181} The court further stated that the Army need not "be compelled to engage in the sleuthing of soldiers' personal relationships for evidence of homosexual conduct in order to enforce its ban on homosexual acts . . . . The Army need not try to fine tune a regulation to fit a particular lesbian's subjective thoughts and propensities."\textsuperscript{182}

In \textit{Woodward v. United States},\textsuperscript{183} the Federal Circuit refused to afford quasi-suspect status to homosexuals, relying on the theory that discrimination based on conduct, rather than status, is acceptable.\textsuperscript{184} In \textit{Woodward}, the plaintiff claimed that the Navy discharged him because he admitted on a number of occasions that he was gay.\textsuperscript{185} The court refused to accord homosexuality suspect or quasi-suspect status, concluding that homosexuality is behavioral and therefore not immutable.\textsuperscript{186} The court concluded that "[a]fter \textit{Hardwick} it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm."\textsuperscript{187}

The district court in \textit{Dahl v. Secretary of the United States Navy}\textsuperscript{188} considered whether homosexual status constitutes a suspect class, but found that it does not have all the necessary characteristics.\textsuperscript{189} In \textit{Dahl}, the plaintiff was discharged from the Navy for being "a stated homosexual."\textsuperscript{190} The plaintiff claimed that the Navy's policy of excluding homosexuals violated his Fifth Amendment right to equal protection.\textsuperscript{191} The plaintiff argued that homosexuals should be considered a suspect class,\textsuperscript{192} despite the Ninth Circuit's decision in \textit{High Tech Gays} that homosexuality is not an immutable characteristic and that

\begin{thebibliography}{99}
\bibitem{181} Id.
\bibitem{182} Id.
\bibitem{183} 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990).
\bibitem{184} Id. at 1076.
\bibitem{185} Id. at 1069-70.
\bibitem{186} Id. at 1076.
\bibitem{187} Id.
\bibitem{188} 830 F. Supp. 1319 (E.D. Cal. 1993).
\bibitem{189} Id. at 1325.
\bibitem{190} Id. at 1321.
\bibitem{191} Id. at 1322. The Fifth Amendment applies to federal action, while the Fourteenth Amendment applies to state action. Fifth Amendment equal protection claims are treated the same as Fourteenth Amendment equal protection claims. \textit{Id.}; Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975).
\bibitem{192} \textit{Dahl}, 830 F. Supp at 1323 n.4. Plaintiff did not argue that homosexuals constitute a quasi-suspect class. \textit{Id.}
\end{thebibliography}
homosexuals have some political power. The plaintiff based his argument on “two important events [that] have changed the landscape” since the High Tech Gays decision. First, the plaintiff claimed that sexual orientation had since been proven to be “biological, genetic and innate.” Second, the plaintiff claimed that homosexuals obviously do not have political power in light of Congress’s refusal to allow President Bill Clinton to lift the ban on gays in the military.

Although the court recognized that sexual orientation might be an immutable characteristic, it found the plaintiff’s evidence of lack of political power unpersuasive. The court found that the test for political power is not whether the group has control over the legislature, but whether it has a voice. Because it found that homosexuals have such a voice, the court concluded that homosexuals do not constitute a suspect class.

C. Toward Quasi-Suspect Status

Some courts, while declining to decide whether homosexuals constitute a suspect or quasi-suspect class, have invalidated laws discriminatory against homosexuals on equal protection grounds using rational basis review. The court of appeals in Steffan v. Aspin held that Department of Defense Directives were unconstitutional because they were based on prejudice and were not rationally related to any legitimate governmental purpose. The directives instructed that homosexuality is incompatible with military service and required that service

193. Id. at 1323 (citing High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990)).
194. Id.
195. Id.
196. Id. at 1324.
197. Id.
198. Id.
199. Id. However, the court concluded that separating the plaintiff from the Navy based solely on his statement of sexual orientation was unconstitutional. Id. at 1338. The court stated that “policies based on or motivated by the prejudice of one group towards another do not further any conceivable legitimate government interest and must be deemed irrational as a matter of law.” Id. at 1331. Applying the rational-basis test, the court found not only that prejudice against homosexuals was the only basis for the policy, but further stated that “the court cannot conceive of any legitimate basis for the policy.” Id. at 1332.
200. 8 F.3d 57 (D.C. Cir. 1993).
201. Id. at 59, 65, 67, 70.
members who state that they are homosexual must be discharged.\textsuperscript{202} The court expressly declined to rule on whether homosexuals constitute a suspect or quasi-suspect class.\textsuperscript{203} However, the court distinguished between equal protection challenges to laws that discriminate on the basis of homosexual conduct and challenges to laws that discriminate on the basis of homosexual status.\textsuperscript{204} On the basis of this distinction, the court implied that \textit{Hardwick} would not apply in the \textit{Steffan} case because the regulation in question discriminated on the basis of status rather than conduct.\textsuperscript{205}

In \textit{Cammermeyer v. Aspin},\textsuperscript{206} the plaintiff was discharged from the National Guard because she admitted that she was a lesbian.\textsuperscript{207} Like the court in \textit{Steffan}, the district court in \textit{Cammermeyer} did not address whether homosexuals should be accorded suspect or quasi-suspect status because both the plaintiff and the defendant agreed that rational basis review was the proper standard.\textsuperscript{208} However, the court in \textit{Cammermeyer} discussed the difference between status and conduct extensively.\textsuperscript{209} The court found that the plaintiff's admission of lesbian orientation was not reliable evidence that she did or would engage in homosexual conduct.\textsuperscript{210} The court concluded that the only possible motivation for excluding acknowledged homosexuals from the military was prejudice and, thus, the governmental purpose was not legitimate.\textsuperscript{211}

The decision in \textit{Watkins v. United States Army}\textsuperscript{212} provides another example of a court avoiding the suspect or quasi-suspect question. There, the Ninth Circuit bypassed the equal protection question in a soldier's action challenging revocation of a security clearance and imminent discharge based on his open homosexuality.\textsuperscript{213} Instead, the court estopped the Army from discharging the plaintiff on the theory that, because the plaintiff

\begin{thebibliography}{1}
\bibitem{202} \textit{Id.} at 59.
\bibitem{203} \textit{Id.} at 62-63.
\bibitem{204} \textit{Id.}
\bibitem{205} \textit{Id.}
\bibitem{206} 850 F. Supp. 910 (W.D. Wash. 1994).
\bibitem{207} \textit{Id.} at 912.
\bibitem{208} \textit{Id.} at 914.
\bibitem{209} \textit{Id.} at 918-20.
\bibitem{210} \textit{Id.} at 920.
\bibitem{211} \textit{Id.} at 924-26.
\bibitem{212} 875 F.2d 699 (9th Cir. 1989).
\bibitem{213} \textit{Id.} at 701-02, 705.
\end{thebibliography}
had been completely candid about his homosexuality throughout his fourteen-year career and the Army had repeatedly violated its own anti-homosexual policy by continuing to re-enlist the plaintiff despite his admission, the Army had waived its right to discharge the plaintiff on the basis of his homosexuality.\textsuperscript{214}

In a concurring opinion, Judge Norris addressed the plaintiff’s equal protection claim and concluded that homosexuals constitute a suspect class.\textsuperscript{215} He determined that \textit{Hardwick} did not bar the plaintiff’s claim because \textit{Hardwick} was a due process case involving homosexual conduct, while \textit{Watkins} was an equal protection case involving homosexual status.\textsuperscript{216} Considering the factors courts have used to determine whether a group should be accorded suspect or quasi-suspect status, Judge Norris found that: homosexuals have “suffered a history of purposeful discrimination”,\textsuperscript{217} sexual orientation is not related to a person’s “ability to perform or contribute to society”,\textsuperscript{218} sexual orientation is an immutable characteristic for equal protection purposes,\textsuperscript{219} and homosexuals lack political power.\textsuperscript{220} Because homosexuals have all the necessary characteristics, Judge Norris concluded that homosexuals constitute a suspect class.\textsuperscript{221}

\textbf{IV. THE FUTURE OF EQUAL PROTECTION AND THE CONDUCT V. STATUS PROBLEM}

Courts have been reluctant to extend heightened scrutiny under the Equal Protection Clause to homosexuals in the form of suspect or quasi-suspect status. However, there are strong arguments that homosexuals are exactly the type of group that the Equal Protection Clause was meant to protect.\textsuperscript{222} The purpose of equal protection is to protect disadvantaged groups from discrimination,\textsuperscript{223} and homosexuals have traditionally

\begin{itemize}
\item \textsuperscript{214} \textit{Id.} at 704-11.
\item \textsuperscript{215} \textit{Id.} at 728 (Norris, J., concurring in judgment, but dissenting from majority’s holding that judgment should rest on doctrine of equitable estoppel).
\item \textsuperscript{216} \textit{Id.} at 717.
\item \textsuperscript{217} \textit{Id.} at 724.
\item \textsuperscript{218} \textit{Id.} at 725.
\item \textsuperscript{219} \textit{Id.} at 726.
\item \textsuperscript{220} \textit{Id.} at 727.
\item \textsuperscript{221} \textit{Id.} at 728.
\item \textsuperscript{222} See \textit{Tribe, supra} note 12, § 16-33, at 1616.
\item \textsuperscript{223} See \textit{supra} notes 10-13.
\end{itemize}
suffered from discrimination on the basis of their sexual orientation. The Equal Protection Clause is emphatically not an effort to protect traditionally held values against novel or short-term deviations. It is implausible to describe the role of the Supreme Court, under the Equal Protection Clause, as the provision of a sober second thought to legislation or the defense of tradition against pent-up majorities. The clause is not backward-looking at all; it was self-consciously designed to eliminate practices that existed at the time of ratification and that were expected to endure.

The main obstacle to finding that homosexuals constitute a quasi-suspect class is the distinction between conduct and status. This distinction may easily be used by the courts to make outcome-based decisions. If a court is sympathetic to the plight of homosexuals, it may define homosexual orientation on the basis of status and find that the class is suspect or quasi-suspect. But, if a court is not sympathetic, it may define sexual orientation on the basis of conduct and find that the class is neither suspect nor quasi-suspect. Unless the United States Supreme Court overrules Hardwick or expressly determines that homosexuals do not constitute a suspect or quasi-suspect class, the lower courts remain split on how to deal with legislation that discriminates on the basis of sexual orientation.

CONCLUSION

The future of laws that discriminate on the basis of sexual orientation remains unclear. As the court in Equality I noted, every circuit court that has addressed the issue of whether homosexuals should be accorded suspect or quasi-suspect status has decided they should not, including the court in Equality II. Regardless of the manner in which the courts frame the issue to arrive at their decisions, homosexuals as a class possess all the characteristics the Supreme Court uses to determine whether a group should be given suspect or quasi-suspect status.

224. See supra notes 107-08.
Recent decisions seem to indicate that courts are slowly beginning to recognize that homosexuals constitute a class in need of protection from discrimination. This recognition is apparent both in decisions in which the courts find that laws discriminating on the basis of sexual orientation fail rational basis review because prejudice is not a legitimate governmental interest, and in decisions in which the courts declare that sexual orientation constitutes a suspect or quasi-suspect class.

Discrimination based on long-established prejudice is difficult to abolish. Once such discrimination is recognized, it may be challenged, as history has demonstrated through both the Civil Rights movement and the women’s movement for equality. Courts reserve heightened scrutiny for only those groups considered most deserving and are reluctant to expand equal protection to include new classes of disadvantaged groups. However, sexual orientation seems to be the next obvious classification that should be protected under the Equal Protection Clause. Perhaps someday the courts will see beyond the traditional prejudices against homosexuality and determine that homosexuals deserve the equal protection of the laws as much as any other suspect or quasi-suspect class.

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