COMMENT

Dronenburg v. Zech: Strict Construction or Abdication of Judicial Responsibility?

*By Howard L. Pearlman**

Introduction

The question whether the United States Constitution protects the private, consensual sexual conduct of homosexuals from government regulation has "swirled nationwide for many years."[1] The issue has arisen primarily in criminal prosecutions under state sodomy statutes[2] and in discharge proceedings pursuant to military regulations proscribing homosexual activity.[3] Defendants have argued that to the extent statutes or regulations punish private, consensual sexual behavior, they violate rights of privacy and equal protection under the Fourteenth Amendment. States generally have argued that they have the right to proscribe homosexuality, no matter how privately practiced, in order to promote "morality and decency."[4] The military has argued further that the pres-

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1. *See* Rowland v. Mad River Local School Dist., 105 S. Ct. 1373, 1375 (1985) (Brennan, Marshall, JJ., dissenting from denial of cert., quoting 730 F.2d 444, 453 (6th Cir. 1984) (Edwards, J., dissenting)).

2. *E.g.*, Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), *summarily aff'g* 403 F. Supp. 1199 (E.D. Va. 1975); Hardwick v. Bowers, 760 F.2d 1202 (11th Cir.), *cert. granted*, 106 S. Ct. 342 (1985); Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985); New York v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981). *See* New York v. Uplinger, 104 S. Ct. 64 (1983) (cert. granted), *cert. denied as improvidently granted*, 104 S. Ct. 2332 (1984) (per curiam). *See generally* Comment, *The Right of Privacy and Other Constitutional Challenges to Sodomy Statutes*, 15 U. TOL. L. REV. 811 (1984).

3. *E.g.*, Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984), *reh'g en banc denied*, 746 F.2d 1579 (D.C. Cir. 1984); Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), *cert. denied sub nom.* Beller v. Lehman, 452 U.S. 905 (1981); *see* Matthews v. Marsh, No. 82-0216 (D. Me. Apr. 3, 1984); benShalom v. Secretary of Army, 489 F. Supp. 964 (E.D. Wis. 1980) (homosexual "tendencies" without overt homosexual activity). *See generally* Comment, *Employment Discrimination in the Armed Services—An Analysis of Recent Decisions Affecting Sexual Preference Discrimination in the Military*, 27 VILL. L. REV. 351 (1982).

4. *See, e.g.*, Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1202, 1205 (E.D. Va. 1975).

ence of homosexuals among its members disrupts "discipline, good order and morale,"[5] which impairs its ability to carry out its duties.

The Supreme Court has never resolved this issue[6] or articulated a principle of personal privacy to explain its right-to-privacy decisions. In the absence of clear guidance, lower courts have divided sharply over the appropriate standard of review for regulations of private homosexual behavior. Some courts have discerned in the Supreme Court's cases a principle of personal privacy or autonomy broad enough to protect private, consensual homosexual conduct from regulations that are not narrowly tailored to meet a compelling governmental interest.[7] Others have refused to extend the right to privacy beyond its stated contours and, in the absence of a constitutionally protected right, have upheld regulations of homosexual activity under a minimum rationality test.[8]

In *Dronenburg v. Zech*,[9] the United States Court of Appeals for the District of Columbia Circuit recently reinforced this latter view and rejected due process and equal protection challenges to a Navy policy requiring mandatory discharge for homosexual conduct. Judge Robert Bork,[10] writing for the court, concluded that the Supreme Court privacy cases do not state a principle broad enough to include homosexual con-

5. Dronenburg v. Zech, 741 F.2d 1388, 1398 (D.C. Cir. 1984) (quoting SEC/NAV Instruction 1900.9D (Mar. 12, 1981)). *See* Beller v. Middendorf, 632 F.2d 788, 801-04 (9th Cir. 1980).

6. The Supreme Court has only indirectly addressed the issue by way of its summary affirmance in Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976). *See* discussion of *Doe, supra* Part II.B and accompanying notes. This Term, the Supreme Court will address the issue in Hardwick v. Bowers, *cert. granted,* 106 S. Ct. 342 (1985). *See infra* note 122. The Supreme Court earlier indicated a willingness to address the issue when it granted certiorari in New York v. Uplinger, 104 S. Ct. 64 (1983); after briefing and oral argument, however, the Court dismissed the writ of certiorari as improvidently granted. 104 S. Ct. 2332 (1984) (per curiam).

7. *See, e.g.,* Hardwick v. Bowers, 760 F.2d 1202, 1213 (11th Cir.), *cert. granted,* 106 S. Ct. 342 (1985); Baker v. Wade, 553 F. Supp. 1121, 1141 (N.D. Tex. 1982), *rev'd,* 769 F.2d 289 (5th Cir. 1985); New York v. Onofre, 51 N.Y.2d 476, 488, 415 N.E.2d 936, 940-41, 434 N.Y.S.2d 947, 951 (1980). *See also* Miller v. Rumsfeld, 647 F.2d 80, 81 (9th Cir. 1981) (Norris, J., dissenting); Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1203, 1205 (E.D. Va. 1975) (Merhige, J., dissenting).

8. Dronenburg v. Zech, 741 F.2d 1388, 1397-98 (D. C. Cir. 1984); Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1202-03 (E.D. Va. 1975); cf. Rich v. Secretary of the Army, 735 F.2d 1220, 1227 n.7, 1228-29 (10th Cir. 1984) (military's "compelling interest" in regulating homosexual conduct); Beller v. Middendorf, 632 F.2d 788, 807 (9th Cir. 1980) (applying a case-by-case balancing of the individual interest and the importance of the governmental interest involved, the degree of infringement, and "the sensitivity of the government entity" to tailor more carefully its regulation to meet its goals).

9. 741 F.2d 1388 (D.C. Cir. 1984).

10. Judge Bork, while a professor at Yale Law School, advocated so-called "judicial self-restraint" and strict construction of the Constitution. *See, e.g.,* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1-20 (1971); Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695 (1979). Judge Bork and Judge Scalia, the two Circuit Judges on the *Dronenburg* panel, are considered to be high on President Reagan's list of future Supreme Court appointees.

duct and that a lower court should not "create" such a right.[11] Because the regulation did not impinge on a "fundamental" constitutional right, the court refused to apply "strict scrutiny" review under the Equal Protection Clause.[12] Applying minimum rationality review, the court upheld the Navy regulation as rationally related to the legitimate end of legislating morality and, alternatively, to legitimate interests of the military.[13] In reaching this determination, the *Dronenburg* court gave an expansive reading to the Supreme Court's ambiguous summary affirmance in *Doe v. Commonwealth's Attorney*,[14] even as it declared that lower court judges should narrowly interpret ambiguous constitutional doctrine.[15] Revealing its faith in majoritarian morality and its distrust of the privacy doctrine, the court failed to analyze fully the complex and important constitutional issues involved in *Dronenburg*.

This Comment examines the *Dronenburg* court's privacy and equal protection analyses. Part I presents the facts, holding, and reasoning of *Dronenburg*, as well as the subsequent dissent from denial of rehearing en banc. Part II considers two flaws in the court's analysis of Dronenburg's privacy claim. First, the court did not fully apply the appropriate analysis of summary affirmances in determining the precedential value of *Doe v. Commonwealth's Attorney*. Second, the court unduly restricted the Supreme Court's privacy cases to their facts and too narrowly interpreted pivotal language in these cases. Part III examines arguments for heightened equal protection scrutiny of regulations affecting homosexuals, which the *Dronenburg* court failed to address and analyze. Finally, the Comment concludes that the *Dronenburg* court refused to conduct independent constitutional analysis to resolve the doctrinal ambiguity in this troubled area of the law. As a result, *Dronenburg* is precedent for denying the personal liberty of homosexuals without any justification beyond notions of "judicial restraint," "common sense," and traditional prejudice.

I. *Dronenburg v. Zech*

A. The Facts

James Dronenburg, a twenty-seven-year-old petty officer, served in the Navy for nine years with an unblemished service record, earning citations for outstanding job performance and obtaining a top security clearance.[16] While studying at the Defense Language Institute, he became involved in a homosexual relationship with another student, a 19-year-

11. 741 F.2d at 1397.
12. *See id.* at 1397-98.
13. *Id.*
14. 425 U.S. 901 (1976), *summarily aff'g* 403 F. Supp. 1199 (E.D. Va. 1975).
15. 741 F.2d at 1396 n.5.
16. *Id.* at 1389.

old seaman recruit. The recruit broke off the relationship and made sworn statements implicating Dronenburg in repeated homosexual acts.[17] The Navy gave Dronenburg formal notice that it was taking administrative action under a Navy regulation mandating discharge of any serviceman who engages in homosexual acts.[18] At a hearing before a Navy Administrative Discharge Board, Dronenburg admitted to engaging in homosexual acts in the barracks. The Board recommended a "general" discharge but, on review, the Secretary of the Navy ordered that Dronenburg be honorably discharged.[19]

Dronenburg brought an action in federal court, alleging that the Navy's policy requiring discharge of all practicing homosexuals violated his constitutional rights to privacy and to equal protection of the laws.[20] He sought an injunction against the discharge and an order of reinstatement.[21] The district court granted summary judgment for the Navy, holding that private, consensual homosexual conduct is not constitutionally protected.[22] After he was honorably discharged, Dronenburg appealed the district court's decision to the United States Court of Appeals for the District of Columbia Circuit.

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17. *Id.*

18. The Navy regulation involved provided in relevant part: "[A]ny member who solicits, attempts or engages in homosexual acts shall normally be separated from the naval service. The presence of such a member in a military environment seriously impairs combat readiness, efficiency, security and morale." *Id.* (citing SEC/NAV Instruction 1900.9C (Jan. 20, 1978)). The regulation did, however, permit retention only if the homosexual act was found to be a single occurrence not likely to recur or to have an adverse effect on the soldier's military performance or on the morale and discipline of his unit. *Id.* at 1389 n.1 (citing SEC/NAV Instruction 1900.9C(6)(b) (Jan. 20, 1978)). SEC/NAV Instruction 1900.9D (Mar. 12, 1981) replaced and continued the policy of Instruction 1900.9C. *Id.*

19. 741 F.2d at 1389. There are five types of discharges from the military: honorable, general, undesirable, bad conduct, and dishonorable. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States,* 30 HASTINGS L.J. 799, 839 (1979). Only the first three may be given as a result of the administrative process; the latter two may only be given as a result of court-martial. *Id.* There are significant practical differences between an "honorable" and "general" discharge; first, because over ninety percent of military personnel are honorably discharged, a lesser designation may stigmatize the soldier in civilian life and his career. Second, certain veterans' benefits differ according to the type of discharge. *Id. See generally* 38 U.S.C. §§ 310, 331 (1982); Note, *Homosexuals in the Military,* 37 FORDHAM L. REV. 465, 468-73 (1969).

20. 741 F.2d at 1388-89.

21. Dronenburg had amended his complaint to eliminate a damages claim. The court, as a threshold matter, dismissed the government's argument that it lacked jurisdiction and asserted jurisdiction on two grounds: (1) the federal courts have jurisdiction to determine the constitutionality of military discharges, Matlovich v. Secretary of the Air Force, 591 F.2d 852, 859 (D.C. Cir. 1978), and (2) the United States and its officers are not insulated from suit for injunctive relief by the doctrine of sovereign immunity. Schnapper v. Foley, 667 F.2d 102, 107 (D.C. Cir. 1981), *cert. denied,* 455 U.S. 948 (1982).

22. 741 F.2d at 1389.

B. The Decision

Dronenburg argued on appeal that private, consensual homosexual activity is within the constitutional right of privacy first recognized by the Supreme Court in *Griswold v. Connecticut*.[23] He contended that *Griswold* and subsequent privacy decisions established " 'that the government should not interfere with an individual's freedom to control intimate personal decisions regarding his or her own body' except by the least restrictive means available and in the presence of a compelling state interest."[24]

The court flatly rejected this argument and held that the Supreme Court had not defined the right to privacy so broadly as to include homosexual conduct and that the District of Columbia Circuit, as a lower court, should not "create" such a right.[25] In reaching this holding, the court commented on the "peculiar jurisprudential problem"[26] posed by the case. Judge Bork stated that "no court should create new constitutional rights" which are not "fairly derived by standard modes of legal interpretation from the text, structure, and history of the Constitution."[27] According to Judge Bork, however, when the Supreme Court "creates" new constitutional rights, lower courts are "bound absolutely" by that determination[28] and should limit their analysis of these rights to principles clearly stated by the Supreme Court.[29]

The first step in the court's analysis was to consider whether Supreme Court precedent applied. The court determined that the Supreme Court's summary affirmance in *Doe v. Commonwealth's Attorney*[30] was binding precedent for the proposition that the constitutional right to privacy does not include homosexual acts. In *Doe*, male homosexuals sought to bar enforcement of a Virginia criminal sodomy stat-

23. 381 U.S. 479 (1965).

24. 741 F.2d at 1391 (quoting Appellant's Opening Brief on Appeal at 15).

25. *Id.* at 1397.

26. *Id.* at 1395.

27. *Id.* at 1396 n.5. *See* Bork, *Neutral Principles and Some First Amendment Problems, supra* note 10, at 8.

28. 741 F.2d at 1396 n.5. While the court said it was doubtful whether the Supreme Court *should* create such rights, it was certain that lower courts should not. *Id.* at 1396. The court warned that if lower courts were to create new rights freely, many of these decisions would evade Supreme Court review and "a great body of judge-made law" would result, preempting " 'another part of the governance of the country without express constitutional authority.' " *Id.* at 1397 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting)).

29. *Id.* at 1395. "The only questions open for [a lower court judge] are whether the Supreme Court has created a right which, fairly defined, covers the case before us or whether the Supreme Court has specified a mode of analysis, a methodology, which, honestly applied, reaches the case we must now decide." *Id.* at 1396 n.5.

30. 425 U.S. 901 (1976), *summarily aff'g* 403 F. Supp. 1199 (E.D. Va. 1975). Three justices dissented, noting probable jurisdiction. 425 U.S. 901 (1976) (Brennan, Marshall, Stevens, JJ., dissenting).

ute[31] as it related to their private, consensual sexual activity. The district court refused to extend the right to privacy to homosexual conduct because such conduct bears no relation to marriage, home, or family life,[32] and the Supreme Court summarily affirmed. The *Dronenburg* court stated that the Court's summary disposition was a vote on the merits, which bound lower courts.[33] The court then reasoned that if a proscription on homosexual conduct was sustainable in a civilian context, it was clearly sustainable in a military context in light of the military's need for discipline and order.[34]

Dronenburg argued, however, that the summary affirmance in *Doe* was based not on the constitutional question but on plaintiffs' lack of standing.[35] Although the *Dronenburg* court agreed that the *Doe* plaintiffs may have lacked standing because they were not threatened with prosecution, it refused to limit the precedential scope of *Doe*. To support this conclusion, the court stated that the district court decision in *Doe* was based on the constitutional issue and that the Supreme Court had given no indication that its summary affirmance was based on an alternative ground.[36]

The court's analysis, however, did not end with *Doe*. Rather, remarking that *Doe* is "somewhat ambiguous precedent,"[37] the court proceeded to examine the Supreme Court's privacy cases. The court moved from case to case, quoting select passages to demonstrate that each case failed to state a privacy principle broad enough to include a right to homosexual conduct.[38] In the absence of any clear Supreme Court gui-

31. The statute challenged in *Doe* provided in relevant part: " 'If any person shall . . . carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a felony . . . .' " Doe v. Commonwealth's Attorney, 403 F. Supp. at 1200 (quoting VA. CODE § 18.1-212 (1950)).

32. 403 F. Supp. at 1202.

33. 741 F.2d at 1392.

34. *Id.*

35. *Id.* This standing argument was made earlier by Professor Tribe. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 943 (1978).

36. 741 F.2d at 1392.

37. *Id.*

38. *Id.* at 1392-95. The court's terse conclusions are summarized as follows: *Griswold v. Connecticut* "stressed the sanctity of marriage," but did not indicate what other activities were protected by the "penumbral" right to privacy or how to reason about future claims. *Loving v. Virginia* held that denial of the fundamental freedom to marry on the basis of racial classification was a violation of equal protection and due process; nothing in this favors plaintiff. *Eisenstadt v. Baird* provided a test: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S. 438, 453. This test failed to provide criteria by which to determine whether the governmental regulation involved was "unwarranted" and whether it involved a matter "so fundamentally affecting a person . . . ." *Roe v. Wade* located the right to privacy in the Fourteenth Amendment's concept of personal liberty and restriction on state action and included in the right to privacy only personal rights that are "fundamental" or "implicit in the concept of ordered

dance, the court confined these decisions to their factual underpinnings—marriage, procreation, contraception, family relationships and childrearing—and concluded: "It need hardly be said that none of these covers a right to homosexual conduct."[39]

The court then considered whether a more general principle of privacy underlies these decisions and applies to situations not addressed by the Supreme Court. Again the court restricted its inquiry to language in Supreme Court opinions. The only guidance it found was in *Roe v. Wade,*[40] in which the Court ruled that only those rights deemed "fundamental" or "implicit in the concept of ordered liberty" are included in the right to privacy.[41] The *Dronenburg* court found these formulations to be mere "conclusions about particular rights enunciated"[42] that failed to prescribe a workable analytic principle. Notwithstanding this criticism, the court applied the test it discerned in *Roe* to concluded that the right to homosexual conduct is not "fundamental" or "implicit in the concept of ordered liberty."[43]

The court then addressed Dronenburg's contention, based on general constitutional principle, that the fact " 'that the particular choice of partner may be repugnant to the majority argues for its vigilant protection—not its vulnerability to sanction.' "[44] The court interpreted this as equivalent to the proposition that majority morality is always presumptively invalid under the Constitution. With this the court strongly disagreed, stating that when the Constitution does not speak to the contrary, the choices of officials elected by the majority are conclusively valid.[45] Legislative majorities can make moral choices contrary to the desires of minorities, and this right, according to the court, is the basis of valued legislation in areas such as civil rights, worker safety, and the environment. Thus, the court reasoned that Dronenburg's argument, which would undermine the basis of this valued legislation, was not a legitimate basis for invalidation of the Navy regulation.[46]

Finding no interference with a fundamental right of privacy, the court concluded that Dronenburg's right to equal protection was in-

liberty." 410 U.S. 113, 152. Although the *Roe* Court concluded that the right is "broad enough to encompass a woman's decision whether or not to terminate a pregnancy," it failed to articulate a principle explaining what is and is not included in the right to privacy. *Carey v. Population Services International* stated that the "underlying foundation" of the holdings in *Griswold, Eisenstadt,* and *Roe* was that the Constitution protected decisions related to matters of childbearing. *See infra* Part II.C., for a critical analysis of these conclusions.

39. 741 F.2d at 1395-96.
40. 410 U.S. 113 (1973).
41. *Id.* at 152 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
42. *Id.* at 1396.
43. *Id.*
44. *Id.* at 1397 (quoting Appellant's Opening Brief on Appeal at 13).
45. *Id.*
46. *Id.*

fringed only if the Navy regulation failed to pass a minimum rationality test.[47] Based on the premise that implementing morality is a legitimate end, the court found the regulation rationally related to that end.[48] Alternatively, assuming that a Navy regulation must serve some further end of the Navy, the court also concluded that the regulation was "plainly" a rational means of achieving the legitimate end of maintaining military morale and discipline.[49] To ask the question is to answer it, according to the court, given the "unique needs of the military"[50] and because the effects of homosexual conduct within a military unit "are almost certain to be harmful to morale and discipline."[51] Accordingly, the court did not require the Navy to submit "social science data or the results of controlled experiments to prove what common sense and common experience demonstrate."[52]

C. The Dissent from Denial of Rehearing En Banc

Dronenburg's petition for rehearing en banc was denied by a bitterly divided court.[53] Chief Judge Robinson, writing for the four dissenting judges, considered the case of extreme practical and jurisprudential importance and raised several objections to the *Dronenburg* panel's opinion. First, he disagreed with the panel's conclusion that *Doe v. Commonwealth's Attorney* was controlling precedent and accused the panel of holding Dronenburg's constitutional claims "hostage to a one-word summary affirmance."[54] While Chief Judge Robinson offered no view as to whether the constitutional right to privacy protects homosexual conduct or whether military regulations call for a relaxed standard of constitutional review, he found the panel's resolution of these issues unsatisfactory:[55] "Instead of conscientiously attempting to discern the principles underlying the Supreme Court's privacy decisions, the panel has in effect thrown up their hands and decided to confine those decisions to their facts."[56] This method of "interpretation," Robinson suggested, is "an abdication of judicial responsibility."[57]

More generally, the chief judge criticized the panel for substituting "its own doctrinal preferences for the constitutional principles estab-

47. *Id.* at 1398 (citing Kelley v. Johnson, 425 U.S. 238, 247-49 (1976)).
48. *Id.*
49. *Id.*
50. *Id.* (citing Parker v. Levy, 417 U.S. 733, 743 (1974)).
51. *Id.*
52. *Id.*
53. Dronenburg v. Zech, 746 F.2d 1579 (D.C. Cir. 1984) (per curiam) (Robinson, C.J., Wald, Mikva, and Edwards, JJ., dissenting).
54. *Id.* at 1580.
55. *Id.* at 1581.
56. *Id.* at 1580.
57. *Id.*

lished by the Supreme Court."[58] In addition, he accused the panel of failing to apply the minimum rationality test seriously and of failing to describe adequately the rational basis for the challenged Navy policy.[59] Pointing to the disparity between the Navy's mandatory discharge of homosexuals and its case-by-case consideration of problems arising from heterosexual behavior, the chief judge saw the need for "serious equal protection analysis."[60]

II. The Right to Privacy

A. Development of the Constitutional Right to Privacy

Ever since the Supreme Court recognized a constitutionally guaranteed "right of privacy" in *Griswold v. Connecticut,*[61] the doctrine has been difficult to define and apply. Indeed, in *Griswold* itself, although seven justices concluded that a Connecticut statute criminalizing the use of contraceptives violated a fundamental right to marital privacy, they disagreed over the textual source of this right. Justice Douglas saw in the structure of the Constitution "penumbras, formed by emanations from [specific guarantees in the Bill of Rights] that help give them life and substance."[62] According to Justice Douglas, the Third, Fourth, Fifth, and Ninth Amendments combine to create "zones of privacy."[63] The intimate relationship between husband and wife, which the Connecticut statute sought to regulate, falls within one of these zones and is protected from unjustified state intrusion. Justice Goldberg, concurring, argued that the right to marital privacy, though not enumerated in the first eight amendments of the Bill of Rights, nonetheless is a fundamental liberty "retained by the people" and thus protected by the Ninth Amendment.[64]

The most influential opinion in *Griswold* was Justice Harlan's concurrence, reaffirming his position in *Poe v. Ullman* that marital privacy involves an aspect of the "liberty" expressly guaranteed by the Four-

58. *Id.* at 1581.

59. *Id.*

60. *Id.* Judge Bork, in a separate statement joined by Judge Scalia, "could not take seriously" the dissent's call for serious equal protection analysis of the Navy's disparate treatment of heterosexual and homosexual conduct. Judge Bork argued that "moral relativism" was neither required by the Constitution nor was it "the moral stance of a large majority of naval personnel." *Id.* at 1583. Moreover, Judge Bork observed that while the dissent faulted him for failing to recognize a unitary privacy principle in the Supreme Court cases, they conspicuously failed to articulate the principle involved. *Id.*

61. 381 U.S. 479 (1965).

62. *Id.* at 484 (citing Poe v. Ullman, 367 U.S. 497, 516-22 (1961) (Douglas, J., dissenting)).

63. *Id.*

64. *Id.* at 486-87 (Goldberg, J., concurring). The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

teenth Amendment Due Process Clause.[65] To the extent that "liberty" is read as encompassing "privacy,"[66] Justice Harlan's is the view most firmly grounded in the text of the Constitution. According to Harlan, certain rights which are "fundamental"[67] or "implicit in the concept of ordered liberty,"[68] require "particularly careful scrutiny of the state needs asserted to justify their abridgment."[69]

The problem, however, with this formulation is determining the standard by which a particular right is deemed "fundamental" and thus protected by the Due Process Clause. In response to the *Griswold* dissent's criticism that this inquiry is inherently subjective and standardless,[70] Justice Harlan, an advocate of "judicial self-restraint,"[71] did not see the task as hopelessly dependent on the personal opinions of judges seeking to keep the Constitution "in tune with the times."[72] According to Justice Harlan, judicial restraint in this area requires "respect for the teaching of history, solid recognition of the basic values that underlie our society," and appreciation of the doctrines of federalism and separation of powers.[73] Justice Goldberg also stated that determining which rights are fundamental requires examination of the " 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked fundamental.' "[74] In dicta, however, without any searching analysis, Justice Goldberg reaffirmed Justice Harlan's conclusion in *Poe v. Ullman* that criminal prosecution of homosexuality, adultery, fornication, and incest, "however privately practiced,"[75] unlike the sexual intimacies of husband and wife, was not constitutionally

65. 381 U.S. at 500 (citing Poe v. Ullman, 367 U.S. 497, 539-45 (1961) (Harlan, J., dissenting)).

66. As Justice Black observed in his dissent: "One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning." *Griswold,* 381 U.S. at 509 (Black, J., dissenting). Justice Black noted, for example, that "right to privacy" has replaced the Fourth Amendment's guarantee against "unreasonable searches and seizures." *Id.*

67. Poe v. Ullman, 367 U.S. 497, 541 (1961).

68. *Griswold,* 381 U.S. at 500 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)) (Harlan, J., concurring in judgment).

69. *Poe,* 367 U.S. at 543.

70. *See Griswold,* 381 U.S. at 520-21 (Black, J., dissenting).

71. *Id.* at 501. *See* New York Times Co. v. United States, 403 U.S. 713, 756 (1971) (Pentagon Papers case) (Harlan, J., dissenting) (judicial deference to executive branch as to matters of national security); Baker v. Carr, 369 U.S. 186, 333 (1961) (Harlan, J., dissenting). "Judicial restraint," as defined by Judge Bork, is "the philosophy that courts ought not to invade the domain the Constitution marks out for democratic rather than judicial governance." Dronenberg v. Zech, 746 F.2d at 1583.

72. *Griswold,* 381 U.S. at 501.

73. *Id.*

74. *Id.* at 493 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

75. Poe v. Ullman, 367 U.S. at 552.

protected.[76]

After *Griswold,* the Court expanded the right to privacy beyond the marital relationship to protect unmarried individuals. In *Eisenstadt v. Baird,*[77] the Court invalidated a state statute which prohibited the use of contraceptives by *unmarried* couples, declaring: "If the right to privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[78] Thus, while the right of privacy in *Griswold* "inhered in the marital relationship,"[79] the *Eisenstadt* Court defined this relationship not as an "independent entity" but as "an association of two individuals."[80]

One year later in the controversial case of *Roe v. Wade,*[81] seven members of the Court adopted Justice Harlan's view of privacy as an aspect of Fourteenth Amendment liberty[82] and held that the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[83] According to the Court, interference with the exercise of this "fundamental" right required a narrowly drawn legislative enactment expressing a "compelling state interest."[84] In support of this holding, the *Roe* Court failed to explain how it reached the conclusion that a limited right to an abortion was "fundamental" and "implicit in the concept of ordered liberty." Notwithstanding the advice of Justices Harlan and Goldberg in *Griswold,* the *Roe* Court did not base its fundamental rights analysis on an express finding that the right to an abortion is so rooted in the traditions and collective conscience of our people as to be ranked fundamental.[85] Rather, it relied on then current medical knowledge[86] as well as psychological and sociological factors.[87]

76. *Griswold,* 381 U.S. at 499 (quoting Poe v. Ullman, 367 U.S. at 553 (Harlan, J., dissenting)).

77. 405 U.S. 438 (1972).

78. *Id.* at 453 (emphasis in original).

79. *Id.*

80. *Id.* Moreover, the Court held that prohibiting distribution of contraceptives to unmarried persons violated the Equal Protection Clause. *Id.* at 454-55.

81. 410 U.S. 113 (1973).

82. *Id.* at 153; *see id.* at 169 (Stewart, J., concurring).

83. *Id.* at 153.

84. *Id.* at 155.

85. Justice Rehnquist argued that the fact that a majority of the states have restricted abortions for at least a century indicates that the right to an abortion "is not 'so rooted in the traditions and conscience of our people as to be ranked fundamental . . . .'" *Id.* at 174 (Rehnquist, J., dissenting) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

86. *See* 410 U.S. at 149-50. The *Roe* decision, in the words of one constitutional scholar,

> read[s] like a set of hospital rules and regulations, whose validity is good enough this week but will be destroyed with new statistics upon the medical risks of childbirth and abortion or new advances in providing for the separate existence of a foetus. Neither historian, layman, nor lawyer will be persuaded that all the details prescribed in *Roe v. Wade* are part of either natural law or the Constitution.

Only in *Moore v. City of East Cleveland*[88] did a plurality of the Court, in an opinion by Justice Powell, determine whether a right is "fundamental" for due process purposes by adopting Justice Harlan's "judicial restraint" approach in *Poe v. Ullman* and *Griswold*.[89] *City of East Cleveland* involved a zoning ordinance that allowed only members of a single "family" to live together and that defined "family" to exclude extended families.[90] Under the ordinance, a sixty-three year old grandmother was criminally prosecuted for permitting two grandsons, who were first cousins, to live with her.[91] The plurality invalidated the ordinance on substantive due process privacy grounds, finding that the extended family was an institution "deeply rooted in this Nation's history and tradition" and thus "fundamental."[92] Justice Stewart, dissenting, relied on a narrow view of constitutionally protected familial relations to conclude that a grandmother's right to share "a single kitchen and a suite of contiguous rooms with some of her relatives,"[93] unlike decisions about marriage and childbearing, did not rise to the level of being "implicit in the concept of ordered liberty." To so equate the two rights, according to Justice Stewart, extended substantive due process beyond recognition.[94]

City of East Cleveland demonstrates that determining the fundamentality of a right by examining whether it arises from a deeply rooted tradition may involve "judgment and restraint" more than a readily discernible principle. One scholar, Professor Tribe, has suggested that in determining what rights involve fundamental liberties, liberty must be defined "at a high enough level of generality to permit unconventional variants to claim protection along with mainstream versions of protected

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A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 113-14 (1976). Similarly, Justice O'Connor has sharply criticized *Roe's* trimester framework and concept of "viability" to the extent that each depends on changing medical knowledge. *See* City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting, joined by White, Rehnquist, JJ.) ("The *Roe* framework . . . is clearly on a collision course with itself.").

87. *See Roe*, 410 U.S. at 153.

88. 431 U.S. 494 (1977).

89. *See supra* notes 65-73 and accompanying text.

90. *See* 431 U.S. at 496 n.2. The definition of "family" was "essentially confined to parents and their own children." *Id.* at 507 n.3 (Brennan, J., concurring).

91. *Id.* at 506. Mrs. Moore was living with her son and grandson when another grandson, John, then less than a year old, came to live with her after his mother's death. *Id.* at 496-97, 506. Mrs. Moore was notified that under the zoning ordinance, John was an "illegal occupant." When she refused to expel her grandson from her home, Mrs. Moore was criminally prosecuted. *Id.* at 497.

92. *Id.* at 503-04. *Cf.* Village of Belle Terre v. Boraas, 416 U.S. 1 (upholding zoning ordinance defining "family" as including persons related by blood, adoption or marriage, or no more than two unrelated persons in a household).

93. *Id.* at 537 (Stewart, J., dissenting).

94. *Id.*

conduct."[95] Assuming that in *City of East Cleveland* nuclear families were "mainstream," the plurality's recognition of constitutional protection for "unconventional" extended families arguably involved precisely this judgment of using a broad definition of protected family relations.

While the "outer limits" of personal privacy have not been marked by the Supreme Court,[96] the Court has expressly recognized fundamental rights in certain decisions relating to marriage,[97] procreation,[98] contraception,[99] abortion,[100] family relations,[101] and child rearing and education.[102] It remains unsettled, however, whether and to what extent the right to privacy protects private sexual activity outside of these areas.[103] As one court observed, it is unclear whether a husband and wife can be criminally prosecuted for privately and consensually engaging in oral or anal sex.[104] Accordingly, the constitutional status of such sexual activity among unmarried heterosexuals or among homosexuals is also uncertain.

Dicta in *Griswold* and *Poe*[105] suggest that the right to privacy does not protect consensual homosexual conduct, even when privately practiced, from state regulation. This dicta alone formed the basis of a district court's determination in *Doe v. Commonwealth's Attorney* that a Virginia sodomy statute need only display minimum rationality to survive a privacy and equal protection challenge by homosexuals.[106] The Supreme Court's summary affirmance in *Doe*, although considered by several courts and commentators to be of little precedential value,[107] is considered by some to establish that homosexual conduct is not constitu-

95. L. TRIBE, *supra* note 35, at 946.

96. Carey v. Population Services Int'l, 431 U.S. at 678, 684 (1977).

97. Loving v. Virginia, 388 U.S. 1 (1967).

98. Skinner v. Oklahoma, 316 U.S. 535 (1942).

99. *Carey*, 431 U.S. 678 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972).

100. City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983); Roe v. Wade, 410 U.S. 113 (1973).

101. Moore v. City of East Cleveland, 431 U.S. 494 (1977); Prince v. Massachusetts, 321 U.S. 158 (1944).

102. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

103. *Carey*, 431 U.S. at 688 n.5, 694 n.17.

104. Baker v. Wade, 553 F. Supp. 1121, 1135 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985).

105. *See supra* notes 75-76 and accompanying text.

106. 403 F. Supp. 1199 (E.D. Va. 1975).

107. *E.g.*, Hardwick v. Bowers, 760 F.2d 1202, 1207-08 (11th Cir.), *cert. granted*, 106 S. Ct. 342 (1985); Rich v. Secretary of the Army, 735 F.2d 1220, 1228 n.8 (10th Cir. 1984); Baker v. Wade, 553 F. Supp. 1121, 1136-39 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985). *See* L. TRIBE, *supra* note 35, at 943; P. BATOR, ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, Supp. 1981, at 159 n.1 (*Doe* is "an egregious example of an unexplained summary affirmance"); *see also* Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L. J. 957, 1017 (1979).

tionally protected.[108]

B. The Precedential Value of *Doe v. Commonwealth's Attorney*

The *Dronenburg* court's cursory analysis of the precedential value of *Doe v. Commonwealth's Attorney* failed to apply principles of analysis set forth by the Supreme Court. The court stated that a summary affirmance is a vote on the merits and thus binding on lower courts. Accordingly, it considered itself bound by the district court's holding in *Doe* that the right to privacy does not extend to private, consensual homosexual conduct.[109] Closer examination of *Doe* reveals that the Supreme Court's summary affirmance need not be viewed as affirming the lower court's determination of the plaintiffs' constitutional privacy claim.

The Supreme Court stated in *Hicks v. Miranda*[110] that its summary affirmances have binding precedential effect.[111] Determining precisely how much of the lower court opinion actually is affirmed, however, is difficult. According to Chief Justice Burger, a summary affirmance affirms only the *judgment* of the court below, not its reasoning.[112] It does not prevent a lower court from reaching an opposite conclusion except on "the precise issues presented and necessarily decided by those actions."[113]

The initial step in a lower court's analysis of a summary affirmance, therefore, should be to ascertain what issues were properly presented in the earlier action.[114] This requires examination of the jurisdictional statement in the earlier case to determine whether the constitutional issues in both cases are the same.[115] Next, the court must consider whether the constitutional issues were necessarily decided by determining whether the judgment arguably rested on an alternative nonconstitutional ground.[116] As Justice Brennan has stated: "The judgment should not be interpreted as deciding the constitutional questions unless no other construction of the disposition is plausible."[117] Consequently, when

108. *See, e.g.,* DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 334 n.1 (9th Cir. 1979) (Sneed, J., concurring and dissenting); Lovisi v. Slayton, 539 F.2d 349, 352 (4th Cir.) (en banc), *cert. denied,* 429 U.S. 977 (1976).

109. *See* 741 F.2d at 1391-92.

110. 422 U.S. 332 (1975).

111. *Id.* at 344-45.

112. Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 182-83 (1978) (citing Fusari v. Steinberg, 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring)).

113. *Id.* at 182 (citing Mandel v. Bradley, 432 U.S. 173, 176 (1977)). *See generally* Note, *The Precedential Effect of Summary Affirmances and Dismissals for Want of a Substantial Federal Question by the Supreme Court After Hicks v. Miranda and Mandel v. Bradley,* 64 VA. L. REV. 117 (1978).

114. *See* Hicks v. Miranda, 422 U.S. at 345 n.14.

115. Mandel v. Bradley, 432 U.S. 173, 180 (Brennan, J., concurring).

116. *Id.*

117. *Id.*

the jurisdictional statement presents a constitutional issue but there is arguably a nonconstitutional ground for the decision, the precedential scope of the summary affirmance is necessarily unclear.

This precise problem arises in interpreting the precedential scope of *Doe* and was, subsequent to *Dronenburg,* skillfully addressed by the Eleventh Circuit in *Hardwick v. Bowers.*[118] In *Hardwick,* the court first noted that the jurisdictional statement in *Doe* presented a constitutional challenge to Virginia's sodomy statute based on the right to privacy, due process, and equal protection. This constitutional challenge is substantially similar to that involved in *Hardwick,* in which both homosexuals and unmarried heterosexuals challenged Georgia's sodomy statute.[119] The court next observed that because the plaintiffs in *Doe* lacked standing to sue, the Court's affirmance arguably rested on that alternative, nonconstitutional ground.[120]

In resolving this conflict between the scope of the jurisdictional statement and the plausible alternative ground for the disposition, the *Hardwick* court concluded that the jurisdictional statement sets the "outside limit on the precedential scope of a summary decision" and is a "tool in determining the ultimate question: the most narrow plausible rationale for the summary decision."[121] The *Doe* plaintiffs' lack of standing is a narrower plausible basis for the Court's affirmance than the privacy issue raised in the jurisdictional statement. Accordingly, the *Hardwick* court concluded that *Doe* was not controlling precedent because the homosexual plaintiff in *Hardwick* had standing.[122]

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118. 760 F.2d 1202, 1207-10 (10th Cir.), *cert.granted,* 106 S. Ct. 342 (1985).

119. Plaintiffs in *Hardwick* were a male homosexual and a married couple, all seeking a declaration that Georgia's sodomy statute was unconstitutional as applied to them. Plaintiff Hardwick had previously been arrested for engaging in consensual sodomy with another adult male in the privacy of his own bedroom. Based on this arrest, Hardwick's intent to continue engaging in consensual sodomy and the state's intent to continue enforcing its sodomy statute, the court concluded that Hardwick had standing. 760 F.2d at 1206. The married couple, however, failed to show a realistic threat of prosecution under the statute to establish standing. *Id.* at 1206-07.

120. *Id.* at 1207 and n.5. The court observed that *Doe* may have presented nonconstitutional standing problems. *Cf.* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); Poe v. Ullman, 367 U.S. 497 (1961).

121. 760 F.2d at 1208.

122. *Id.* at 1206-07. *See supra* note 119. The Supreme Court has certified for review the question: "(1) Did [the *Hardwick*] court err in concluding that Doe v. Commonwealth's Attorney, . . . does not constitute precedent binding upon lower federal courts?" 54 U.S.L.W. 3292, 3293 (U.S. Nov. 5, 1985) (No. 85-140). Therefore, the Court will have to resolve the questions of interpretation of summary affirmances addressed by *Hardwick* and other courts. The Court also certified the substantive constitutional issue: "(2) Did the court err in concluding that Georgia's sodomy statute infringes upon fundamental rights of homosexuals and in requiring the state to demonstrate a compelling interest in order to support constitutionality of statute?" *Id.*

While the *Dronenburg* court conceded that the *Doe* plaintiffs may have lacked standing, it refused to adopt the narrow view of *Doe*'s precedential scope because the district court had decided the case on the constitutional question and the Supreme Court did not indicate its affirmance was based on lack of standing.[123] This reasoning is unsound for several reasons. First, the Court rarely states its reasoning and authority in summary affirmances, even where, as in *Doe*, important constitutional questions are presented.[124] Therefore, the Court's failure to note the lack of standing in *Doe* is of little, if any, significance. Second, the issue is not whether the affirmed decision was decided "squarely on the constitutionality of the statute,"[125] but whether both the affirmed case and the case at issue present identical constitutional issues in their jurisdictional statements. In this regard, Chief Judge Robinson, in his dissent from the denial of rehearing in *Dronenburg,* suggested that there is an important difference between *Doe*'s "pre-enforcement constitutional challenge to a state criminal statute" and *Dronenburg*'s "discharge pursuant to a military regulation not expressly authorized by statute."[126]

More to the point, while *Doe* and *Dronenburg* present essentially the same right to privacy issue, Doe did not present *Dronenburg*'s equal protection question. The Virginia statute proscribed anal and oral sex practiced by heterosexuals as well as homosexuals,[127] while the Navy regulation prohibited sexual acts between homosexuals only.[128] As a result, the *Dronenburg* court's reasoning—"[i]f a statute proscribing homosexual conduct in a civilian context is sustainable, then such a regulation is certainly sustainable in a military context"[129]—would be persuasive only if the *Doe* statute expressly proscribed homosexual conduct, which it did not. Finally, restricting a summary affirmance to what necessarily was decided is not "speculation that the Court might possibly have had

123. 741 F.2d at 1392. Interestingly, District Judge Merhige, who dissented on the constitutional issue raised in *Doe*, recently concluded that the Supreme Court's summary affirmance in *Doe* was "an adjudication on the merits of the issues in that case." Doe v. Duling, 603 F. Supp. 960, 965 (E.D. Va. 1985). In *Duling*, an unmarried heterosexual couple challenged the constitutionality of Virginia's fornication and cohabitation statutes as applied to their private sexual activity. Defendant, the Richmond Chief of Police, contended that *Doe v. Commonwealth's Attorney* controlled the case. In rejecting this argument, Judge Merhige refused "to speculate and extend the Supreme Court's affirmance in *Doe* beyond the facts presented therein." *Id.* Based on those facts, he concluded that *Doe* established the constitutionality of Virginia's sodomy statute as applied to private, consensual homosexual conduct, which does not imply that the right to privacy would not protect the sodomistic conduct of heterosexuals. *Id.*

124. *See* Colorado Springs Amusements, Ltd. v. Risso, 428 U.S. 913, 919 (1976) (Brennan, J., dissenting).

125. 741 F.2d at 1392.

126. 746 F.2d at 1580.

127. *See supra* note 31.

128. *See supra* note 18.

129. 741 F.2d at 1392.

something else in mind";[130] rather, it gives narrow effect to the Court's one word decisions, which seems altogether appropriate.

In sum, the *Dronenburg* court's conclusion that it was bound by the *Doe* court's holding on the merits is contrary to the conclusion reached by applying established principles. As the *Hardwick* court concluded, *Doe* is properly construed as "an affirmance based on the plaintiffs' lack of standing"[131] and as otherwise noncontrolling precedent.

Even assuming *Doe* affirmed the district court's holding on the constitutional issue, it would not bind a lower court if subsequent doctrinal developments cast doubt on the constitutional interpretation implied by the summary affirmance.[132] The *Dronenburg* court failed to consider doctrinal developments since *Doe* in determining *Doe*'s precedential scope. For example, since *Doe,* a plurality of the Court agreed in *Carey v. Population Services International* that it "has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults."[133] This suggests that at least a plurality of the Court did not consider *Doe* dispositive of the constitutional status of consensual homosexual conduct: if the *Doe* Court had affirmed the district court's holding, one aspect of the question would have been definitively answered. Significantly, Justice Rehnquist disagreed with the plurality and, citing *Doe*, insisted that the constitutional protection of "certain consensual acts" had been definitively established.[134] The language in *Carey* nevertheless suggests, as several courts have found,[135] that lower courts are free to analyze the constitutional privacy claims of homosexuals in spite of *Doe*.

Another doctrinal development, documented by the Eleventh Circuit in *Hardwick*,[136] was the Supreme Court's grant of certiorari in *New York v. Uplinger*.[137] In *Uplinger*,[138] the New York Court of Appeals held that a statute punishing loitering in public with the intent to engage in "deviate sexual behavior" was unconstitutional because it punished "conduct anticipatory to the act of consensual sodomy"[139] which was

130. *Id.*

131. 760 F.2d at 1208.

132. Hicks v. Miranda, 422 U.S. 322, 344 (1974); Lecates v. Justice of the Peace, 637 F.2d 898, 904 (3d Cir. 1980).

133. 431 U.S. 678, 688 n.5, 694 n.17 (1977).

134. *Id.* at 718 n.2.

135. *See, e.g.*, Hardwick v. Bowers, 760 F.2d at 1209-10; Baker v. Wade, 553 F. Supp. 1121, 1138 (N.D. Tex. 1982), *rev'd,* 769 F.2d 289 (5th Cir. 1985). *See also* Dronenburg v. Zech, 746 F.2d at 1580 (Robinson, C.J., dissenting).

136. 760 F.2d at 1210.

137. 104 S. Ct. 64 (1983).

138. People v. Uplinger, 58 N.Y.2d 936, 447 N.E.2d 62, 460 N.Y.S.2d 514 (1983).

139. 58 N.Y.2d at 937-38, 447 N.E.2d at 62-63, 460 N.Y.S.2d at 515.

decriminalized in *People v. Onofre*.[140] Noting that the case was an "inappropriate vehicle" for addressing the constitutional issues involved, the Court dismissed its writ of certiorari as improvidently granted.[141] Nevertheless, the original grant of certiorari indicated the Court's willingness to address the issues in *Uplinger,* which included the constitutionality of state sodomy laws.[142] As the Eleventh Circuit concluded in *Hardwick, Uplinger,* combined with *Carey,* indicates that the constitutional status of private, consensual homosexual conduct is still open for lower court, and ultimately Supreme Court, consideration.[143]

C. Critique of the *Dronenburg* Court's Privacy Analysis

The *Dronenburg* court's analysis of the privacy doctrine ignored important Supreme Court language and construed too narrowly the language it chose to examine. The court was guided by its preferences for strict construction of the Constitution and strict lower court adherence to Supreme Court language where nontextual constitutional rights are involved.[144] Based on these premises, the *Dronenburg* court restricted its analysis to a case-by-case review of Supreme Court precedent, quoting select passages in search of a clear principle or mode of analysis fairly applicable to new claims. Evaluation of this analysis requires an examination of whether the selected language fairly represents the holding of the case for which it purports to speak, and whether the language is fairly susceptible of broader construction.

The *Dronenburg* court did not mention the significant post-*Doe* declaration by the Supreme Court in *Carey v. Population Services International* that the constitutional status of private consensual sexual behavior was still unsettled.[145] Rather, the court cited only a brief passage from *Carey* which stated that the personal right of decision in matters of childbearing was the underlying foundation of *Griswold, Eisenstadt,* and *Roe*.[146] Citing this passage out of context gave the false impression that *Carey* limits the privacy doctrine to the area of childbearing. To the contrary, Justice Brennan, writing for the *Carey* Court, was particularly careful to note that the concept of personal privacy is broader in scope

140. 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981). *See infra* notes 159-166 and accompanying text.

141. 104 S. Ct. 2332, 2334 (1984) (per curiam) (White, J., joined by Burger, C.J., Rehnquist and O'Connor, JJ., dissenting, would have addressed the case on the merits).

142. 760 F.2d at 1210. Indeed, the Supreme Court recently granted certiorari in the *Hardwick* case to address the constitutionality of Georgia's sodomy law. Hardwick v. Bowers, 106 S. Ct. 342 (1985). *See supra* notes 119 and 122.

143. 760 F.2d at 1210.

144. *See supra* notes 25-29 and accompanying text.

145. 431 U.S. 678, 688 n.5, 694 n.17 (1977).

146. 741 F.2d at 1395.

than the underlying factual foundations of the Court's prior decisions.[147] According to the Court, "[t]he decision whether or not to beget or bear a child" is "*in a field* that by definition concerns the most intimate of human activities and relationships . . . among the most private and sensitive [of decisions]."[148]

The *Dronenburg* court also overlooked the Court's suggestion in *Eisenstadt v. Baird*[149] that the privacy doctrine is potentially broader in scope: "If the right to privacy means anything, it is the right of the *individual* . . . to be free from unwarranted governmental intrusion into *matters so fundamentally affecting a person as* the decision whether to bear or beget a child."[150] Had the Court omitted the phrase "matters so fundamentally affecting a person," it would have restricted its holding to the area of childbearing. The language the Court chose, however, clearly invites extension of the right to privacy to other fundamental matters. Yet, because the Court did not articulate specific criteria for determining when governmental intrusion is "unwarranted" and what other matters are fundamental, the *Dronenburg* court found no guidance in this test.[151]

Other courts faced with the issue of whether the right to privacy protects private, consensual homosexual conduct have found sufficient guidance in the language of *Eisenstadt* and *Carey*. Judge Merhige, dissenting in *Doe,* found in *Eisenstadt* a principle of personal privacy that includes a field of intimate concerns: "[E]very individual has a right to be free from unwarranted governmental intrusion into one's decisions *on private matters of intimate concern.*"[152] Judge Merhige then reasoned that "[a] mature individual's choice of an adult sexual partner, in the privacy of his or her own home," is a decision of utmost private and intimate concern and thus is included in the right to privacy."[153]

Similarly, in *Baker v. Wade,*[154] a federal district court, citing the *Doe* dissent with approval, held that a Texas sodomy law as applied to a

147. Justice Brennan broadly defined the right to privacy as including "the interest in independence in making certain kinds of important decisions." 431 U.S. at 684 (quoting Whalen v. Roe, 429 U.S. 589, 599-600 (1977)). He also stated that "it is clear that *among* the decisions that an individual may make without unjustified government interference are [those involving the underlying factual foundations of the prior Court decisions]." *Id.* at 684-85 (emphasis added).

148. 431 U.S. at 685 (emphasis added).

149. 405 U.S. 438 (1972).

150. *Id.* at 453 (emphasis partly in original and partly added).

151. 741 F.2d at 1393-94.

152. 403 F. Supp. at 1203 (Merhige, J., dissenting) (emphasis added).

153. *Id.* Judge Merhige outlined his view of the constitutional contours of protected sexual behavior: the participants both must be capable of consent and in fact must have consented to the sexual act; the right will not attach where a minor or force or coercion is involved; and the act cannot take place in "publicly frequented areas." *Id.* at 1204-05.

154. 553 F. Supp. 1121 (N.D. Tex. 1982), *rev'd,* 769 F.2d 289 (5th Cir. 1985).

male homosexual violated his fundamental right to privacy. The court reasoned, from language in *Eisenstadt* and *Carey,* that "[t]he right of two individuals to choose what type of sexual conduct they will enjoy in private is *just as personal, just as important, just as sensitive*—indeed, even more so—than the decision by the same couple to engage in sex using a contraceptive to prevent unwanted pregnancy."[155] The court concluded, using the *Eisenstadt* test, that the right of privacy extends to the "decision to engage in private sexual conduct with another consenting adult."[156] Also interpreting *Eisenstadt*, another federal district court in *benShalom v. Secretary of Army*[157] held that the right to privacy protected a lesbian soldier from military discharge for evidencing homosexual tendencies without engaging in homosexual acts. The court concluded that "one's personality, self-image, and indeed, one's very identity" are matters so fundamentally affecting a person as to require constitutional protection.[158]

Perhaps the most searching analysis of the privacy doctrine and of *Eisenstadt* in this context was made by the New York Court of Appeals in *New York v. Onofre.*[159] *Onofre* consolidated three cases involving arrests for engaging in consensual sodomy. In one case, Onofre was arrested for engaging in "deviate sexual intercourse" with another male in the privacy of Onofre's home; in the other cases, two men were arrested for engaging in "oral sodomy" in a parked car on a city street, and a woman was arrested for similar behavior.[160] The applicable New York statute prohibited only unmarried persons from engaging in consensual sodomy. The court held that the statute violated the defendants' rights to privacy[161] and equal protection[162] under the federal Constitution.

In reaching its decision, the *Onofre* court acknowledged the importance of reading *Eisenstadt* together with *Stanley v. Georgia,* on which the Supreme Court had relied in delineating its test in *Eisenstadt.*[163] In *Stanley*, the Court held that a statute criminalizing the possession of ob-

155. 553 F. Supp. at 1140 (emphasis added).

156. *Id.* The Fifth Circuit's recent reversal of the district court's decision in *Baker v. Wade* did not present a reasoned analysis of the privacy claim. Rather, in one paragraph the court asserted that *Doe v. Commonwealth's Attorney* was binding precedent, citing *Dronenburg v. Zech* for support. 769 F.2d 289, 292 (5th Cir. 1985).

157. 489 F. Supp. 964 (E.D. Wis. 1980).

158. *Id.* at 975.

159. 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied,* 451 U.S. 987 (1981).

160. 51 N.Y.2d at 483-84, 415 N.E.2d at 937-38, 434 N.Y.S.2d at 948.

161. *See id.* at 488-90, 415 N.E.2d at 940-41, 434 N.Y.S.2d at 951-52.

162. *Id.* at 491-94, 415 N.E.2d at 942-44, 434 N.Y.S.2d at 953-54.

163. *Id.* at 487, 415 N.E.2d at 939-40, 434 N.Y.S.2d at 950. *See* Doe v. Commonwealth's Attorney, 403 F. Supp. at 1205 (Merhige, J., dissenting) (*Stanley* "teaches us that socially condemned activity, excepting that of demonstrable external effect, is and was intended by the Constitution to be beyond the scope of state regulation when conducted within the privacy of the home").

scene matter within the home violated the First Amendment and the Fourteenth Amendment right to privacy.[164] In a footnote appended to its citation to *Stanley*, the *Eisenstadt* Court quoted Justice Brandeis' famous dissent in *Olmstead v. United States*: " '[The makers of our Constitution] sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.' "[165] Reading *Eisenstadt* together with *Stanley,* the *Onofre* court concluded that the Supreme Court intended the right to privacy to include even "deviant" conduct likely to arouse moral indignation among broad segments of the community, as long as the conduct was practiced voluntarily in a noncommercial, private setting.[166]

The *Dronenburg* court's analysis overlooked the significance of *Stanley*. Instead, the court merely asserted that the state can legitimately regulate private deviant conduct on moral grounds.[167] In support, the court cited Justice Harlan's dissenting remark in *Poe v. Ullman* that the state may proscribe by criminal statutes private intimate sexual matters between unmarried persons or homosexuals.[168] *Eisenstadt,* however, to some extent vitiated the implication that a state may proscribe extramarital sex.[169]

In addition, the *Dronenburg* court declared that "[w]hen the Constitution does not speak to the contrary," legislation of morality is conclusively valid.[170] Although this proposition may well be true, it fails to resolve the problem involved in *Dronenburg*—namely, whether the Constitution has in fact spoken. To the extent that the *Stanley* citation qualifies the *Eisenstadt* test,[171] the Supreme Court has suggested that when certain behavior—however morally repugnant to the majority—is practiced in private without external harm, the Constitution *has* spoken affirmatively to protect the behavior from majoritarian regulation. Thus,

164. 394 U.S. 557 (1969).

165. Eisenstadt v. Baird, 405 U.S. at 453 n.10 (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

166. 51 N.Y.2d at 488, 415 N.E.2d at 940-41, 434 N.Y.S.2d at 951. *Cf.* Lovisi v. Slayton, 539 F.2d 349, 351-52 (4th Cir.) (en banc), *cert. denied sub nom.* Lovisi v. Zahradnick, 429 U.S. 977 (1976) (presence of third-party onlooker in bedroom while married couple engaged in consensual sodomy dissolved expectation of privacy); United States v. Lemons, 697 F.2d 832 (8th Cir. 1983) (right of privacy does not protect oral sodomy between two men in public restroom); Connor v. Hutto, 516 F.2d 853 (8th Cir. 1975) (oral sodomy in parked car on public highway).

167. *See* 741 F.2d at 1397-98.

168. 367 U.S. at 553.

169. *See Doe,* 403 F. Supp. at 1204 (Merhige, J., dissenting). This perhaps explains why the *Dronenburg* court chose not to quote language from Justice Harlan's dissent.

170. 741 F.2d at 1397. *See supra* notes 44-46 and accompanying text.

171. *See supra* notes 163-166 and accompanying text.

the *Dronenburg* court should have addressed the suggestions in *Eisenstadt* and *Carey* that the privacy doctrine is of a broader scope than the factual bases of the Court's decisions; and it should have resolved any ambiguity with doctrinal analysis rather than merely reciting dicta.

The *Dronenburg* court found little in the language of *Roe v. Wade*[172] to guide its analysis. *Roe* adopted Justice Harlan's view in *Griswold* that rights deemed "fundamental" or "implicit in the concept of ordered liberty" are included in the privacy/liberty protected by the Fourteenth Amendment Due Process Clause.[173] The *Dronenburg* court rejected these formulations because they were mere "conclusions about particular rights enunciated," which failed to prescribe a mode of reasoning.[174] Notwithstanding this criticism, Judge Bork was willing to "conclude" that the right to homosexual activity was not "fundamental" or "implicit in the concept of ordered liberty."[175]

Judge Bork's conclusory remarks disregard the principles for determining fundamentality set forth by Justices Harlan and Goldberg in *Poe* and *Griswold* and applied in *City of East Cleveland*.[176] Although the *Roe* Court may be criticized for failing to analyze thoroughly our nation's deeply rooted traditions in concluding that a limited right to an abortion is "fundamental,"[177] the determination of which rights are fundamental need not be arbitrary, as *Griswold* and *City of East Cleveland* demonstrate. Thus, complete rejection of these formulations was inappropriate.

At most, the *Dronenburg* court's fundamental rights analysis noted only that homosexuality has been "a form of behavior never before protected, and indeed traditionally condemned."[178] True as this may be, it does not compel the conclusion that the decision to engage in private, consensual homosexual conduct is not a fundamental right. Indeed, it hardly can be said that termination of unwanted pregnancies is a deeply rooted national tradition "implicit in the concept of ordered liberty." Nonetheless, the Supreme Court's 1973 decision in *Roe* determined that the fundamental right of privacy precludes unwarranted governmental intrusion into a woman's decision whether to abort during the first trimester of pregnancy. Given this, the *Dronenburg* court should have explained what principle protects a woman's right to choose a first trimester abortion, but allows a state to criminally prosecute her for her expressions of sexual intimacy with another woman in the privacy of her

172. 410 U.S. 113 (1973).

173. *See supra* notes 65-73, 81-87 and accompanying text.

174. 741 F.2d at 1396.

175. *Id.*

176. *See supra* notes 88-95 and accompanying text.

177. *See* A. Cox, *supra* note 86.

178. 741 F.2d at 1396.

home.[179] Clearly, only by formulating a principle of fundamental liberty which is broader than the *Dronenburg* court's, do *Roe,* and indeed *Eisenstadt* and *Carey,* make sense. Courts that have recognized this principle in its broader context have required a compelling governmental interest to justify regulation of the private, consensual sexual acts of homosexuals.[180]

III. Equal Protection

Dronenburg's equal protection challenge to the Navy regulation arguably confronted more directly the type of discrimination against homosexuals effected by the regulation than did the right to privacy challenge. This is because the more immediate question posed by Dronenburg's situation is not whether he had a right to engage in private, consensual homosexual activity, but rather why this behavior calls for mandatory discharge while prohibited heterosexual behavior receives a case-by-case review. Indeed, the same arguments against extending the right to privacy to include homosexual behavior militate in favor of equal protection analysis. That is, if the right to engage in private consensual homosexual conduct does not form part of a traditional liberty—and in fact has been "traditionally condemned"—then the need for a more careful scrutiny of statutes regulating homosexual behavior is apparent.

The *Dronenburg* court, however, relied on traditional social condemnation of homosexuality to deny both the privacy and equal protection claims. The court's cursory equal protection analysis essentially consisted of one sentence: "[I]f no [right to privacy] exists, then appellant's right to equal protection is not infringed unless the Navy's policy is not rationally related to a permissible end."[181] Thus, the court assumed that any heightened scrutiny under the Equal Protection Clause was de-

179. *See* Richards, *Homosexuality and the Constitutional Right to Privacy,* 8 N.Y.U. REV. L. & SOC. CHANGE 311, 314 (1979) ("The difference between homosexuality . . . and abortion is not constitutional or moral principle, but *popularity*; namely, that the non-procreational model in the other areas is supported by substantial popular sentiment, whereas homosexuality is still the settled object of widespread social hostility and opprobrium.").

180. *See, e.g.,* Hardwick v. Bowers, 760 F.2d 1202 (11th Cir.), *cert. granted,* 106 S. Ct. 342 (1985); Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982), *rev'd,* 769 F.2d 289 (5th Cir. 1985); benShalom v. Secretary of the Army, 489 F. Supp. 964 (E.D. Wis. 1980); New York v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied,* 451 U.S. 987 (1981). *See also* Miller v. Rumsfeld, 647 F.2d 80 (9th Cir. 1981) (Norris, J., dissenting from denial of rehearing en banc); Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1203 (E.D. Va. 1975) (Merhige, J., dissenting). *Cf.* Rich v. Secretary of the Army, 735 F.2d 1220, 1227 n.7, 1228-29 (10th Cir. 1984) (court found it "unnecessary" to analyze constitutional principle: "even if privacy interests were implicated . . ., they are outweighed by the Government's interest in preventing armed service members from engaging in homosexual conduct."); Beller v. Middendorf, 632 F.2d 788, 809-10 (9th Cir. 1980) (same), *cert. denied sub nom.* Beller v. Lehman, 452 U.S. 905 (1981).

181. 741 F.2d at 1391 (citing Kelley v. Johnson, 425 U.S. 238, 247-49 (1976)).

pendent upon and coextensive with the existence of a fundamental right. This reasoning failed to consider the "suspect class" prong of the Supreme Court's equal protection doctrine, under which Dronenburg argued for heightened scrutiny of regulations affecting homosexuals.

In *Plyler v. Doe,*[182] the Supreme Court stated that heightened scrutiny under the Equal Protection Clause applies only where the challenged law impinges on "the exercise of a 'fundamental right' " or disadvantages a "suspect class."[183] A "fundamental right" for these purposes is one that finds its source "explicitly or implicitly" in the Constitution.[184] The right to privacy is such an "implicit" fundamental constitutional right.[185] Accordingly, when the *Dronenburg* court found that no right to privacy was implicated, it simultaneously found that strict scrutiny under the fundamental rights prong of the Equal Protection Clause did not apply.

The court then should have considered whether heightened scrutiny was appropriate under the suspect class prong. This analysis recognizes that certain groups have historically been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[186] Traditionally, strict scrutiny has been applied to "suspect" classifications based on race,[187] alienage,[188] and nationality.[189] More recently, the Court has applied a middle level "heightened scrutiny" to classifications based on gender,[190] illegitimacy,[191] and to discrimination against illegal alien children.[192] Several "indicia of suspectness" have been articulated by the Court and commentators to guide a determination of when to apply heightened scrutiny: whether the class-

182. 457 U.S. 202 (1982).

183. *Id.* at 216-17.

184. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973).

185. *See* Rowland v. Mad River Local School Dist., 105 S. Ct. 1373, 1377 (1985) (Brennan, J., dissenting); Roe v. Wade, 410 U.S. 113 (1973).

186. *Rodriguez,* 411 U.S. at 28.

187. *See, e.g.,* McLaughlin v. Florida, 379 U.S 184, 191-92 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (racial classifications "constitutionally suspect").

188. *See, e.g., In re* Griffiths, 413 U.S. 717 (1973); Graham v. Richardson, 403 U.S. 365, 371-72 (1971). *But see* Ambach v. Norwick, 441 U.S. 68 (1979) (5-4 decision, applying mere rationality review).

189. *See, e.g.,* Korematsu v. United States, 323 U.S. 214, 216 (1944) (racial classifications subject to the "most rigid scrutiny").

190. *E.g.,* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); Craig v. Boren, 429 U.S. 190, 197 (1976) (gender classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives").

191. *See, e.g.,* Mills v. Habluetzel, 456 U.S. 91, 99 (1982); Lalli v. Lalli, 439 U.S. 259 (1978).

192. Plyler v. Doe, 457 U.S. 202 (1981). *But see* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (old age not a suspect class); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (no heightened scrutiny based solely on discriminatory wealth classification).

ification affects a "discrete and insular" minority,[193] groups characterized as "perennial losers in the political struggle";[194] whether the classification is defined by an immutable characteristic "determined by causes not within the [person's] control";[195] whether it is based on a stereotype,[196] or generalization "whose incidence of counterexample is significantly higher than the legislative authority appears to have thought it was";[197] and whether the group involved has suffered from a history of past discrimination.[198]

Applying these indicia of suspectness to homosexuals, Justices Brennan and Marshall, as well as several commentators, have concluded that homosexuality should be recognized as a suspect classification requiring strict or heightened scrutiny under the Equal Protection Clause.[199] According to Professor Tribe, for example, homosexuals may constitute a discrete and insular minority solely because of the history of discrimination against them.[200] Justice Brennan recently reinforced this observation when he concluded that homosexuals constitute a "*significant* and insular minority" in our country.[201] Justice Brennan further argued that homosexuals historically have been subject to "pernicious and sustained hostility" reflecting " 'deep-seated prejudice rather than . . . rationality,' " with the result that homosexuals are politically powerless to pro-

193. *See, e.g.,* Graham v. Richardson, 403 U.S. 365, 372 (1971) (quoting United States v. Carolene Prod. Co., 304 U.S. 144, 152-53, n.4 (1938) (Stone, J.)).

194. L. TRIBE, *supra* note 35, at 1002.

195. Mathews v. Lucas, 427 U.S. 495, 505 (1976); *see* Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (opinion of Brennan, J.); Plyler v. Doe, 457 U.S. at 220 (although illegal alien status is not an "immutable characteristic," it is a "legal characteristic over which children can have little control").

196. *See* University of California Regents v. Bakke, 438 U.S. 265, 405-06 (1977) (separate opinion of Blackmun, J.).

197. J. ELY, DEMOCRACY AND DISTRUST 157 (1980).

198. *See* Frontiero v. Richardson, 411 U.S. at 682-84 (1973) (history of sex discrimination); Michael M. v. Superior Court, 450 U.S. 464, 476 (1980) (no past discrimination against men); *Rodriguez,* 411 U.S. at 28-29.

199. *See, e.g., Rowland,* 105 S. Ct. at 1377-78 (Brennan and Marshall, JJ., dissenting); L. TRIBE, *supra* note 35, at 944-45 n.17; Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification,* 98 HARV. L. REV. 1285, 1297-1309 (1985); Comment, *Dronenburg v. Zech: Judicial Restraint or Judicial Prejudice?,* 3 YALE LAW & POL'Y REV. 245, 253-56 (1984); Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality,* 57 S. CAL. L. REV. 797 (1984); Friedman, *Constitutional and Statutory Challenges to Discrimination in Employment Based on Sexual Orientation,* 64 IOWA L. REV. 527, 556-61 (1979); Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct,* 72 MICH. L. REV. 1613, 1624-28 (1974). *See also* J. ELY, *supra* note 197, at 162-64.

200. L. TRIBE, *supra* note 35, at 944.

201. *Rowland,* 105 S. Ct. at 1377 (emphasis added). Justice Brennan noted that Judge Edward's dissent in the court below cited evidence that homosexuals may constitute 8 to 15% of the average population. *Id.* at 1377 n.7 (citing 730 F.2d at 455-56 (citing J. MARMOR, HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL (1980))).

tect their rights because they are reluctant to risk public opprobrium.[202] This political powerlessness, it has been argued, is evidenced by the failure of legislative bodies to change laws discriminating against homosexuals.[203] For example, twenty-three states and the District of Columbia continue to criminalize consensual homosexual acts.[204] Moreover, Professor Tribe has cited psychological and physiological studies indicating that homosexuality is an immutable characteristic which is not within a person's control and, once formed, is not likely to change.[205]

Thus, a strong case can be made for applying strict or heightened scrutiny to the Navy regulation in *Dronenburg*. Whatever conclusion the court ultimately might have reached, its failure even to consider whether homosexuals as a class bear "indicia of suspectness" was a serious flaw in its equal protection analysis.

Ironically, the *Dronenburg* court's application of minimum rationality review reveals the very stereotypes and prejudice against homosexuals that call for stricter scrutiny. The court did not examine the rational relationship between mandatory discharge of homosexuals and the Navy's goal of maintaining morale and discipline; it merely restated the Navy's asserted interests, which themselves amounted only to common stereotypes about homosexuals.[206] The court simply declared that "com-

202. *Id.* at 1377.

203. *See* Note, 57 S. CAL. L. REV., *supra* note 199, at 825-27.

204. *See id.* at 800.

205. L. TRIBE, *supra* note 35, at 944-45 n.17.

206. 741 F.2d at 1398. The Navy's reasons for mandatory discharge were stated as follows:

> It is considered that administrative processing is mandatory. This is because it is perceived that homosexuality adversely impacts on the effective and efficient performance of the mission of the United States Navy in several particulars.
>
> (a) Tensions and hostilities would certainly exist between known homosexuals and the great majority of naval personnel who despise/detest homosexuality, especially in the unique close living conditions aboard ships.
>
> (b) An individual's performance of duties could be unduly influenced by emotional relationships with other homosexuals.
>
> (c) Traditional chain of command problems could be created, i. e., a proper command relationship could be subverted by an emotional relationship; an officer or senior enlisted person who exhibits homosexual tendencies will be unable to maintain the necessary respect and trust from the great majority of naval personnel who despise/detest homosexuality, and this would most certainly degrade the individual's ability to successfully perform his duties of supervision and command.
>
> (d) There would be an adverse impact on recruiting should parents become concerned with their children associating with individuals who are incapable of maintaining high moral standards.
>
> (e) A homosexual might force his desires upon others or attempt to do so. This would certainly be disruptive.
>
> (f) Homosexuals may be less productive/effective than their heterosexual counterparts because of:
>
> (1) Fear of criminal prosecution;
>
> (2) Fear of social stigmatization;
>
> (3) Fear of loss of spouse and/or family through divorce proceedings as a result of disclosure;
>
> (4) Undue influence by a homosexual partner.

mon sense and common experience" demonstrate that the effects of homosexuality are "almost certain to be harmful to morale and discipline," and that mandatory discharge is a rational means of avoiding this harm.[207]

The court stated that *Dronenburg* illustrated the dangers which homosexual acts present in the military: such episodes are certain "to call into question the even-handedness of superiors' dealings with lower ranks, to make personal dealings uncomfortable where the relationship is sexually ambiguous, to generate dislike and disapproval among many who find homosexuality morally offensive, and . . . to enhance the possibility of homosexual seduction."[208] This remark implies that Dronenburg may have used his age and rank to coerce his sexual partner, yet no evidence to support this possibility was presented or discussed in the opinion. Moreover, because the court considered "common sense" sufficient to dispose of the issue, it did not require the Navy to offer any evidence to support its asserted interests. Thus, although the maintenance of morale and discipline is certainly a legitimate interest of the military, *Dronenburg* contains no evidence indicating that the presence of homosexuals has ever actually harmed military morale and discipline.

Conclusion

While the *Dronenburg* court did not misapply a clearly defined constitutional principle, it did substitute its preference for strict construction—so called "judicial restraint"—for analysis of the difficult and important principles involved. As a consequence, *Dronenburg* may be more important for what it did not do than for what it did. It did not adequately examine the precedential scope of the Supreme Court's summary affirmance in *Doe v. Commonwealth's Attorney*. It did not acknowledge important principles set forth, however ambiguously, in controlling Supreme Court decisions. And it did not consider the Navy's disparate treatment of homosexuals under the suspect class prong of the equal protection analysis.

Instead, the *Dronenburg* court gave broad precedential scope to the Court's one-word opinion in *Doe*. It confined prior Supreme Court precedents to their factual underpinnings and limited important language in those cases to their narrowest meanings. It incorporated into its opinion traditional prejudice against homosexuals as a basis for denying strict scrutiny under the Due Process and Equal Protection Clauses of the

Beller v. Middendorf, 632 F.2d 788, 811 n.22 (9th Cir. 1980), *cert. denied,* 452 U.S. 905 (1981). All of these alleged military interests failed to survive the heightened scrutiny of one circuit judge. *See* Miller v. Rumsfeld, 647 F.2d 80, 86-89 (9th Cir. 1981) (Norris, J., dissenting).

207. 741 F.2d at 1398.

208. *Id.*

Constitution and as a basis for upholding the Navy regulation as minimally rational.

From its inception as a constitutional principle, the right to privacy has not been susceptible of clear definition. Nonetheless, underlying the privacy doctrine is the idea that there are certain decisions and forms of behavior which are so personal, intimate, and sensitive that a state may regulate them only when necessary to achieve a compelling state interest. This general principle arguably includes the decision to engage in private, consensual homosexual conduct.

If the *Dronenburg* court had recognized an applicable privacy principle, the case would have survived summary judgment and turned on its genuine issues of fact, including whether Dronenburg's behavior was "private" and "consensual" and, if so, whether the Navy's interests in prohibiting this behavior were compelling. The trial court might have found that barracks on a Navy base are not "private"; evidence might have demonstrated that Dronenburg used his age and rank to coerce his sexual partner; and the Navy might have submitted sufficient evidence of problems and conflicts due to homosexual conduct in its ranks to establish that mandatory discharge is necessary to maintain morale and discipline. Rather than allow the trial court to address these issues, however, the *Dronenburg* court decided the case on the grounds of stereotype and "common sense" morality.

Dronenburg takes on a further significance in light of the current AIDS epidemic, which threatens to aggravate traditional hostility toward homosexuals.[209] Under the *Dronenburg* view that homosexuals are not to be afforded a right to privacy or suspect class status, the state need only articulate a conceivable rational basis for its regulation of homosexual conduct. If mandatory discharge of all practicing homosexuals from the military was rationally related to the legitimate end of legislating morality, is not the removal of homosexuals from the general work force, indeed from other public places, also rationally related to the even more clearly legitimate state interest in promoting public health? Certainly *Dronenburg,* by approving the discharge of an exemplary soldier without consideration of a rational nexus between his sexual identity and work performance, has demonstrated, at least in a military context, the ease of isolating homosexuals from participation in society.[210] Without the pro-

209. *See generally* Comment, *AIDS—A New Reason to Regulate Homosexuality?,* 11 J. CONTEMP. L. 315 (1984); N.Y. Times, Oct. 26, 1985, at 11, col. 1 (noting various legislative proposals requiring certain workers to undergo AIDS antibody testing, requiring the reporting of positive test results to state health officials, quarantining AIDS patients, and making it a felony for homosexuals to donate blood).

210. *But see* benShalom v. Secretary of the Army, 489 F. Supp. 964, 977 (E.D. Wis. 1980) (no "nexus" between lesbian soldier's homosexuality and her suitability for service); Norton v. Macy, 417 F.2d 1161, 1167 (D.C. Cir. 1969) (dismissal of homosexual civil service employee invalid absent nexus between his homosexuality and work performance).

tection of heightened scrutiny, the possibility exists that courts will use minimum rationality review to rubber-stamp sweeping state regulation of homosexuals on the grounds of public health. Thus, the need could not be greater for heightened scrutiny to assure that necessary government regulation of homosexual activity is narrowly tailored to further no more than the state's interest in preventing the spread of disease.

The Supreme Court's decision in *Roe v. Wade* established that, notwithstanding moral objections, our concept of ordered liberty would not tolerate relegating one million women a year who seek to terminate their pregnancies to unhealthy and illegal abortions. Similarly, our Constitution will not permit arbitrary treatment of more than twenty million of our population[211] based solely on the expression of sexual identity. The principle supporting this conclusion is not, as the *Dronenburg* court suggested, a judicial creation: it is the concept of fundamental personal liberty embodied in the Due Process Clause of the Fourteenth Amendment.

211. *See supra* note 201.