Pace Law Review

Volume 19
Issue 3 *Spring 1999*

Article 5

April 1999

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Recommended Citation
Sherene D. Hannon, *License to Oppress: The Aftermath of Bowers v. Hardwick Is Still Felt Today: Shahar v. Bowers*, 19 Pace L. Rev. 507 (1999)
DOI: https://doi.org/10.58948/2331-3528.1296
Available at: https://digitalcommons.pace.edu/plr/vol19/iss3/5

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License to Oppress: The Aftermath of *Bowers v. Hardwick*[1] is Still Felt Today: *Shahar v. Bowers*[2]

I. Introduction

Homosexual rights claims have reached the courts through alleged constitutional violations of the right to Due Process under the Fifth and Fourteenth Amendments,[3] to Equal Protection under the Fourteenth Amendment,[4] to free speech under the First Amendment,[5] to association,[6] and to privacy.[7] Since the Supreme Court decision in *Bowers v. Hardwick*, which held that state laws criminalizing consensual sodomy are constitutional, gay litigants asserting civil rights violations have struggled against the inference that is often made from their homosexual status to illegal sexual conduct.[8] Courts have used the holding in *Bowers* to deny homosexual rights based on this inference.[9]

In 1997, in *Shahar v. Bowers*,[10] the Court of Appeals for the Eleventh Circuit held that Plaintiff Robin Shahar was right-

1. 478 U.S. 186 (1986).
2. 114 F.3d 1097 (1997), *cert. denied*, 118 S. Ct. 693 (1998).
3. *See, e.g.,* Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that there is no constitutionally protected right to engage in consensual sodomy).
4. *See, e.g.,* Romer v. Evans, 116 S. Ct. 1620 (1996) (striking down a provision of an amendment to Colorado's state constitution which prohibited any protection of homosexuals as a class).
5. *See, e.g.,* Able v. United States, 880 F. Supp. 968 (E.D.N.Y. 1995) (striking down military exclusion on the basis of homosexual status).
6. *See, e.g., Bowers*, 478 U.S. at 189.
7. *See id.*
8. *See id.* at 186.
9. *See* Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997).
10. 114 F.3d 1097 (11th Cir. 1997).

fully terminated from her employment with the Attorney General's Office in Georgia due to her 'marriage' to another woman.[11] Shahar brought an action alleging violations of her rights to freedom of association, to the free exercise of her religion, and to equal protection and substantive due process.[12] However, the court failed to opine regarding the constitutional violations alleged by Shahar because it found that even if she had the rights which she claimed, she was not entitled to any relief.[13] Instead, the court assumed arguendo that Shahar had the constitutional rights which she claimed and employed a balancing test to consider the respective rights of the Attorney General as a government employer and of Shahar.[14] Ultimately, the court found that the Attorney General's interests as a government employer outweighed Shahar's.[15]

Part II explores constitutionally protected intimate and expressive associations. The naming, constitutional origin and Supreme Court definition of intimate association are given particular emphasis. Two Supreme Court cases of critical importance to homosexual rights litigation, *Bowers v. Hardwick*[16] and *Romer v. Evans*,[17] are analyzed and juxtaposed. Part II also explores the treatment of homosexual rights cases in lower courts, including those involving gays in the military and same-sex marriages. Lastly, Part II discusses the balancing test which is employed by courts when a government-employer infringes upon a constitutional right of one of its employees.[18]

Part III discusses the decisional history of the *Shahar* case, including a detailed analysis of the four dissenting opinions written when the Court of Appeals of the Eleventh Circuit sat en banc.[19] This en banc hearing both vacated the panel decision which found for Shahar on her intimate association claim, and affirmed the district court opinion which held that the Attorney

11. *See Shahar*, 114 F.3d at 1111.
12. *See id.* at 1101.
13. *See id.* at 1099.
14. *See id.* at 1103 (citing Pickering v. Board of Ed., 391 U.S. 563 (1968)).
15. *See id.* at 1111.
16. 478 U.S. 186 (1986).
17. 116 S. Ct. 1620 (1996).
18. *See* Pickering v. Board of Educ., 391 U.S. 563 (1968).
19. *See Shahar*, 114 F.3d at 1118.

General's interests as a government-employer outweighed Shahar's constitutional interests.[20]

Finally, Part IV proposes that the Supreme Court, through its decision in *Bowers v. Hardwick*, has established a framework within which lower courts can infer illegal sexual conduct from homosexual status and thus perpetuate the denial of constitutional rights to homosexuals.[21] This framework is constructed as if the law made *being* homosexual a criminal offense and has created an environment in which silence about self-identity is encouraged. A detailed analysis is presented to illustrate that Shahar's lesbian relationship clearly fits into the Supreme Court's definition of intimate association, and therefore should have been given great weight in the balancing analysis done by the *Shahar* court.[22] Part IV also discusses the similarities between the State's reliance on 'tradition' and public perception in *Shahar*[23] and the State's reasoning in *Loving v. Virginia*,[24] where Virginia's anti-miscegenation statute was struck down as unconstitutional.[25] Part IV further asserts that the dissenting justices in *Shahar* were correct in finding that Shahar's constitutionally protected intimate association outweighs any reasonable interests of the Attorney General as a state employer.

II. Background

A. *Constitutionally Protected Associations: Expressive and Intimate*

Associational rights have been viewed by the Supreme Court on a continuum from the least protected form of association in commercial activities to the most protected forms of association to engage in political or religious speech, or for highly personal, 'intimate' relationships.[26] The right to "association" in general, although not explicitly enumerated in the First

20. *See id.* at 1111.
21. *See Bowers*, 478 U.S. at 186; *see also Shahar*, 114 F.3d at 1104.
22. *See* Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984).
23. *See Shahar*, 114 F.3d at 1104.
24. 388 U.S. 1 (1967).
25. *See Loving*, 388 U.S. at 2.
26. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 16.41 (5th ed. 1995).

Amendment, is preservative of those rights which are enumerated and thus implicitly protected.[27]

1. *Early Recognition of the Freedom to Associate: Expressive Association*

The Court's recognition of a freedom of association initially surfaced in situations involving organizations and their membership policies.[28] The right to "expressive association" is a right to associate for the purpose of engaging in those activities enumerated in the First Amendment.[29] Implicit in the right to engage in the activities protected by the First Amendment is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[30] The freedoms protected by the First Amendment would not be adequately protected from State interference without the existence of a 'correlative freedom' to engage in a group effort to express them.[31] The protection of this implicit right facilitates an environment within which political and cultural diversity is fostered and preserved, and minority points of view are not suppressed by the majority.[32] The Court has concluded, however, that the right to expressive association may be infringed upon by the State if the State action can survive a strict scrutiny test.[33] This test requires the State to demon-

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27. *See id.*

28. *See, e.g.,* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

29. *See* NOWAK & ROTUNDA, *supra* note 26.

30. *See Roberts,* 468 U.S. at 622; *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907-09, 932-33 (1982); Larson v. Valente, 456 U.S. 228, 244-46 (1982); In re Primus, 436 U.S. 412, 426 (1978); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977).

31. *See Roberts,* 468 U.S. at 622; *see also* Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley, 454 U.S. 290, 294 (1981); *see also* NOWAK & ROTUNDA, *supra* note 26.

32. *See Roberts,* 468 U.S. at 622; *see also* Gilmore v. City of Montgomery, 417 U.S. 556 (1974); Griswold v. Connecticut, 381 U.S. 479 (1965); NAACP v. Button, 371 U.S. 415, 431 (1963); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 462 (1958).

33. *Roberts,* 468 U.S. at 622; *see also* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 91-92 (1982); Democratic Party of the U.S. v. Wisconsin, 450 U.S. 107, 124 (1981); Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam); Cousins v. Wigoda, 419 U.S. 477, 489 (1975); American Party of Tex. v. White, 415 U.S. 767, 780-81 (1974); NAACP v. Button, 371 U.S. at 483; Shelton v. Tucker, 364 U.S. 479, 486, 488 (1960).

strate that its acts are narrowly tailored to further a compelling state interest.[34]

In 1958 in *NAACP v. Alabama*,[35] the Court held that the State could not compel the NAACP to disclose its membership lists.[36] Due to the cultural climate at the time, the disclosure of this kind of information could have impeded the members' ability to "engage in lawful association in support of their common beliefs."[37] The Court emphasized that "[it] is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces the First Amendment."[38]

2. *The 1980s: Intimate Association Is Named*

Although Justice Douglas, in his Hymn to Marriage in *Griswold v. Connecticut*[39] in 1965, referred to marriage as an association, "intimate association" was not named until 1980.[40] The right to intimate association, as an offshoot of the more general freedom of association, was first articulated by the Supreme Court in *Roberts v. United States Jaycees*.[41] In that case, the Court held that the application of a state human rights law which compelled the Jaycees to accept women did not abridge male members' freedom of intimate or expressive association.[42] With respect to intimate association, the Supreme

34. *See* NOWAK & ROTUNDA, *supra* note 26, § 14.3. The Court in *Roberts* emphasized that the compelling state interest must be unrelated to the suppression of ideas. *See Roberts*, 468 U.S. at 623.

35. 357 U.S. 462 (1958).

36. *See Patterson*, 357 U.S. at 465.

37. *Id.* at 462.

38. *Id.*

39. 381 U.S. 479 (1965).

40. *See* Kenneth Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980). Karst articulated four key components of intimate association: 1) the opportunity to enjoy the society of other people, 2) caring and commitment, 3) intimacy, and 4) self-identification. *See id.* at 647. Karst also stated that this concept of intimate association is not only applicable to traditional relationships like marriage, but also to nontraditional relationships, including unmarried couples, illegitimate children, and gay and lesbian relationships. *See id.* at 673. According to Karst, intimate association is derived from a combination of the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See id.* at 625.

41. 468 U.S. 609 (1984).

42. *See id.* at 626.

Court concluded that "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."[43]

The Supreme Court has long acknowledged that certain highly personal relationships must be given protection from State interference.[44] Intimate association is protected by the Due Process Clause and is an implicit component of the Bill of Rights guarantees.[45] The Court has established objective parameters for determining where each relationship falls on a spectrum from the most intimate to the most attenuated of personal attachments.[46] Great importance has been attached to those kinds of relationships which "have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs."[47] These bonds are said to "foster diversity and act as critical buffers between the individual and the power of the State."[48] The underlying notion which drives the protection of these types of relationships is that defining one's identity is critical to the concept of liberty.[49]

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43. *Id.* at 618.

44. *See* Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

45. *See* NOWAK & ROTUNDA, *supra* note 26, § 16.41. Intimate association is also closely related to the right to privacy guaranteed by the Due Process Clause. *See* Scott D. Weiner, *Same-Sex Intimate and Expressive Association: The Pickering Balancing Test or Strict Scrutiny?*, HARV. C.R.-C.L. L. REV. 651 (1996). Intimate association and privacy have been treated as equivalent by some courts. *See, e.g.*, Fleisher v. City of Signal Hill, 829 F.2d 1491, 1499-500 (9th Cir. 1987), *cert. denied*, 485 U.S. 961 (1988).

46. *See Roberts*, 468 U.S. at 619.

47. *Id.* at 619.

48. *Id.* at 619; *see also* Zablocki v. Redhail, 434 U.S. 374, 383-86 (1978); Moore v. East Cleveland, 431 U.S. 494, 503-04 (1972); Griswold v. Connecticut, 381 U.S. 479, 482-85 (1965); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1974); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-62 (1958); Poe v. Ullman, 367 U.S. 497, 542-45 (1961) (Harlan, J., dissenting).

49. *See* Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Smith v. Organization of Foster Families, 431 U.S. 816, 844 (1977); Carey v. Population Servs. Int'l., 431 U.S. 678, 684-86 (1977); Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632, 639-40 (1974); Stanley v. Illinois, 405 U.S. 645, 651-52 (1972); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

Those personal affiliations which have been constitutionally protected generally have been limited to the following: the creation of a family, or marriage,[50] childbirth,[51] the raising and education of children,[52] and cohabitation with one's relatives.[53] These types of associations have been characterized as, "relatively small, highly selective, and in [their] nature, almost exclusive because they concern highly personal relationships."[54] In *Board of Directors of Rotary Int'l v. Rotary Club*,[55] the Supreme Court held that the First Amendment protects those relationships, including family relationships, that presuppose "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."[56] Conversely, associations lacking these qualities, such as large commercial enterprises, are not afforded constitutional protection.[57] For example, in that case, the Court found that the California civil rights statute did not violate the First Amendment by requiring California Rotary Clubs to admit women to membership because the application of the statute to the Clubs did not interfere unduly with the members' freedom of association.[58] The Court explained that the relationship among the Club members was not the kind of intimate or private relation that warranted constitutional protection.[59]

B. *The Eleventh Circuit's Treatment of Associational Rights*

The Eleventh Circuit has taken "an expansive view of the right of intimate association under the First Amendment, pro-

50. *See* Zablocki v. Redhail, 434 U.S. 374 (1978).

51. *See* Carey v. Population Servs. Int'l., 431 U.S. 678 (1977).

52. *See* Smith v. Organization of Foster Families, 431 U.S. 678 (1977).

53. *See* Moore v. East Cleveland, 434 U.S. 494 (1972).

54. NOWAK & ROTUNDA, *supra* note 26, § 16.41 (citing *Roberts*, 468 U.S. at 619).

55. 481 U.S. 537 (1987).

56. *Rotary Int'l*, 481 U.S. at 545 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 619-20); *see also* Cummings v. DeKalb, 24 F.3d 1349 (11th Cir. 1994) (stating that both intimate and expressive association are First Amendment rights).

57. *See Roberts*, 468 U.S. at 619.

58. *See Rotary Int'l*, 481 U.S. at 547.

59. *See id.* at 546.

tecting even dating relationships."[60] Before the *Roberts* decision in 1984, most of the association cases before the Eleventh Circuit involved the protection of an individual from being found "guilty" solely based on his personal connection to criminals or others.[61] After the *Roberts* court acknowledged intimate association as a legal right,[62] the Eleventh Circuit decided its leading case regarding intimate association.[63] In *McCabe v. Sharrett*, the secretary of a local police chief was demoted because she married a local police officer and there were subsequent concerns about her loyalty and ability to maintain the office's confidentiality.[64] The court there acknowledged that the action taken against McCabe was related to her constitutionally protected intimate association with her husband.[65] However, after balancing McCabe's interests against the interests of her employer, the Eleventh Circuit held that the demotion decision was proper.[66]

60. Shahar v. Bowers, 70 F.3d 1218, 1228-29 (11th Cir. 1995) (Kravitch, J., concurring in part and dissenting in part) (citing Hatcher v. Board of Educ., 809 F.2d 1546, 1558 (11th Cir. 1987); *see also* Wilson v. Taylor, 733 F.2d 1539, 1544 (11th Cir. 1984), *rehearing en banc granted*, 78 F.3d 499 (11th Cir. 1996), *rehearing vacated*, 78 F.3d 499 (11th Cir. 1996).

61. *See, e.g.*, Wilson v. Taylor, 658 F.2d 1021 (5th Cir. 1981) (Wilson I), *appeal after remand*, 733 F.2d 1539 (11th Cir. 1984) (Wilson II) (holding that dating relationship with convicted felon was protected by First Amendment freedom of association); Tyson v. New York Hous. Auth., 369 F. Supp. 513 (S.D.N.Y. 1974) (emphasizing that eviction of parents based on criminal activities of their nonresident adult children is a violation of parents' freedom of association).

62. *See Roberts*, 468 U.S. at 618.

63. *See* McCabe v. Sharrett, 12 F.3d 1558 (11th Cir. 1994).

64. *See id.* at 1560.

65. *See id.* at 1563. The court in *McCabe* did not explicitly state the constitutional origin of this right. However, later cases involving public employment acknowledged intimate association as a First Amendment right. *See, e.g.*, Cummings v. DeKalb County, 24 F.3d 1349, 1354 (11th Cir. 1994); Parks v. City of Warner Robins, 43 F.3d 609, 615 (11th Cir. 1995).

66. *See McCabe*, 12 F.3d at 1570-71. The court there employed the *Pickering* balancing test which includes an assumption that when the state acts as an employer it has a unique interest in providing quality services to the public which must be taken into consideration. *See* Pickering v. Board of Educ., 391 U.S. 563 (1968).

C. *Homosexual Rights and the Supreme Court*

1. *There's Nothing Fundamental About* Bowers v. Hardwick[67]

In 1982, Hardwick was charged with violating a Georgia statute criminalizing consensual sodomy for engaging in sodomy with another adult male in the bedroom of Hardwick's home.[68] In 1986, when Attorney General Bowers' case reached the Supreme Court of the United States, it was held that no fundamental right exists for consenting adults to engage in homosexual sodomy.[69] The Court there stated that precedent cases only conferred a right to privacy where there was a clear connection to family, marriage or procreation.[70] The privacy and intimate association rights asserted by Hardwick were denied by the Court on the grounds that "the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable."[71]

In identifying the nature of those rights which do qualify for heightened judicial protection, the Court stated that the category includes those fundamental liberties that are "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.'"[72] The Court further noted that the liberty must be "deeply rooted in this Nation's history and tradition."[73] It was further emphasized that the

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67. 478 U.S. 186 (1986).

68. *See Bowers*, 478 U.S. at 187. Georgia's anti-sodomy statute reads in pertinent part as follows:

> "A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another."

GA. CODE ANN. § 16-6-2(a) (1984).

69. *See Bowers*, 478 U.S. at 204.

70. *See id.* at 190 (citing Carey v. Population Servs. Int'l., 431 U.S. 678, 685 (1977)); *see also* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); Prince v. Massachusetts, 321 U.S. 158 (1944); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942); Loving v. Virginia, 388 U.S. 1 (1967); Roe v. Wade, 410 U.S. 113 (1973).

71. *Bowers*, 478 U.S. at 191.

72. *Bowers*, 478 U.S. at 192 (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

73. *Id*; *see also* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 216 (1990) (holding that "personal bonds" formed through the use of a motel room for less than 10

proscriptions against sodomy have "ancient roots."[74] Until 1961, all 50 states outlawed sodomy.[75] Today, 24 states and the District of Columbia have statutes making consensual sodomy a criminal act.[76] The Court relied on this historical context in expounding that "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."[77]

2. *Not a Word About* Bowers v. Hardwick:[78] *Equal Protection and Homosexual Rights in* Romer v. Evans[79]

In the tradition of the language of the Fourteenth Amendment that no state shall "deny to any person within its jurisdiction the equal protection of the laws,"[80] Justice Kennedy wrote

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hours are not those that have played a critical role in the culture and traditions of the Nation). In *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 845 (1977), the Supreme Court held that "the liberty interest in family privacy has its source, . . . in intrinsic human rights, as they have been understood in 'this Nation's history and traditions.'" In *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977), the Supreme Court held that "[its] decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *See also* Zablocki v. Redhail, 434 U.S. 374 (1978).

74. *Bowers*, 478 U.S. at 196.

75. *See* Thompson v. Aldredge, 187 Ga. 467, 200 S.E. 799 (1939). In 1961, Illinois adopted the American Law Institute's Model Penal Code which decriminalized private sexual conduct between consenting adults. Criminal Code of 1961, §§ 11-2, 11-3, 1961 Ill. Laws, pp. 1985, 2006 (codified as amended at Ill. Rev. Stat., ch. 38, ¶ ¶ 11-2, 11-3 (1983) (repealed 1984)).

76. *See Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 525 (1986).

77. *Bowers*, 478 U.S. at 194. The dissent of Justices Blackmun, Brennan, Marshall, and Stevens, however, stated that the "right to be let alone" is one of the most comprehensive of rights, and one most valued by "civilized men." *Id.* at 199 (citing Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). It was further opined that "only the most willful blindness could obscure the fact that sexual intimacy is 'a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality.'" *Bowers*, 478 U.S. at 205 (citing Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973); Carey v. Population Serv. Int'l, 431 U.S. 678, 685 (1977)).

78. 478 U.S. 186.

79. 116 S. Ct. 1620 (1996). The majority opinion in *Romer* does not make any mention of the *Bowers* decision, despite the fact that it was the last case before *Romer* regarding homosexual rights which the Supreme Court had heard.

80. U.S. CONST. amend. XIV, § 1.

that "the Constitution 'neither knows nor tolerates classes among citizens.'"[81] Statutory classifications of citizens must meet at least a minimum rationality requirement, namely that the classification be rationally related to the purpose of the legislation.[82] The Court has, however, developed two other levels of scrutiny for assessing the validity of certain statutory classifications. In the late 1960s, the Warren Court developed a "new" equal protection or "strict scrutiny" standard.[83] The Court determined that either the presence of a "suspect" classification, or an impact on fundamental rights, would require a statute to withstand a strict scrutiny analysis in order to be upheld as constitutional.[84] Historically, a common "suspect" classification has been one based on race.[85] Sex, alienage and illegitimacy have also been subject to a heightened, or "intermediate" scrutiny.[86] As a middle ground between the rational basis and strict scrutiny standards, the Court espoused this "intermediate" level of review to be applied in areas such as sex discrimination and gender classifications.[87] Under this test, the statutory classification must be justified by an "important" governmental objective and must be "substantially related" to the achievement of those objectives.[88]

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81. Romer v. Evans, 116 S. Ct. 1620, 1622, 134 L. Ed. 2d 855 (1996) (citing Plessy v. Ferguson, 163 U.S. 537, 559 (1896)).

82. *See* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 628 (13th ed. 1997).

83. *See id.* at 630. This is the highest level of scrutiny which the court can employ when faced with an Equal Protection challenge. It requires that the state action be narrowly tailored to achieve a compelling state interest. *See id.*

84. *See* NOWAK & ROTUNDA, *supra* note 26, § 14.3 (stating "[E]qual protection analysis demands strict scrutiny . . . of old classifications that penalize rights already established as fundamental for reasons unrelated to equality . . . .").

85. *See* Korematsu v. United States, 323 U.S. 214 (1944) (holding that classifications based on race are 'suspect' and must be held to the most rigid scrutiny and would be upheld only if they were based on 'public necessity').

86. *See id.*

87. *See id.*

88. *See id.; see also* Craig v. Boren, 429 U.S. 190 (1976) (invalidating under an intermediate scrutiny standard a statutory provision that entitled women workers to less benefits for their families than their male counterparts); Plyler v. Doe, 457 U.S. 202 (1982) (holding that Texas statute which withheld from local school districts any state funds for children who were not 'legally admitted' and which authorized local schools to deny enrollment to such children violated Equal Protection).

In *Romer v. Evans*, the Court held that an Amendment to the Colorado Constitution, which prohibited all legislative, executive or judicial action designed to protect homosexuals, lesbians and bisexuals as a class, was violative of Equal Protection.[89] The Amendment read:

> No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This section of the Constitution shall be in all respects self-executing.[90]

The Court found that the Amendment failed even a rational basis test and "seem[ed] inexplicable by anything but animus toward the class that it affects; it lack[ed] a rational relationship to legitimate state interests."[91] Additionally, the Court found it unacceptable that the Amendment "nullifie[d] specific legal protections for this targeted class in all transactions in housing, the sale of real estate, insurance, health and welfare services, private education, and employment."[92]

The State's rationale for the Amendment was that it "puts gays and lesbians in the same position as all other persons . . . [it] does no more than deny homosexuals special rights."[93] The Court responded by acknowledging that the Amendment was both too narrow and too broad in that it identified persons by a single trait and then denied them equal protection altogether.[94] The Court found that the language of the Amendment, "de-

89. 116 S. Ct. 1620 (1996).

90. Colo. Const., Art. II § 30b.

91. *Romer*, 116 S. Ct. at 1627. *See* O'Connor v. Donaldson, 422 U.S. 563, 575 (1975) ("No matter how uncomfortable a certain group may make the majority of this court, we have held that 'mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's . . . liberty."); *see also* Cleburne v. Cleburne Living Ctr, Inc., 473 U.S. 432 (1985); United States Dept. of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

92. *Romer*, 116 S. Ct. at 1626.

93. *Id.* at 1624.

94. *See id.* at 1628.

prive[d] gays and lesbians even of the protection of the general laws and policies that prohibit arbitrary discrimination in governmental and private settings."[95] The Amendment was declared a "status-based enactment" and a "classification of persons undertaken for its own sake, something [equal protection] does not permit" for "'class legislation. . . [is] obnoxious to the prohibitions of the Fourteenth Amendment. . . .'"[96]

D. *Homosexual Rights in Lower Courts*

1. *Military Service*

Inferences which are often made from homosexual status to illegal sexual conduct are particularly prevalent in litigation regarding military service. Actions brought by gay plaintiffs in this area often reflect concerns expressed by the dissenting justices in *Bowers*, for "litigation over the expulsion of lesbians and gays from the armed services has a particularly close nexus to *Bowers*, as both concern the relationship between gay sexual acts and gay identities."[97] Despite the fact that the United States Code now states that gays may serve in the military, gay litigants have faced an uphill battle.[98] Many courts have followed the lead of the Supreme Court in *Bowers*, and equated "gayness" with sodomy.[99] In 1989, the Seventh Circuit held that even though the record showed no evidence that the plaintiff had engaged in criminal sexual conduct "[p]laintiff's lesbian acknowledgment, if not an admission of practice, at least can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct."[100] Additionally, in 1989, the Federal Circuit upheld the dismissal of a gay Navy reservist based on the fact that he had not affirmatively claimed to be celibate and that he once went to an officer's club with another enlisted gay man.[101]

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95. *Id.* at 1626.

96. *Romer*, 116 S. Ct. at 1629.

97. Andrew M. Jacobs, *Romer Wasn't Built in a Day: The Subtle Transformation in Judicial Argument over Gay Rights*, 1996 WIS. L. REV. 893, 911.

98. *See* 10 U.S.C. § 654 (1996).

99. *See, e.g.*, Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) (upholding the Army Reserve's decision not to allow an openly lesbian reservist to reenlist).

100. *Id.*

101. *See* Woodward v. United States, 871 F.2d 1068, 1074 n.6 (Fed. Cir.).

Gay servicepeople have been given the opportunity to take advantage of a "Don't Ask, Don't Tell" policy within which gays are permitted to serve in the military if they can rebut the presumption that they would engage in homosexual acts.[102] In *Cammermeyer v. Aspin*,[103] a senior officer and nurse in the United States Army was discharged because she admitted that she was gay, but was reinstated after she convinced the court that a distinction existed between her lesbianism and the criminal acts of sodomy.[104] Despite some such 'victories,' many courts have rejected constitutional challenges to military bans on homosexual conduct.[105]

2. *Same-Sex Marriage: The Hawaiian Anomaly*

Gay litigants in Hawaii broke new ground when the Hawaii Supreme Court vacated a lower court decision which dismissed an action brought by four lesbians and two gay men seeking declaratory judgment that Hawaii's refusal to issue marriage licenses to same-sex couples violated their right to privacy and Equal Protection under the Hawaii Constitution.[106] The court in *Baehr v. Lewin*[107] analogized Hawaii's prohibition of same-sex marriage to Virginia's prohibition of miscegenation, which the Court in *Loving v. Virginia* held to be unconstitutional in 1967.[108] The court in *Baehr* also found that the notion that same-sex marriage was not constitutionally protected because it is "intrinsically unnatural" was "tautological and circular."[109] The court reasoned that "constitutional law may mandate, like it or not, that customs change with an evolving social order."[110]

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102. *See* Cammermeyer v. Aspin, 850 F. Supp. 910, 920 (W.D. Wash. 1994); *see also* Able v. United States, 88 F. 3d 1280 (2d Cir. 1996) (stating that seven servicepeople have successfully rebutted the presumption that homosexual status and sodomy are inseparable).

103. 850 F. Supp. 910 (W.D. Wash. 1994).

104. *See Cammermeyer*, 850 F. Supp. at 918.

105. *See, e.g.,* Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996) (holding that discharge proceedings are not unconstitutional if subsequent to admission of homosexual status).

106. *See* Baehr v. Lewin, 852 P.2d 44 (Sup. Ct. Haw. 1993).

107. 852 P.2d 44 (Sup. Ct. Haw. 1993).

108. *See id.* at 61-62. (citing Loving v. Virginia, 388 U.S. 1 (1967)).

109. *See id.* at 63.

110. *Id.*

In response to this controversial decision, Congress passed the Defense of Marriage Act.[111] This Act allows states to refuse to recognize same-sex marriages legitimized in other states.[112] It has been argued that the Act conflicts with the Full Faith and Credit Clause of the United States Constitution which provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[113] The *Baehr* decision coupled with the enactment of the Defense of Marriage Act has led to individual states taking action to enact laws against acknowledging same-sex marriages from other states.[114]

E. *Government Employers and Their Employees' Constitutional Rights*

1. *Standards of Review*

When the state infringes upon a fundamental right its action is subject to strict scrutiny and must be justified by a compelling state interest and narrowly tailored to achieve that interest.[115] However, when the state acts as an employer that burdens an employee's fundamental right, the Supreme Court has set forth a balancing test which allows for consideration of the interests of both employer and employee, and is to be applied on a case-by-case basis.[116]

2. *The* Pickering *Balancing Test*[117]

In *Pickering v. Board of Educ. of Township High School*,[118] Pickering, a teacher in Township High School, was dismissed

111. *See* H.R. 3396, 104th Cong., 2d Sess. (1996).

112. *See id.*

113. U.S. CONST. art. IV, § 1; *see also* Habib A. Balian, *Til Death Do Us Part: Granting Full Faith and Credit To Marital Status*, 68 S. CAL. L. REV. 397 (Jan. 1995).

114. *See* Jacobs, *supra* note 97 (citing *Anti-Gay Backlash Continues in Tennessee, Nationwide*, FAMILY LAW, March 6, 1996, *available at* WLN 1192; *Illinois Advances Same-Sex Marriage Ban*, FAMILY LAW, APRIL 29, 1996, *available at* WLN 3270; Elaine Herscher, *When Marriage Is a Tough Proposal / Women's Suit at Heart of Debate Over Same-Sex Unions*, S.F. CHRON., May 15, 1995 at A1).

115. *See* GUNTHER & SULLIVAN, *supra* note 82, at 630; *see, e.g.*, Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 666 (1990).

116. *See Pickering*, 391 U.S. 563 (1968).

117. *See id.*

118. 391 U.S. 563 (1968).

from his position by the Board for sending a letter to a local newspaper that was critical of the way in which the Board had handled past proposals to raise revenue for new schools.[119] The Supreme Court stated that "teachers may [not] constitutionally be compelled to relinquish a First Amendment right which they would otherwise enjoy as citizens to comment on matters of public interest in connection with operation of public schools in which they work. . . ."[120] However, the Court emphasized that the State, as employer, has interests in regulating the speech of its employees in order to enable it to provide quality services to the public.[121]

In order to determine whether the State, as employer, has infringed upon its employees' constitutional rights, the Court indicated the need for a balancing test.[122] This test includes balancing "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[123] The Court set out a general guideline for factors to be considered in such a balancing analysis and included the following: whether there would be a problem maintaining harmony among co-workers, and whether the employment relationships are intimate such that personal loyalty and confidence are necessary to their proper functioning.[124] The weight afforded to the State's inter-

119. *See Pickering,* 391 U.S. at 568.

120. *Id.*

121. *See id.*

122. *See id.*

123. *See Pickering*, 391 U.S. at 568. The *Pickering* balancing test also has been applied in cases where adverse employment decisions have been made on account of the employee's exercise of other constitutionally protected rights. *See, e.g.*, Hatcher v. Board of Pub. Educ. and Orphange, 809 F.2d 1546, 1559 (11th Cir. 1987) (applying *Pickering* test to expressive association claim); Stough v. Crenshaw Bd. of Educ., 744 F.2d 1479, 1480-82 (11th Cir. 1984) (applying *Pickering* test to parents' constitutional right to control the education of their children); Brown v. Polk Cty., 61 F.3d 650, 658-59 (8th Cir. 1995) (en banc), *cert. denied*, 116 S. Ct. 1042 (1996) (applying test to free exercise of religion claim); Sullivan v. Meade Indep. Sch. Dist. No. 101, 530 F.2d 799, 804-06 (8th Cir. 1976) (suggesting that test would apply to association and substantive due process claim).

124. *See Pickering*, 391 U.S. at 570.

ests depends on the reasonableness of the State's predictions in taking particular action.[125]

III. *Shahar v. Bowers*[126]

A. *Factual Background*

Plaintiff Robin Joy Shahar, spent the summer of 1990, while a law student, as a clerk with the Office of the Attorney General of the State of Georgia.[127] In September of that year Attorney General Michael J. Bowers offered Shahar the position of Staff Attorney to commence upon her graduation from law school.[128] Shahar accepted the Attorney General's offer and was to begin work in September of 1991.[129]

During the summer of 1990, Shahar began to make plans for a religious ceremony, or "wedding," in which she would be "married" to another woman by a rabbi from the Reconstructionist Movement of Judaism.[130] This religious movement acknowledges and accepts same-sex marriages.[131] Both Shahar and her partner had practiced this religion for many years.[132] Shahar invited two department employees from the Attorney General's Office to the "wedding."[133] Additionally, in November of 1990, Shahar filled out the required application for a Staff Attorney where she indicated that her status was "engaged"

125. *See* Waters v. Churchill, 511 U.S. 661, 677 (1994) (stating that "it may be unreasonable, for example, for the employer to come to a conclusion based on no evidence at all . . . [and] likewise, it may be unreasonable for an employer to act based on extremely weak evidence when strong evidence is clearly available."); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Palmore v. Sidoti, 466 U.S. 429 (1984) (noting that catering to private prejudice is not a legitimate government interest); *see also* Bates v. Hunt, 3 F.3d 374 (11th Cir. 1993) (holding that government employer's interest in staffing its offices with persons the employer trusts is given great weight); Board of Comm'rs, Waubansee Cty. v. Umbehr, 116 S. Ct. 2342, 135 L. Ed. 2d 843 (1996) (stating that government needs to be free to terminate employees to improve efficiency, efficacy, and responsiveness of services to the public).

126. 114 F.3d 1097 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998).

127. *See Shahar*, 114 F.3d at 1100.

128. *See id.*

129. *See id.*

130. *See id.* at 1110.

131. *See id.*

132. *See Shahar*, 114 F.3d at 1118.

133. *See id.* at 1100.

and filled in the name of her partner, Francine M. Greenfield, after changing "spouse's name" to "future spouse's name."[134]

In June of 1991, Shahar told Deputy Attorney General Robert Coleman that she was getting married at the end of July, changing her last name and taking a trip to Greece.[135] Senior Assistant Attorney General Jeffrey Milsteen was present at the time and heard Coleman congratulate Shahar on her marriage.[136] Milsteen was later informed by Susan Rutherford, another attorney in the office, that Shahar was marrying a woman and "this revelation caused a stir."[137]

Five aides to the Attorney General held several meetings to discuss the situation.[138] The Attorney General did not attend these meetings because he was out of the office that week.[139] Upon the Attorney General's return he was informed about the situation and had several meetings with senior aides and lawyers.[140] In addition, Bowers spoke to a Jewish attorney in his office who informed him that the ceremony was to be performed by a rabbi from New York, but that, "she was not aware of homosexual marriages being recognized in Judaism."[141] After these discussions and meetings with office employees, but without discussing the situation with Shahar personally, Attorney General Bowers decided to "withdraw" the employment offer which Shahar had already accepted.[142]

In July of 1991, the Attorney General sent Shahar a letter stating the following:

> [The withdrawal of your employment offer] has become necessary in light of information which has only recently come to my attention relating to a purported marriage between you and another woman. As chief legal officer of this state, inaction on my part would constitute tacit approval of this purported marriage and jeopardize the proper functioning of this office.[143]

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134. *Id.*
135. *See id.* at 1101.
136. *See id.*
137. *Shahar*, 114 F.3d at 1101.
138. *See id.*
139. *See id.*
140. *See id.*
141. *Id.* at 1121.
142. *See Shahar*, 114 F.3d at 1101.
143. *Id.*

The Attorney General did not have any discussion with Shahar either before or after sending this termination letter.[144] After she had a termination meeting with several office employees which the Attorney General did not attend, Shahar asked to see the Attorney General and was told that he was unavailable to speak with her.[145]

B. *Procedural History*

In October of 1991, Shahar filed a § 1983 action in the United States District Court for the Northern District of Georgia, alleging that the Attorney General's revocation of her employment offer violated her rights of intimate and expressive association, free exercise of religion, equal protection, and substantive due process.[146] The District Court granted Attorney General Bowers summary judgment on all claims.[147] Shahar then appealed to the United States Court of Appeals for the Eleventh Circuit.[148] A panel of Eleventh Circuit Court of Appeals judges found for Shahar on her intimate association claim and affirmed the judgment for Attorney General Bowers on all other claims.[149] Attorney General Bowers then requested and was granted an en banc hearing of the Eleventh Circuit Court of Appeals.[150]

1. *The District Court Decision*[151]

The District Court did not decide whether Shahar's intimate association with her lesbian partner fell within the definition of protected family relationships defined by the Supreme Court in *Roberts v. U. S. Jaycees*.[152] It did state, however, that Shahar's association was within the "broad range of [constitutionally protected] human relationships," which fall on the spectrum of relationships between familial relationships and

144. *See Shahar*, 114 F.3d at 1121 (Godbold, J., dissenting).
145. *See id.*
146. *See* Shahar v. Bowers, 836 F. Supp. 859 (1993).
147. *See Shahar*, 114 F.3d at 1101.
148. *See* Shahar v. Bowers, 70 F.3d 1218 (11th Cir. 1995).
149. *See id.* at 1226.
150. *See* Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997).
151. Shahar v. Bowers, 836 F.Supp. 859 (1993).
152. *See* Shahar v. Bowers, 70 F.3d 1218, 1221 (11th Cir. 1995) (citing *Roberts*, 468 U.S. 609, 619-20 (1984)).

business associations.[153] The court employed the *Pickering* balancing test and found that the Attorney General's concerns regarding Shahar's employment outweighed Shahar's interests in her intimate association with her partner.[154]

With respect to Shahar's claim of an equal protection violation, the court found that the Attorney General's classification of Shahar, if there was one, was not based solely on sexual orientation.[155] Additionally, the court granted summary judgment for defendant on the substantive due process claim on the grounds that plaintiff "conceded that she had no property interest in the promised employment and made no showing of deprivation of any liberty interest."[156]

2. *United States Court of Appeals for the Eleventh Circuit: The Panel Decision*[157]

a. *Intimate Association*

The Court of Appeals held that the intimate relationship between Shahar and her partner did not involve civil, legal marriage, "but it was inextricably entwined with Shahar's free exercise of her religious beliefs."[158] The court vacated the summary judgment for defendant on Shahar's intimate association claim finding that the district court erred in applying the *Pickering* balancing test and remanded it for consideration under a strict scrutiny test.[159] The court noted that the *Pickering* test

153. *Shahar*, 70 F.3d at 1221 (quoting *Roberts*, 468 U.S. at 620). The District Court failed to address Shahar's expressive association claim separately on the grounds that it 'overlapped' her free exercise of religion claim, and therefore required no greater constitutional protection than her intimate association claim. *See id.*

154. *See id.* at 1221. (citing *Pickering*, 391 U.S. 563 (1968)). Claiming that it found no other controlling guideline, the court also applied this balancing test to Shahar's free exercise of religion claim, and likewise found Shahar's interest outweighed by the Attorney General's. *See Shahar*, 70 F.3d at 1221.

155. *See id.* The court also noted that even if Shahar had shown that the Attorney General's classification of her was on the basis of sexual orientation, she would have also had to show that he acted with 'impermissible intent to discriminate.' *Id.*

156. *Id.* at 1221.

157. *See* Shahar v. Bowers, 70 F.3d 1218 (1995).

158. *Id.* at 1224.

159. *See id.* at 1226. The court also remanded Shahar's expressive association claim to the district court for consideration under a strict scrutiny analysis. *See id.* at 1224.

was developed to be applied to a free speech case, and most often has been applied to cases involving freedom of speech or expressive association, giving, "somewhat more deference to the employer."[160] Additionally, the court stated that, "marriage in the conventional sense is an intimate association significant burdens on which are subject to strict scrutiny," and that although Shahar's marriage was not a civil, legal one, it was, "intimate and highly personal in the sense of affection, commitment, and permanency."[161]

In assessing Shahar's intimate association claim, the court came to three critical conclusions regarding the nature of Shahar's relationship.[162] First, the court found that Shahar never asserted that her marriage was a Georgia civil marriage.[163] Additionally, Shahar never challenged the constitutionality of Georgia's licensing statute or any other provisions of Georgia law which speak of marriage as a ceremony, and a status between persons of different sexes.[164] Finally, the court recognized that the intimate association asserted by Shahar was not based on "false or sham assertions of religious beliefs."[165]

b. *Equal Protection*

The Court of Appeals stated that although federal courts have concluded that the equal protection claims of homosexuals should be analyzed using a rational basis test, the facts of this particular case require a strict scrutiny analysis.[166] According to the court, Shahar was classified not only as a homosexual,

160. *Id.* at 1224.

161. *Id.* (citing Zablocki v. Redhail, 434 U.S. 374 (1978)).

162. *See Shahar*, 70 F.3d at 1222.

163. *See id.*

164. *See id.* Shahar's amended complaint alleged: "Plaintiff does not believe and has at no time represented either that her religious union with her partner carries with it any legal rights or that it constitutes a legal (civil) marriage. The ceremony was of a purely religious nature." *Id.*

165. *Id.*

166. *See id.* at 1225 (citing Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261, 266 n.2 (6th Cir. 1995); Jantz v. Muci, 976 F.2d 623, 630 (10th Cir. 1992); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); Pdaula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987).

but as a homosexual engaging in the exercise of her religious faith.[167]

3. Shahar v. Bowers: *The Court of Appeals for the Eleventh Circuit: En Banc*[168]

a. *The Majority Opinion*

The court declined to decide whether a constitutionally protected right exists for two women to be "married" in the sense that Shahar and her partner are married,[169] because the court claimed that even a favorable decision for Shahar on the constitutional issue presented would entitle her to no relief in this case.[170] Instead, the court assumed, arguendo, that Shahar had the rights she claimed, and still held that the Attorney General's act was constitutional.[171] The court began its analysis by stressing that the rights to intimate and expressive association are not absolute,[172] and that the *Pickering* balancing test is the appropriate standard of review for testing for a violation of those constitutional rights in a case such as this.[173] The rights and duties of Georgia and its Attorney General were empha-

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167. *See Shahar*, 70 F.3d at 1225. The court noted that "where a constitutional 'fundamental right' is assaulted by the operation of [a government regulation], . . . the enactment 'will be sustained only if [it is] suitably tailored to serve a compelling state interest." *Id.* (citing *Equality Found.*, 54 F.3d at 266) (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985)).

168. *See* Shahar v. Bowers, 114 F.3d 1097(1997), *cert. denied,* 118 S. Ct. 693 (1998).

169. *Id.* at 1100. The court stated that "powerful considerations of judicial restraint call upon us not to decide these constitutional issues." *Id. (*citing Lyng v. Northwest Indian Cemetery Protective Ass'n., 485 U.S. 439, 445 (1988)) (stating that "a fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."); Employment Div., Dept. of Human Res. v. Smith, 485 U.S. 660 (1988); City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 294 (1982) (stating that "this self-imposed limitation on the exercise of this Court's jurisdiction has an importance to the institution that transcends the significance of particular controversies.").

170. *See Shahar*, 114 F.3d at 1100.

171. *See id.* at 1100. The court did qualify, however, that, "[it did not] decide . . . that the Attorney General did or did not do the right thing when he withdrew the pertinent employment offer . . . [t]hat decision is not properly [for the court] to make." *Id.* at 1110.

172. *See id.* at 1102 (citing Board of Comm'rs, Wabaunsee Cty. v. Umbehr, U.S., 116 S. Ct. 2342, 2346, 135 L. Ed. 843 (1996)).

173. *See id.* at 17; *see also* Pickering, 391 U.S. at 568.

sized, particularly in light of the fact that the state in this case was acting as an employer.[174]

1. *Shahar's Argument for Strict Scrutiny, Court's Conclusions*

Shahar argued that the court should rely on *Dike v. School Bd.*,[175] and should review the case under strict scrutiny.[176] There, the court held that a school district's refusal to allow a teacher to breastfeed her child on her lunch hour should be held to a strict scrutiny standard.[177] The *Shahar* court overruled *Dike* to the extent that it might be interpreted as requiring strict scrutiny review of a government employee's freedom of association claim against a government-employer.[178] To support this ruling, the court relied on *Board of Comm'rs, Wabaunsee Cty. v. Umbehr*,[179] where the Court employed the *Pickering* balancing test and held that government contractors are protected from termination or failure to renew their contracts for exercising their free speech rights.[180] Rejecting Shahar's argument for strict scrutiny application, the court concluded that the *Pickering* balancing test should be employed.[181]

In finding that the Attorney General's interests outweighed Shahar's under the balancing test, the court relied on a line of cases which held that "government employees who have access to their employer's confidences or who act as spokesperson for their employers, as well as those employes with some policy-

174. *See Shahar*, 114 F.3d at 1102. The court acknowledged that the government's role as employer is different from its role as sovereign, and must be reviewed accordingly. *See id.* (citing Waters v. Churchill, 511 U.S. 661, 675 (1994) (stating that "the key to First Amendment analysis of government employment decisions. . . is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when its acts as sovereign to a significant one when it acts as employer.").

175. 650 F.2d 783 (5th Cir. Unit B 1981).

176. *See Shahar*, 114 F.3d at 1101 (citing *Dike*, 650 F.2d at 787). Shahar also asked that the court look to the case of *Loving v. Virginia*, 388 U.S. 1 (1967), which held that miscegenation is not a legitimate governmental interest and discussed public perception about miscegenation, but the court concluded that "the analogy [was] not helpful to decide this case." *Shahar*, 114 F.3d at 1105.

177. *See Dike*, 650 F.2d at 787.

178. *See Shahar*, 114 F.3d at 1101.

179. 116 S. Ct. 2342, 135 L Ed. 843 (1996).

180. *See Shahar*, 114 F.3d at 1103 (citing *Umbehr*, 116 S. Ct. at 2342).

181. *See id.*

making role, are in a special class of employees and might seldom prevail under the First Amendment."[182] Among the noted responsibilities of a Staff Attorney for the Attorney General's office were "doing, or be[ing] ready to do important things, which require the capacity to exercise good sense and discretion (as the Attorney General . . . defines those qualities): advise about policy; have access to confidential information; speak, write on behalf of the Attorney General and for the State."[183] The court concluded that the Attorney General could limit the lawyers on his personal staff to those whom he trusted, and found no federal appellate decision which allowed a "subordinate" prosecutor to keep his job over the chief lawyer's objection.[184] Therefore, in balancing the parties' interests, the court noted that because the chief attorney must have faith and confidence in his legal staff, he "must be given greater deference in his employment decisions than might be appropriate in other areas of government."[185]

When analyzing the Attorney General's rationale for revoking Shahar's employment offer, the court primarily focused on the public perception of the Attorney General's office and on his concerns for the inner workings of his department.[186] The court discussed the statutory context presented by Georgia's sodomy laws[187] and found that the Attorney General believed that

182. *Id.* (citing Bates v. Hunt, 3 F.3d 374, 378 (11th Cir. 1993); Sims v. Metropolitan Dade Cty., 972 F.2d 1230, 1237-38 (11th Cir. 1992); Kinsey v. Salado Indep. Sch. Dist., 950 F.2d 988 (5th Cir. 1992) (en banc).

183. *See Shahar,* 114 F.3d at 1104.

184. *See id.* at 1103 (citing Connick v. Myers, 461 U.S. 138 (1983); Livas v. Petka 711 F.2d 798 (7th Cir. 1983). *See* GA. CODE ANN. § 45-15-30 (1998") (providing that all subordinate attorneys of the Attorney General's office "shall be appointed by the Attorney General for such periods of time as he deems advisable" and "may be removed by the Attorney General."). *Shahar,* 114 F.3d at n.5. The court also noted that the Attorney General lost confidence in Shahar's ability to make good judgments due to the fact that she engaged in this controversial 'marriage' and that she, "seemingly did not appreciate the importance of appearances and the need to avoid bringing 'controversy' to the Department." *Id.* at 1105.

185. *Id.* at 1104 (citing Americanos v. Carter, 74 F.3d 138, 143 (7th Cir. 1996); Monks v. Marlinga, 923 F.2d 423, 426 (6th Cir. 1991); Branti v. Finkel, 445 U.S. 507, 519 n. 13 (1980)).

186. *See Shahar,* 114 F.3d at 1104.

187. *See id.* at 1105 (citing Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that criminal prosecution of consensual homosexual sodomy does not violate substantive due process). The court also stated that although the fact that Shahar and her partner hold themselves out to be lesbians does not prove beyond a reasonable

within that context, Shahar's acts had a "realistic likelihood" to 1) affect the department's credibility; 2) interfere with the department's ability to handle controversial matters, such as claims to same-sex marriage licenses; 3) interfere with Georgia's ability to enforce its laws against homosexual sodomy; and 4) create other difficulties within the department which would be likely to harm the public perception of the office.[188] The court emphasized the potential implications on public perception based on the idea that "some reasonable persons may suspect that having a Staff Attorney who is part of a same-sex 'marriage' is the same thing as having a Staff Attorney who violates the State's law against homosexual sodomy."[189] The court found the Attorney General's worries and views to be within the range of reasonable assessments of the facts in this case,[190] and concluded that the fact that the Attorney General never met with Shahar personally was "inconsequential."[191]

2. *Additional Arguments Asserted by* Shahar

In addition to requesting that the court apply a strict scrutiny standard of review, Shahar also argued that the Attorney General impermissibly discriminated against her by using the perceived public reaction to her "marriage" to justify his decision to terminate her.[192] She relied on *Romer v. Evans*[193] to sup-

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doubt that either of them has engaged in sodomy, "when two people say of themselves that they are 'married' to each other, it is reasonable for others to think those two people engage in marital relations." The court further concluded that "sodomy is an act basic to homosexuality." *Shahar,* 114 F.3d at 1105.

188. *See Shahar,* 114 F.3d at 1104 (citing Board of Comm'rs, Waubansee Cty. v. Umbehr, U.S. , 116 S. Ct. 2342, 135 L. Ed.2d 843 (1996) (stating "The government needs to be free to terminate both employees and contractors . . . to improve the efficiency, efficacy and responsiveness of service to the public . . .").

189. *Shahar,* 114 F.3d at 1105.

190. *See Shahar,* 114 F.3d at 1110. The court concluded that statutory developments were reflective of the fact that "Georgia's people, in general, are set against equating in some way a relationship between persons of the same sex with traditional marriage." *Id.* at n.24 (citing O.C.G.A §7) (defining marriage as consisting of a man and a woman) and U.S.C. § 1738(c) (giving states the power to refuse to recognize same-sex marriages entered into in other states)).

191. *See Shahar,* 114 F.3d at 1106 (citing Waters v. Churchill, 511 U.S. 661(1994) (holding that *Pickering* balance only requires facts to be weighed on government's side to be reasonable view of facts or reasonable predictions).

192. *See Shahar,* 114 F.3d at 1107.

193. *See Romer,* 116 S. Ct. 1620, 134 L. Ed.2d 855 (1996).

port her argument.[194] The court distinguished the instant case from *Romer* stating that "*Romer* is about people's condition; this case is about a person's conduct . . . and, *Romer* is no employment case."[195] In rejecting Shahar's argument the court also relied on *McCullen v. Carson,*[196] where the court held that a sheriff's clerical employee's First Amendment interest in an off-duty statement that he was employed by the sheriff's office and also was a recruiter for the Ku Klux Klan was outweighed by the sheriff's interest in community perception and credibility.[197] As the court found in the *McCullen* case, the court in *Shahar* stated that the Attorney General did not have to wait for events to unfold, but could make judgments and "take steps to protect the public from confusion about his stand and the Law Department's stand on controversial matters, such as same-sex marriage."[198]

Shahar also asked the court to consider the fact that she affirmatively disavowed a right to benefits from the Department based on her marriage.[199] The court found that this fact did not "count for much in the balance," for Shahar was "merely acknowledging what is undisputed, that Georgia law does not and has not recognized homosexual marriage."[200] Additionally, the court noted that Shahar certainly held herself out as married and that this was "not done secretly, but openly."[201]

Shahar further argued that the "weakness," or unreasonableness of the Attorney General's 'predictions' should lessen the weight they are given in the balancing.[202] The court found, however, that Shahar overstated the Attorney General's evidentiary burden, and concluded that the close working relation-

194. *See id.*

195. *Shahar,* 114 F.3d at 1110. The court also noted that in deciding *Romer,* the Court did not overrule, disapprove of, or even mention *Bowers v. Hardwick,* 478 U.S. 186 (1986). *See id.*

196. 754 F.2d 936 (11th Cir. 1985).

197. *See McCullen,* 754 F.2d at 940.

198. *Shahar,* 114 F.3d at 1109.

199. *See id.* at 1118 (Godbold, J., dissenting).

200. *Shahar,* 70 F.3d at 1106-07.

201. *Shahar,* 114 F.3d at 1107. The court also referred to the fact that both women had legally changed their family name to Shahar, that they sought and received a married rate on their insurance and that they jointly own the house in which they live. *See id.*

202. *See id.*

ships involved in an Attorney General's office call for "a wide degree of deference to the employer's judgment."[203] Because he was found to have acted to prevent the "doubt and uncertainty of purpose [which can] undo an office," the court found that "he [was] not unreasonable to guard against [this] potentiality."[204] Additionally, the court rejected Shahar's argument that the *Pickering* test requires evidence of potential interference with her particularized duties.[205]

b. *The Dissents*[206]

1. *Reasonableness Requirements Not Met*

The dissenting judges found that 1) Shahar's association qualifies as a constitutionally protected intimate association and, therefore must be given great weight in the balancing analysis; 2) the *Pickering* balancing test was appropriate; 3) the Attorney General's interests and actions must be assessed in light of their reasonableness or lack thereof; and that 4) Shahar's interests outweighed the Attorney General's.[207] A primary focus of each of the dissenting opinions in this case is the notion that the Attorney General did not meet constitutional requirements of reasonableness.[208] The Attorney General based his decision to terminate Shahar's employment offer based on the assertion that Shahar "invoked the civil and legal status of being married to another woman" and on a series of inferences flowing therefrom.[209] The dissenting judges found the Attorney General's conclusions to be unsupported.[210]

First, the Attorney General drew an inference from Shahar's status as a lesbian and concluded that the public would be hostile to her participation in a same-sex marriage and might view her employment by his Department as inconsis-

203. *Id.* (citing Waters, 114 S. Ct. at 1888; Connick v. Myers, 461 U.S. 138 (1983)).

204. *Id.* at 1108.

205. *See id.*

206. *See Shahar,* 114 F.3d. at 1117. Four separate dissenting opinions were written. *See id.* (Godbold, J., Kravitch, J., Birch, J., Barkett, J., dissenting).

207. *See id.* at 1123.

208. *See id.* at 1124.

209. *Id.* at 1120.

210. *See id.* at 1119.

tent with Georgia law.[211] In his brief, Bowers argued that "public perception is that 'the natural consequence of a marriage is some sort of sexual conduct . . . and if it's homosexual, it would have to be sodomy.'"[212] The dissenting judges found that this statement "[was] based not on anything set forth in the record but rather on public stereotyping and animosity toward homosexuals."[213] Particularly, they found that the government may not transform private biases into legitimate state interests,[214] and that "[i]f the public's perception is borne of no more than unsupported assumptions and stereotypes, it is irrational and cannot serve as the basis of legitimate government action."[215]

Bowers also asserted an interest in terminating Shahar's offer due to concern for the inner workings of his office.[216] His two primary arguments in support of his predictions in this regard were that 1) Shahar's conduct might undermine morale because some might view her conduct as a political statement inconsistent with Georgia's sodomy laws; and that 2) he is justified in assuming that Shahar would commit sodomy, and that she necessarily would have a conflict of interest with respect to enforcing laws regarding sodomy or same-sex marriages.[217] Judge Kravitch emphasized, however, that Shahar never claimed that she was legally married, and in fact actually disputed that idea.[218] It was also pointed out that although Shahar's relationship was not "secret," it was private, and there was no evidence on the record of any violation or challenge of Georgia law.[219]

Judge Birch stated that Bowers relied on deficient speculations regarding Shahar's ability to handle certain types of cases, and that his assumptions were unreasonable and were inconsistently applied to Office employees.[220] For example, Bowers

211. *See Shahar,* 114 F.3d at 1127.
212. *Id.*
213. *Id.* at 1128.
214. *See id.* (citing Palmore v. Sidoti, 466 U.S. 429 (1984)).
215. *Shahar,* 114 F.3d at 1128.
216. *See id.* at 1101.
217. *See id.*
218. *See id.* at 1119.
219. *See id.*
220. *See Shahar,* 114 F.3d at 1124. The judge also noted that there was no showing made by the Attorney General of actual disruption in his office caused by Shahar. *See id.*

"does not assume . . . that an unmarried employee who is openly dating an individual of the opposite sex has likely committed fornication, a criminal offense in Georgia," or even that "married employees could well have committed sodomy."[221] In fact, when a married heterosexual petitioner who had been convicted of sodomy in Georgia moved to discover whether any of the Attorney General's attorneys had themselves ever violated the sodomy law, the Attorney General's Law Department moved to strike claiming that "the personal conduct [of Department attorneys] is no more relevant than the personal conduct of Petitioner's counsel or the Court."[222]

In addition to the inferences on which the Attorney General relied, the dissenting judges also took issue with the manner in which Bowers went about his "investigation" of the facts of the case and his "termination" of Shahar.[223] They found particularly unreasonable the fact that the Attorney General never spoke to Shahar personally about the issue, and that the Attorney General was not present at the "termination" meeting and was "unavailable" to speak with Shahar upon her request following the meeting.[224] Judge Barkett stated that "in the absence of any record evidence of 'weighing' or 'balancing' by the Attorney General, the majority attempts to provide after-the-fact reasons to support Bower's side of the scale."[225]

2. Pickering *Balancing Focused on One Side of the Scale*

The Supreme Court has held "that the First Amendment protects those relationships, including family relationships, that presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.'"[226] Judge Kravitch found that Shahar's relationship satisfied the Supreme Court's definition of intimate association in that it is characterized by "relative smallness, a high degree of selectivity in decisions to

221. *Shahar,* 114 F.3d at 1128.
222. *Id.* (Birch, J., dissenting).
223. *See id.* at 1120.
224. *See id.* at 1122.
225. *Id.* at 1133.
226. *Shahar,* 114 F.3d at 1122 (citing Bd. of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 545 (1987) (quoting Roberts at 619-20)).

begin and maintain an affiliation, and seclusion from others in critical aspects of the relationship."[227] Because he found that Shahar's relationship falls on the familial end of the continuum of human relationships, he concluded that it should be given great weight in the balancing test.[228] While the en banc majority recognized that as the chief law enforcement officer in Georgia, Bowers' legitimate interests in the functioning of his staff carry special weight, Judge Kravitch found that the majority inappropriately granted almost absolute deference to Bowers' interests and actions,[229] and stated that the majority "employed a balancing test in name only."[230]

IV. Analysis

The Supreme Court's decision in *Bowers v. Hardwick*[231] has established a framework within which lower courts, like the court in *Shahar*, have inferred illegal sexual conduct from homosexual status, and thus have denied homosexuals' rights.[232] Courts are relying on status-based classifications and punishments by employing some version of the following logic:

- In *Bowers v. Hardwick*, the Supreme Court said that it is constitutional for states to make consensual sodomy illegal.[233]
- "Sodomy is an act basic to homosexuality."[234]
- Therefore, homosexuals engage in illegal conduct and violate sodomy laws.

The acceptance of such logic makes homosexual status "punishable." Nowhere in *Bowers v. Hardwick* does the Supreme Court reach such a holding.[235]

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227. *Id.* (citing *Roberts,* 468 U.S. at 620).

228. *See id.* at 1104.

229. *See id.* at 1124 (citing Bates v. Hunt, 3 F.3d 374, 378 (11th Cir. 1993) (stating that "whether a governmental employer has improperly infringed on an employee's First Amendment rights turns on the specific facts of the particular case: a 'case-by-case' analysis is required.") (Kravitch, J., dissenting).

230. *Id.* at 1124 (Kravitch, J., dissenting).

231. 478 U.S. 186 (1986).

232. *See Shahar,* 114 F.3d at 1104.

233. *Bowers,* 478 U.S. at 186.

234. *See Shahar,* 114 F.3d at 1105 (quoting Watkins v. United States Army, 847 F.2d 1329, 1357 (9th Cir. 1988) (Reinhardt, J., dissenting), *vacated by* 875 F.2d 699 (1989)).

235. *Bowers,* 478 U.S. 186 (1986).

In failing to acknowledge that Shahar's relationship fits squarely within the Supreme Court's definition of intimate association, the *Shahar* court relied on public prejudice rather than on legal precedent. After assuming, arguendo only, that Shahar had a constitutionally protected right to intimate association, the court claimed to employ the *Pickering* balancing test to analyze the competing interests of the parties.[236] In fact, however, very little balancing was done. The Attorney General's interests were considered almost exclusively and his decisions were given near absolute deference.[237]

A. *Traditions of Oppression*

1. *A Decade Later the Paralyzing Effects of* Bowers v. Hardwick *Are Still Felt*[238]

While the Supreme Court in *Bowers v. Hardwick* held that laws prohibiting consensual homosexual sodomy between adults are constitutional, the Court has never held that simply being homosexual is illegal.[239] Despite this critical distinction between status and conduct, lower courts have invoked *Bowers* to support holdings which rely upon a direct inference from homosexual status to sodomy.[240] This inference or assumption creates a slippery slope for denial of homosexuals' rights because it operates as if being homosexual were in some way criminal or punishable. Such an unreasonable leap in legal logic was made by the court in *Shahar*.[241]

The "traditions" relied on by the Attorney General and the court in *Shahar* are not those referred to in *Roberts,* but are traditions of prejudice and unconstitutional discrimination.[242] The *Shahar* court has added to and thus perpetuated a tradition in which homosexuals are identified and punished based solely on their perceived sexual activity. The court there relied on the notion that "sodomy is an act basic to homosexuality," to justify the Attorney General's unreasonable punishment of

236. *See Shahar*, 114 F.3d at 1103.
237. *See id.*
238. *Bowers*, 478 U.S. 186 (1986).
239. *See id.* at 196.
240. *See Shahar,* 114 F.3d at 1097.
241. *See id.*
242. *See, e.g.,* Loving v. Virginia, 388 U.S. 1 (1967).

Shahar for *being* gay.[243] The court used the power of inference to achieve the effect of making homosexual status unacceptable: if homosexuals engage in sodomy, and sodomy is illegal, then being homosexual is "punishable." Because such a status-based conclusion or classification is unacceptable, courts like the *Shahar* court are hiding behind the public controversy about homosexual issues to oppress homosexuals as a class.[244] The Attorney General's decision was found reasonable "against this background of ongoing controversy" about "homosexual sodomy, homosexual marriages and other related issues."[245] According to this logic, no openly gay individual can be employed by the Attorney General. By grounding his argument in public perception, the Attorney General, and in turn the court, impermissibly give effect to public prejudice.

The Supreme Court's 1986 opinion established a legal framework within which courts can hide homophobia.[246] As discussed above, the *Bowers* court not only held that is there no fundamental right to engage in sodomy, but also that the notion that "any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable."[247] The court there based much of its opinion on its perception of the "history and tradition[s]" of our nation.[248] The court emphasized that fundamental rights are only those which are "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.'"[249]

While the Supreme Court has acknowledged that the "ability independently to define one's identity is central to any concept of liberty,"[250] the *Bowers* Court failed to recognize that this self-definition cannot truly occur in a vacuum.[251] The *Bowers* Court failed to leave room for *all* individuals to define and ex-

243. *See Shahar*, 114 F.3d at 1105 (quoting Watkins v. United States Army, 847 F.2d 1329, 1357 (9th Cir. 1988) (Reinhardt, J., dissenting), *vacated by* 875 F.2d 699 (1989).

244. *See Romer*, 116 S. Ct. at 1628.

245. *Shahar*, 114 F.3d at 1105.

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

247. *Id.* at 191.

248. *Id.* at 192.

249. *Id.* at 191-92 (citing *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

250. *Bowers*, 478 U.S. at 205 (citing *Roberts*, 468 U.S. at 619).

251. *Id.* at 205 (Blackmun, J., dissenting).

press themselves through their intimate relationships. The Court held that state laws criminalizing consensual sodomy are constitutional due to the states' police power, despite the fact that "[a] way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different."[252]

The fact that the Attorney General gave effect to public prejudice is revealed as one compares the disparate treatment of heterosexuals and homosexuals under the same law. As opposed to heterosexuals, homosexuals are defined by their potential participation in acts of sodomy, rather than by the emotional attachments which may define the core of their relationships.[253] No consideration is given to the fact that Georgia's anti-sodomy statute does not refer specifically to homosexual sodomy, but to sodomy in general.[254] The question remains as to whether the Attorney General could terminate a heterosexual employee due to the possibility or likelihood that he or she might engage in an "illegal" sexual activity, namely sex "out of wedlock" or heterosexual oral or anal sex. It is difficult to imagine the court giving the same deference to the Attorney General in such a case. In *Shahar,* however, the court does make such a leap and gives effect to public prejudices. This "*Bowers* phenomenon," when courts automatically equate homosexual status with illegal sexual conduct, results in the law being carried out as if *being* homosexual were illegal. This distortion is couched in the language of tradition and moral teaching.

2. Loving v. Virginia*: Tradition Abandoned*[255]

In *Loving v. Virginia,* the Supreme Court struck down Virginia's anti-miscegenation statute as unconstitutional.[256] Although this statute was struck down on Equal Protection grounds because it inappropriately invoked a racial classification, there the Court overturned hundreds of years of so-called

252. *Id.* (citing Wisconsin v. Yoder, 406 U.S. 205, 223-24 (1972)(Blackmun, J., dissenting)).

253. *See id.* at 1104.

254. *See* GA. CODE ANN. § 16-6-2(a) (1984).

255. 388 U.S. 1 (1967).

256. *See id.* at 2.

tradition.[257] It has been argued that this kind of racial discrimination cannot be analogized to discrimination against homosexuals; however, the similarity in the rationale of the oppressors in both situations is uncanny.[258] In *Loving,* the State relied on religious tradition and argued that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents . . . The fact that he separated the races shows that he did not intend for the races to mix."[259] The State further argued that "traditional Judeo-Christian values proscribe such conduct."[260]

At the time that *Loving* was before the Court, 16 states still had statutes which outlawed interracial marriage.[261] However, the Court there finally acknowledged that although "the constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly give them effect."[262] Additionally, no matter how uncomfortable a certain group may make the majority of the Court, the Court has held that, "mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's . . . liberty."[263]

This traditional religious premise once used as a justification for racism, is now being used to rationalize homophobia. Although society has now recognized the evils of racism, the same antiquated justifications are being used by the courts in the realm of sexuality.[264] Despite a strong dissent by Justice Scalia, the Court in *Romer v. Evans* found that animosity towards homosexuals as a class is not a legitimate basis for state action.[265] In light of this progression, Justice Scalia's dissenting

257. *See* HAWLEY & MCGREGOR, THE CRIMINAL LAW 287 (discussing that miscegenation was once treated as a crime similar to sodomy).

258. *See Romer,* 116 S. Ct. at 1629 (Scalia, J., dissenting); *see also Shahar,* 114 F.3d 1097.

259. Bowers v. Hardwick, 478 U.S. 186, 211 (Blackmun, J., dissenting) (quoting Loving v. Virginia, 388 U.S. 1, 3 (1967)).

260. *Id.*

261. *See Loving,* 388 U.S. at 6, n.5.

262. Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

263. O'Connor v. Donaldson, 422 U.S. 563, 575 (1975); *see also* Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); United States Dept. of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

264. *See id.*

265. *See Shahar,* 114 F.3d at 1125 (citing *Romer,* 116 S. Ct. at 1629).

opinion in *Romer*, which the *Shahar* court echoes, seems particularly ironic.[266] In that opinion he wrote: "In holding that homosexuality cannot be singled out for disfavorable treatment, the Court . . . places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias."[267] Justice Scalia articulated his view that "opposition to homosexuals" as a class is acceptable. This same tradition-based opposition was used 30 years ago to counter the "evils" of interracial marriage.[268]

Just one year after *Romer*, the *Shahar* court, in less than a full paragraph, discredited the analogy between *Loving* and *Shahar:*

> Shahar has tried to analogize this case to miscegenation cases. Particularly given the obvious difference between concerns about public perception about miscegenation—which cannot constitute a legitimate governmental interest—and concerns about public perceptions about whether a Staff Attorney in the Attorney General's office is engaged in an ongoing violation of criminal laws against homosexual sodomy - which laws the Supreme Court has said are valid, we believe that the analogy is not helpful to decide this case.[269]

The clear findings in *Romer*, however, should have informed the court's decision in *Shahar*.[270] While Attorney General Bowers and the court in *Shahar* attempt to distinguish between status and conduct and claim that the Attorney General did not classify Shahar based on her status as a homosexual, this distinction is one without a difference.[271] As dissenting Justice Birch wrote, "Bowers' action . . . draws on a distinction that on its face reaches homosexuals only and distinguishes among similarly situated people on the basis of one trait only: that they are homosexual."[272]

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266. *See Romer*, 116 S.Ct. at 1629 (Scalia, J., dissenting).

267. *See id.*

268. *See Loving*, 388 U.S. at 3.

269. *Shahar,* 114 F.3d 1105.

270. *See id.* at 1125 (Birch, J., dissenting) (citing *Romer*, 116 S.Ct. at 1627).

271. *See id.* at 1097.

272. *Id.* at 1126 (Birch, J., dissenting).

3. *"Closeting" Encouraged*

In addition to the legal difficulties faced by gay litigants, a general climate which encourages silence and even repression has also developed. The Clinton Administration's creation of the "Don't Ask, Don't Tell" policy fostered an environment in which homosexuals must bear the burden of defending themselves simply because of who they are. This policy "allowed" homosexuals to remain in the military if they could meet the burden of rebutting the presumption that they would engage in illegal sexual acts.[273]

In *Shahar,* the Court's language suggests a preference for silence.[274] Shahar's assertion that she disclaimed any benefits bestowed by the State based on marriage was quickly dismissed by the court as a mere statement of the obvious fact that Georgia does not recognize same-sex marriages.[275] However, Shahar's purpose was to demonstrate that her "marriage" was purely a religious, associational one.[276] The court did not find this point persuasive and added in an accusatory tone that "[t]hese things were not done secretly, but openly."[277]

B. *Shahar's Relationship Falls Within the Supreme Court Definition of "Intimate Association"*

Shahar's association with her partner consists of all of the characteristics set forth by the Supreme Court in its definition of "intimate association,"[278] and therefore should have been given great weight in the court's balancing analysis. Their relationship is a "highly personal relationship," and involves "deep attachments and commitments . . . not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of [their] li[ves]."[279] Shahar's relationship is also "relative[ly] [small]" and involved "a high degree of selectivity in decisions to begin and maintain the affiliation. . . ."[280]

273. *See* Able v. United States, 88 F.3d 1280 (2d Cir. 1996).
274. *See Shahar,* 114 F.3d at 1106.
275. *Id.*
276. *See Shahar,* 70 F.3d at 1222.
277. *See Shahar,* 114 F.3d at 1107.
278. *See Roberts,* 468 U.S. at 618.
279. *Id.* at 620.
280. *Id.*

A relationship of love and mutual respect between two women who have agreed to dedicate their lives to one another clearly is located on the relationship continuum much nearer the most intimate of relationships than near attenuated commercial relationships.[281]

The portion of the definition set forth in *Roberts* which both the court and the Attorney General incorrectly interpreted is that which refers to "the culture and traditions of the Nation."[282] The court in *Roberts* stated:

> certain *kinds* of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; *they thereby foster diversity* and act as critical buffers between the individual and the power of the State . . . Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their *emotional* enrichment from close ties with others.[283]

This description of protected associations does not refer to *who* has the association with whom, but to the *kind* of association (i.e., highly personal versus business oriented) as characterized above.

C. *Attorney General's Interests*

The Attorney General asserted that he terminated Shahar's employment offer because she "invoked the civil and legal status of being married" and because he believed that Shahar's conduct had the "realistic likelihood" to 1) affect the Department's credibility; 2) impede its ability to handle controversial matters; 3) interfere with its ability to enforce Georgia's laws against homosexual sodomy; and 4) create other difficulties within the office which would affect public perception nega-

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281. *See id.* at 619

282. *Id.*

283. *Roberts*, 468 U.S. at 618-19 (emphasis added). *See* Zablocki v. Redhail, 434 U.S. 374, 383-86 (1978); Moore v. East Cleveland, 431 U.S. 494, 503-04(1972); Griswold v. Connecticut, 381 U.S. 479, 482-85 (1965); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); *see also* Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1974); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-62 (1958); Poe v. Ullman, 367 U.S. 497, 542-45 (1961) (Harlan, J., dissenting). As Justice Blackmun wrote in his dissenting opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986) "only the most willful blindness could obscure the fact that sexual intimacy is 'a sensitive, key [part] of human existence, central to family life, community welfare, and the development of human personality.'"

tively.[284] The Attorney General's concerns about the proper functioning of his Department are legitimate concerns. However, "because courts must thoroughly assess the relevance and relative importance of asserted government interests, generalized concerns that have little to do with work and more to do with the sensibilities or prejudices of the employer or the employee's coworkers, should receive little or no weight."[285] Although it has been noted that the State should be given greater deference in its capacity as employer, as opposed to in its capacity as sovereign "governmental interests in regulating the controversial speech, [or conduct], of its employees are not boundless . . . [r]ather, the regulations must be narrowly drawn to serve the objectives of effective government without intruding unnecessarily into the private associations and beliefs of its employees."[286]

In *Waters v. Churchill*,[287] the Supreme Court held that although courts must give "substantial weight to government employers' reasonable predictions of disruption," courts should not passively accept claims of disruption or harm suggested by government employers.[288] The Attorney General's conclusions should have been assessed in terms of reasonableness and given their weight in the balancing accordingly, because

> the court must [not] apply the [balancing] test only to the facts as the employer thought them to be, without considering the reasonableness of the employer's conclusions. Even in situations where courts have recognized the special expertise and special needs of certain decisionmakers, the deference to their conclusions has never been complete . . .We think employer decisionmaking will not be unduly burdened by having courts look to the facts as the employer reasonably found them to be. It may be unreasonable, for example, for the employer to come to a conclusion based on no

284. *Shahar*, 114 F.3d at 1120.

285. Scott D. Weiner, *Same-Sex Intimate and Expressive Association: The Pickering Balancing Test or Strict Scrutiny?*, 31 HARV. C.R.-C.L. L. Rev. 561, 581 (1996). For example, an employee who cohabitates with someone to whom she is not married could potentially disrupt the workplace if coworkers are extremely offended by such cohabitation and potential fornication. However, such an effect would not be sufficient to justify adverse employment action against the employee. *See id.*

286. NOWAK & ROTUNDA, *supra* note 26, at § 16.52

287. 511 U.S. 661 (1994).

288. *See id.* at 673.

> evidence at all. Likewise, it may be unreasonable for an employer to act based on extremely weak evidence when strong evidence is clearly available.[289]

The means which the Attorney General employed were unreasonable and unacceptable under the circumstances. While the Attorney General may be afforded the right to take action consistent with the successful operation of his office, he must do so reasonably.[290] He must be held at least to a minimum standard of reasonableness in his attempt to determine the facts concerning an employee's speech or conduct before taking adverse employment action against that employee.[291]

The Attorney General made his decision to terminate Shahar's employment without ever speaking to her about the issues involved.[292] He made no attempt to get first hand information from Shahar concerning the truth of the matter involved, but relied entirely on hearsay and speculated based on the uninformed inferences he had drawn.[293] First, the Attorney General made a direct inference of conduct from status when he stated as his justification that public perception is that the natural consequence of homosexual marriage is sodomy.[294] Georgia's sodomy laws refer to unlawful acts, not unlawful status, and "once it is established that gay intimate association exists independently of potentially criminal sexual activity, there is no logical or constitutional basis to distinguish same-sex intimate associations from analogous opposite-sex associations."[295] Bowers' unreasonableness in this matter is further exemplified by his inconsistent inferences. He had not expressed concern of this kind regarding any heterosexual employees who may engage in premarital sex or in sodomy, both of which are illegal in Georgia.[296]

Next, Bowers asserted that Shahar had exercised poor judgment in making a political statement holding herself out to

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289. *See id.* at 677.

290. *See id.* at 684.

291. *See id.* (holding that for *Pickering* balance, facts to be weighed on government's side need to be reasonable view of facts or reasonable predictions).

292. *See Shahar*, 114 F.3d at 1106.

293. *See id.*

294. *See id.* at 1104.

295. Weiner, *supra* note 287, at 577.

296. *See Shahar*, 114 F.3d at 1128.

be legally and civilly married to another woman.[297] Again, Shahar did not make any statement claiming a legal or civil marriage, nor did she challenge the constitutionality of any of Georgia's laws concerning same-sex marriage, or sodomy for that matter.[298] By failing to confront Shahar regarding the information he had obtained from others regarding her, the Attorney General assumed things that simply were not true.

In addition to the Attorney General's flawed inferences, he also failed to present any evidence of actual disruption of his office caused by Shahar or her conduct. It was not reasonable for the Attorney General to conclude that Shahar's association would negatively affect the department's credibility or impede its ability to handle controversial matters. The Attorney General's conclusions were based upon his acknowledging and fostering public prejudice. The "stir" which the Attorney General alleges was caused in his office by the news of Shahar's "marriage" is not enough to justify her termination.[299] A similar stir would likely be caused by the staff's discovery that one of their colleagues was engaged in the practice of an unpopular religion. If faced with this analogy, both the Attorney General and the Court of Appeals would likely conclude that the analogy is faulty because there exists a right to freedom of religion, but not to be "married" to a same-sex partner. The flaw in this line of reasoning, however, is in its disregard for the definition of protected intimate association which the Supreme Court has set out.[300] Shahar's relationship is the *kind* of relationship which warrants constitutional protection, and it is not within the court's authority to dictate *with whom* she chooses to have this *kind* of intimacy.[301]

V. Conclusion

Despite the giant leap which was taken by the Supreme Court in *Romer v. Evans,* casualties of the Court's decision in *Bowers* continue. The lesson learned through *Loving v. Virginia* will not be integrated into the legal system in the realm of

297. Weiner, *supra* note 287, at 582.
298. *See Shahar*, 70 F.3d at 1222.
299. *See Shahar*, 114 F.3d at 1101.
300. *See Roberts,* 468 U.S. at 618.
301. *See id.* at 618.

homosexual rights until antiquated notions of tradition cease to be used as a mask to hide fear and oppression of that which is different. The Court's definition of intimate association does leave room for all individuals to choose to define the most important relationships in their lives, and it should be applied to give effect to this most crucial of freedoms. Despite the fact that homosexuality may not have been on the minds of the Framers of our Constitution:

> When we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.[302]

*Sherene D. Hannon**

302. State of Missouri v. Holland, 252 U.S. 416, 433 (1920).

* This Casenote is dedicated to the loving memory of Henrietta Rollo, grandmother, teacher and friend.