Dronenburg v. Zech: Judicial Restraint or Judicial Prejudice?

In recent years, some courts have concluded that the constitutional rights of privacy and equal protection unequivocally protect homosexual conduct between consenting adults. Other court opinions, however, have relied on the traditional legal and social condemnation of homosexuality to deny protection to homosexual conduct, especially by members of the military. In Dronenburg v. Zech, for example, the U.S. Court of Appeals for the D.C. Circuit rejected privacy and equal protection challenges to a Navy regulation prohibiting homosexual conduct, including private consensual activity. Judge Bork, writing the opinion of the panel designated to hear the case, refused to find a right of privacy in private homosexual conduct between consenting adults, and upheld the challenged Navy regulation as bearing a rational relationship to legitimate governmental interests.

This Comment challenges the Dronenburg panel’s analysis of the equal protection issues raised by the case: first, because the panel

1. Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982) (invalidating statute proscribing intercourse between individuals of the same sex); People v. Uplinger, 58 N.Y.2d 936, 474 N.E.2d 62, 460 N.Y.S.2d 514 (1983), cert. denied, 52 U.S.L.W. 4677 (1984) (invalidating statute proscribing loitering in public for purposes of soliciting “deviate” sexual conduct, including conduct in private, since statute did not require conduct proscribed to be in some way offensive or annoying to others); People 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) (striking down statute proscribing consensual sodomy between homosexuals and between heterosexuals). As used in this Comment, a homosexual is defined as a person whose sexual orientation is toward members of the same sex. The term “homosexual” is also used to describe the orientation itself. The term “open homosexuals” is used in this Comment to refer to those homosexuals who publicly acknowledge their sexuality; the term “active homosexuals” refers to those homosexuals who are currently participating in homosexual activity. The term “gay” is used interchangeably with the term “homosexual” to refer to both male and female homosexuals.


3. Dronenburg I, 741 F.2d 1388.

4. The Dronenburg I case was heard before a panel composed of only two judges of the D.C. Circuit, Robert Bork and Antonin Scalia. The third judge, David W. Williams of the Central District of California, sat by designation pursuant to 28 U.S.C. § 294(d).
erroneously finds a rational nexus between the regulation and legitimate government purposes and, second, because the panel applies the rational basis test when a strict scrutiny analysis would be more appropriate. A more thorough analysis of the application of Supreme Court doctrine to the case at hand would suggest the need for strict scrutiny either because homosexuals are a class of individuals entitled to special protection against discrimination or because homosexual conduct is immune from governmental regulation under the right to privacy doctrine. Thus, the primary focus of the opinion—that equal protection and the right of privacy do not protect homosexual conduct—arbitrarily and wrongly denies the fundamental rights of homosexuals.5

I. Equal Protection Under the Rational Relationship Analysis

In Dronenburg v. Zech, the appellant, James L. Dronenburg, challenged a Navy regulation requiring dismissal of persons engaging in homosexual activity.6 Dronenburg, a petty officer who had been honorably discharged for committing homosexual acts with a seaman recruit in Navy barracks,7 argued that the regulation violated equal protection of the laws and should be subjected to strict scrutiny analysis. This level of scrutiny would require the Navy to jus-

5. This Comment does not evaluate the merits of Bork's formulation of the concept of judicial restraint but rather attempts to show that the panel's conclusions are indefensible under either a restrained or activist approach. The philosophy of judicial restraint requires that courts decide cases through neutral principles and not through arbitrary value choices. Bork believes that this concept of neutral principles mandates that issues of governance be left to majoritarian decisionmaking except where special protections have been either expressly marked out by the Constitution or implicated by the governmental process established by the Constitution. See Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971)[hereinafter cited as Bork, Neutral Principles]. As this Comment will explain, Judge Bork completely violates the concept of neutral principles, even under an attitude of restraint, by using inaccurate stereotypes to justify the rationality of the regulation. Moreover, although an academic may be free to discard eighty years of Supreme Court substantive due process doctrine, see Bork, Neutral Principles, at 11 (dismissing substantive due process reasoning beginning with Lochner v. New York, 198 U.S. 45 (1905)), as a member of the lower federal judiciary, Judge Bork is obliged to apply well-established Supreme Court doctrine even when such doctrine is inconsistent with his personal views.

6. The Navy regulation violated by Dronenburg provided that "Any member who solicits, attempts, or engages in homosexual acts shall be normally separated from the naval services. The presence of such a member in a military environment impairs combat readiness, efficiency, security and morale." SEC/NAV Instruction 1900.9C (Jan. 20, 1978), quoted in Dronenburg I, 741 F.2d at 1389.

7. Dronenburg I, 741 F.2d at 1389. The panel opinion does not clearly state whether the acts committed were both private and consensual. Thus, despite Judge Bork's elaborate exposition of the privacy doctrine, it is not wholly clear whether appellant Dronenburg had standing to raise privacy claims. This Comment, however, will assume that the appellant in fact was in a position to assert such claims.
Dronenburg v. Zech
tify its policy as a well-tailored means of promoting a compelling state interest. The D.C. Circuit rejected this position, holding that strict scrutiny applies only if a fundamental right has been infringed. After a long exegesis narrowly construing the Supreme Court’s privacy decisions, the panel concluded that no fundamental right to engage in homosexual conduct exists. Consequently, the Navy need only satisfy the less rigorous rational basis test by establishing that the regulation bears a rational relationship to a permissible end.

In a few brief concluding paragraphs, Judge Bork purports to find the rational relationship in the military’s independent authority to “implement morality” among troops. This Comment will leave

8. Dronenburg I, 741 F.2d at 1391. Strict scrutiny protection, however, is required both when fundamental rights are burdened, Skinner v. Oklahoma, 316 U.S. 535 (1942)(statute authorizing sterilization of criminals unconstitutionally infringed upon right to procreate), and when a suspect class is discriminated against, United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938)(dictum treating with suspicion all public actions tending to burden “discrete and insular” minorities). Bork does not address the argument that under the Supreme Court’s established methodology for the determination of a suspect class, homosexuals should be treated as a suspect class and should therefore receive strict scrutiny protection. See infra text accompanying notes 33-48.


10. Dronenburg I, 741 F.2d at 1391-97. This Comment challenges Bork’s conclusions on the privacy question, infra text accompanying notes 52-75.

11. Dronenburg I, 741 F.2d at 1392. Despite a general inclination of deference to the accuracy or correctness of legislative decisionmaking, see, e.g., Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981)(upholding law banning sale of milk in plastic containers: “...States are not required to convince the courts of the correctness of their legislative judgments. ...”), the Supreme Court has on several occasions employed the rational basis test to invalidate laws which were “not only ‘imprecise,’ ” but “wholly without any rational basis.” Department of Agriculture v. Moreno, 413 U.S. 528, 538 (1973)(invalidating food stamp program that denied relief to unrelated persons). The Supreme Court defines the burden of the party challenging the rationality of a law as follows: “[T]hose challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the government decisionmaker.” Vance v. Bradley, 440 U.S. 93, 111 (1979)(upholding federal law requiring Foreign Service personnel to retire at age 50). Given that courts have expressed hesitancy in recognizing the fundamental rights of homosexuals in the contexts of suspect classification and privacy, discussed infra, this Comment presents the rationality analysis as the least politically controversial means for courts to reject the Dronenburg conclusion, although ideally greater scrutiny should be constitutionally required.

12. Dronenburg I, 741 F.2d at 1392.
aside the difficulties in circumscribing such a vague, unqualified authority, for the panel does not rest its holding exclusively on this basis. The panel instead finds that the regulation bears a rational relationship to the Navy's interest in morale and discipline, because homosexual relationships in the military are likely:

[T]o call into question the evenhandedness 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, it must be said, given the power of military superiors over their inferiors, to enhance the possibility of homosexual seduction.

The shallow analysis offered by Judge Bork in finding a rational basis for the regulation illustrates how Judge Bork approaches the question in a decidedly partial manner. "To ask the question," declares Bork, "is to answer it." The Navy is not required to produce any social science data or other proof to support its allegation that homosexual conduct is harmful to military interests. Instead, Judge Bork blindly accepts unproven generalizations about homosexuality and finds support for the regulation in what he terms "common sense and experience." By failing to require the Navy to prove even a minimal connection between the regulation and a valid military purpose, and by accepting assertions reflecting intolerance and stereotyping more than fact, Dronenburg was foreclosed from even disputing the alleged rational basis that the Navy proffered for the regulation. Although courts often defer to the judgment of the

13. Even assuming that the legislature has the power to "implement morality" in civilian society, it is unclear, as Bork realizes, whether the military, as a non-elected arm of the executive, has the right to independently legislate its own morality. Note that Instruction 1900.9C diverges significantly from the Congressional prohibition of sodomy in the military under 10 U.S.C. §925 (1983) both by focusing on all homosexual activity whether or not sodomy is involved and by not addressing heterosexual sodomy.


15. Id.

16. Id.


An [sic] homosexual is after all a human being, and a citizen of the United States. . . . He is as much entitled to the protection and benefit of the laws, and due process fair treatment as are others, at least as to public employment in the absence of proof and not mere surmise. . . . that his employment efficiency is impaired by his homosexuality.

316 F. Supp. at 814. In the federal civilian workplace, discharge based solely on homosexual status has been held unconstitutional; to establish a rational nexus, there must be proof that the discharge will promote the agency's efficiency. Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969).
military, the Drakenburg opinion goes one step beyond—avoiding any meaningful judicial review in favor of accepting unproven and unprovable assertions.

A more comprehensive analysis reveals little basis in fact for any of the alleged dangers posed by homosexuals in the military. First, the Navy's contention that the presence in the military of a person who engages in homosexual conduct impairs combat readiness, efficiency and morale is highly debatable, for there is nothing inherent in homosexuality that has been shown to affect an individual's efficiency, combat readiness or morale. If homosexual acts affected a person's military competence, it would seem that he or she would be easily detected and removed. Yet, empirical studies of homosexuals in the military suggest not only that most homosexuals (75 to 80 percent) remain undetected, but also that many complete their terms successfully, often as officers.

The Navy, perhaps recognizing that empirical studies contradict its view of homosexuals as unfit for military service, focuses its arguments not on homosexuality per se but on its effect upon those heterosexuals who are offended by homosexuality. Yet, even if widespread anti-homosexual sentiment could be shown to impair the functioning of the military, the Navy's regulation remains irrational because it aims at the wrong group. The problem would be attributable more directly not to homosexuals themselves but to heterosexuals who oppose integration. Moreover, the intolerance

20. C. Williams & M. Weinberg, Homosexuals and the Military: A Study of Less Than Honorable Discharges 60 (1971). Although Williams and Weinberg found that the risk of being detected increases as frequency of sexual activity increases, many military personnel were nonetheless able to engage in homosexual activity without being discovered. Id. at 178.

Although the regulation still speaks of security, it is not clear whether the military still argues that homosexuals are a security risk. See Berg v. Claytor, 436 F. Supp. 76, 80 (D.D.C. 1977), vacated on other grounds, 591 F.2d 849 (D.C. Cir. 1978) (military no longer argues that homosexuals impair security); Matthews v. Marsh, No. 82-0216, slip op., at n.12. The argument formerly was that homosexuals were a security risk because they were vulnerable to blackmail. Obviously, this argument is not valid with respect to open homosexuals. Moreover, with regard to both open and "closet" homosexuals, the regulation is irrational because the fear of discharge under the regulation increases the risk of blackmail. Thus, the regulation itself is a source of the evil sought to be prevented. See McKeand v. Laird, 490 F.2d 1202, 1266 (9th Cir. 1973) (Peckham, J., dissenting from denial of security clearance on grounds of plaintiff's homosexuality: "[T]he Department of Defense can easily cure the danger to national security allegedly posed by all homosexuals. It can abandon its arbitrary system of revoking security clearances solely on the findings of homosexuality and, thus, end homosexuals' fear that public exposure will cost them their security classifications.").
rationale—that the military can exclude unpopular groups on grounds of the feared reactions of other military personnel—has already been rejected on previous occasions. A recent case discussing the Army’s exclusionary policy toward homosexuals comments:

[T]he Army’s defense of its policy is based solely upon heterosexuals’ reactions when they learn that a soldier like Matthews has a desire or intent to engage in homosexual conduct. If the question were the propriety of excluding black soldiers because of the feared reactions of whites—a argument raised by the Army in resisting desegregation . . . the answer clearly would be that blacks must be admitted and the Army must through discipline and education control the reaction . . . . Although the analogy is imperfect (constitutionally, race is a suspect classification; and race, unlike desire or intent, cannot be suppressed), the military interests here are comparable: to avoid disruptive reactions.22

Thus, to justify homosexuals’ exclusion on the basis of heterosexuals’ aversion to them is not only illogical but also fundamentally offensive to the notion of equal protection; intolerance has never been a permissible basis for disparate treatment.23

Even if the Navy regulation is concerned more with disapproval of

22. Matthews v. Marsh, No. 82-0216, slip op., at text accompanying n.41; see also Saal v. Middendorf, 427 F. Supp. 192, 201 (N.D. Cal. 1977), rev’d sub nom Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), cert. denied sub nom, Miller v. Weinberger, 454 U.S. 855 (1981)(Navy regulation excluding homosexuals held unconstitutionally arbitrary and capricious); Miller v. Rumsfeld, 647 F.2d 80, 88 (9th Cir. 1981)(Boocheever, J., dissenting from denial of rehearing of Beller v. Middendorf). The military advances several other arguments that simply reiterate the intolerance rationale and are therefore similarly unacceptable. The military suggests that homosexual officers will not be able to gain the respect or trust of their inferiors; this variation of the disapproval theme was also once used against blacks and women. See, e.g., Saal v. Middendorf, 427 F. Supp. at 201 n.10. The military is also concerned that parents will not let their children join the armed forces for fear of having them exposed to homosexuals; however, it is debatable both that parents control the enlistment decision and that the military should shield recruits from the reality of homosexuality.

23. See Miller v. Rumsfeld, 647 F.2d at 89. The argument that homosexuals should be excluded on the grounds that they impair military efficiency because they “tend to become . . . victims of physical assaults,” Matthews v. Marsh, No. 82-0216, slip op., at text accompanying n.15, is antithetical to the constitutional obligation to protect oppressed classes. See Cooper v. Aaron, 358 U.S. 1, 16 (1958) (state officials required to desegregate schools despite claims that desegregation would lead to racial tension); Buchanan v. Warley, 245 U.S. 60, 81 (1917) (invalidating zoning ordinance requiring racially segregated neighborhoods: “It is urged that this proposal will promote the public peace by preventing race conflicts. Desirable as this is, and important as it is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.”). See also L. TRIBE, AMERICAN CONSTITUTIONAL LAW 944-46 (1978)(arguing that homosexuals cannot be denied protection “simply by virtue of the group’s long history of disapproval; any such doctrine would turn on its head the axiom of heightened judicial solicitude for despised groups and their characteristic activities.”). See also Miller v. Rumsfeld, 647 F.2d at 88 (Boocheever, J., dissenting: “Intolerance is not a constitutional basis for an infringement of fundamental personal rights. Yet intolerance or a presumption of intolerance is at the
homosexual acts than with homosexuals themselves, it still seems particularly improper to protect heterosexuals' intolerance when the acts of which they complain are conducted in private. Moreover, given the fact that most homosexual activity in the military is likely to be undetected, the removal of a few known homosexuals does not solve the adverse effects of anti-homosexual sentiment. Those who are most disapproving of homosexuality may suspect that additional activity is going undiscovered. The regulation, if it has any effect, may well impair military efficiency and morale by encouraging military personnel to spy on and to gossip about one another.

The rationale that homosexuals must be excluded from the military because they inspire "dislike and disapproval" among some heterosexuals may also be self-sustaining. Excluding homosexuals from the military prevents them from setting an example contrary to accepted stereotypes. The intolerance that Judge Bork employs to justify government regulation in Dronenburg thus may be perpetuated by the regulation itself.

The Dronenburg opinion also finds a rational purpose for the regulation by suggesting that the presence of homosexuals in the military would lead to "sexually ambiguous relationships" that would make personal dealings uncomfortable. Yet, the opinion does not explain why homosexual attractions are inherently any more ambiguous than the heterosexual attractions that are currently tolerated. If the military wishes to discourage all sexually ambiguous relationships, then a regulation proscribing homosexual conduct responds to only a small portion of the problem. Also, even if homosexual

24. See supra note 20 and accompanying text.
25. Homosexuals who are open and therefore more likely to defend their homosexual orientation appear to be the primary targets of the military's exclusionary policy. See Matthews v. Marsh, No. 82-0216, slip op., at text accompanying nn.17 & 18 (Army officials testifying that the Army seeks to prevent homosexuals from revealing their orientation).
26. Dronenburg 1, 741 F.2d at 1398. The military sometimes asserts that the ambiguity problem is exacerbated by the fact that military personnel of the same sex must often live in close confinement. See Beller v. Middendorf, 632 F.2d at 812. Yet, there is no reason to think that sexual attractions are any different in close quarters than in less crowded conditions. Also, if the military is alluding to heterosexuals' fear of being close to homosexuals, then the military is simply reiterating the unacceptable intolerance rationale. If military personnel fear unwilling exposure to sexual acts in close quarters, such fear is unwarranted because such sexual behavior, not being conducted in private, is not protected under the right to privacy. Such non-private homosexual activity can therefore be regulated in the same manner as public displays of heterosexual activity. If military personnel fear being raped or otherwise sexually harassed, such a problem can be addressed by proscribing rape without distinguishing homosexual rape from heterosexual rape.
encounters were uniquely ambiguous, the effect of a regulation that excludes open homosexuals but not latent homosexuals would be to exclude the sexually unambiguous. A heterosexual might experience more confusion in dealing with a repressed homosexual than with a person whose sexual preferences were known to both parties.

In his opinion, Judge Bork also suggests that the military can exclude active homosexuals in order to prevent the homosexual seduction of military personnel by their commanding officers.\textsuperscript{27} If Bork uses the term “homosexual seduction” to mean non-consensual activity, the regulation is unnecessary because coerced sexual activity is already illegal in both the military and civilian sectors.\textsuperscript{28} More importantly, given the presence of women in the military, a prohibition against homosexual seduction but not heterosexual seduction addresses only part of the dangers of sexual harassment.

Additionally, the opinion alludes to the possibility of favoritism by a commanding officer toward a subordinate with whom he or she is having an affair.\textsuperscript{29} The regulation, however, is an irrational solution to this problem because there is no reason to treat homosexual favoritism any differently than heterosexual favoritism. Yet, when heterosexual relationships impair the evenhandedness of superiors’ dealings with their inferiors, the problems are approached on a case-by-case basis.\textsuperscript{30} Thus, the regulation is superfluous because there already is a system for dealing more directly and precisely with the problem of sexual favoritism.

The approach of the Bork opinion is decidedly “non-neutral.” The finding of a rational relationship between the Navy regulation and a permissible government purpose depends on a biased and limited understanding of homosexuality. Viewed in “neutral” terms—\textit{i.e.} terms not different from those reserved for heterosexual activity—homosexuality poses no greater threat to military morale

\textsuperscript{27} \textit{Dronenburg I}, 741 F.2d at 1398.
\textsuperscript{28} Rape is prohibited under the Uniform Code of Military Justice, 10 U.S.C. §920 (1983); however, rape is currently defined only with reference to female victims, homosexual rape being punishable under the sodomy provision.
\textsuperscript{29} If Bork is referring not to coerced “seduction” but to non-coerced “seduction,” then he is simply reiterating the rationale that consensual homosexual activity should be prohibited on “moral” grounds. The moral justification is criticized \textit{infra} at text accompanying notes 70-75.
\textsuperscript{30} \textit{See}, \textit{e.g.}, United States v. Johanns, 17 M.J. 862, 868 (A.F.C.M.R. 1983)(adverse effect of officer’s heterosexual activity with unmarried enlisted persons evaluated in light of “surrounding circumstances”); \textit{see also Dronenburg II}, 746 F.2d at 1579 (Robinson, J., dissenting to denial of rehearing: “In effect, the navy presumes that any homosexual conduct constitutes cause for discharge but it treats heterosexual relations on a case-by-case basis giving fair regard to the surrounding circumstances.”).
or troop readiness than heterosexual activity. Judicial prejudice is thus central to the holding in Dronenburg that the challenged Navy regulation meets even a minimal threshold of rationality.

II. Strict Scrutiny Under the Suspect Class Approach

In addition to failing to establish a rational basis for the regulation, the Dronenburg opinion errs in a more fundamental way by failing to recognize that the regulation invidiously discriminates against a group possessing all the characteristics of a suspect class. As such, the Navy regulation should be upheld only if it is the least restrictive means of promoting a compelling state interest. Judge Bork acknowledges that the “strict scrutiny” analysis is required where actions impinge on suspect classes such as racial minorities and that lower court judges can turn to the established methodology of the Supreme Court to determine the scope of constitutional rights. Yet, in the Dronenburg opinion, he does not even consider the possibility that homosexuals may be a suspect class entitled to strict scrutiny protection.

31. The concept of neutral principles is discussed briefly, supra note 5. In Dronenburg II, Bork defends his non-neutral approach by asserting that the military can treat homosexuals and heterosexuals as classes which are “morally” different:

We cannot take seriously the dissent’s suggestion that the Navy may constitutionally be required to treat heterosexual conduct and homosexual conduct as either morally equivalent or as posing equal dangers to the Navy’s mission. Relativism in these matters may or may not be an arguable moral stance, a point that we as a court of appeals are not required to address, but moral relativism is hardly a constitutional command, nor is it, we are certain, the moral stance of a large majority of naval personnel.

Dronenburg II, 746 F.2d at 1582. Yet, even if the state is allowed to regulate sexual behavior, and even if the military is allowed to enforce its independent “moral stance” with regard to the propriety of particular sexual behavior, Judge Bork’s statement is unacceptable because it eradicates the very foundations of equal protection; what Bork suggests is that the Constitution allows a majority to deny even the lowest-level equal protection scrutiny to any class that the majority “abhors.” Thus, once again Bork returns to intolerance as a basis for abandoning any meaningful judicial review.

32. The Navy regulation is not only an irrational answer to the problems perceived by Judge Bork, it may also do the military a disservice by preventing it from attracting and retaining qualified and dedicated people. Dronenburg, for example, had earned many citations praising his performance before his private homosexual activities were discovered. Dronenburg I, 741 F.2d at 1389.

33. Dronenburg I, 741 F.2d at 1397.

34. Dronenburg I, 741 F.2d at 1395.

35. The Dronenburg opinion is not the only decision to refrain from treating homosexuals as a suspect class; in fact, most courts have denied homosexuals suspect class treatment. Yet, none of these decisions has actually analyzed the applicability of suspect class criteria to homosexuals. See Rich v. Secretary of the Army, 735 F.2d at 1229; National Gay Task Force v. Board of Educ., 729 F.2d 1270, 1273 (10th Cir. 1984) prob. juris. noted, 53 U.S.L.W. 3235 (1984), aff’d, 53 U.S.L.W. —, No. 83-2030 (March 26, 1985) (declaring unconstitutional statute permitting teacher to be fired for engaging in public homosexual conduct because statute regulated free speech); Hatheway v. Secretary of
In defining a suspect class, the Supreme Court has established several requirements: 1) that the group in question must have suffered a long history of discrimination; 2) that the group must be defined by a trait not related to the ability to perform in and contribute to society; 3) that the group must be visibly identifiable; 4) that the group must be politically powerless; and 5) that the trait characterizing the group be inherent or immutable. Each of the characteristics, it can be argued, is applicable to homosexuals.

Homosexuals have suffered a long history of discrimination in Western society. This intolerance dates back at least to the Old Testament and spread through European civilization with the rise of the Christian church. In addition, homosexuality is a characteristic unrelated to job performance. Thus, the first two requirements are easily met. As to the requirement that the group be easily identifiable, although most gays cannot be distinguished at a glance, an open homosexual who participates in gay social, political and religious activities or who publicly acknowledges his or her homosexuality may indeed be “visible” within the local community. With the Army, 641 F.2d 1376, 1382 (9th Cir. 1981), cert denied, 454 U.S. 864 (1982) (upholding discharge for homosexual conduct against privacy and equal protection challenges); DeSantis v. Pacific Telephone and Telegraph Co., 608 F.2d 327, 333 (9th Cir., 1979) (homosexuals not a class within meaning of Title VII’s prohibition of discrimination based on gender). But see Rowland v. Mad River Loc. School Dist., 53 U.S.L.W. 3614, 3615 (Feb. 25, 1985) (Brennan and Marshall, JJ., dissenting from denial of certiorari in case involving bisexual teacher, suggesting that homosexuals are a suspect class). L. Tribe, supra note 23, at 944 n.17 (arguing that homosexuals satisfy suspect class criteria).

This analysis is based on the list of requirements presented in Note, Homosexuals’ Right to Marry: A Constitutional Test and a Legislative Solution, 128 U. Pa. L. Rev. 193, 202-03 (1979).

San Antonio School District v. Rodriguez, 411 U.S. 1, 28 (1973), reh’g denied, 411 U.S. 959 (1973)(state public school financing scheme based on property taxation did not discriminate against any definable suspect class); Frontiero v. Richardson, 411 U.S. 677, 684 (1973)(plurality opinion invalidating statute treating men and women in the armed forces differently with regard to the ability to claim a spouse as a dependant). The strict scrutiny treatment for women adopted in Frontiero was later abandoned, and an intermediate level of scrutiny was applied instead. Craig v. Boren, 429 U.S. 190 (1976) (invalidating statute prohibiting sale of beer to males less than 21 years of age and to females less than 18 years of age).

Frontiero, 411 U.S. at 684.

Frontiero, 411 U.S. at 686.

San Antonio, 411 U.S. at 28.


Tribe, supra note 19, at 944 n.17.

Although open homosexuals are more visible than latent homosexuals, the latter
regard to the requirement of political powerlessness, the inability of homosexuals to achieve recognition in the legislatures is evidenced by the fact that 24 states still retain laws criminalizing homosexual conduct. Moreover, gays continue to face numerous other legal and social inequities that both attest to and perpetuate the powerlessness of the gay population. Finally, homosexuality, while not necessarily determined at birth, is usually determined at an early age; it is thus not a conscious choice of an individual, and in that sense is an inherent characteristic. In addition, sexual orientation, once realized by an adult homosexual, is unlikely to change, having already become an integral part of that individual's personality. In each circumstance, courts should recognize the

should also be included in the protected class of homosexuals because in many cases a latent homosexual's true sexual orientation may be suspected or even known by others regardless of his or her desire to remain undetected. Even if many latent homosexuals are not visible, such invisibility does not preclude their inclusion in the protected class of homosexuals because visible traits are not an absolute requirement for a suspect class; nationality, for instance, is suspect but not visible. See Chaitin and Lefcourt, Is Gay Suspect?, 8 LINCOLN L. REV. 24, 43 (1973); Note, Homosexuals' Right to Marry, supra note 36, at 204. Furthermore, visibility seems to be a questionable requirement for protection given the fact that homosexuals are often invisible because they are hiding their orientation in order to avoid discrimination. Thus, requiring visibility seems illogical because lack of visibility stems in part from the need for protection. See J. ELY, DEMOCRACY AND DISTRUST 163 (1980)("It is therefore a combination of prejudice and hideability that renders classifications that disadvantage homosexuals suspicious.").

45. Williams, After Uplinger, LAMBDA UPDATE, Sept. 1984, at 5. Accord, Rowland, 53 U.S.L.W. 3614, 3615 (Brennan and Marshall, JJ., dissenting from denial of certiorari: "Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of the group are politically powerless to pursue their rights in the political arena.").


47. Churchill, supra note 42, at 260-91; Note, The Constitutionality of Laws Forbidding Private Homosexual Conduct, supra note 42, at 1626; L. TRIBE, supra note 23, at 944 n.17 (most scientists concluding that homosexuality is either determined before birth or in early childhood).

48. Note, The Constitutionality of Laws Forbidding Private Homosexual Conduct, supra note 42, at 1626 (citing D. WEST, HOMOSEXUALITY 266 (1968) and W. BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION 227 (1973)). See also L. TRIBE, supra note 23, at 944 n.17 (even scientists who do not view homosexuality as immutable admit that orientation cannot be changed in all cases). Some commentators argue that homosexuals should receive intermediate level scrutiny. See, e.g., Note, Homosexuals' Right to Marry, supra note 36, at 206. This Comment argues, however, that homosexuals are more like suspect racial classes than intermediate level classes such as women because homosexuals have a history of social ostracism, scorn, ridicule, and violent treatment. This treatment is more characteristic of oppressed races than of intermediate-level groups such as women, who also face inequity and occasional violence but have always been treated with some degree of cultural acceptance. Even if courts conclude that homosexuals do not fully satisfy all of the suspect criteria, homosexuals' history of brutal mistreatment certainly suggests that homosexuals deserve far more than rational basis protection. See, e.g., Rowland, 53 U.S.L.W. 3614, 3615 (1985) (Brennan and Marshall, JJ., dissenting from denial of certiorari: "[H]omosexuals have historically been the object of pernicious and sustained
status of homosexuals as a suspect class in need of strict scrutiny protection.

The application of a heightened level of scrutiny illustrates how the regulation operates to exclude homosexuals on the basis of their status rather than on the basis of their effects on military interests. The regulation is not narrowly tailored to the problems alleged by the military because it proscribes all homosexual conduct, whether relevant to military interests or not. For example, the prohibition seeks to prevent coerced seduction by prohibiting both consensual and nonconsensual homosexual activity rather than only the latter. Similarly, the regulation attempts to combat the problem of favoritism by proscribing all homosexual relationships, not just relationships between officers and persons under their command. The regulation is also overly broad because it proscribes homosexual conduct under every circumstance, including activities conducted off duty, off base and with civilians. By requiring homosexuals, but not heterosexuals, to be virtually celibate throughout their military careers, the regulation acts upon homosexuals as a class rather than against particular situations in which sexual activity, heterosexual as well as homosexual, may be harmful to military interests.

Finally, the military's policy of excluding homosexuals, when viewed in its entirety, suggests more clearly that the Navy regulation is part of a larger plan to discriminate solely on the basis of homosexual status. The fact that the armed forces attempt to deny admission to all open homosexuals, including those who promise not to engage in sexual activity, demonstrates that the military is more concerned with excluding an unpopular class than with prohibiting allegedly deleterious acts. Thus, the regulation, viewed both independently and as part of a larger pattern of invidious discrimination on the basis of homosexual status, should be struck down.

hostility, and it is fair to say that discrimination against homosexuals is likely . . . to reflect deep-seated prejudice rather than . . . rationality.” (citation omitted).


51. Other evidence of status discrimination includes SEC/NAV Instruction 1900.9C ¶ 6b (Jan. 20, 1978), which excuses isolated homosexual incidents provided that the accused does not "profess or demonstrate proclivity to repeat such act", quoted in Dronenburg I, 741 F.2d at 1389 (emphasis added). Also recall that SEC/NAV Instruction 1900.9C is designed to eliminate the "presence" of homosexuals. See supra note 6.
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III. Strict Scrutiny Under The Right of Privacy Analysis

Dronenburg's second argument for strict scrutiny was based on the claim that the regulation infringed his constitutional right of privacy. He argued that the right of privacy doctrine as developed by the Supreme Court encompasses homosexual conduct under the principle that "the government should not interfere with an individual's freedom to control intimate personal decisions regarding his or her own body."52

The Dronenburg panel holds instead that none of the Supreme Court's privacy decisions have "defined the right so broadly as to encompass homosexual conduct" and that several justices have expressly rejected the inclusion of homosexual conduct within the right of privacy.53 The court cites Doe v. Commonwealth's Attorney for Richmond,54 in which the Supreme Court summarily affirmed without opinion a district court decision concluding that the right of privacy does not extend to homosexual conduct. Doe involved a pre-enforcement challenge to a state anti-sodomy statute that, like the Navy regulation, prohibited homosexual conduct between consenting adults even in private.

Reliance on Doe, however, may be misplaced. Doe has been subsequently interpreted by several courts as an ambiguous precedent because it is not clear whether the Supreme Court adopted the lower court's privacy reasoning or only affirmed its suggestion that the petitioners lacked standing as representatives in a class action pre-enforcement challenge.55 Even leaving aside its uncertain precedential value, the lower court holding in Doe should be rejected because it

52. Dronenburg I, 741 F.2d at 1391. It appears that Dronenburg also challenged the regulation on privacy grounds independent of equal protection analysis; this Comment, however, will track the path of Bork's opinion and will consider the privacy doctrine only as a reason for strict scrutiny. In Roe v. Wade, 410 U.S. at 154, the Supreme Court rejected in dictum the claim that "one has an unlimited right to do with one's body as one pleases"; however, Dronenburg did not assert that the right to do with one's body as one pleases was unlimited. Dronenburg I, 741 F.2d at 1391.

53. Dronenburg I, 741 F.2d at 1391 (citing the dissent of Justice Harlan in Poe v. Ullman, 367 U.S. 497, 553 (1961), reh'g denied, 368 U.S. 901 (1961)).


55. For a discussion of the precedential value of Doe, see Baker v. Wade, 553 F. Supp. at 137-38; Miller v. Rumsfeld, 647 F.2d at 84; People v. Onofre, 415 N.E.2d 936. In Dronenburg II, Judge Robinson of the Court of Appeals for the D.C. Circuit explained in his dissent to the denial of a rehearing of Dronenburg I: "To hold Dronenburg's claims hostage to a one-word summary affirmance disregards the well-established principle that such a disposition by the Supreme Court decides the issue between the parties on the narrowest possible grounds." Dronenburg II, 746 F.2d at 1580. Bork responded in Dronenburg II that Hicks v. Miranda, 422 U.S. 332 (1975)(summary dismissal constituted a decision on the merits), requires that summary affirmances be fully binding on the lower federal courts. Dronenburg II, 746 F.2d at 1582 n.1. Bork does not acknowledge
mistakenly assumes that the right of privacy must be extended beyond existing Supreme Court precedent in order to protect homosexual conduct. Judge Bork adopts this view in Dronenburg, concluding that the lower courts have no warrant to create new rights and thereby promulgate "judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution." 56

Where Bork errs, even under a restrictive approach to the privacy doctrine, is by adopting the questionable assertion of the district court in Doe that homosexual conduct bears no relationship to the traditional concerns of privacy law: marriage, home and family. 57 Doe overlooks the fact that several Supreme Court decisions have already extended the right to privacy beyond the marital institution. 58 Furthermore, it is circular to deny homosexuals privacy protection on the grounds that they cannot marry while simultaneously denying homosexuals legal marriage on the grounds that the right of privacy does not extend to homosexual conduct. 59 Finally, the assertion that homosexual activity has nothing to do with home and family is simply incorrect. Many homosexuals enter long-term relationships 60 and sometimes adopt or have their own children through traditional methods or through artificial insemination and surrogate mothers. 61 Thus, homosexual relationships are not necessarily inconsistent with the traditional emphasis on home and family life. 62 Therefore, as threshold matter, the right of privacy arguably

that the language in Carey implicitly overrules the summary affirmance in Doe. See infra text accompanying note 71.

56. Dronenburg I, 741 F.2d at 1396 (quoting Justice White's dissent in Moore v. City of East Cleveland, 431 U.S. 494, 544 (1977)(plurality opinion invalidating zoning ordinance limiting occupancy of dwellings only to nuclear family units)).
57. 403 F. Supp. at 1202.
58. Stanley v. Georgia, 394 U.S. 557 (right to possess obscene materials in the privacy of the home); Eisenstadt v. Baird, 405 U.S. 438 (right of unmarried adults to receive contraceptives); Carey v. Population Services International, 431 U.S. 678 (right of unmarried minors to receive contraceptives); Roe v. Wade, 410 U.S. 113 (right of a woman, whether married or not, to terminate her pregnancy); see also the analysis in Baker v. Wade, 553 F. Supp. at 1136-41.
59. Compare Note, Homosexuals' Right to Marry, supra note 36, at 201 (arguing that homosexuals' right to marry cannot be based in the right to privacy because the right to privacy has not been extended to homosexuals).
60. Id. at 197-98 nn.26-27.
62. The Constitution protects family units other than the nuclear family, which consists solely of a husband, wife and their children. Moore v. City of East Cleveland, 431 U.S. 494 (invalidating zoning ordinance limiting occupancy of dwellings to nuclear families). "[T]he Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns." 431 U.S. at
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already encompasses homosexual relationships.

The Bork opinion also argues that the Supreme Court has provided no guidance to determine the extent of the right of privacy beyond observing that it includes rights that are "fundamental" or "implicit in the concept of ordered liberty." According to Bork, it is impossible to conclude that a right to homosexual conduct meets this requirement. Yet Bork's restricted view of the privacy doctrine seems itself to be antithetical to a notion of ordered liberty. Denying privacy protection whenever the activity involved is homosexual means that a homosexual must transform his or her sexual preference in order to receive the protection that the right of privacy provides for sexual intimacy; however, requiring individuals to restructure their emotional identity seems to violate rights essential to individual liberty, such as the right to think freely. Bork simply overlooks the argument that "ordered liberty" necessarily encompasses something as deeply intertwined with personal autonomy as sexual preference and that to discriminate between heterosexual and homosexual activity therefore violates the essence of individual liberty by attempting to regulate personalities.

Bork's view of ordered liberty not only imperils free thinking but

506. Moore does not indicate where the line defining a family unit can constitutionally be drawn.

63. Dronenburg I, 741 F.2d at 1396. Because Dronenburg I was heard before a panel comprised of only two D.C. Circuit judges, it is not clear whether Bork's construction of the privacy doctrine expresses the majority view of the court. Even Judge Ginsburg, who concurred with the denial of rehearing in Dronenburg II, said: "I read the opinion's extended remarks on constitutional interpretation as commentarial exposition of the opinion writer's viewpoint, a personal statement that does not carry or purport to carry the approbation of the court." Dronenburg II, 746 F.2d at 1582. In response to Bork's explanation that the Supreme Court's privacy decisions offer no guidance, Judge Robinson, dissenting in Dronenburg II, called Bork's approach a "spring cleaning" of constitutional law. 746 F.2d at 1580.

64. Dronenburg I, 741 F.2d at 1396.

65. Arguments linking a right to sexual privacy with personal autonomy are deserving of a more comprehensive discussion than this Comment can pursue. See, e.g., Gerety, Redefining Privacy, 12 Harv. C.R.-C.L. L. Rev. 233, 261-81 (1977). Because homosexuals' first amendment rights are protected by the courts, it would seem that a right to privacy is thereby implicated. See benShalom v. Secretary of Army, 489 F. Supp. at 976 ("the Army's policy of discharging people simply for having homosexual personalities also offends privacy interests rooted in the First Amendment") (emphasis in original); Richardson v. Hampton, 345 F. Supp. 600, 608 (D.D.C. 1972) ("Courts have increasingly recognized that an individual's private sexual preferences, activities and associations are among those areas protected from governmental inquiry by the First Amendment."); Matthews v. Marsh, No. 82-0216, slip op.; Scott v. Macy, 417 F.2d at 1165 ("[T]he notion that it could be an appropriate function of the federal bureaucracy to enforce the majority's conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy, and diversity."). See also Hatheway v. Secretary of the Army, 641 F.2d at 1382 (privacy concerns trigger intermediate scrutiny of Army's exclusion of active homosexuals).
also demotes homosexuals to a second-class status entitling them to only a portion of the full scope of constitutional guarantees. If privacy is a constitutional right, however, then it must apply to all citizens.66 Yet, this right, as it is viewed by Bork, allows the homosexual minority nothing more than the meaningless right to engage in heterosexual conduct. Thus, Bork's scheme of ordered liberty allows heterosexuals to engage in sexual activity but relegates homosexuals to celibacy. This interpretation of ordered liberty, which arbitrarily treats a substantial component of the population as quasi-citizens entitled to only a lesser level of constitutional freedoms, has no mandate in either the language or design of the Constitution.

Having found no guidance in the Supreme Court's privacy doctrine for protecting homosexual activities, Bork asserts that the regulation of sexual conduct is a legitimate state interest: "If the revolution in sexual mores that appellant proclaims is in fact ever to arrive, we think it must arrive through the moral choices of the people and their chosen representatives, not through the ukase of this court."67 Yet a majoritarian solution to homosexual discrimination seems patently inadequate, especially in light of the relative powerlessness of the homosexual minority.68 It is not clear how a minority of an estimated 10 percent of the male population and 8 percent of the female population can achieve change within a majoritarian system, especially on a national level.69 The problem is all the more serious because politicians are reluctant to adopt a stance on gay issues, perhaps for fear of raising suspicions concerning their own sexuality.

Bork's majoritarian solution also assumes that the Constitution permits the majority to regulate private sexual behavior. This premise was undermined in Carey v. Population Services International,70 in which the Supreme Court stated that it had not "definitively answered the difficult question whether and to what extent the Consti-

67. Dronenburg I, 741 F.2d at 1397.
68. See supra text accompanying notes 45 & 46.
tution prohibits state statutes regulating [private consensual sexual] behavior among adults."

The state conceded has an interest in certain arguably moral concerns, such as preventing harm to individuals and to the state. It is not clear, however, that any harm results from private consensual activity. Bork nonetheless analogizes the public moral concerns expressed in worker safety and environmental legislation to the concern motivating prohibitions on homosexual conduct. Such an analogy is misplaced because the former involve conflicts between actors in the public arena whereas the latter involve private consensual activities, which by definition involve neither conflict nor public conduct. Bork's amorphous concept of morality obscures the distinctions between the constitutionally questionable regulation of private, consensual sexual activity and regulation of public concerns whose validity has already been constitutionally established. Thus, with Carey having left the legitimacy of "moral" legislation against homosexual conduct in doubt, the questions raised in the Dronenburg case are ones that are appropriately addressed by constitutional interpretation and not, as Bork perceives, by majoritarian lawmaking.

IV. Conclusion

The Dronenburg decision offers a significant example of how some judges rely on traditional misconceptions about homosexuality to justify repression of nonconformist behavior. Also, the manner in which Bork's decision confines doctrinally important Supreme Court cases to their facts allows courts, when faced with issues in-

71. 431 U.S. at 688 n.5, 694 n.17 (brackets in original). Bork's concept of judicial restraint apparently does not inhibit him from definitively answering in the homosexual context the "difficult question" that the Supreme Court left open in Carey. In Dronenburg II, Bork explained that the concept of judicial restraint did not prevent him from criticizing the Supreme Court privacy decisions and thereby concluding that the privacy doctrine provided no basis for leaving the sexual issue open with regard to homosexuals. Judicial restraint, in Bork's view, in fact required such criticism; Bork explains: "Judicial restraint is shorthand for the philosophy that courts ought not invade the domain the Constitution marks out for democratic rather than judicial governance." Dronenburg II, 746 F.2d at 1583. The problem with Bork's analysis here is that Carey demonstrates that the regulation of private sexual activity has not yet been determined to be an area that the Constitution has granted to the legislature.

72. For a more in-depth discussion of harm as an interest of the state, see Gerety, supra note 65, at 276-81.

73. Id.

74. Dronenburg I, 741 F.2d at 1397.

75. Bork also inappropriately analogizes the moral concern in preventing consensual private adult homosexuality to the concern for prohibiting bestiality, Dronenburg I, 741 F.2d at 1397 n.6; however, bestiality is by definition neither between adults nor between consenting parties.
volving unconventional activity, to abandon their obligation to protect fundamental rights against infringement. By denying even a minimum of equal protection, Bork's opinion in Dronenburg seriously exacerbates the already precarious legal position of homosexuals. Unless courts are willing to fulfill their obligation to deliberate seriously such issues when presented to them, members of the homosexual minority, confronted by insensitivity to gay issues in many legislatures as well as courts, appear to have nowhere left to turn for recognition of their fundamental rights as autonomous individuals.

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76. Because some courts refuse to protect homosexual activity, it would seem that active homosexuals born and raised in socially and legally intolerant areas must migrate to more tolerant areas (e.g., cities such as New York and San Francisco) in order to establish their autonomy. It seems questionable that the people of the "land of the free" must migrate in order to attain fundamental constitutional rights. Note that recent cases sustaining the military's exclusionary policy, such as Dronenburg I, have already served as the basis for two major law schools to revoke policies that had barred on-campus military recruitment on the grounds of discrimination against homosexuals. The University of California law schools at Los Angeles and at Berkeley (Boalt Hall) have denied that the change was due to a threat by Major General Hugh J. Clausen, the Army's judge and advocate general, that both schools would lose valuable government contracts unless the anti-discrimination policy was changed. President David Gardner of the University of California explained that the university's anti-discrimination policy applied only to employment practices in violation of federal or state law; thus, since courts have upheld the military's exclusionary policy, the law schools' policy against anti-gay recruiters no longer applied to the Department of Defense. Kaplan, Two California Schools Lift Ban on Visits by Anti-Gay Recruiters, Nat'l L. J., Oct. 29, 1984, at 4.