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***Dronenburg v. Zech*: Sexual Preference Discrimination Sanctioned in the Name of Judicial Restraint**

I. Introduction

Tolerance of homosexuality has not prevailed in the Anglo-American legal tradition.¹ Although the trend in the past two decades in both England and the United States has been toward decriminalization of private consensual homosexual acts between adults,² the United States Armed Forces have remained intran-

1. Sir William Blackstone, the eminent eighteenth century English legal scholar, summed up the common law's treatment of deviate sexual preferences in the following way:

What has been here observed, especially with regard to the manner of proof, which ought to be more clear in proportion as the crime is the more detestable, may be applied to another offence, of a still deeper malignity; the infamous *crime against nature*, committed with either man or beast. A crime which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out: for, if false, it deserves a punishment inferior only to that of the crime itself.

I will not act so disagreeable a part, to my readers as well as myself, as to dwell any longer upon a subject, the very mention of which is a disgrace to human nature. It will be more eligible to imitate in this respect the delicacy of our English law, which treats it, in its very indictments, as a crime not fit to be named: "*peccatum illud horribile, inter christianos non nominandum.*"

4 W. BLACKSTONE, COMMENTARIES *216.

As early as 1533, sodomy was a felony offense, which was punishable by death. 25 Hen. 8, ch. 6 (1533). In 1861, England abolished the death penalty and fixed the minimum punishment for sodomy at 10 years penal servitude. Offenses Against the Persons Act, 24 & 25 Vict., ch. 100, § 61 (1861). The minimum punishment was abolished in 1891. Penal Servitude Act, 54 & 55 Vict., ch. 69, § 1 (1891).

2. Private consensual homosexual conduct has been decriminalized in England. See HOME OFFICE SCOTTISH HOME DEPARTMENT REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION (WOLFENDEN REPORT) 9-10, 20-21, 24, 79-80 (1957), reprinted in S. KADISH & M. PAULSON, CRIMINAL LAW AND ITS PROCESSES 6-9 (2d ed. 1969).

As of 1979, 21 states have decriminalized homosexual conduct: Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Maine, Nebraska, New Hampshire, New Mexico, North Dakota, Ohio, Oregon, South Dakota, Vermont, Washington, West Virginia, and Wyoming. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L. J. 799, 950-51 (1979). In addition, New York's sodomy statute was declared unconstitutional in *People*

sigent.³ Perhaps as many as 3000 servicemembers each year are administratively discharged under the Pentagon's rigid anti-homosexuality directives.⁴ In and of itself, homosexuality has little correlation with a soldier's capacity to render competent military service.⁵ The Pentagon has steadfastly maintained, however, that homosexuality is per se disruptive behavior.⁶ Federal

v. Onofre, 72 A.D.2d 268, 424 N.Y.S.2d 566 (1980).

Twenty-eight states and the District of Columbia still proscribe private consensual homosexual conduct by statute: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Jersey, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, and Wisconsin. Rivera, *supra*, at 949-50. For further information, see MODEL PENAL CODE art. 207 commentary (Tentative Draft no. 4 1955) (arguing for decriminalization).

3. See *infra* notes 83-98 and accompanying text.

4. C. WILLIAMS & M. WEINBERG, *HOMOSEXUALS AND THE MILITARY* 53 (1971). One anti-homosexual directive stated:

Department of Defense policy requires prompt separation of homosexuals. The homosexual person is considered unsuitable for military service and is not permitted to serve in the Armed Forces in any capacity. His presence in a military unit would seriously impair discipline, good order, morale, and security. Further, the Department of Defense has an obligation and responsibility to provide our young men and women in the Armed Forces with the most wholesome and healthful environment possible.

U.S. Dep't of Defense Policy on Homosexuals in the Armed Forces, App."A," reprinted in Comment, *The Aftermath of Saal v. Middendorf: Does Homosexuality Preclude Military Fitness?* 22 SANTA CLARA L. REV. 491, 491 (1982).

5. Everhard, *Problems Involving the Disposition of Homosexuals in the Service*, JAG BULL., Nov. 1960, at 20.

6. The Pentagon's regulations provide in part:

Homosexuality is incompatible with military service. The presence in the military of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among service-members; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Military Services; to maintain the public acceptability of military service and to prevent breaches of security.

32 C.F.R. § 41.6 app. A, pt. 1, (H)(1) (1984). For similar Navy regulations, see 32 C.F.R. §§ 730.10(b)(7), 730.12(b)(5) (1983), removed by, 48 Fed. Reg. 40,224 (1983). The Navy no longer publishes its regulations in the Code of Federal Regulations. The source directives (SECNAV Instruction 1900.9) upon which they were derived remain in effect. Since James Dronenburg was discharged from the United States Navy, both Pentagon and Navy regulations will be discussed. See also Comment, *Employment Discrimination in the Armed Forces — An Analysis of Recent Decisions Affecting Sexual Preference Dis-*

cases indicate that it may be of little consequence in a discharge proceeding that a homosexual servicemember's duty record is otherwise exemplary.⁷

Despite an increasing number of constitutional right to privacy challenges by homosexual servicemembers, the United States Supreme Court has never granted certiorari in a case concerning sexual preference discrimination in the armed forces. Indeed, the Court recently stated: "Whether constitutional rights are infringed in sexual preference cases, and whether some compelling state interest can be advanced to permit their infringement, are important questions this Court has never addressed, and which have left the lower courts in some disarray."⁸

In *Dronenburg v. Zech*,⁹ the District of Columbia Circuit Court of Appeals became the first circuit court to directly address whether the principles enunciated in *Griswold v. Connecticut*¹⁰ and subsequent Supreme Court cases, which recognized a

crimination in the Military, 27 VILL. L. REV. 352 (1981).

7. See *Saal v. Middendorf*, 427 F. Supp. 192 (N.D. Cal. 1977), *rev'd sub nom.* *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980) (three Navy servicemembers discharged due to their sexual preference despite untainted service records); *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984) (Naval petty officer discharged due to his sexual preference despite exemplary service record). *But see* *Berg v. Claytor*, 436 F. Supp. 76 (D.D.C. 1976), *vacated and remanded*, 591 F.2d 849 (D.C. Cir. 1978) (case remanded for Navy to prove appellant homosexual servicemember did not come within the purview of the exceptions contemplated by the regulations by reason of his exemplary record); *Matlovich v. Secretary of the Air Force*, 591 F.2d 852 (D.C. Cir. 1978), 23 Fair Empl. Prac. Cas. (BNA) 1251 (1980) (after being discharged solely because of his sexual preference, Technical Sergeant was reinstated because it was determined that his exemplary service record was not accorded any weight in the Air Force's decision to discharge him); *benShalom v. Secretary of Army*, 489 F. Supp. 964 (E.D. Wis. 1980) (Army Drill Sergeant who was discharged due to her sexual preference was reinstated by federal judge because Army failed to show that her sexual preference compromised her military capabilities).

8. *Rowland v. Mad River Local School Dist.*, 45 S. CT. BULL. (CCH) B1138, B1145 (1985) (Brennan, J., dissenting). See, e.g., *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980) (denying appellant's substantive due process, right to privacy, and procedural due process claims); *Rich v. Secretary of Army*, 735 F.2d 1220 (10th Cir. 1984) (denying appellant's procedural due process, substantive due process, right to privacy, equal protection, and first amendment claims); *benShalom v. Secretary of Army*, 489 F. Supp. 964 (E.D. Wis. 1980) (sustaining petitioner's first, fifth, ninth, and fourteenth amendment claims); *Matthews v. Marsh*, No. 82-0216 (D. Me. Apr. 3, 1984) (available May 23, 1985, on LEXIS, Genfed library, Dist file) *vacated and remanded*, No. 84-1482 (1st Cir. Feb. 22, 1985) (upholding petitioner's first amendment claim, but not discussing petitioner's right to privacy claim because relief was granted on first amendment grounds).

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

10. 381 U.S. 479 (1965).

constitutional right to privacy, implied protection of consensual homosexual conduct in the military. Writing for a unanimous court, Judge Bork asserted that although the Supreme Court may create new constitutional rights, a panel of the court of appeals should not be so presumptuous; according to Judge Bork, legislatures, not courts, are the proper place to recast sexual mores.¹¹ The *Dronenburg* court, therefore, agreed with the Navy that a petty officer who admitted performing homosexual acts with a subordinate recruit was justifiably discharged and possessed no discernible constitutional right to privacy.¹²

Part II of this Note discusses the applicable military regulations, the Supreme Court cases concerning the constitutional right to privacy, and the lower federal cases that have addressed the right to privacy of homosexuals in the military. Part III presents the facts of *Dronenburg*, the circuit court opinion, and the dissenting opinion filed with the court's denial for a rehearing en banc. Part IV analyzes the opinion of the circuit court, focusing on the court's interpretation of the Supreme Court right to privacy decisions and the role of judicial restraint in constitutional jurisprudence. Part V concludes that the Supreme Court's right to privacy cases evince a privacy right that subsumes private consensual sexual conduct. Thus, a homosexual's right to privacy should be classified as fundamental and infringements on that right should warrant strict scrutiny review.

II. Background and Historical Development

A. *Military Regulations Concerning Homosexual Servicemembers*

1. *Regulations before 1949*

The Pentagon's treatment of homosexuals within its ranks, although never particularly enthusiastic, has evolved through many stages.¹³ During World War II, the "section VIII" dis-

11. *Id.* at 1396-97.

12. *Id.* at 1397-98.

13. For an authoritative examination of military-homosexual relations, see West & Glass, *Sexual Behavior and the Military Law*, in *SEXUAL BEHAVIOR AND THE LAW* 250 (R. Slovenko ed. 1965). See also Note, *Homosexuals in the Military*, 37 *FORDHAM L. REV.* 465 (1969).

charge¹⁴ provided for "prompt separation of those exhibiting various types of deviant behavior," in which "sexual perversion" (including homosexuality) was a recognized malfeasance.¹⁵ Section VIII discharges of enlisted men were effected through administrative procedures, rather than by court-martial.¹⁶

Toward the end of World War II, through the influence of the Surgeon General's Office, the military relaxed its policy with regard to homosexual servicemembers.¹⁷ The Pentagon further liberalized its policy in 1945 by allowing homosexual servicemembers to be honorably discharged if the accused possessed an otherwise exemplary record and had committed no homosexual offenses.¹⁸

After 1947 this more lenient attitude toward homosexual servicemembers toughened.¹⁹ It has been suggested that the shift in Pentagon policy was a sign of the times and paralleled contemporaneous congressional inquiries concerning homosexuals in government.²⁰ During this time, homosexual servicemembers were considered both "military liabilities" and "se-

14. See West & Glass, *supra* note 13 at 251. (A Section VIII discharge provided for the immediate discharge of servicemembers, who displayed certain types of objectionable behavior, under the heading: "Inaptness or Undesireable Habits or Traits of Character." Specific sexual offenses were not enumerated.)

15. *Id.*

16. Note, *supra* note 13, at 465. The administrative process began with a three-member board of officers. In the event that the panel found a section VIII discharge was warranted, the discharge was labeled either "white" (with honor) or "blue" (without honor). A vast majority of the section VIII discharges were white. Homosexuals discharged under section VIII, however, typically received blue discharges, which indicated the "exhibited maladjustment was more severe from a moral standpoint." *Id.*

17. West & Glass, *supra* note 13, at 253. The Surgeon General's Office was pivotal in the formulation of U.S. DEP'T OF WAR, CIRCULAR No. 3 (1944), which provided that only homosexuals who were "apprehended or were reported to have performed homosexual acts" were to be discharged. *Id.* Confirmed homosexual officers were allowed to resign for the good of the service, and enlisted men were given "blue" section VIII discharges. The Surgeon General had advocated conferring "white" discharges, but "blue" discharges continued because the Pentagon feared that "many homosexuals who were well-adjusted would seek to be discharged and that others might claim to be homosexual for the purpose of getting out of the Army with honorable discharges." *Id.* at 253-55. For an explanation of the distinction between "white" and "blue" section VIII discharges, see *supra* note 16.

18. West & Glass, *supra* note 9, at 253-54.

19. *Id.* at 255.

20. *Id.* at 255-56. See SENATE COMM. ON EXPENDITURES IN THE EXECUTIVE DEPARTMENTS, EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOVERNMENT, S. DOC. No. 241, 81st Cong., 2d Sess. (1950).

curity risks."²¹

2. *Current regulations*

The Secretary of Defense is empowered by Congress to set forth regulations for the governance of his department.²² Pursuant to this authority, the Pentagon has mandated that "homosexuality is incompatible with military service."²³ Separation from military service is required for all homosexuals unless one of a few narrow exceptions allowing retention applies.²⁴ The burden of proof lies with the accused servicemember to show that retention is warranted.²⁵ If the alleged homosexual conduct is private, consensual, and between adults, an honorable discharge is recommended when sexual preference is the sole basis for separation.²⁶

21. Security breaches in the State Department were alleged by the Senate to have occurred because of the distinctive risks posed by homosexual employees. West & Glass, *supra* note 13, at 256.

22. 5 U.S.C. § 301 (1977).

23. 32 C.F.R. § 41.6 app. A, pt. 1, (H)(1) (1984). *See supra* note 6.

24. *Id.* at pt. 1, (H)(1)(c), which states in relevant part:

c. The basis for separation may include preservice, prior service, or current service conduct or statements. A member shall be separated under this section if one or more of the following approved findings is made:

(1) The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are approved further findings that:

(a) Such conduct is a departure from the member's usual and customary behavior;

(b) Such conduct under all the circumstances is unlikely to recur;

(c) Such conduct was not accomplished by use of force, coercion, or intimidation by the member during a period of military service;

(d) Under the particular circumstances of the case, the member's continued presence in the Service is consistent with the interest of the Service in proper discipline, good order, and morale, and;

(e) The member does not desire to engage in or intend to engage in homosexual acts.

(2) The member has stated that he or she is a homosexual or bisexual unless there is a further finding that the member is not a homosexual or bisexual.

(3) The member has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the persons involved) unless there are further findings that the member is not a homosexual or bisexual and that the purpose of the marriage or attempt was the avoidance or termination of military service.

25. *Id.* at pt. 1, (H)(3)(e).

26. *Id.* at pt. 1, (H)(2), which states in relevant part:

Administrative discharge processing commences once the military has probable cause to believe separation is warranted.²⁷ If the Administrative Board concludes that the allegations are supportable by competent evidence, the servicemember is recommended for discharge unless the Board finds that an enumerated exception applies.²⁸ If the Board recommends retention, the Separation Authority²⁹ may either approve the Board's findings³⁰ or send the case to the Secretary of the applicable service branch, who has the authority to discharge the accused.³¹ If the Board recommends discharge, the Separation Authority can either approve the finding,³² disapprove the finding due to lack of evidence,³³ or recommend retention of the accused under one of the enumerated exceptions.³⁴

2. *Characterization or description.* Characterization of service or description of separation shall be in accordance with the guidance in section C. of Part 2. When the sole basis for separation is homosexuality, a characterization Under Other Than Honorable Conditions may be issued only if such a characterization is warranted under section C. of Part 2 and there is a finding that during the current term of service the member attempted, solicited, or committed a homosexual act in the following circumstances:

- a. By using force, coercion, or intimidation;
- b. With a person under 16 years of age;
- c. With a subordinate in circumstances that violate customary military superior-subordinate relationships;
- d. Openly in public view;
- e. For compensation;
- f. Aboard a military vessel or aircraft; or
- g. In another location subject to military control under aggravating circumstances noted in the finding that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

This regulation also precludes courts-martial in appropriate cases. *Id.* at pt. 1 (H)(3)(f)(5).

27. *Id.* at pt. 1, (H)(3)(a). For complete Board procedure and rules which govern all administrative discharges see *id.* at pt. 3, (A)-(D).

28. *Id.* at pt. 1, (H)(3)(b)(1). The Board consists of three officers, either commissioned or noncommissioned, or senior enlisted personnel, if appointed. *Id.* at pt. 3, (c)(5)(a)(1).

29. *Id.* at pt. 1, (H)(3)(c). The Separation Authority is a special court-martial convening authority which consists of a commanding officer and a judge advocate or legal advisor. *Id.* at pt. 3, (B)(4)(a). The Separation Authority reviews the Board's findings as a higher authority. *Id.* at pt. 3, (B)(6)(A)-(D).

30. *Id.* at pt. 1, (H)(3)(d)(1)(a).

31. *Id.* at pt. 1, (H)(3)(d)(1)(b).

32. *Id.* at pt. 1, (H)(3)(d)(2)(a).

33. *Id.* at pt. 1, (H)(3)(d)(2)(b)(1).

34. *Id.* at pt. 1, (H)(3)(d)(2)(b)(2). The accused has the option to waive Board pro-

The second stage of the military's administrative discharge process consists of review boards authorized by federal statute.³⁵ For example, the Navy provides for a Board of Correction of Naval Records.³⁶ The Board is comprised of civilians³⁷ and has the authority to correct any naval record when necessary to rectify alleged errors or to cure injustices.³⁸ The procedure and machinery provided is similar to appellate review in the civilian context.³⁹ After an examination of the relevant documentation and evidence, the Board makes a formal recommendation to the Secretary of the Navy.⁴⁰ The Secretary may, at his discretion, reject or adopt the Board's recommendation.⁴¹ The Secretary's final decision is subject to review in federal district court.⁴²

Generally, federal courts require the servicemember to exhaust his administrative remedies before bringing suit against the military.⁴³ This doctrine has been disregarded, however, when judges have found that remanding the case would be futile.⁴⁴ When the armed forces' administrative remedies would be unavailing, the resolution of a claim founded solely upon a constitutional right is suited to a judicial forum.⁴⁵ But the Supreme

ceedings, in which case the Separation Authority will determine the accused's fate. *Id.* at pt. 1, (H)(3)(d)(3)(a)-(b).

35. 10 U.S.C. § 1552 (1983).

36. 32 C.F.R. § 723 (1984).

37. *Id.* at § 723.2(a).

38. *Id.* at § 723.2(b)-(c).

39. *Id.* at §§ 723.3-11.

40. *Id.* at § 723.6(e).

41. *Id.* at § 723.7.

42. *See* Harmon v. Brucker, 355 U.S. 579, 581-83 (1958).

43. Champagne v. Schlesinger, 507 F.2d 979, 982 (7th Cir. 1974) (homosexual servicemember required to exhaust administrative remedies before litigation); Krugler v. Secretary of Army, No. 83-8265 (N.D. Ill. Sept. 27, 1984) (available Feb. 1, 1985, on Lexis, Genfed library, Dist file) (homosexual servicemember required to exhaust her administrative remedies before resorting to federal court).

44. Martinez v. Brown, 449 F. Supp. 207, 211 (N.D. Cal. 1978) (A homosexual servicemember was not required to exhaust his administrative remedies because Navy regulations mandated discharge for all homosexuals.); Saal v. Middendorf, 427 F. Supp. 192, 196-97 (N.D. Cal. 1977), *rev'd sub nom.* Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980) (The trial judge declined to require homosexual servicemember to exhaust her administrative remedies because Navy regulations mandated discharge for all homosexuals.).

45. Martinez v. Brown, 449 F. Supp. at 211; Saal v. Middendorf, 427 F. Supp. at 196-97. *See, e.g.,* Heliman, *The Constitutionality of Discharging Homosexual Military Personnel*, 12 COLUM. HUM. RTS. L. REV. 191, 194-96 (1980).

Court has consistently counselled that great deference is due when federal courts review matters of Pentagon policy and procedure.⁴⁶ As the cases reveal, the military's latitude is wide.⁴⁷

B. *The Right to Privacy*

1. *History*

The first duty of a responsible government is to protect citizens in their persons and property.⁴⁸ This duty goes to the heart of the common law.⁴⁹ Before Brandeis' day, the common law

46. This principle was forcibly enunciated in *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953), in which the Court held that Pentagon discretion to assign duties to a servicemember should be carefully guarded. Justice Jackson stated: "[J]udges are not given the task of running the Army. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to interfere in judicial matters." In *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981), the Court upheld male only draft registration. In an opinion by Justice Rehnquist, the Court held that this "case arises in the context of Congress' authority over national defense and military affairs, and in perhaps no other area has the Court accorded Congress greater deference." Finally, in *Gilligan v. Morgan*, 413 U.S. 1, 11 (1973), the Court declined to continue judicial oversight concerning National Guard training and weaponry, holding:

[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.

47. See *benShalom v. Secretary of Army*, 489 F. Supp. 964, 970 (E.D. Wis. 1980); *Rich v. Secretary of Army*, 735 F.2d 1220, 1229 (10th Cir. 1984).

48. See J. LOCKE, *TWO TREATISES ON GOVERNMENT* 395 (J. Laslett ed. 1963); *THE FEDERALIST* No. 17 (A. Hamilton) (C. Rossiter ed. 1961).

49. See *Boyd v. United States*, 116 U.S. 616, 624-630 (1886). Justice Bradley's remarks are worth quoting at length:

The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence, — it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.

Id. at 630. In *In re Pacific Ry. Comm'n*, 32 F. 241 (1887), Justice Field wrote:

Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private

provided remedies for the physical encroachment upon life and property.⁵⁰ At the turn of the century, during a period when society experienced rapid social change, the common law began to recognize basic privacy rights of individuals.⁵¹ The intellectual genesis of a right of privacy is generally acknowledged to have come from Louis Brandeis and Samuel Warren's article in the *Harvard Law Review* in 1891.⁵²

The right to privacy principle was not expressly acknowledged by the Supreme Court until 1965 in *Griswold v. Connecticut*.⁵³ In *Griswold*, the Court held that Connecticut's anticontraceptive statute violated the due process clause of the fourteenth amendment because it deprived *married* persons of the fundamental right to make intimate marital decisions con-

affairs, books, and papers, from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value.

Id. at 250. See also J. LANDER, *ANCIENT AND MEDIEVAL ENGLAND* 81-87 (1973) (examining the origins of the common law and Henry II's twelfth century reforms to better protect persons and property).

50. See *Weeks v. United States*, 232 U.S. 383 (1913); *Boyd v. United States*, 116 U.S. at 624-30 (1886); see also F. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW*, 17-32 (A. Chaytor ed. 1981); O.W. HOLMES, *THE COMMON LAW* 206-46 (1881).

51. *Poe v. Ullman*, 367 U.S. 497, 518-19 n.9 (1961) (Douglas, J., dissenting). Justice Douglas wrote:

The due process clause is said to exact from the states all that is "implicit in the concept of ordered liberty." It is further said that the concept is a living one, that it guarantees basic rights, not because they have become petrified as of any one time, but because due process follows the advancing standards of a free society as to what is deemed reasonable and right.

Id. See also RUBENSTEIN & FRY, *Right of Privacy: The Third Specific Deprivation*, in *OF A HOMOSEXUAL TEACHER: BENEATH THE MAINSTREAM OF CONSTITUTIONAL EQUALITIES* 48, 48 (1981).

52. S. Warren & L. Brandeis, *The Right to Privacy*, 4 *HARV. L. REV.* 193 (1891). Brandeis had occasion to expound his views once he ascended to the Supreme Court in *Olmstead v. United States*, 277 U.S. 438, 471-81 (1927) (Brandeis, J., dissenting):

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They 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 most valued by civilized men. Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasions of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

53. 381 U.S. 479 (1965).

cerning procreation by regulating the marital relationship without a rational or legitimate basis.⁵⁴

After *Griswold, Whalen v. Roe*⁵⁵ was the Supreme Court's most comprehensive attempt to define the constitutional right to privacy.⁵⁶ At issue in *Whalen* was a New York statute that required pharmacists to provide the state with a copy of every prescription for certain enumerated drugs.⁵⁷ The Court held that neither the immediate nor threatened impact on privacy of the patient identification provision in the statute was onerous enough to invalidate New York's legitimate interest in attempting to control the dissemination of dangerous drugs.⁵⁸

The Court in *Whalen* enunciated a framework for analyzing

54. Writing for the majority, Justice Douglas stated: "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance Various guarantees create zones of privacy Without those peripheral rights the specific rights would be less secure." *Id.* at 482-84 (citations omitted). The Court, however, made clear in *Katz v. United States*, 389 U.S. 347 (1967), that although the Constitution provides protection against particular governmental intrusions into personal and private matters, no general right to privacy exists. *Id.* at 350-51.

In *Roe v. Wade*, 410 U.S. 113 (1973), the Court curtailed state police power to regulate abortions. In holding that a Texas abortion statute violated the fourteenth amendment's due process clause, Justice Blackmun, writing for the majority, compiled a history of the "personal and private" matters the Court has protected:

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as . . . [1891], the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, . . . in the Fourth and Fifth Amendments, . . . in the penumbras of the Bill of Rights, . . . in the Ninth amendment, . . . or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" . . . are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, . . . procreation, . . . contraception, . . . family relationships, . . . and child rearing and education

Id. at 152-53. See also *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (in which a New York statute that restricted distribution of contraceptives, in the absence of a compelling state interest, was declared unconstitutional because it violated the right to privacy and the fourteenth amendment).

55. 429 U.S. 589 (1977).

56. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 886 (1978).

57. *Whalen v. Roe*, 429 U.S. at 593.

58. *Id.* at 598.

the constitutional right to privacy. Relying on *Paul v. Davis*,⁵⁹ Justice Stevens asserted that the right of privacy entails something more than “the least common denominator of the Court’s prior decisions”⁶⁰ concerning procreation, contraception, child rearing, and marital choice.⁶¹ Two distinct types of privacy interests were articulated.⁶² The first interest was the individual interest in keeping certain personal matters private.⁶³ The second interest concerned the individual’s interest in unimpeded discretion with regard to certain important personal decisions.⁶⁴ A unanimous Court held that because New York had a justifiable end — the control of stolen or revised drug prescriptions⁶⁵ — and because the means used to attain that end were the least restrictive available,⁶⁶ the individual privacy interests of persons in need of treatment — fear that the state’s accumulated data would be made public and stigmatize them as addicts — were not impermissibly invaded.⁶⁷

The issue of whether consensual homosexual conduct is protected by a constitutional privacy interest has never been

59. 424 U.S. 693, 713 (1976) (where the Court found that the actions of a Police Chief in distributing flyers of defendant, an active shoplifter, did not abridge defendant’s liberty or property rights under the fourteenth amendment).

60. L. TRIBE, *supra* note 56, at 886.

61. *Whalen*, 429 U.S. at 600 n.26.

62. *Id.* at 598-99.

63. *Id.* at 599. See *Olmstead v. United States*, 277 U.S. at 478 (Brandeis, J., dissenting) (The right to be let alone is the right most valued by civilized man.); *Griswold v. Connecticut*, 381 U.S. at 483 (“[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion.”). See also *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (quoting with approval Justice Brandeis’ dissent in *Olmstead v. United States*, 277 U.S. at 478).

64. *Id.* at 599-600. See *Roe v. Wade*, 410 U.S. at 153 (“This right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent.”); *Loving v. Virginia*, 388 U.S. at 11-12 (The freedom to marry one of another race cannot be proscribed by state statute.) For the historical antecedents to the right to privacy enunciated in *Roe*, see *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (The freedom to educate one’s own children in a parochial school was found to be constitutionally protected.); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (The freedom to acquire knowledge of the German language was found to be constitutionally protected.).

65. *Whalen v. Roe*, 429 U.S. at 591.

66. *Id.* at 603. See, e.g., *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354-55 (1951) (setting forth least restrictive means requirement).

67. *Whalen v. Roe*, 429 U.S. at 602.

granted full plenary review by the Supreme Court. *Doe v. Commonwealth's Attorney*⁶⁸ is the only Supreme Court case that has addressed the issue of whether consensual homosexual conduct is constitutionally protected.

2. *The Doe case and the right to privacy standard of review*

In *Doe v. Commonwealth's Attorney*⁶⁹ the Supreme Court summarily affirmed⁷⁰ the judgment of a divided three-judge district court sustaining Virginia's statute prohibiting sodomy. *Doe*, like other Supreme Court privacy cases,⁷¹ involved choosing between the Court's two levels of scrutiny of substantive due process rights.⁷² Historically, the Court has protected certain noneconomic substantive due process rights, but economic rights have received virtually no substantive due process protection since the 1930's.⁷³

When economic rights are impaired by a statute, the Court merely requires a rational connection between the law and the legitimate state ends.⁷⁴ When the Court finds that a fundamen-

68. 425 U.S. 901 (1976).

69. *Doe v. Commonwealth's Att'y*, 403 F. Supp. 1199, 1200 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

70. Unlike denials of certiorari, a summary affirmance is considered a judgment on the merits, although no opinion is written and no oral argument is heard. *See infra* note 143.

71. *See supra* notes 53-67 and accompanying text. For discussion of the Court's two-tier analysis of substantive due process cases, *see infra* notes 74-79 and accompanying text.

72. "Substantive due process," as defined here, refers to freedom from arbitrary state action. *See, e.g.* *Zablocki v. Redhail*, 434 U.S. 374 (1978) (A state law required that any parent legally responsible for child support payments could not remarry unless (1) payments were made in full, and (2) there was a showing that the child would not likely become a ward of the state. The Court held the law to be a denial of substantive due process rights and equal protection of the law.).

73. *See United States v. Carolene Products, Co.*, 304 U.S. 144, 152 n.4 (1938) *See infra* note 171.

74. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955) (The Court stated that the fourteenth amendment due process clause would no longer be employed to strike down state laws regulating business, because they may be unwise or out of harmony with a particular school of thought. It is enough that there is an evil at hand for correction, and that the particular legislative measure was a rational way to correct it.); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 381 (1937) (A state minimum wage law for women was upheld upon application of a rational basis test.); *Nebbia v. New York*, 291 U.S. 502, 537 (1934) (New York's regulations for milk-pricing were upheld as rationally furthering a

tal noneconomic right has been curtailed by statute, heightened scrutiny is applied;⁷⁵ the government's ends must be both legitimate and compelling, and the ends must be closely related to the means.⁷⁶ Whether or not a right is fundamental is an important distinction. If the right is not fundamental, and the state objective is found to be legitimate and rationally connected to the statute, the Supreme Court shows complete deference to the legislature.⁷⁷

An analysis was conducted by the district court in *Doe* to determine which level of scrutiny was warranted. The three-judge panel held that the Supreme Court had never defined the right to engage in homosexual conduct as a "fundamental right."⁷⁸ Additionally, the panel concluded that Virginia's objective — the promotion of morality and decency — was legitimate.⁷⁹ Finally, because no fundamental right was at stake and because the Commonwealth's end was a valid one, only a rational connection between the sodomy statute and the objective was required.⁸⁰ The court concluded that the Commonwealth's

legitimate state end.).

75. *United States v. Carolene Products Co.*, 304 U.S. at 152 n.4.

76. *See Griswold v. Connecticut*, 381 U.S. at 503-04 (White, J., concurring); *United States v. Carolene Products Co.*, 304 U.S. at 152 n.4. In fact, the fundamental right determination has been virtually dispositive of whether the statute survives or not. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting).

77. In these circumstances, the level of scrutiny is extremely low. No statute regulating economic rights has been voided by the Court on substantive due process grounds since *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (Bituminous Coal Conservation Act of 1935 was held unconstitutional on substantive due process grounds.).

78. *Doe v. Commonwealth's Att'y*, 403 F. Supp. at 1201-03.

79. *Id.* at 1202-03.

80. *Id.* In dissent, District Judge Merhige disputed the majority's contention that the state had a legitimate interest or rational basis to support the statute's application:

The defendants, represented by the highest legal officer of the state, made no tender of any evidence which even impliedly demonstrated that homosexuality causes society any significant harm. No effort was made by the defendants to establish either a rational basis or a compelling state interest so as to justify the proscription of § 8.1-212 of the Code of Virginia, presently under attack. To suggest, as defendants do, that the prohibition of homosexual conduct will in some manner encourage new heterosexual marriages and prevent the dissolution of existing ones is unworthy of judicial response. . . . Whether the guarantee of personal privacy springs from the First, Fourth, Fifth, Ninth, the penumbra of the Bill of Rights, or, as I believe, in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, the Supreme Court has made it clear that fundamental rights of such an intimate facet of an individual's life as sex, absent circumstances warranting intrusion by the state, are to be respected.

assertion that homosexual conduct was likely to contribute to immorality was sufficient to uphold the statute.⁸¹ Virginia was not required to show that delinquency was actually produced by homosexual conduct.⁸² Similarly, in the cases discussed in the following subsection, the military was not required to prove that homosexual conduct actually produced the adverse effects claimed.

3. *Military cases after Doe v. Commonwealth's Attorney*

Courts in five federal circuits have addressed the issue of whether military regulations proscribing homosexuality violate a servicemember's constitutional right to privacy.⁸³ Of these courts, four have decided the issue on the merits. The Ninth, Tenth, and District of Columbia circuits have denied the servicemember's claim.⁸⁴ In contrast, a Wisconsin federal district court recognized a lesbian servicemember's right to privacy because no homosexual conduct was alleged.⁸⁵

The decisions in the Ninth, Tenth, and District of Columbia circuits which denied the homosexual servicemember's claim had three things in common.⁸⁶ First, each court practiced time-honored deference to the military.⁸⁷ The armed forces maintained that the nature of the military mission was such that discipline, good order, morality, and mutual trust were concerns

Id. at 1205 (Merhige, J., dissenting).

81. *Doe v. Commonwealth's Att'y*, 403 F. Supp. at 1202.

82. *Id.*

83. *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984); *Rich v. Secretary of Army*, 735 F.2d 1220 (10th Cir. 1984); *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980); *ben-Shalom v. Secretary of Army*, 489 F. Supp. 964 (E.D. Wis. 1980); *Matthews v. Marsh*, No. 82-0216 (D. Me. Apr. 3, 1984) (available Sept. 1, 1984, on Lexis, Genfed library, Dist file), *vacated and remanded*, No. 84-1482 (1st Cir. Feb. 22, 1985). In *Matthews*, a Maine district court reinstated a self-professed lesbian ROTC cadet, but on first amendment grounds. Although the cadet claimed a deprivation of a right to privacy, the court refused to address the issue. *Id.*

84. *Dronenburg*, 741 F.2d at 1397-98; *Rich v. Secretary of Army*, 735 F.2d at 1228; *Beller v. Middendorf*, 632 F.2d at 810.

85. *ben-Shalom v. Secretary of Army*, 489 F. Supp. at 975.

86. *Dronenburg*, 741 F.2d at 1397-98; *Rich v. Secretary of Army*, 735 F.2d at 1228; *Beller v. Middendorf*, 632 F.2d at 810.

87. *Dronenburg*, 741 F.2d at 1398; *Rich v. Secretary of Army*, 735 F.2d at 1228; *Beller v. Middendorf*, 632 F.2d at 812. Each case involved both homosexual conduct by the servicemember and an allegation by the servicemember that Pentagon regulations violated a constitutional right to privacy.

paramount to individual liberties, and in each case convinced the court that respect for military judgment was warranted.⁸⁸ Second, each court concluded that Pentagon policies requiring the mandatory processing for discharge of homosexual servicemembers served a legitimate state interest, namely, preserving the integrity, efficiency, and success of the military's mission.⁸⁹ A rational basis standard was therefore applied; and the military was only required to prove that homosexuals were likely to have an adverse effect on the military mission.⁹⁰ Finally, each court held that the Supreme Court's privacy decisions never defined the right so broadly as to encompass homosexual activity.⁹¹

In *benShalom v. Secretary of Army*,⁹² a Wisconsin federal district court granted a servicemember's mandamus request to be reinstated after she was discharged solely on the basis of her homosexual status.⁹³ Although the servicemember was a self-professed lesbian, the Army was unable to allege any homosexual conduct.⁹⁴ Because no homosexual conduct was alleged, the servicemember claimed that she was denied both her constitutional right to privacy and freedom of association under the first amendment.⁹⁵ The court stated that the privacy of the innermost parts of one's personality was so "fundamental" or "implicit in the concept of ordered liberty" that constitutional pro-

88. *Beller v. Middendorf*, 632 F.2d at 801, 802 n.9; *Rich v. Secretary of Army*, 735 F.2d at 1227 n.7; *Dronenburg*, 741 F.2d at 1398. Cf. *Parker v. Levy*, 417 U.S. 733, 743-44 (1974) (The military was given deference when it denied an Army doctor the right to make antiwar speeches on an army base.).

89. *Dronenburg*, 741 F.2d at 1398; *Rich v. Secretary of Army*, 735 F.2d at 1228; *Beller v. Middendorf*, 632 F.2d at 812.

90. *Dronenburg*, 741 F.2d at 1398; *Rich v. Secretary of Army*, 735 F.2d at 1227 n.7; *Beller v. Middendorf*, 632 F.2d at 812. In *Beller*, the court declined to decide whether a "fundamental right" was at issue. *Beller v. Middendorf*, 632 F.2d at 807. The value of its substantive due process analysis as precedent, therefore, is limited. In *Rich*, the court likewise refused to decide whether a fundamental right was at stake. *Rich v. Secretary of Army*, 735 F.2d at 1228. Only in *Dronenburg* did the court address this issue, and it unanimously held that homosexual conduct was not a fundamental right. *Dronenburg*, 741 F.2d at 1397.

91. *Dronenburg*, 741 F.2d at 1397-98; *Rich v. Secretary of Army*, 735 F.2d at 1228; *Beller v. Middendorf*, 632 F.2d at 810-12.

92. 489 F. Supp. 964 (E.D. Wis. 1980).

93. *Id.* at 977.

94. *Id.* at 969.

95. *Id.* at 972-75.

tection was warranted.⁹⁶ A homosexual "personality," without more, was not sufficient to warrant discharge.⁹⁷ Because the Army could not show that Ms. benShalom's sexual preference compromised her effectiveness as a drill sergeant, the regulation requiring discharge was unconstitutional.⁹⁸ It was within the background of these federal court decisions that the District of Columbia Circuit Court of Appeals examined the constitutional right to privacy in *Dronenburg v. Zech*.⁹⁹

III. *Dronenburg v. Zech*: Factual Setting, the Opinion of the Court, and the Motion Denying a Rehearing En Banc

A. *The Facts*

On April 21, 1981, James L. Dronenburg, a twenty-seven year old petty officer and student at the Defense Language Institute in Monterey, California, was discharged from the Navy for repeated homosexual conduct.¹⁰⁰ Dronenburg was a Korean linguist and cryptographer who had served in the navy for nine years. In addition, when he was discharged, Dronenburg had an exemplary service record and a top security clearance. In August, 1980, a nineteen year old seaman and student at the Institute made statements under oath alleging that he and Dronenburg had engaged in repeated homosexual conduct. Subsequently, the Navy commenced an investigation of Dronenburg, and after first denying the charges, he acknowledged that he was a homosexual and that he had engaged in homosexual activities on the Navy base.¹⁰¹

Pursuant to the applicable directive,¹⁰² the Navy notified

96. *Id.* at 975. See also *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

97. *benShalom v. Secretary of Army*, 489 F. Supp. at 976-77.

98. *Id.* at 977. Because a fundamental right was implicated, the court required a higher level of scrutiny than the rational basis review set forth by the Ninth, Tenth, and District of Columbia Circuits. A nexus was thus required to satisfy a strict scrutiny review. Although the government's interest was compelling — the need for discipline and good order — the regulation was invalidated because it mandated the discharge of all homosexuals. Absent a showing of deviant conduct and a diminished military capability on the servicemember's part, the means-ends relationship was not close enough. *Id.*

99. 741 F.2d 1388, 1389 (D.C. Cir. 1984).

100. *Dronenburg v. Zech*, 741 F.2d 1388, 1389 (D.C. Cir. 1984).

101. *Id.*

102. SECNAV Instruction 1900.9c (Jan. 20, 1978), cited in *Dronenburg*, 741 F.2d at 1389.

Dronenburg on September 18, 1980, that it was contemplating discharging him for misconduct because of his homosexual acts.¹⁰³ Dronenburg was brought before a Navy Administrative Discharge Board on January 20 and 22, 1981. Accompanied by an attorney, he testified and admitted engaging in homosexual conduct in the barracks. The Board unanimously recommended that Dronenburg be discharged. Of the three board members, two voted to have Dronenburg generally discharged, while the third member voted to give him an honorable discharge. The Secretary of the Navy later reviewed the case at Dronenburg's request and ordered that the discharge be categorized as honorable.

On April 20, 1981, Dronenburg filed suit in federal district court, contesting the Navy's policy of mandatory discharge for all homosexual servicemembers.¹⁰⁴ In an unreported opinion, the district court granted the Navy's motion for summary judgment.¹⁰⁵

B. *The Opinion of the Circuit Court of Appeals*

On appeal, James L. Dronenburg argued two constitutional theories: a constitutional right to privacy and a right to equal protection under the law.¹⁰⁶ The court reasoned that the equal protection claim was to some extent dependent on the right to privacy claim; if homosexual conduct was not a constitutionally protected privacy right, then equal protection was not infringed unless the Navy's policy of automatically processing all homosexuals for discharge was not rationally related to a legitimate end.¹⁰⁷ The court held that homosexual conduct was not a fundamental right and that the Navy's discharge policy was ration-

103. *Dronenburg*, 741 F.2d at 1389.

104. *Id.*

105. *Id.* (discussing the holding in *Dronenburg v. Zech*, No. 81-933, (D.D.C. Oct. 5, 1982)(unreported decision)).

106. *Dronenburg*, 741 F.2d at 1391. As a threshold matter, the circuit court in *Dronenburg* rejected the Navy's contention that there was no subject matter jurisdiction. *Id.* at 1389-90. This Note does not address this issue.

107. *Id.* at 1391. The Supreme Court's equal protection analysis is analogous to its treatment of noneconomic rights under substantive due process. See *supra* notes 73-82 and accompanying text. For a discussion of the various Supreme Court right to privacy theories and their development, see *supra* notes 48-67 and accompanying text.

ally related to the Navy's objective of maintaining discipline, morality, and good order in the military.¹⁰⁸

Whatever the common line of reasoning decipherable from *Griswold* and its progeny, the *Dronenburg* court concluded that it was not so broad as to include protection of private consensual homosexual conduct.¹⁰⁹ The *Dronenburg* court's exegesis of the Supreme Court right to privacy cases was that, although the decisions provide an "illustrative list" of what is protected, the Supreme Court had expressly denied in *Roe v. Wade*¹¹⁰ that the right was so broad as to say that one was free to do anything with one's body.¹¹¹ Neither *Roe* nor presumably any other Supreme Court decision had ever articulated an "explanatory principle" to which lower courts could look to discern what constituted protected privacy.¹¹² Because the facts in *Griswold* and its progeny related to such matters as marriage, procreation, family relationships, child rearing, and education, a right to homosexual conduct could not be implied.¹¹³ The *Dronenburg* court concluded that if homosexual conduct was "implicit in the concept of ordered liberty," then all private sexual behavior was protected, which was a conclusion the court was unwilling to make.¹¹⁴

Relying on dicta from Justice Harlan's dissent in *Poe v. Ullman*¹¹⁵ and the Supreme Court's summary affirmance in *Doe v. Commonwealth's Attorney*,¹¹⁶ the court held that if state action

108. *Id.* See also *Kelley v. Johnson*, 425 U.S. 238, 247-49 (1976) (A county regulation limiting the length of policemen's hair was held to be rationally related to the governmental objective of promoting safety of persons and property.).

109. *Dronenburg*, 741 F.2d at 1391.

110. 410 U.S. 113, 153-54 (1973).

111. *Dronenburg*, 741 F.2d at 1395 (discussing *Roe v. Wade*, 410 U.S. at 153-54).

112. *Dronenburg*, 741 F.2d at 1395-96.

113. *Id.*

114. *Id.* at 1396.

115. 367 U.S. 497, 553 (1961) (Harlan, J., dissenting). The Court held that a challenge to Connecticut's anticontraceptive statute was nonjusticiable. Justice Harlan, in dissent, set forth arguments that urged invalidation of the statute on grounds substantially adopted in *Griswold v. Connecticut*, 381 U.S. 479 (1965). In his dissent, Justice Harlan argued that although there was a right to privacy of constitutional dimension, all consensual activity should not be protected, and it was a permissible exercise of state police power to proscribe homosexual conduct.

116. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976). See *supra* notes 68-82 and accompanying text.

to prohibit homosexual conduct was constitutional in the civilian context, then such action was certainly valid in the military context.¹¹⁷ Moreover, the court observed that although summary affirmances were "somewhat ambiguous precedent," the Supreme Court's summary disposition of a case from its appellate docket was a decision on the merits.¹¹⁸ Consequently, *Doe* was binding on inferior courts.¹¹⁹

The *Dronenburg* court explained its role in the case as one of a disinterested arbiter, rather than as a policymaker on morality.¹²⁰ Espousing principles of judicial restraint, the court asserted that a lower federal court, unlike the Supreme Court, was not free to create new constitutional rights.¹²¹ Thus, the two issues open to review were whether the Supreme Court had created a right that was pertinent to the dispute's facts, or whether the Court had specified an analytical framework that covered homosexuality.¹²² The court held that the Supreme Court has never created a constitutional right to privacy for homosexual conduct.¹²³ Furthermore, the *Griswold* line of cases embodied no discernible explanatory principle to define the contours of protected privacy; therefore, the court had no unified standard to apply.¹²⁴ Absent both a fundamental right and a unified principle, a minimum rational basis review was conducted, and the military's need for discipline and good order was enough to sustain the regulation.¹²⁵

C. *The Denial of the Motion for a Rehearing En Banc*

James L. Dronenburg's request for a rehearing en banc was denied in a one paragraph per curiam opinion by the District of Columbia Circuit Court of Appeals on November 15, 1984.¹²⁶

117. *Dronenburg*, 741 F.2d at 1392.

118. *Id.* See also *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975).

119. *Dronenburg*, 741 F.2d at 1392. See also *Hicks v. Miranda*, 422 U.S. at 343-45.

120. *Dronenburg*, 741 F.2d at 1392.

121. *Id.* at 1396 n.5.

122. *Id.*

123. *Id.* at 1395-96.

124. *Id.* at 1395.

125. *Id.* at 1398.

126. *Dronenburg v. Zech*, 746 F.2d 1579 (D.C. Cir. 1984), *per curiam denying rehearing on Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984). Judges Bork, Scalia, Starr, Ginsburg, Wright, and Wilkey voted to deny the request for rehearing. *Id.* Judges

Chief Judge Robinson dissented on primarily two grounds.¹²⁷ First, Chief Judge Robinson maintained that the three-judge panel's exegesis of the constitutional right to privacy was unnecessary.¹²⁸ Whatever the origin of the right to privacy, the dissent asserted that it was clear that the principles underlying the Supreme Court's decisions were by now fairly established.¹²⁹ By confining *Griswold* and its progeny to their facts, the panel had abdicated its judicial responsibility.¹³⁰ Chief Judge Robinson concluded that such a use of judicial restraint was as inappropriate as would be a decision sustaining all privacy claims the Supreme Court had yet to reject.¹³¹

Second, Chief Judge Robinson maintained that *Doe*, which was a pre-enforcement dispute regarding a state criminal statute, was distinguishable from *Dronenburg*, which was a constitutional challenge to a Pentagon regulation not explicitly established by Congress.¹³² Chief Judge Robinson concluded that according *Doe* sweeping precedential value disregarded the time-honored principle that summary disposition of a case by the Supreme Court necessarily resolves the dispute between the litigants on the "narrowest possible grounds."¹³³

Wald, Mikva, Edwards and Chief Judge Robinson dissented. *Id.*

127. *Id.* at 1580-81 (Robinson, C.J., dissenting).

128. *Id.* at 1580.

129. *Id.*

130. *Id.*

131. *Id.* In her statement supporting denial of the petition for rehearing, Judge Ginsburg disagreed with the dissent's position: judicial restraint did not require inferior court judges to propose the direction of "further enlightenment" from the Supreme Court. *Dronenburg v. Zech*, 746 F.2d at 1581 n.1 (Ginsburg, J., concurring).

In his statement supporting the denial of the rehearing, Judge Bork defended the three-judge panel's interpretation of the Supreme Court's right to privacy cases. *Id.* at 1582. Inferior courts owed the Supreme Court obedience, Judge Bork stated, not "unquestioning approval." *Id.* at 1583. Absent a unifying principle with which to base a new constitutional right, courts ought not to usurp prerogatives the Constitution has left to the legislature. *Id.* In his statement supporting the denial, Judge Starr agreed that the right to privacy protects the home, decisions concerning childbirth, and traditional relationships. *Id.* at 1584. Furthermore, the principles set forth in those privacy cases did not preclusively bar the government from regulating consensual sex outside traditional relationships. *Id.*

132. *Id.* at 1580. See *supra* notes 22-47, 66-82, and accompanying text.

133. *Dronenburg v. Zech*, 746 F.2d at 1580 (Robinson, C.J., dissenting). In her statement supporting the denial, Judge Ginsburg agreed with the three-judge panel that *Doe v. Commonwealth's Att'y*, 425 U.S. 901 (1976), was binding. *Dronenburg v. Zech*, 746 F.2d at 1581 (Ginsburg, J., concurring) (citing *Hicks v. Miranda*, 422 U.S. at 334-45

IV. Constitutional Analysis

In *Dronenburg*, the District of Columbia Circuit Court of Appeals concluded that the Supreme Court's summary affirmance in *Doe v. Commonwealth's Attorney*¹³⁴ was dispositive.¹³⁵ Further, the court concluded that there was no unifying principle in the Supreme Court's right to privacy cases.¹³⁶ Without a unifying principle that embraced homosexual conduct, the court concluded that homosexual conduct was not a fundamental right and thus judicial restraint was appropriate.¹³⁷ Moreover, the court maintained that because homosexuality was not a fundamental right, the Navy's policy of automatically discharging homosexuals must only be rationally related to its military mission.¹³⁸ The court concluded that the policy was rationally related and therefore it neither violated substantive due process nor the equal protection clause.¹³⁹

The significance of *Dronenburg* will be primarily jurisprudential. Part of this significance lies in the court's constitutional analysis: the extensive exegesis the court employed to reach a very narrow conclusion concerning the right to privacy.¹⁴⁰ But in

(1975)). See also R. Ginsburg, *Inviting Judicial Activism: A "Liberal" or "Conservative" Technique*, 15 GA. L. REV. 539, 547-58 (1981). For a discussion of the *Hicks* doctrine, see *infra* notes 144-150 and accompanying text. In his statement supporting denial, Judge Bork proffered three reasons for suggesting that *Doe* controlled this case. *Dronenburg v. Zech*, 746 F.2d at 1582 n.1 (Bork, J., concurring). Like Judge Ginsburg, Judge Bork felt that the *Hicks* rule meant that Supreme Court summary affirmances were "fully binding," required the three-judge panel to follow *Doe. Id.* Further, Justice Brennan's suggestion in *Carey v. Population Servs. Int'l*, 431 U.S. 678, 694 n.17 (1977), stating that the *Doe* issue was still unresolved, was not tantamount to an overruling of *Doe. Dronenburg v. Zech*, 746 F.2d 1582 n.1. Finally, Judge Bork reasoned that because the Navy's regulation in *Dronenburg* was less restrictive than the statute at issue in *Doe*, it followed that the regulation was constitutional. *Id.* In his statement supporting the denial, Judge Starr concluded that the three-judge panel had performed an "elementary judicial obligation" in following *Doe. Id.* at 1584 (Starr, J., concurring).

134. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

135. *Dronenburg v. Zech*, 741 F.2d at 1391-92 (D.C. Cir. 1984).

136. *Id.* at 1391-96. For a discussion of the Supreme Court's right to privacy cases, see *Roe v. Wade*, 410 U.S. 113, 152-153 (1973). See also *supra* notes 53-82 and accompanying text.

137. *Dronenburg*, 741 F.2d at 1395-97.

138. *Id.* at 1397-98.

139. *Id.* at 1391. For a discussion explaining the rational basis analysis, see *supra* notes 71-77 and accompanying text.

140. *Dronenburg*, 741 F.2d at 1391-98.

view of the Supreme Court's apparent reluctance to address the constitutional privacy rights of homosexuals,¹⁴¹ the conclusive weight accorded by the District of Columbia Court of Appeals to the Supreme Court's summary affirmance in *Doe* may have wide implications in the other circuits.

A. *Doe v. Commonwealth's Attorney: The Precedential Value of Summary Affirmances*

The *Dronenburg* court's reliance on *Doe v. Commonwealth's Attorney*¹⁴² as a controlling precedent raises anew the issue of how inferior courts should interpret Supreme Court summary affirmances. *Doe* involved a federal constitutional challenge to a state statute and as such was a direct appeal within the Supreme Court's appellate jurisdiction.¹⁴³

141. See *Bd. of Education v. Nat'l Gay Task Force*, No. 83-2030 (U.S. March 26, 1985) (available March 29, 1985, on Lexis, Genfed library, Sup file) (The Court, in a 4-4 deadlock, sustained a Tenth Circuit court which found an Oklahoma law proscribing teachers from discussing homosexual issues as violative of the first amendment); *Rowland v. Mad River Local School Dist.*, 45 S. Ct. BULL. (CCH) B1138, B1138 (1985) (Brennan, J., dissenting) (A case involving the termination of an Ohio school teacher who had acknowledged her bisexuality was denied certiorari after a Sixth Circuit court denied the teacher relief.); *New York v. Uplinger*, 104 S. Ct. 2332 (1984) (Dismissing certiorari as improvidently granted in a case challenging a New York law which made homosexual solicitation a crime.); *Ratchford v. Gay Lib*, 434 U.S. 1080, 1181 (1978) (Rehnquist & Blackmun, JJ., dissenting from the denial of certiorari) (arguing that there was sufficient confusion in the lower courts to warrant Supreme Court review of this issue); *Gaylord v. Tacoma School Dist. No. 10*, 434 U.S. 879 (1978) (denying certiorari to review a Washington decision which allowed a school board to presume that a homosexual teacher was immoral and thus unfit to teach); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 688 n.5 (1977) ("[T]he Court has not definitely answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults."). Professor Tribe has written that "[t]he issue of homosexual rights is being left for another day, when public sentiment is clearer and legal theory more fully developed." L. Tribe, *AMERICAN CONSTITUTIONAL LAW* 87 (Supp 1979). *But see Carey v. Population Servs. Int'l*, 431 U.S. at 718 n.2 (Rehnquist, J., dissenting) (citing *Doe v. Commonwealth's Att'y*, 425 U.S. 901 (1976)) ("The facial constitutional validity of criminal statutes prohibiting certain consensual acts has been 'definitely' established.").

142. 403 F. Supp 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

143. 425 U.S. 901 (1976). Direct appeals from the decisions of three-judge district courts are governed by 28 U.S.C. § 1253 (1977). Under that provision, any party can appeal to the Supreme Court "an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action . . . heard and determined by a district court of three judges." *Id.* The decision to hear or make summary dispositions of an appeal is made by the whole Court. C. WRIGHT, *FEDERAL COURTS* 757 (4th ed. 1983). If

In *Hicks v. Miranda*,¹⁴⁴ the Supreme Court held that a summary affirmance of a case within the Court's appellate jurisdiction, unlike a denial of a petition for a writ of certiorari, constituted a judgment on the merits and thus was binding on lower federal courts.¹⁴⁵ Subsequently, in *Mandel v. Bradley*,¹⁴⁶ the Court indicated that summary dispositions prevent lower courts from arriving at opposite conclusions on the precise issues necessarily decided by the disposition.¹⁴⁷ Summary actions, however, should not be construed as breaking new ground but rather as applying principles previously established by the Court to the particular facts involved.¹⁴⁸ Consequently, Justice Brennan, concurring in *Mandel*, suggested that in the future inferior courts should accord "appropriate, but not necessarily conclusive, weight" to the Supreme Court's summary dispositions.¹⁴⁹

In *Dronenburg*, the court did not focus on the precise issues decided by *Doe*. Instead, the court maintained that the Supreme Court's summary affirmance gave no indication that it was based

four justices vote to hear an appeal, the case receives full plenary review. *Id.* If less than four justices vote to hear the case, it is either summarily affirmed or dismissed for lack of substantial federal question. *Id.* See *Ohio ex. rel. Eaton v. Price*, 360 U.S. 246, 247 (1959). See also 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). Both types of summary disposition constitute a vote on the merits, and as such, they are binding on lower federal courts. *Hicks v. Miranda*, 422 U.S. at 344-45 (1975).

Similarly, a decision to grant or deny certiorari in a case is made by the whole Court. C. WRIGHT, *FEDERAL COURTS* 757 (4th ed. 1983). If four justices vote to grant certiorari, it is likely that the case will receive full plenary review. *Id.* at 756. If less than four justices vote to hear a case, certiorari is denied. *Id.* Unlike summary disposition of appeals, however, denials of certiorari are not considered decisions on the merits. *Darr v. Burford*, 339 U.S. 200, 226 (1950) (Frankfurter, J., dissenting) ("The denial means that this court has refused to take the case. It means nothing else."). See also Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227 (1979).

144. 422 U.S. 332 (1975).

145. *Id.* at 344-45.

146. 432 U.S. 173 (1977) (per curiam).

147. *Id.* at 176.

148. *Id.*

149. *Id.* at 180 (Brennan, J., concurring). Justice Brennan maintained that in the future the lower courts must "(a) examine the jurisdictional statement in the earlier case to be certain that the constitutional questions presented were the same and, if they were, (b) determine that the judgment in fact rests upon decision of those questions and not even arguably upon some alternative nonconstitutional ground." *Id.* See generally Note, *supra* note 143 (discussing the practical problems associated with implementing the *Hicks* and *Mandel* rules).

on rationale other than the lower court's constitutional decision.¹⁵⁰ Moreover, the court extended the import of the summary disposition well beyond the particular facts involved in *Doe*.

Doe involved a pre-enforcement challenge to a state statute criminalizing sodomy.¹⁵¹ In contrast, *Dronenburg* involved a constitutional challenge to a Navy regulation requiring mandatory discharge of homosexual servicemembers.¹⁵² The *Dronenburg* court ignored the important distinction between state statutes and administrative regulations. In fact, the Court in *Doe* adopted a view that homosexuality involves issues of morality which can only be properly addressed by a state legislature.¹⁵³ Thus, the *Dronenburg* court gave an administrative regulation the presumptive validity belonging to a state statute. This led to the mistaken conclusion that if a state statute proscribing homosexual conduct is constitutional in a civilian context, then a similar regulation is necessarily constitutional in a military context.¹⁵⁴

Finally, the court's conclusive reliance on *Doe* is misplaced

150. *Dronenburg*, 741 F.2d at 1392. The summary affirmance in *Doe* can be explained in part by the plaintiff's weak showing of ripeness and standing. For example, not one of the plaintiffs had been indicted or convicted. *Doe v. Commonwealth's Att'y*, 403 F. Supp. at 1200. See also Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 280 n.172 (1977).

151. *Doe v. Commonwealth's Att'y*, 403 F. Supp. at 1200.

152. *Dronenburg v. Zech*, 746 F.2d at 1580. *Dronenburg* was discharged pursuant to a Naval directive which sets out official policy concerning homosexuals in the Navy and is authorized by a general residual delegation of power to the Secretary of Defense from Congress:

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

5 U.S.C. § 301 (1977). Federal courts have recognized the power of Congress to delegate to executive agencies the power to regulate. For example, see *Georgia v. United States*, 411 U.S. 526 (1973) (Section 301 of 5 U.S.C. constitutes ample legislative authority for regulations promulgated by Executive department heads.); *Ex parte Reed*, 100 U.S. 13 (1879) (Regulations have the force of law.); *Reed v. Franckle*, 297 F.2d 17, 24 (4th Cir. 1961) (Because discharges of servicemembers come within the purview of Congress' power to delegate, it is propieterous for the Secretary of Defense to promulgate regulations regarding such discharges.).

153. *Doe v. Commonwealth's Att'y*, 403 F. Supp. at 1202.

154. *Dronenburg*, 741 F.2d at 1392.

because after *Doe*, in *Carey v. Population Services Int'l*,¹⁵⁵ the Supreme Court explicitly stated that the difficult consensual acts questions raised in *Doe* were still undecided.¹⁵⁶ Thus, it remains open whether the Supreme Court's privacy cases evince a unifying principle that embraces homosexual conduct.

B. *Unifying Principle: Private Consensual Sexuality*

Although the *Dronenburg* court's presentation of the privacy cases was extensive, it was also selective and incomplete. The court employed a lengthy exposition of the Supreme Court's cases to conclude that the right to privacy cases provided an illustrative list of rights, not an explanatory principle to identify such rights.¹⁵⁷

Initially, however, the court implied that a thread of principle was discernible in the right to privacy cases.¹⁵⁸ This view is supported by *Whalen v. Roe*,¹⁵⁹ which the *Dronenburg* court chose not to examine. In *Whalen*, the Supreme Court suggested that the right to privacy meant something more than the least common denominator of the Court's prior decisions concerning procreation, contraception, child rearing, and marital choice.¹⁶⁰ The Supreme Court in *Whalen* went further to hold that the sum of the *Griswold* line of cases made manifest two distinct privacy principles: ¹⁶¹ the interest of a person to keep certain matters private and the unimpeded discretion of an individual with regard to certain important personal decisions.

Concluding that the Supreme Court had merely provided an

155. 431 U.S. 678 (1977).

156. *Id.* at 694 n.17. In a footnote to his dissent in *Carey*, Justice Rehnquist argued that *Doe* "definitely" settled the the consensual acts question. *Carey v. Population Servs. Int'l*, 431 U.S. at 718 n.2. Yet Justice Rehnquist wrote for the Court in *Edelman v. Jordan*, 415 U.S. 651, 671 (1974), asserting that summary affirmances carry noticeably less precedential value than full opinions on the merits. This contradiction has not gone unnoticed. Professor Tribe has commented that *Doe*, as precedent, stands for very little. TRIBE, *supra* note 141, at 87. In addition, one commentary has termed *Doe* "an egregious example of an unexplained summary affirmance." Hart & Wechsler, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 159 n.1 (1981 Supp.).

157. *Dronenburg*, 741 F.2d at 1395.

158. *Id.* at 1391. ("Whatever thread of principle may be discerned in the right of privacy cases, we do not think it is the one discerned by [*Dronenburg*].").

159. 429 U.S. 589 (1977). See *supra* notes 55-67 and accompanying text.

160. *Id.* at 598-600. See TRIBE, *supra* note 56, at 886.

161. *Id.* at 599-600.

illustrative list of privacy rights, the *Dronenburg* court observed that none of the illustrations covered homosexual conduct.¹⁶² As suggested in *Whalen*, however, there is a thread of principle discernible in the right of privacy cases. The essence of the privacy cases is that there is a privacy right inherent in private consensual sexuality. This right embraces not only marriage, contraception, procreation decisions, and family relationships, but also homosexuality.

The *Dronenburg* court refused to recognize such a privacy right by utilizing an equivocal characterization of the right as enunciated in *Roe v. Wade*.¹⁶³ The court emphasized Justice Blackmun's statement in *Roe* that "*it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions.*"¹⁶⁴ The acknowledgement that one has a privacy right in private consensual sexuality is not tantamount to asserting that one has an unlimited right to do with one's own body as one pleases. Moreover, such an overstatement of the right to be embraced on the one hand while confining the privacy cases to their facts on the other hand belies the *Dronenburg* court's reliance on judicial restraint.

C. *Judicial Restraint*

Judicial restraint is the philosophy that courts should not invade the domain that the Constitution has reserved for the po-

162. *Dronenburg*, 741 F.2d at 1391.

163. *Dronenburg*, 741 F.2d at 1394-95 (citing *Roe v. Wade*, 410 U.S. at 153-54).

164. *Id.* at 1395 (emphasis in original). The two cases Justice Blackmun cited in *Roe v. Wade*, 410 U.S. at 154, to support this finding are factually distinguishable from *Dronenburg*. In *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the Court held that it was within a state's police power to enact a compulsory smallpox vaccination law. *Id.* at 35-39. The state's duty to safeguard its citizens' health, although not absolute, was considerable in the face of such a fatal disease. *Id.* at 38-39. In *Buck v. Bell*, 274 U.S. 200 (1927), the Court upheld a Virginia statute providing for the sexual sterilization of institutionalized imbeciles as a valid health regulation within the purview of the state's police power. A state's power to usurp an individual's procreative choices has since been curtailed, and *Buck* today is accorded little stare decisis effect. See also *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (Free procreative choice is to be vigilantly guarded from state infringements.).

litical branches of government.¹⁶⁵ In *Dronenburg*, the court premised its application of judicial restraint on the conclusion that there was no unifying constitutional principle that protected homosexual conduct.¹⁶⁶ Thus, to recognize *Dronenburg's* claim would require creating a new constitutional right.¹⁶⁷ But, as has been demonstrated, a privacy right in private consensual sexuality may be derived from the "text, structure, and history of the

165. See generally A. BICKEL, *THE LEAST DANGEROUS BRANCH* 46-49, 86 (1962); Thayer, *The Origin and the Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). Professor Bickel wrote that Thayer's article was "a singularly important piece of American legal scholarship" concerning the doctrine of judicial restraint:

The power of review, says Thayer, must be conceived of strictly "as a judicial one," quite unlike, and distinct from, the functions of the political branches of government. In discharging their limited office, the courts must be astute not to trench upon the proper powers of the other departments of government, nor to confine their discretion. Full and free play must be allowed to "that wide margin of considerations which address themselves only to the practical judgment of a legislative body." Moreover, every action of the other departments embodies an implicit decision on their part that it was within their constitutional power to act as they did. The judiciary must accord the utmost respect to this determination, even though it be a tacit one.

BICKEL, *supra* at 35 (discussing Thayer). Advocates of judicial restraint often cite THE FEDERALIST No. 78, at 518-19 (A. Hamilton) (P. Ford ed. 1898), as unimpeachable authority:

Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution: because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

See also *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (Courts ought not to adjudicate political questions such as legislative apportionment.); *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (supporting the rationale of *Colegrove*); *Mapp v. Ohio*, 361 U.S. 643, 672 (1961) (Harlan, J., dissenting) ("Judicial restraint" embodies the principle that past decisions should be accorded *stare decisis* effect.); L. HAND, *THE BILL OF RIGHTS* 1-30 (1958) (Judge Hand sets forth his theory of judicial restraint.); Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 361-64 (1924) (Judicial restraint discussed in the context of early twentieth century national industrial policy).

166. "[R]ights must be fairly derived by standard modes of legal interpretation of the text, structure, and history of the Constitution." *Dronenburg*, 741 F.2d at 1396 n.5.

167. *Id.* at 1396 n.5.

Constitution."¹⁶⁸

In addition, the court concluded that homosexuality is a moral issue best reserved for the legislature.¹⁶⁹ A prominent feature of each of the Court's privacy decisions, however, is that they involve difficult moral issues.¹⁷⁰ It is precisely when the majority threatens to infringe the constitutionally protected rights of the minority that the Constitution is properly invoked.¹⁷¹

Furthermore, in its analysis of *Doe*, the *Dronenburg* court is equating a legislative enactment with an administrative regulation.¹⁷² The same deference accorded to democratic choice is not required in the case of regulations because they are not the product of a democratic process.¹⁷³ Regulations are promulgated

168. *Id.* at 1396 n.5. See *supra* notes 157-164 and accompanying text.

169. *Id.* at 1397.

170. See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (regulation of dissemination of contraception); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (availability of contraceptives to unmarried individuals); *Stanley v. Georgia*, 394 U.S. 557 (1969) (obscene materials within the home); *Loving v. Virginia*, 388 U.S. 1 (1967) (activities relating to marriage); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (availability of contraceptives to married couples); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (state's power to control conduct of children); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (procreation); *Olmstead v. United States*, 277 U.S. 438 (1928) (governmental wiretapping of a citizen's home); *Pierce v. Society of Sisters*, 268 U.S. 540 (1925) (child rearing and education); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (education of one's children).

171. Justice Stone's famous footnote four in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), is the jurisprudential genesis of this commonly accepted principle:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or national, . . . or racial minorities, . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. at 152 n.4 (citations omitted).

172. See *supra* notes 142-156 and accompanying text.

173. See 5 U.S.C. § 301 (1977). Regulations promulgated pursuant to this broad statutory grant are not ratified by Congress subsequent to such promulgation.

by bureaucrats, not enacted after debate by a political body.

D. *Equal Protection and the Court's Application of the Rational Basis Test*

The *Dronenburg* court concluded that because no fundamental right was at stake, the Navy's regulation was only required to rationally relate to a legitimate state interest.¹⁷⁴ The court accepted the military's need for good order and discipline as sufficient to uphold *Dronenburg's* discharge.¹⁷⁵ But the *Dronenburg* court never required the Navy to prove that the petty officer's sexual preference necessarily compromised his military abilities.

A better approach was used in *benShalom v. Secretary of Army*,¹⁷⁶ in which a lesbian drill sergeant, discharged because of her sexual preference, was reinstated by a Wisconsin federal district court. The court held that the Army regulations infringed her right to privacy because the Army was not required to prove that the servicemember's sexual preference actually compromised her capacity as a soldier.¹⁷⁷ The court concluded that *Doe v. Commonwealth's Attorney*¹⁷⁸ provided little guidance for lower courts, and that although "the peculiar nature of military life" legitimated considerable Army control over the sexual conduct of servicemembers,¹⁷⁹ "constitutional privacy principles clearly protect one's sexual preferences in and of themselves from government regulation."

The *benShalom* court's right to privacy analysis was based on the "nexus" requirement enunciated in *Norton v. Macy*.¹⁸⁰ Unless the Army could prove that "actual deviant conduct" existed and without evidence of a nexus between the petitioner's sexual preference and her military capabilities, the court would

174. *Dronenburg*, 741 F.2d at 1397-98.

175. *Id.* For a discussion of the rational basis and strict scrutiny tests, see *supra* notes 69-82 and accompanying text.

176. 489 F. Supp. 964 (E.D. Wis. 1980).

177. *Id.* at 977.

178. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

179. *Id.* at 976.

180. 417 F.2d 1161, 1164-67 (D.C. Cir. 1969) (A homosexual federal employee was reinstated because no nexus was proved between his sexual preferences and his job effectiveness.).

not defer to the Army's regulation.¹⁸¹ Because the Army made no attempt to show such a nexus, the district court reinstated the petitioner.¹⁸² In *Dronenburg*, the Navy was not required to show such a nexus. Had such a showing been required, as it was in *benShalom*, the result may have been different. Objectionable conduct occurs in the military in both homosexual and heterosexual contexts. In both cases, misconduct can threaten security or impair the integrity of the system of rank and command. By contrast with the treatment of homosexuals, problems arising from heterosexual relationships are treated by the Navy on a case-by-case basis, suggesting that immediate discharge is not rationally related to protecting the capacity of the military to carry out its unique mission.¹⁸³ Homosexuals alone are "classified as 'intolerable' and singled out for 'prompt separation.'" ¹⁸⁴

V. Conclusion

In *Dronenburg v. Zech*, the District of Columbia Circuit Court of Appeals upheld the discharge of a Navy petty officer who was discharged solely because of his sexual conduct. The servicemember's claim that such a discharge denied his constitutional right to privacy was not recognized by the circuit court because it concluded that homosexuality is not an activity that has traditionally received constitutional protection.¹⁸⁵ The court asserted that the Supreme Court's privacy cases, linked by no unifying principle, are to be confined strictly to their facts.¹⁸⁶ The *Dronenburg* court accepted *Doe v. Commonwealth's Attorney*,¹⁸⁷ a summary affirmance, as dispositive of the right to engage in homosexual conduct.¹⁸⁸

181. *benShalom v. Secretary of Army*, 489 F. Supp. at 976. The court also concluded that application of the nexus test showed that the Army had acted "arbitrarily and capriciously" towards petitioner, since her record was impeccable, thus infringing her fifth amendment due process rights. *Id.*

182. *Id.*

183. *Saal v. Middendorf*, 427 F. Supp. 192, 201-02 (N.D. Cal. 1977), *rev'd sub nom. Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), *cert. denied sub nom. Beller v. Lehman*, 452 U.S. 905 (1981).

184. *Id.* at 202.

185. *Dronenburg v. Zech*, 741 F.2d 1388, 1395 (D.C. Cir 1984).

186. *Id.* at 1396-97.

187. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

188. *Id.* at 1391-92.

The unifying principle of the Supreme Court's right to privacy cases, as set forth in *Whalen v. Roe*,¹⁸⁹ is that individuals should be free from governmental intrusion into private matters of intimate concern. A mature individual's choice of a consenting adult sex partner is, by any standard, the conceptual minimum implied by the right to privacy.¹⁹⁰ By failing to examine *Whalen*, the *Dronenburg* court overlooked important precedent. *Whalen* clearly states that the right to privacy cases are something more than the least common denominator of their facts.¹⁹¹

Because Pentagon regulations mandate compulsory discharge for all homosexual servicemembers, but provide case-by-case evaluation, counselling, and rehabilitation for heterosexuals charged with misconduct, the regulations must meet the requirements of the equal protection clause.¹⁹² At a minimum, equal protection requires that the military prove the validity of its assertion that summary discharge of homosexuals is rationally related to preserving the integrity of military operations. The simple assertion, without proof, that "[t]he effects of homosexual conduct within a naval or military unit are almost certain to be harmful to morale and discipline,"¹⁹³ fails to demonstrate that immediate discharge of homosexuals is rationally related to fulfilling the military's unique mission. Thus, the court's analysis of the right to privacy was not only unjustifiably restrictive, it also led to a failure to prove the rational basis of the Navy's regulation.

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189. 429 U.S. 589 (1977).

190. Gerety, *supra* note 150, at 280.

191. *Whalen v. Roe*, 429 U.S. at 599-600.

192. *See supra* notes 183-84 and accompanying text.

193. *Dronenburg*, 741 F.2d at 1398.