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To Say &quoi Do": Shahar v. Bowers, Same-Sex Marriage, And Public Employee And Free Speech Rights

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TO SAY "I DO": *SHAHAR V. BOWERS*, SAME-SEX MARRIAGE, AND PUBLIC EMPLOYEE FREE SPEECH RIGHTS

Bryan H. Wildenthal†

> When two people marry . . . they express themselves more eloquently, tell us more about who they are and who they hope to be, than they ever could do by wearing armbands or carrying red flags. The decision to 'come out of the closet' and avow one's homosexual association is certainly a statement of great personal importance and may also be a political act. . . . If the First Amendment deserves interpretations that will 'protect a rich variety of expressional modes,' there is no reason in logic for excluding the expression that is at the heart of most intimate associations.[1]

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† Associate Professor of Law, Thomas Jefferson School of Law, San Diego, California; J.D., Stanford Law School, 1989. I presented an early version of this Article in a talk at the National Lesbian and Gay Law Association Lavender Law Conference in West Hollywood, California, on October 24, 1997, and in a faculty roundtable at Thomas Jefferson School of Law on November 10, 1997, and I thank the participants at those events for their helpful feedback. I am especially grateful to the following individuals for their time and care in reviewing the article and providing numerous helpful suggestions: my colleagues Dean Kenneth Vandevelde, Associate Dean Marybeth Herald, and Professors William Slomanson, Julie Greenberg, Ilene Durst, Joy Delman, and Colin Crawford at Thomas Jefferson School of Law; Professor Marilyn Ireland at California Western School of Law; Professor Toni Massaro at University of Arizona College of Law; Professor Amy Ronner at St. Thomas University School of Law; Professor Ronald Krotoszynski at Indiana University School of Law, Indianapolis; Deb Quentel, formerly my faculty colleague when we were both Visiting Assistant Professors at IIT Chicago-Kent College of Law, now with CALI: The Center for Computer Assisted Legal Instruction; Kurt D. Hermansen and M.E. Stephens, Co-Presidents, Tom Homann (San Diego County Gay, Lesbian, and Bisexual) Law Association; and Professor Lora Wildenthal, History Department, Massachusetts Institute of Technology. I owe a very special thanks to Robin Shahar for generously sharing her perspectives on the case bearing her name. Needless to say, the views expressed herein are mine alone, as are any mistakes or shortcomings. I welcome comments on this article at my e-mail address, <bryanbhw@ix.netcom.com>, and homepage, <http://www.netcom.com/~bryanbhw/bryan.html>.

I dedicate this Article with love to my late maternal grandmother, Lora Bell Kunze Lockhart (July 21, 1909-Jan. 8, 1998), a woman ahead of her time in so many ways.

1. Kenneth L. Karst, *The Freedom of Intimate Association,* 89 YALE L.J. 624, 654 (1980) (quoting LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 579 (1978)).

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INTRODUCTION

The current legal and political debate about same-sex marriage is, in part, a struggle over the important legal benefits and obligations conferred by civil marriage.[2] It is also a highly-

2. *See, e.g.*, HAWAII COMMISSION ON SEXUAL ORIENTATION AND THE LAW, REPORT (visited Feb. 18, 1999) <http://www.hawaii.gov/lrb/cpt1.html> (cataloging numerous legal and economic rights and benefits obtained by virtue of marriage, rights and benefits currently denied throughout the United States to same-sex couples wishing to marry); *see also* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (holding that denial of civil marriage to same-sex couples constitutes sex discrimination subject to strict scrutiny under Hawaii state constitution, and remanding for trial on whether State could demonstrate compelling interest to justify such discrimination), *on remand sub nom.* Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235 at *21-22 (Haw. Cir. Ct. Dec. 3, 1996) (finding that Hawaii had failed to justify denial of civil marriage to same-sex couples and ordering state to grant such marriage licenses, but staying decision pending second appeal to Hawaii Supreme Court); *Alaska's Same-Sex Marriage Ban Takes a Hit in Court,* CHI.

charged cultural battle over symbolism and language—in other words, over *speech* in its full constitutional sense. The debate concerns not just the legal significance of a civil marriage license, strictly speaking the only issue in the well-known Hawaiian litigation.[3] It also evokes the intense emotional, religious, and social connotations of "marriage" in all its cultural meanings.[4] Much has been written, and deservedly so, on the former, "legal" aspects of same-sex marriage. This Article focuses on certain legal issues raised by the latter, "cultural" side of the same-sex marriage debate. Specifically, it focuses on marriage *as speech,* or, if you will, the marriage ceremony as a type of "performance art" arguably protected by the First Amendment.[5] It also seeks to draw some broader lessons regarding, and frame a broad critique of, the current state of constitutional protection for off-the-job, non-job-related speech by public employees.

The starting point of this Article is the recent litigation in *Shahar v. Bowers.*[6] This case did not concern any attempt to obtain a same-sex marriage as a state-conferred benefit or status. Rather, it involved a prospective public employee's participation, outside the workplace on her own time, in a ceremony that she and her female lover characterized as a marriage in the social, cultural, and religious senses of the term. A central focus of this Article is on the "private" or "public"

TRIB., Mar. 1, 1998, at C3 (reporting Alaska state trial court decision on February 27, 1998, that Alaska had to demonstrate compelling reason under Alaska state constitution to justify limiting marriage to opposite-sex couples). Ballot initiatives approved by Hawaiian and Alaskan voters on November 3, 1998, amended Hawaii's and Alaska's state constitutions to deny (or authorize denial of) state recognition of same-sex marriages and, thus, eliminate the basis for the foregoing lawsuits; however, similar litigation continues in Vermont. *See* Carol Ness, *Gay-Marriage Foes Have Eyes on 2000 Ballot,* S.F. EXAMINER, Nov. 5, 1998, at A26; *Vermont Supreme Court Takes up Gay Marriage,* N.Y. TIMES, Nov. 19, 1998, at A20, col. 1.

3. *See supra* note 2.

4. This Article touches upon many of these "cultural" aspects of the same-sex marriage debate but does not pretend to offer a comprehensive survey. An excellent overview is provided in ANDREW SULLIVAN, SAME-SEX MARRIAGE: PRO AND CON (1997).

5. *See* U.S. CONST. amend. I ("Congress shall make no law abridging the freedom of speech . . . ."); Stromberg v. California, 283 U.S. 359, 368 (1931) (holding that the right of free speech also limits states' power via the Fourteenth Amendment).

6. 836 F. Supp. 859 (N.D. Ga. 1993), *aff'd in part, vacated in part, and remanded,* 70 F.3d 1218 (11th Cir. 1995), *vacated and reh'g en banc granted,* 78 F.3d 499 (11th Cir. 1996), *aff'd en banc,* 114 F.3d 1097 (11th Cir.), *reh'g denied en banc,* 120 F.3d 211 (11th Cir. 1997), *cert. denied,* 118 S. Ct. 693 (1998).

nature of this ceremony and the significance of any such characterization, matters which were deeply contested in this lawsuit.[7]

As a result of this ceremony, the prospective employee, Robin Joy Shahar, paid the price of revocation of a staff attorney position in the Georgia Department of Law. The case was ably litigated[8] as an alleged violation of Shahar's rights to equal protection, freedom of religion, and "intimate" and "expressive" association.[9] However, despite the First Amendment overtones of the association and religion claims, Shahar and her attorneys chose not to make this a free speech case.[10] There were entirely understandable strategic reasons for this in light of current First Amendment doctrine as applied to public employees. Shahar's nonspeech claims had great merit and importance, and arguably a greater chance of success. Indeed, she temporarily prevailed on certain of those claims before a three-judge panel of the United States Court of Appeals for the Eleventh Circuit, before losing in an eight-to-four *en banc* decision.[11]

Nevertheless, it is the thesis of this Article that *Shahar* should have been understood as primarily a case about freedom of speech. Furthermore, the outcome of the case is both inconsistent with basic First Amendment principles and curiously out of line with a contemporaneous Eleventh Circuit case also involving free speech and "gay rights."[12] The decision

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7. *See infra* Part III.B.

8. Shahar was represented by Ruth E. Harlow and Matthew A. Coles of the American Civil Liberties Union Foundation, and Debra Schwartz of the Atlanta firm of Stanford, Fagan & Giolito, with Professors Nan D. Hunter and William B. Rubenstein "of counsel." Ms. Harlow is now with the Lambda Legal Defense and Education Fund (LLDEF), and I appreciate her kindness in generously providing me with copies of the appellate briefs. In the interest of full disclosure, I should note that I am a member of, though not an active attorney with, LLDEF.

9. *See infra* Part I.B.

10. *See* Shahar v. Bowers, 114 F.3d 1097, 1111 n.1 (11th Cir. 1997) (Tjoflat, J., concurring in the judgment) ("Shahar . . . did not present a free speech claim to the district court; consequently, such a claim is not involved in this case.").

11. *See id.* at 1097; Shahar v. Bowers, 70 F.3d 1218 (11th Cir. 1995).

12. *See* Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543 (11th Cir. 1997). "Gay rights" is, strictly speaking, a misnomer because the real issue is equal rights for all (and "special rights" for none, contra the claims of many on the political/religious right) without regard to sexual orientation, a concept that relates inextricably to sexual or gender identity as experienced by transgendered and intersexual people. *See, e.g.*, Mary Coombs, *Transgenderism and Sexual Orientation: More Than a Marriage of Convenience*, 3 NAT'L J. SEX. ORIENT. L. 4 (1997) (visited Nov. 16, 1998) <http://sunsite.

not to litigate *Shahar* as a free speech case, and the outcome of the case, are entirely understandable in light of current public employee free speech doctrine. But by the same token, this highlights the deep wrongheadedness of much of that doctrine. *Shahar* is the latest in a long line of cases which demonstrate the need for a fundamental reevaluation of *Connick v. Myers,*[13] the 1983 decision in which the United States Supreme Court sharply restricted the speech rights of public employees. *Connick* not only remains flawed in itself—especially with regard to its troubling requirement that public employee speech must be "of public concern" to qualify for protection[14]—it has been misapplied and improperly extended.

Part I.A of this Article summarizes the facts and procedural history of *Shahar,* and Part I.B surveys the important nonspeech issues raised in the litigation. Part II

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unc.edu/gaylaw/issue5/coombs.html>; Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology,* 41 ARIZ. L. REV. (forthcoming 1999). This Article nevertheless uses the phrase "gay rights" as a matter of convenience and familiarity. For a cogent summary of "the potentially tedious matter of terminology" in this area, and the compelling reasons for use of the terms "gay" and "lesbian" as opposed to "homosexual," see Jeffrey G. Sherman, *Speaking Its Name: Sexual Orientation and the Pursuit of Academic Diversity,* 39 WAYNE L. REV. 121, 122-23 (1992). *See generally infra* note 345. This Article generally uses "gay" to refer to same-sex orientation. Since Shahar, like most same-sex-oriented women, also identifies as "lesbian," this Article also makes appropriate use of that term. Strictly speaking, "gay" has never been restricted in its meaning to men (as the common usage of "gay men," when such specification is sought, reflects), although it has come to have male connotations for many and is actively disavowed by some lesbians. I for one would like to see "gay" restored to what I believe was its originally intended liberatory meaning as a nonexclusive, unifying term for all people, regardless of gender, sharing the common attribute of having (to some significant degree) a same-sex orientation or experience. This is not to detract from the rich and irreplaceable term "lesbian," which will likely remain, certainly in the view of most same-sex-oriented women, an essential signifier of their unique experience as such. Nor is it intended to diminish the unique perspectives of people identifying as "bisexual." Some may regard as hopelessly utopian the aspiration (which I happen to share) of liberating the term "gay" from the sexist and male-supremacist attitudes that have long infected the sexual minority community, along with society generally, although some same-sex-oriented women in recent years seem to have embraced or reclaimed "gay" more readily as an identifying term. In any event, this Article's use of the term "gay" is not intended to exclude either women or those who may not have an exclusively same-sex orientation, nor to exclude or subsume other terms, such as "lesbian," signifying same-sex orientation in more specific contexts. Since this Article does not generally focus on gender issues as such, but rather (primarily) on free speech issues related to same-sex orientation without regard to gender, such specific contexts are not generally relevant herein.

13. 461 U.S. 138 (1983).

14. *Id.* at 146-49.

explores how *Connick* and its "public concern" requirement have been misapplied to off-the-job, non-job-related speech, and proposes an approach to such speech more in keeping with core First Amendment values and doctrine. Part III.A analyzes Shahar's marriage ceremony as a classic example of such off-the-job, non-job-related speech, touches upon some broader issues regarding the cultural and linguistic symbolism of the same-sex marriage debate, and argues that the revocation of Shahar's job offer impinged upon (more directly and transparently than it did any other right at stake) her freedom of speech. Part III.B explores the elusive boundary between public and private speech relating to sexual orientation. Part III.C sets forth the proper standard to apply in public employee speech cases and concludes that Shahar's freedom of speech was violated in this case. Part IV compares *Shahar* to the Eleventh Circuit's decision just a month earlier in *Gay Lesbian Bisexual Alliance v. Pryor*,[15] a discordantly resounding victory for gay speech, and concludes with some general observations on the historical (and, one hopes, future) role of free speech arguments in the arsenal of gay rights litigation and on the importance of freedom of speech in protecting the integrity, liberty, and general welfare of gay people.

I. *SHAHAR V. BOWERS*: ONE WEDDING AND A LAWSUIT

A. The Facts and Procedural History

In the summer of 1990, Robin Joy Brown, a student between her second and third years at Emory University Law School, worked as a law clerk for the Georgia Department of Law (Department), then headed by Georgia Attorney General Michael J. Bowers.[16] Due to her apparently excellent job

15. 110 F.3d 1543 (11th Cir. 1997). *Pryor* was handed down on April 29, 1997. *See id.* The *en banc* decision in *Shahar* was handed down on May 30, 1997. *See Shahar*, 114 F.3d at 1097. Rehearing was denied in *Shahar*, with further opinions, on August 1, 1997. *See* Shahar v. Bowers, 120 F.3d 211, 211-16 (11th Cir. 1997).

16. Yes, *that* Bowers. *See* Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding, against substantive due process challenge and as applied to a gay man, Georgia's statute criminalizing private, consensual, anal or oral intercourse; the statute was later struck down by the Georgia Supreme Court, *see infra* note 70). Ironically, in that earlier litigation, Bowers lost in the Eleventh Circuit before finally winning in the Supreme Court. *See* Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985) (2-1 panel decision

performance and otherwise stellar credentials (she was an editor of the *Emory Law Review* and ultimately graduated sixth in her class), Brown was offered a permanent position as an attorney in the Department to begin in the fall of 1991, which she accepted. Brown, a lesbian, was already at that time in a committed relationship with another woman, Francine M. Greenfield, and the two planned to be married in the summer of 1991 in a Jewish religious ceremony performed and sanctioned by the rabbi of the Reconstructionist synagogue they attended in Atlanta.[17] After the ceremony took place on July 28, 1991, Robin and Francine legally changed their surnames to "Shahar," a Biblical Hebrew word meaning "seeking God."[18]

Shahar was not especially secretive about her status as a lesbian[19] or her plans to marry Francine. Their rabbi, Sharon Kleinbaum, announced their engagement in the summer of 1990 to the congregation at their synagogue.[20] In November 1990, in filling out a required Department application form, Shahar indicated her "marital status" as "engaged," wrote that her "future spouse's name" was "Francine M. Greenfield," and, in response to a question asking if any of her relatives worked for the State of Georgia, wrote "Francine Greenfield, future spouse."[21] In the spring of 1991, the Shahars (ironically, while working on their wedding invitations) encountered Elizabeth Rowe, a Department paralegal, and Susan Rutherford, a Department attorney, at a restaurant and briefly discussed the

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subjecting to strict scrutiny and, thus, effectively striking down the Georgia law), *rev'd,* 478 U.S. 186 (1986). The Author of this Article clerked in 1989-90 for Judge Frank M. Johnson, Jr., the author of the Eleventh Circuit *Hardwick* decision.

17. *See* Shahar v. Bowers, 114 F.3d 1097, 1100-01 (11th Cir. 1997); Appellant's Principal *En Banc* Brief at 4-5, Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997) (No. 93-9345) [hereinafter Appellant's Principal Brief].

18. Appellant's Principal Brief, *supra* note 17, at 5, 9 & n.4. For clarity's sake, I refer henceforth (even with regard to events preceding the marriage) to Robin Shahar as "Shahar," to Francine Shahar as "Francine," and to both jointly as "the Shahars."

19. During her clerkship in the summer of 1990, Shahar told her supervisor at the Department that she was a lesbian. *See* Appellee's *En Banc* Brief at 2-3, Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997) (No. 93-9345) [hereinafter Appellee's Brief]. However, Senior Assistant Attorney General Jeffrey Milsteen, the co-chair of the summer clerkship committee, testified that the committee was unaware of Shahar's sexual orientation when it recommended to Bowers that he make a permanent job offer to her. *See* Appellant's Principal Brief, *supra* note 17, at 11.

20. *See Shahar,* 114 F.3d at 1100; Appellee's Brief, *supra* note 19, at 3.

21. At that time, Francine worked for a state university. *See Shahar,* 114 F.3d at 1100-01 & n.6.

wedding plans. The Shahars invited more than 250 people to the ceremony, including Rowe and another Department employee. "The written invitations characterized the ceremony as a 'Jewish, lesbian-feminist, out-door wedding.' "[22]

Nevertheless, the truth still had not dawned on senior Department officials by June 1991, when Shahar informed Deputy Attorney General Robert Coleman in a telephone conversation that she was getting married, changing her surname, and taking a honeymoon in Greece that would delay her entry into service with the Department. Coleman congratulated her and her "husband-to-be" and agreed to a starting date for her employment of September 23, 1991. Shahar did not correct Coleman's misapprehension about the sex of her prospective spouse. Bowers's *en banc* brief before the Eleventh Circuit implies disingenuousness on her part. Shahar testified that she did not elaborate simply because Coleman was not someone she knew personally, in keeping with her characterization of the marriage as a personal, private, religious matter. If she also, perhaps, feared the consequences of "outing" herself in this context, subsequent events proved her right. Senior Assistant Attorney General Jeffrey Milsteen, to whom Shahar had returned the form listing Francine as her prospective spouse, and who had simply filed it away without reading it, overheard Coleman congratulating Shahar and later remarked to attorney Rutherford about the upcoming nuptials. The sputtering fuse on the misunderstanding finally ran out when Rutherford informed Milsteen that Shahar was marrying a woman.[23]

As the Eleventh Circuit's *en banc* opinion put it, "[t]his revelation caused a stir."[24] For probably the first time in the history of the office, senior attorneys in the Department debated the crisis they perceived to be created by the forthcoming wedding of a prospective employee.[25] With Attorney General Bowers absent that week, Coleman and Milsteen huddled

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22. *Id.* at 1100; *see also id.* at 1100-01; *id.* at 1119 (Godbold, J., dissenting); Appellee's Brief, *supra* note 19, at 3.

23. *See Shahar,* 114 F.3d at 1101; Shahar v. Bowers, 836 F. Supp. 859, 861 (N.D. Ga. 1993); Appellant's Principal Brief, *supra* note 17, at 6-9, 12-13; Appellee's Brief, *supra* note 19, at 4.

24. *Shahar,* 114 F.3d at 1101.

25. *See id.; see also* Appellant's Principal Brief, *supra* note 17, at 7-8.

several times with three other senior Department officials, and upon Bowers's return, the Attorney General met several times with his top aides on the matter.[26] On July 10, 1991, Coleman summoned Shahar to his office and handed her a letter from Bowers revoking her employment. The letter stated, in relevant part:

> This action 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 the 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.[27]

As Bowers was well aware, Shahar's religious marriage ceremony had no standing as a legal or civil "marriage" in Georgia,[28] and, as he could easily have clarified by talking to Shahar, she never claimed that it did and made no attempt to gain legal recognition or benefits based on it.[29]

Consistent with the revocation letter's focus on Shahar's "purported marriage," Bowers contended throughout the litigation that his action was neither predicated on Shahar's status as a lesbian nor even her status and conduct as a

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26. *See Shahar*, 114 F.3d at 1101; Appellant's Principal Brief, *supra* note 17, at 7-8.

27. Appellant's Principal Brief, *supra* note 17, at 7-8; *see also Shahar*, 114 F.3d at 1101.

28. *See Shahar*, 114 F.3d at 1106-07 (citing O.C.G.A. §§ 19-3-1, -3.1 (1991 & Supp. 1998)).

29. *See id.* at 1118 (Godbold, J., dissenting); *id.* at 1122-23 (Kravitch, J., dissenting); Appellant's *En Banc* Reply Brief at 9-11 & n.3, Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997) (No. 93-9345) [hereinafter Appellant's Reply Brief]; Appellant's Principal Brief, *supra* note 17, at 7, 16-17. Neither Bowers nor anyone in his office made any effort to contact Shahar before her employment was revoked, in order to clarify or expand upon the "casual office gossip" (as Shahar's brief succinctly describes it) in his possession at the time, and Bowers refused Shahar's request for a meeting after the fact. Appellant's Principal Brief, *supra* note 17, at 7-11.

The Shahars did, of course, legally change their names, and also purchased a house together and obtained the "married rate" on their insurance policies. *See Shahar*, 114 F.3d at 1107 & n.20. But the former two actions are legal options available to anyone without regard to marital status, and the latter was merely a business courtesy extended by the Shahars' private insurance company after full disclosure of the relevant facts and involved no deception regarding the legal status of their relationship. *See id.* at 1122 n.3 (Godbold, J., dissenting); Shahar v. Bowers, 70 F.3d 1218, 1224 (11th Cir. 1995) (Godbold, J.).

The multiple and contested meanings of "marriage" (civil/legal, religious, personal, *etc.*) figure prominently in this Article's and the Eleventh Circuit's analysis of this case, as discussed *infra* Part III.A.

practicing lesbian in a lesbian relationship.[30] There is ample reason to doubt those protestations, as discussed below in connection with Shahar's equal protection arguments. However, it seems genuinely to be the case that the central and crowning offense Shahar committed in Bowers's eyes was not being a lesbian, but simply that she had the chutzpah to say she was "marrying" another woman.

As noted above, Shahar did indeed marry the woman she loves, just eighteen days after losing the coveted job she had spent much of her law school career working to obtain. The ceremony was performed by Rabbi Kleinbaum in a reserved area of Table Rock State Park in South Carolina.[31] Shahar also filed suit against Bowers in the United States District Court for the Northern District of Georgia, contending that Bowers had violated her rights to freedom of association (both intimate and expressive), freedom of religion, and equal protection of the laws.[32]

The district court granted Bowers summary judgment, ruling that the Shahars' relationship was a constitutionally protected form of intimate association, but that Bowers was

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30. Appellee's Brief, *supra* note 19, at 51-53 (arguing, for example, that "Shahar's offer was withdrawn because of her same-sex 'marriage,' not her homosexuality," that Bowers had "never inquired about the sexual preference *or practices* of any applicant or employee" (emphasis added), and that Bowers was unconcerned about a male staff attorney's reported involvement in a "homosexual relationship," except to satisfy himself that the attorney was not, as had been alleged, misusing his position in the Department to benefit his alleged male lover). Of course, Bowers was talking out of both sides of his mouth in the sense that he also argued that Shahar's marriage ceremony created a reasonable inference, both on his part and the Georgia public's, that she regularly violated Georgia's "sodomy" law, which in turn, he claimed, was a valid reason to revoke her employment. *See id.* at 7, 15, 52 n.9; Appellant's Principal Brief, *supra* note 17, at 14-15. However, it is plausible that his concern about her private sexual activity was primarily triggered by her self-described "marriage," and that a relatively closeted homosexual who was discovered to be carrying on a discreet and unnamed same-sex "relationship" might have escaped his wrath. *See infra* Part III.A. Even if this interpretation of Bowers's motivations was true, however, it would not undermine Shahar's argument that she was also subjected to different and unfavorable treatment and inferences of various sorts based solely on her lesbianism. *See* discussion, *infra* Part I.B.

31. *See* Appellant's Principal Brief, *supra* note 17, at 5, 11-12.

32. *See* Shahar v. Bowers, 836 F. Supp. 859, 862 (N.D. Ga. 1993). Shahar also raised at the district court level a separate claim that her job revocation was an "arbitrary employment decision" violating her substantive due process rights. *Id.* at 868-69. The court rejected this claim, finding it merely duplicative of her other claims. *See id.* Shahar did not pursue the issue on appeal. *See Shahar*, 114 F.3d at 1101 & n.7.

nevertheless justified in revoking Shahar's employment because it threatened to disrupt "the efficient operation of the Department."[33] The court applied *Pickering v. Board of Education,*[34] the landmark 1968 Supreme Court decision establishing, in essence, that (1) the government may not generally condition public employment on the exercise or non-exercise of a constitutionally protected right (most typically, as in *Pickering,* freedom of speech), but that (2) the government's interests as an employer may justify employment-related sanctions for the exercise of constitutional rights that might not be tolerable when the government acts as a sovereign (for example, by imposing criminal punishment).[35] Under *Pickering,* a court must "balance . . . the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[36] The State bears the burden of justifying under this balancing test an employment action based on an employee's exercise of a constitutional right. The court considers the time, place, manner, and context of the disputed exercise, weighing, for example, whether it disrupts workplace discipline, harmonious working relationships, or the employee's or employer's effective discharge of their duties and functions.[37]

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33. *Shahar,* 836 F. Supp. at 863-65.

34. 391 U.S. 563 (1968).

35. *See Pickering,* 391 U.S. at 568; *Shahar,* 836 F. Supp. at 864. *Pickering* was the culmination of a series of decisions rejecting the "right/privilege" distinction under which it had previously been held that, while public employees might retain all their rights as citizens, they had no right to public employment, which was deemed a privilege the government might revoke at will. *Compare, e.g.,* Adler v. Board of Education, 342 U.S. 485, 491-92 (1952) (upholding denial of "privilege" of public employment as teachers to those advocating overthrow of the government), *and* McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892) ("[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."), *with* Wieman v. Updegraff, 344 U.S. 183, 191-92 (1952) (striking down loyalty oath for state employees as overbroad), *and* Shelton v. Tucker, 364 U.S. 479, 490 (1960) (striking down statute requiring nontenured teachers to list all organizations to which they had belonged or contributed in past five years), *and* Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967) (effectively overruling *Adler* and striking down restrictions on public employees' allegedly subversive speech or associations). The Court recently extended *Pickering* to the government's relationship with independent contractors. *See* Wabaunsee County Bd. of Comm'rs v. Umbehr, 518 U.S. 668 (1996).

36. *Pickering,* 391 U.S. at 568.

37. *See* Rankin v. McPherson, 483 U.S. 378, 388 (1987) (citing Connick v. Meyers, 461

The district court also rejected Shahar's religious freedom and equal protection claims.[38]

On appeal, a fractured three-judge panel of the Eleventh Circuit initially granted substantial relief to Shahar. Judge John C. Godbold wrote the lead opinion. Joined by Judge Lewis R. Morgan, he affirmed the district court's holding that the Shahars' relationship was constitutionally protected, but vacated and remanded on the ground that "strict scrutiny,"[39] rather than the *Pickering* balancing test, should be applied to Bowers's action.[40] The panel majority took a somewhat unorthodox approach in declining to apply *Pickering* to Shahar's claim, and Judge Godbold abandoned this stance on rehearing *en banc,* when both the majority and the dissenters agreed that *Pickering* provided the appropriate framework.[41] As the deep divisions on the *en banc* court made clear, however, that premise only begins the debate. Furthermore, as discussed in Parts II and III.C of this Article, a strong argument can be made that *Pickering* should not apply, or should apply only in a carefully circumscribed manner, to cases involving speech or other constitutionally protected conduct that neither takes place on the job nor is job-related.

U.S. 138, 150 (1983)).

38. *See Shahar,* 836 F. Supp. at 866-68. The court treated Shahar's "expressive association" claim as overlapping her intimate association and religious freedom claims and therefore not requiring separate analysis. *See id.* at 862.

39. In other words, that Bowers's action "must be deemed to infringe on Shahar's rights unless shown to be narrowly tailored to serve a compelling government interest." Shahar v. Bowers, 70 F.3d 1218, 1224 (11th Cir. 1995).

40. *See id.* at 1221-25; *id.* at 1227 (Morgan, J., concurring in part and concurring in result).

41. *See* Shahar v. Bowers, 114 F.3d 1097, 1118-22 (11th Cir. 1997) (Godbold, J., dissenting) (avoiding citation of *Pickering,* but concluding that Bowers, "[w]hatever his views about possible adverse effects on his office," *id.* at 1122, "did not act reasonably in revoking the agreement made with Shahar," *id.* at 1118); *id.* at 1102-03 (*en banc* majority opinion) (rejecting strict scrutiny standard in favor of *Pickering* balancing); *accord id.* at 1111-13 (Tjoflat, J., concurring in the judgment); *id.* at 1123 (Kravitch, J., dissenting); *id.* at 1125-26 (Birch, J., dissenting); *id.* at 1129 (Barkett, J., dissenting). Judge Godbold also joined the dissents of Judges Kravitch, Birch, and Barkett. Senior Circuit Judge Morgan did not participate in the *en banc* decision. *See id.* at 1098; *see also* Scott D. Wiener, Recent Development, *Same-Sex Intimate and Expressive Association: The* Pickering *Balancing Test or Strict Scrutiny?,* 31 HARV. C.R.-C.L. L. REV. 561, 577-83 (1996) (commenting on the *Shahar* panel decision and arguing that *Pickering* balancing should apply to intimate association claims).

Judge Phyllis A. Kravitch, in her separate panel opinion, agreed with the district court that Shahar's freedom of intimate association was burdened by Bowers's action.[42] She also agreed that *Pickering* should apply, but, unlike the panel majority, her application of the balancing test led her to conclude that Shahar's constitutional rights were violated.[43] The panel was thus unanimous in granting actual or likely victory to Shahar on what Shahar herself seemed to view as the central and most important claim in the case: the intimate association claim.[44] Judge Godbold also opined that Shahar presented separate and valid religious freedom and equal protection claims that should be tested on remand by the strict scrutiny standard,[45] but Judges Kravitch and Morgan viewed those claims as either unsupported by the record or, at best, duplicative of Shahar's association claims.[46]

The full Eleventh Circuit, however, vacated the panel decision and granted rehearing *en banc*,[47] and ultimately affirmed the district court's rejection of Shahar's claims.[48] Since the Supreme Court denied Shahar's petition for certiorari without recorded dissent,[49] it is with the Eleventh Circuit's *en banc* decision that we must grapple. The twelve participating judges agreed that some form of *Pickering* balancing should apply,[50] but concurred on little else. Judge James L. Edmondson's opinion, for a bare majority of seven,[51] took the

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42. *See Shahar*, 70 F.3d at 1228-34 (Kravitch, J., concurring in part and dissenting in part).

43. *See id.*

44. *See* Appellant's Principal Brief, *supra* note 17, at 20-47 (devoting first 27 of 40 pages of argument to intimate association claim). All three panel members also found merit in Shahar's expressive association claim, although, like the district court, they noted its overlap with her intimate association and religious freedom claims, and, again, disagreed over the standard of review. *See Shahar*, 70 F.3d at 1225 (Godbold, J.); *id.* at 1227 (Morgan, J., concurring in part and concurring in result); *id.* at 1234-35 (Kravitch, J., concurring in part and dissenting in part).

45. *See Shahar*, 70 F.3d at 1225-26.

46. *See id.* at 1227-28 (Morgan, J., concurring in part and concurring in result); *id.* at 1235 (Kravitch, J., concurring in part and dissenting in part).

47. *See* Shahar v. Bowers, 78 F.3d 499 (11th Cir. 1996).

48. *See* Shahar v. Bowers, 114 F.3d 1097, 1099 (11th Cir. 1997).

49. *See* Shahar v. Bowers, 118 S. Ct. 693 (1998).

50. *See supra* note 41.

51. Judge Edmondson's opinion was joined by Chief Judge Joseph W. Hatchett and Judges R. Lanier Anderson III, Emmet Ripley Cox, Joel F. Dubina, Susan H. Black, and Edward E. Carnes. *See Shahar*, 114 F.3d at 1098-99.

unusual approach of assuming arguendo (while disparaging the assumption in scarcely veiled terms) that Shahar enjoyed a constitutional associational right to celebrate her marriage to Francine, but concluded that Bowers was, on balance, nevertheless entitled to revoke her employment on that basis because of his claimed fears about the negative impact on the Department.[52] Judge Gerald Bard Tjoflat, concurring in the *en banc* judgment, argued that the *Pickering* balance could not coherently be applied without confronting and deciding, rather than merely assuming, "where [Shahar's claimed] right ranks in the constitutional hierarchy"[53]—but that "if one assumes that the First Amendment protects the homosexual relationship between Shahar and her partner as an intimate association,"[54] "Shahar would [likely] prevail in such a balance."[55] Judge Tjoflat concluded, however, that the Shahars' marriage lacked constitutional protection, thus pre-ordaining the outcome under *Pickering*.[56] Judge Kravitch, joined now in dissent by Judge Godbold and also by Judges Rosemary Barkett and Stanley F. Birch, Jr., reiterated her view in the panel decision that not only was the Shahars' marriage a constitutionally protected intimate association, but Shahar should also prevail in the *Pickering* balance.[57]

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52. *See id.* at 1099-1100, 1103-11.
53. *Id.* at 1112 (Tjoflat, J., concurring in the judgment).
54. *Id.* at 1113 (Tjoflat, J., concurring in the judgment).
55. *Id.* at 1116 (Tjoflat, J., concurring in the judgment).
56. *See id.* at 1113-15 (Tjoflat, J., concurring in the judgment).
57. *See id.* at 1122-25 (Kravitch, J., joined by Barkett and Godbold, JJ., dissenting); *see also id.* at 1125-29 (Birch, J., joined by Barkett, Godbold, and Kravitch, JJ., dissenting) (expressing agreement with Judge Kravitch's dissent and elaborating on why the *Pickering* balance tipped in favor of Shahar); *id.* at 1129-34 (Barkett, J., joined by Godbold and Kravitch, JJ., dissenting) (same). The dissenters were especially harsh in criticizing the majority's *Pickering* analysis. *See, e.g., id.* at 1124 (Kravitch, J., dissenting) (asserting that "the *en banc* majority has employed a balancing test in name only . . . devot[ing] paragraph after paragraph to Bowers' interests, but giv[ing] short shrift to Shahar's intimate associational interests"); *id.* at 1129 (Barkett, J., dissenting) (accusing the majority of indulging in a "wholesale restructuring of *Pickering*" which "permits a government employer to . . . terminat[e] . . . [an] employee[] . . . [based on] only a minimal and totally subjective rationale and without considering the rights of the employee in the balance," and, "[i]n effect, . . . grant[ing] overwhelming, if not complete, deference to the Attorney General's subjective views").

B. The Nonspeech Issues

It is important to survey the arguments Shahar raised to clarify how and to what extent they do, and do not, relate to the potential free speech arguments that she did not raise but which are central to the case.[58] First, while Shahar presented both her intimate and expressive association claims as arising under the First Amendment, they are in fact quite different from each other, and an intimate association claim is not really a First Amendment claim at all. It refers rather to the constitutional protection the Supreme Court has afforded to certain family relationships, notably those involving heterosexual marriage,[59] the parent-child relationship,[60] and cohabitation of relatives,[61] a body of case law intimately related to the right of privacy regarding contraception[62] and abortion[63] and which derives from "the right to liberty guaranteed by the due process clauses, and as an implicit part of the Bill of Rights."[64]

Shahar attempted to extrapolate from this case law a generalized freedom of intimate association that would protect her relationship with Francine. She relied on dicta in several Supreme Court opinions over the last fifteen years that suggested such a right, while rejecting in each case the claimed application of the right.[65] Just to confuse things nicely, some of

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58. This leaves aside for the moment any critique of the majority's application of *Pickering*. *See infra* Part III.C.

59. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967).

60. *See, e.g.*, Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

61. *See, e.g.*, Moore v. East Cleveland, 431 U.S. 494 (1977).

62. *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Griswold v. Connecticut, 381 U.S. 479 (1965).

63. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113 (1973).

64. Mark Strauss, Note, *Public Employees' Freedom of Association: Should* Connick v. Myers' *Speech-Based Public-Concern Rule Apply?*, 61 FORDHAM L. REV. 473, 481 (1992).

65. *See* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 237 (1990) (holding that city ordinance regulating motels that rent rooms for fewer than 10 hours as "sexually oriented businesses" did not violate motel patrons' freedom of association); City of Dallas v. Stanglin, 490 U.S. 19, 28 (1989) (ruling that age restriction on attendance at teenage dance halls did not implicate any constitutional right of association); New York State Club Ass'n v. City of New York, 487 U.S. 1, 18 (1988) (upholding city civil rights ordinance against facial freedom of association challenge by consortium of private

the Court's dicta does seem to describe intimate association as a First Amendment right, although a careful reading of the Court's opinions makes clear its roots in the concept of substantive due process.[66]

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clubs); Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 546-47 (1987) (holding that application of state civil rights act to local Rotary Clubs did not violate members' freedom of association); Roberts v. United States Jaycees, 468 U.S. 609, 621-22 (1984) (holding that application of state civil rights statute to compel Jaycees to accept women as members did not violate freedom of association).

66. *See, e.g., Rotary,* 481 U.S. at 545 (stating that "the First Amendment protects those relationships, including family relationships," described in *Roberts*) (citing *Roberts,* 468 U.S. at 619-20); *cf.* Appellant's Principal Brief, *supra* note 17, at 21 (citing *Rotary* and several lower court decisions to argue that intimate association "is rooted in the First Amendment"); Shahar v. Bowers, 114 F.3d 1097, 1102 n.9 (11th Cir. 1997) (citing *Rotary* for the same point); *id.* at 1113 n.6 (Tjoflat, J., concurring in the judgment) (stating that "the Supreme Court has formally located the right of intimate association within the First Amendment," but that "[t]he cases cited by *Roberts*... are substantive due process cases," and that "[b]ecause of this confusion" there is a circuit split on the issue).

In fact, the pages in *Roberts* cited in the Court's dictum in *Rotary* nowhere mention the First Amendment; instead, as Judge Tjoflat correctly noted, they cite and discuss a host of substantive due process/privacy cases, as indeed that very page of *Rotary* does. *See Roberts,* 468 U.S. at 618-20; *Rotary,* 481 U.S. at 545. Indeed, there is a clear contrast between the vaguely generalized constitutional sources cited in *Roberts* for the right of intimate association (so typical of the Court's privacy cases), *see, e.g., Roberts,* 468 U.S. at 618 (citing "the Bill of Rights" generally); *id.* at 620 (describing intimate association as "an intrinsic element of personal liberty"), and the specific citation of the First Amendment and free speech cases in the section of *Roberts* devoted to the issue of *expressive* association, *see id.* at 622-29, which, as discussed below in text, is indisputably a First Amendment doctrine. It seems that the *Rotary* dictum is simply an anomaly, perhaps occasioned by confusion arising from the fact that most of these association cases deal with both intimate and expressive association. The Court's later decisions have not resolved the confusion. *See New York State Club Ass'n,* 487 U.S. at 12-13 (discussing right of "intimate association" without specifying its constitutional source, while citing the First Amendment in discussion of "expressive association"); *Stanglin,* 490 U.S. at 23-25 (citing both the First Amendment, and the United States Constitution generally, in a brief and hopelessly intermingled discussion of intimate and expressive association); *id.* at 28 (Stevens, J., joined by Blackmun, J., concurring in the judgment) (noting that "the critical issue in this case involves substantive due process rather than the First Amendment right of association"); *FW/PBS,* 493 U.S. at 236-37 (merely citing *Roberts* and its reference to the Bill of Rights in disposing of "intimate association" claim). *See generally* Cornelia Sage Russell, Note, Shahar v. Bowers: *Intimate Association and the First Amendment,* 45 EMORY L.J. 1479, 1487-94 (1996) (discussing *Shahar* panel decision and pointing out lack of clarity in Court's intimate association jurisprudence). For an argument that intimate association *should* be doctrinally grounded in the First Amendment, see generally Gwynne L. Skinner, *Intimate Association and the First Amendment,* 3 LAW & SEXUALITY 1 (1993). *See also* Russell, *supra,* at 1529-31 (suggesting "a way to conceive of intimate association as a First Amendment right" based on the element of self-expression in pursuing an intimate relationship reflecting one's sexual minority status). I am in accord with Skinner and Russell on the importance of free expression in protecting socially unconventional

Justice Brennan's classic formulation of the right would protect

> 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 . . . distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.[67]

The Shahars' relationship would seem to fall within the core of this conception. Unfortunately, however, the Supreme Court's substantive due process/privacy jurisprudence, already highly suspect in any of its applications in the eyes of some Justices and commentators,[68] has conspicuously refused to offer any

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relationships. *See generally infra* Parts III and IV. However, I do not think a generalized right of intimate association can properly be shoe-horned into the First Amendment.

67. *Roberts,* 468 U.S. at 620. The Court seems to have drawn the phrase "intimate association" from a law review article by Professor Kenneth L. Karst, which attempted to derive such a doctrine from much the same precedents cited by the Court in *Roberts. See* Karst, *supra* note 1, at 627 nn.16-17, 628 n.18 (citing *Loving, Zablocki,* and *Moore*). Professor Karst defined "intimate association" as "a close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship," typically with some "degree of exclusivity." *Id.* at 629 & n.26. While he found considerable support for such a right in the Court's First Amendment jurisprudence, *see id.* at 655-59, he conceded the faintly ridiculous overtones of such an approach, "conjuring up the image of a lover who sits up [in bed, presumably] and says, 'I suppose you're wondering why I've called this meeting,' " *id.* at 656, and ultimately rested more on substantive due process, *see id.* at 653, 664-65; *see also* Russell, *supra* note 66, at 1484-87 (discussing Karst's approach). For a recent, comprehensive survey of the law relating to employees' freedom of intimate association, and a strong argument for respecting that freedom, see Terry Morehead Dworkin, *It's My Life—Leave Me Alone: Off-the-Job Employee Associational Privacy Rights,* 35 AM. BUS. L.J. 47 (1997).

68. For two of the classic critiques of the theory of substantive due process, see Griswold v. Connecticut, 381 U.S. 479, 507-27 (1965) (Black, J., dissenting), and JOHN HART ELY, DEMOCRACY AND DISTRUST 14-21 (1980). I happen to agree with Professor Ely that "'substantive due process' is a contradiction in terms—sort of like 'green pastel redness,'" *id.* at 18, and I have previously criticized "non-interpretivist," "natural law," or other approaches to constitutional jurisprudence not firmly rooted in the text of the Constitution. *See, e.g.,* Bryan H. Wildenthal, *The Right of Confrontation, Justice Scalia, and the Power and Limits of Textualism,* 48 WASH. & LEE L. REV. 1323, 1380-92 (1991) [hereinafter Wildenthal, *Confrontation*] (embracing "textualist" approach to constitutional interpretation, while criticizing Justice Scalia's version of textualism); Bryan H. Wildenthal, *Judicial Philosophies in Collision: Justice Blackmun,* Garcia, *and the Tenth Amendment,* 32 ARIZ. L. REV. 749, 768 (1990) (criticizing lack of textual mooring for supposedly "conservative" states'-rights doctrine of National League of

protection to gay relationships. That is reflected most starkly in *Bowers v. Hardwick*,[69] which upheld Georgia's criminal prohibition of private, consensual, adult oral and anal sex as applied to same-sex couples, even while strongly hinting that such conduct would fall within the constitutionally protected zone of privacy for opposite-sex couples.[70] The *Hardwick* dissents noted that Georgia defended the law by conceding that it would be unconstitutional as applied to heterosexuals (at least heterosexual married couples), but claiming only to enforce it, if at all, against homosexuals.[71]

The *Hardwick* dissents also noted that Georgia's concededly (indeed, toutedly) discriminatory enforcement policy raised serious questions under the Equal Protection Clause, an issue the majority declined to address.[72] The Court's implicit endorsement of such discrimination in *Hardwick*—indeed, its reliance upon it to justify its decision—is

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Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)). I do not agree, however, with those who would use "original intent," "historical understanding," or "tradition" to impose unduly cramped limitations on the meaning of constitutional provisions that are, by their nature, sweeping and open-ended. *See, e.g.*, Wildenthal, *Confrontation, supra*, at 1380 (criticizing the "noisy, shallow, right-wing appeal to historical textualism of former Attorney General Ed Meese"). In any event, whatever the merits of the Court's supra-textualist substantive due process/privacy jurisprudence, I agree with Professor Karst that it appears to be "here to stay," Karst, *supra* note 1, at 665, and as long as it is here, there is no justification for applying it in an unprincipled manner.

69. 478 U.S. 186 (1986).

70. *Compare id.* at 188 n.2 ("The only claim properly before the Court . . . is Hardwick's challenge to the Georgia statute as applied to consensual homosexual sodomy. We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy."), *with id.* at 200-01 (Blackmun, J., dissenting) (criticizing Court's "as applied" approach and its "almost obsessive focus on homosexual activity" in light of fact that Georgia statute by its terms applied evenhandedly to all "sodomy," even between heterosexual married couples). In a case decided shortly before this Article went to press, Georgia did attempt to enforce its "sodomy" statute in a heterosexual context, against a man who performed oral sex on his 17-year-old niece by marriage. Powell v. State, 270 Ga. 327, 510 S.E.2d 18 (1998). The Georgia Supreme Court, however, took the opportunity to strike down the statute as violating Georgia's state constitutional right of privacy, as applied to any "private, unforced, non-commercial acts of sexual intimacy between persons legally able to consent." *Id.* at 336, 510 S.E.2d at 26. Thus, ironically, it appears that Shahar's intimate association claim would have fared better had she raised it in Georgia state court under Georgia state constitutional law.

71. *See Hardwick*, 478 U.S. at 201, 202 n.2 (Blackmun, J., dissenting); *id.* at 218-20 & nn.10, 12 (Stevens, J., dissenting).

72. *See id.* at 196 n.8 (majority opinion); *id.* at 202 n.2 (Blackmun, J., dissenting); *id.* at 218-20 (Stevens, J., dissenting).

now in striking tension with its more recent decision in *Romer v. Evans,*[73] an Equal Protection Clause case which held that sheer "animosity toward" gay people cannot justify unequal treatment of them under the law.[74] As of this writing, the Court has not reconciled *Hardwick* and *Romer,* and *Hardwick* remains governing law at least in the field of substantive due process/privacy rights.

In any event, the Court's selective willingness to appeal when convenient to history and "tradition"[75] made it all too easy

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73. 517 U.S. 620 (1996).

74. *Id.* at 634; *see also id.* at 636-38 (Scalia, J., dissenting) (criticizing *Romer* Court's failure to distinguish or even cite *Hardwick*).

75. *Hardwick,* 478 U.S. at 192 (suggesting that substantive due process protects only "those liberties that are 'deeply rooted in this Nation's history and tradition' " and emphasizing "ancient roots" of criminal prohibitions of "sodomy") (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1997) (plurality opinion of Powell, J.)); *see also Hardwick,* 478 U.S. at 196-97 (Burger, C.J., concurring) (contending that "[c]ondemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards" and that protecting "homosexual sodomy" as a fundamental right would "cast aside millennia of moral teaching"); Michael H. v. Gerald D., 491 U.S. 110, 123 (1989) (plurality opinion of Scalia, J.). *But see* Roe v. Wade, 410 U.S. 113, 129-67 (1973) (recognizing fundamental right to abortion, despite long history of criminal prohibition and moral condemnation of abortion); Loving v. Virginia, 388 U.S. 1, 6-12 (1967) (same as to right of interracial heterosexual couples to marry). The Court's opinion in *Roberts* itself, prior to its rhapsodically theoretical description of protected "intimate associations" quoted in text above, seemed to slap a historical and traditional straitjacket on the concept by stating:

> Without precisely identifying every consideration that may underlie this type of constitutional protection, we have noted that *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.

Roberts v. United States Jaycees, 468 U.S. 609, 618-19 (1984) (emphasis added). Predictably, later opinions have seized on this language to limit the scope of any right of intimate association. As Justice O'Connor wryly observed, for example, in batting aside a challenge to a Dallas ordinance regulating motels renting by the hour, "[a]ny 'personal bonds' that are formed from the use of a motel room for fewer than 10 hours are not those that have 'played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs.' " FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 237 (1990) (quoting *Roberts,* 468 U.S. at 618-19). Shahar understandably protested that the motel-room quickies at issue in *FW/PBS* had no rational bearing on "the deep and committed nature of constitutionally-protected intimate relationships." Appellant's Reply Brief, *supra* note 29, at 7 n.2; *see also* Shahar v. Bowers, 114 F.3d 1097, 1123 n.3 (11th Cir. 1997) (Kravitch, J., dissenting) (arguing that *FW/PBS* "stands for the proposition that superficial relationships fail to qualify as intimate associations . . . , not . . . that courts should deny recognition to deep-seated relationships which are, or have been, unpopular"). To which I can only sympathetically

for the Eleventh Circuit to cast aspersions on—and Judge Tjoflat to reject outright—Shahar's claimed right of intimate association.[76] It is thus understandable that Shahar steered as clear of *Hardwick* as she possibly could,[77] downplaying the sexual aspect of her relationship with Francine[78] and insisting that her intimate association claim was rooted in the First Amendment.[79] What is surprising is that the Eleventh Circuit panel opinions and *en banc* dissents in *Shahar* almost completely ignored *Hardwick* as well.[80] Even Bowers himself made amazingly little use of his own prior litigation victory.[81]

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respond: Tell it to the Supreme Court, which found "[n]o connection between family . . . on the one hand and homosexual activity on the other . . . ," *Hardwick,* 478 U.S. at 191, in either ignorance or sheer disdain of the social fact that "homosexual activity" is most assuredly central to the lives and happiness of millions of American families.

76. *See Shahar,* 114 F.3d at 1099 ("Given the culture and traditions of the Nation, considerable doubt exists that Plaintiff has a constitutionally protected federal right to be 'married' to another woman[.]"); *id.* at 1115 (Tjoflat, J., concurring in the judgment) (relying on *Hardwick* to conclude that "[h]omosexual relationships have not played the same role as marital or familial relationships in the history and traditions of the Nation"); *see also* Louis Norvell, Case Comment, *Constitutional Law: Defining the Boundaries of Protected Intimate Associations,* 50 FLA. L. REV. 233 (1998) (endorsing Judge Tjoflat's view that *Hardwick* compelled rejection of Shahar's claim). *But see* Allison Dawn Gough, Note, *The First Amendment Fails to Protect Lesbian Love in the Eleventh Circuit,* 23 U. DAYTON L. REV. 371 (1998) (arguing that Shahar's intimate association claim was meritorious and should have been upheld). Note how the *Shahar* majority seemed to conflate "marriage" as a legal status conferred by the State (the issue in the Hawaiian litigation, *see supra* note 2) with Shahar's right not to be penalized by the State for simply calling herself "married." This is explored *infra* Part III.A.

77. In fact, she never even cited the case in her Principal *En Banc* or *En Banc* Reply Briefs.

78. *See, e.g.,* Appellant's Reply Brief, *supra* note 29, at 8-9 (describing Shahars' marriage as "an association of confidences and support within which to live out their lives," comparing it to nonsexual same-sex associations such as male-only private clubs, and generally arguing that right of intimate association encompasses both sexual and nonsexual relationships without regard to gender or sexual orientation of participants).

79. *See* Appellant's Principal Brief, *supra* note 17, at 20-24; Appellant's Reply Brief, *supra* note 29, at 1-5; *cf. supra* note 66.

80. The sole exception was Judge Kravitch's panel opinion, where she defiantly cited Justice Blackmun's *dissent* in *Hardwick* to bolster her analysis! *See* Shahar v. Bowers, 70 F.3d 1218, 1229 (11th Cir. 1995) (Kravitch, J., concurring in part and dissenting in part); *see also* Russell, *supra* note 66, at 1528 (noting "almost total absence" of *Hardwick* from *Shahar* panel opinions, and finding this both "striking" and "encouraging").

81. Bowers cited *Hardwick* several times, but mostly just to argue generally that the scope of substantive due process should be limited by history and tradition. *See* Appellee's Brief, *supra* note 19, at 11-12, 18, 24 n.4, 28. In order to demonstrate why allowing her employment would supposedly have disrupted the proper functioning of the Department, he also relied, without citing *Hardwick,* on the argument that Shahar may have violated (or may have been perceived by the public as likely to violate) the

This is not meant to imply that *Hardwick* necessarily precluded victory for Shahar's intimate association claim, any more than it necessarily spells doom for other gay-rights claims, especially those not involving substantive due process or privacy rights. That assumption is not always true,[82] as *Romer* so dramatically teaches. Furthermore, arguments like Shahar's represent part of a necessary, on-going effort to force the Supreme Court to finally confront the incongruity of *Hardwick* within its substantive due process/privacy jurisprudence.

Nevertheless, the failure of Shahar's intimate association claim, however disappointing, is not at all surprising in light of *Hardwick.* It is true, of course, that an intimate same-sex *relationship* in the broader sense *can* be distinguished from the specific types of sexual conduct found unprotected in *Hardwick.*[83] But one has to ask *why* a court would, or should, draw such a distinction for constitutional purposes. There is undeniable truth in Judge Tjoflat's comment that "homosexual conduct is as central to a homosexual 'marriage' as heterosexual intercourse is to a heterosexual marriage."[84] Judge Tjoflat's words echo, in a bitterly ironic way, those of Judge Johnson in the Eleventh Circuit's *Hardwick* decision:

> [T]he marital relationship is . . . significant because of the unsurpassed opportunity for mutual support and self-expression that it provides. . . . For some, the sexual activity

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"sodomy" law upheld in *Hardwick* (since struck down by the Georgia Supreme Court, *see supra* note 70). *See id.* at 7, 15, 52 n.9. The closest, however, that Bowers came to using *Hardwick* to specifically refute Shahar's invocation of intimate association to protect her relationship with Francine was to briefly note that "the Supreme Court treated Hardwick's 'intimate association' claim as identical to a substantive due process privacy claim, and rejected it." *Id.* at 21-22.

82. *See* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection,* 55 U. CHI. L. REV. 1161 (1988) (prophetically criticizing conclusion of some judges and commentators that *Hardwick* necessarily doomed claims that anti-gay discrimination might violate the Equal Protection Clause).

83. *See, e.g.,* Wiener, *supra* note 41, at 576-77 (quoting David A.J. Richards, *Sexual Preference as a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of Anti-Lesbian/Gay Initiatives,* 55 OHIO ST. L.J. 491, 515 (1994)) (pointing out that "[g]ay relationships go far beyond 'sodomy' " and are signified by a whole range of erotic and affectionate behavior, such as kissing and handholding, totally outside the historical scope of "sodomy" laws and not addressed in *Hardwick*).

84. Shahar v. Bowers, 114 F.3d 1097, 1115 n.7 (11th Cir. 1997) (Tjoflat, J., concurring in the judgment).

> in question here serves the same purpose as the intimacy of marriage. . . . The activity [Michael Hardwick] hopes to engage in is quintessentially private and lies at the heart of an intimate association beyond the proper reach of state regulation.[85]

The Supreme Court did not reverse Judge Johnson's decision in *Hardwick* because it disagreed that homosexual conduct is central to gay relationships. Rather, it simply found no constitutional value in gay relationships, or perhaps did not even comprehend that gay people *have* relationships above and beyond the occasional sexual encounter.[86] There is little doubt, as even Georgia conceded in *Hardwick,* that the constitutional protection the Court has afforded to the heterosexual marital relationship extends to any particular private, consensual sexual acts in which the participants in that relationship might engage.[87] It is already an odd jurisprudence that denies to gay people fundamental rights of privacy and intimate association taken for granted by heterosexuals. It would be an odder jurisprudence still that would extend constitutional protection to intimate gay relationships in a general sense while allowing the government to criminalize sexual conduct central to many such relationships.[88]

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85. Hardwick v. Bowers, 760 F.2d 1202, 1211-12 (11th Cir. 1985), *rev'd,* 478 U.S. 186 (1986).

86. *See* Bowers v. Hardwick, 478 U.S. 186, 191 (1986) ("No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent."). *See generally supra* note 75.

87. That follows *a fortiori* from the right of heterosexual marriage recognized in *Loving v. Virginia,* 388 U.S. 1, 12 (1967), and the sanctity of the heterosexual marital bedroom recognized in *Griswold v. Connecticut,* 381 U.S. 479, 485-86 (1965). That such sexual privacy rights extend to unmarried heterosexuals as well is strongly implied by *Eisenstadt v. Baird,* 405 U.S. 438 (1972) (protecting right of access to contraception by unmarried persons). Of course, one should not search too hard for logic in the Court's decisions in this area, which have, for example, guaranteed to underage teenagers some rights of access to abortion and contraception, *see, e.g.,* Hodgson v. Minnesota, 497 U.S. 417, 436-44 (1990); Carey v. Population Serv. Int'l, 431 U.S. 678, 691-99 (1977), while denying that they have any right to enjoy consensual sexual intercourse in the first place, *see* Michael M. v. Superior Court, 450 U.S. 464 (1981).

88. *Cf. Shahar,* 114 F.3d at 1115 n.7 (Tjoflat, J., concurring in the judgment) ("The suggestion that homosexual relationships have played a role in our history and traditions while acknowledging that homosexual conduct has played no role in them would be 'at best, facetious.' ") (quoting *Hardwick,* 478 U.S. at 194 ("[T]o claim that a right to engage in [homosexual sodomy] is 'deeply rooted in this Nation's history and

"Expressive association," in contrast to intimate association, is indisputably a First Amendment doctrine. The Court has protected freedom of association in the expressive sense as a necessary corollary to the First Amendment rights of free speech, free press, free exercise of religion, and peaceable assembly because people must often associate and organize in groups to effectively exercise such rights.[89] But Shahar made carefully limited use of this doctrine and did not thereby contend (as this Article does) that her marriage was a form of protected speech. Rather, taking care to emphasize the "religious and personal" nature of her marriage ceremony and to disclaim any public or political purpose behind it,[90] she argued that her association with Francine, and with the family members and friends who helped them celebrate their wedding, served to facilitate her free exercise of her Jewish religion within the confines of her "religious community."[91] Her

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tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious.")).

It is irrelevant for present purposes whether the Shahars in particular, or lesbian couples in general, were likely to violate the Georgia "sodomy" law upheld in *Hardwick,* although Shahar's argument that they were not (or at least were no more likely to do so than any given heterosexual couple, married or unmarried) *is* relevant to the *Pickering* analysis of her case. *See infra* Part III.C. *Compare* Appellant's Principal Brief, *supra* note 17, at 14-16, 53-54 & n.23, *and* Appellant's Reply Brief, *supra* note 29, at 24 n.10, *with* Appellee's Brief, *supra* note 19, at 7, 15, 52 n.9; *compare also Shahar,* 114 F.3d at 1105 & n.17, *with id.* at 1125 & n.6 (Kravitch, J., dissenting), *and id.* at 1127-29 & nn.4, 7 (Birch, J., dissenting), *and id.* at 1133 & n.7 (Barkett, J., dissenting). If the right of intimate association protects the Shahars' marriage, it must also protect gay male relationships. Yet it could not coherently do so while *Hardwick* remains good law.

89. *See* Roberts v. United States Jaycees, 468 U.S. 609, 622-23 (1984) (citing, *e.g.*, NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); NAACP v. Alabama, 357 U.S. 449 (1958)); *see also* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995) (holding that application of state civil rights law to force inclusion of gay group in parade violated freedom of expressive association of parade organizers).

90. "We very much viewed our ceremony as a private, religious celebration in front of the gathered community of our family and friends. All the members of our synagogue were invited to the ceremony. We sought affirmation in this religious community, while realizing that our ceremony would have no legal significance whatsoever. . . . [We] never contemplated making, and certainly never did make, any kind of announcement to the general public about our ceremony. The ceremony's significance was religious and personal."

Appellant's Principal Brief, *supra* note 17, at 6-7 (quoting Shahar's deposition testimony); *see also* Appellant's Reply Brief, *supra* note 29, at 20 n.6 ("Shahar . . . made no 'political statement' or 'announcement' to the public.").

91. Appellant's Principal Brief, *supra* note 17, at 7. *See generally id.* at 47-50.

expressive association claim would thus seem to rise or fall with her direct religious freedom claim.[92]

The *en banc* court's treatment of Shahar's religious freedom and equal protection claims was, to put it mildly, unsatisfactory. First, Judge Edmondson suggested the puzzling non sequitur that Shahar's religious freedom claim might lack merit because her faith "requires a woman neither to 'marry' another female—even in the case of lesbian couples—nor to marry at all."[93] But as even Judge Tjoflat's concurrence pointed out, there is "no authority for the proposition that the Free Exercise Clause protects only those activities which a person's religion commands him or her to perform,"[94] a proposition that would contravene the Supreme Court's repeated warnings "that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."[95] He might have added that such a parochial conception of religious freedom would leave in limbo the many religious traditions which, unlike the Middle Eastern monotheistic faiths,[96] do not embrace the concept of divine "commands," violations of which are deemed "sins" meriting divine retribution.[97]

Judge Edmondson also cursorily observed that Bowers "did not revoke Shahar's [employment] because of her religious affiliation or her religious beliefs (as opposed to her conduct)," and Judge Edmundson expressed "doubt that a facially neutral executive act which adversely impacts on the exercise of one's religion either constitutes a violation of the Free Exercise

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92. *See, e.g.,* Shahar v. Bowers, 70 F.3d 1218, 1235 (11th Cir. 1995) (Kravitch, J., concurring in part and dissenting in part) ("Shahar's expressive association claim overlaps not just her intimate association claim but also her free exercise [of religion] claim.").

93. *Shahar,* 114 F.3d at 1099.

94. *Id.* at 1117 n.12 (Tjoflat, J., concurring in the judgment).

95. *Id.* (quoting Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 887 (1990)).

96. *I.e.,* Judaism, Christianity, and Islam.

97. For example, "the belief systems of Native Americans do not rely on doctrines, creeds, or dogmas .... Native American faith is inextricably bound to the use of land." Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 460-61 (1988) (Brennan, J., dissenting); *see also* Bryan H. Wildenthal & Patrick M. O'Neil, *Native American Religious Rights, in* RELIGION AND THE LAW: AN ENCYCLOPEDIA (Paul Finkelman ed., forthcoming 1999). *See generally* Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses,* 41 STAN. L. REV. 233, 249-88 (1989) (discussing difficulty of defining "religion").

Clause or requires heightened scrutiny."[98] Judge Tjoflat argued similarly that, (1) in order to uphold Shahar's religious freedom claim, a court must find that "Shahar's religious exercise motivated [Bowers's] decision,"[99] and (2) that Bowers "was motivated by *the religious nature* of Shahar's marriage ceremony."[100]

Bowers, of course, openly conceded that his decision was motivated by Shahar's prospective marriage ceremony, and it was undisputed that he was fully aware of the religious nature of the ceremony.[101] It is inescapable, therefore, that he knowingly burdened Shahar's exercise of her religion. To be sure, he might well have taken the same action, and imposed the same burden, if she had characterized the ceremony as a "marriage" under some other religious tradition, or no religious tradition. But the majority's premise, almost entirely unexplained and unanalyzed, was that such facts do not suffice to make out a religious freedom claim; rather, such a claimant must demonstrate that she was *discriminated against because of* her religion.[102]

Such a stunted and redundant reading of the Constitution's protection of religious freedom would have been dismissed as completely out of line with established doctrine as recently as 1990. That year, however, in *Employment Division, Department of Human Resources v. Smith,*[103] the Supreme Court found the Free Exercise Clause inapplicable to otherwise

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98. *Shahar,* 114 F.3d at 1111 n.27. Judge Edmondson's entire operative analysis of Shahar's religious freedom and equal protection claims was contained in a single footnote at the very end of his opinion. *See id.*

99. *Id.* at 1117 (Tjoflat, J., concurring in the judgment).

100. *Id.* at 1118 (Tjoflat, J., concurring in the judgment) (emphasis added); *see also* Shahar v. Bowers, 70 F.3d 1218, 1235 n.23 (11th Cir. 1995) (Kravitch, J., concurring in part and dissenting in part) ("Shahar does not argue, and the record does not indicate, that she was treated differently because of her religion.").

101. *See Shahar,* 114 F.3d at 1118 (Tjoflat, J., concurring in the judgment).

102. Just to cover his bases, Judge Edmondson held that, even assuming Shahar's religious freedom had been burdened, the *Pickering* balancing test would still apply and Bowers would "prevail[] in that balance for the reasons discussed [previously]." *Id.* at 1111 n.27. It may be that some form of the *Pickering* balancing test should apply to a religious freedom claim in the public employment context, but Judge Edmondson's perfunctory reference to his *Pickering* analysis of Shahar's intimate association claim—itself deeply flawed, *see* discussion, *supra* note 57; *infra* Part III.C (especially note 318)—without any further calibration in response to the difficult and sensitive issues raised by a religious claim, verged on irresponsible, even insulting.

103. 494 U.S. 872 (1990).

valid and neutral criminal laws applied evenhandedly to substantive conduct (as opposed to beliefs) not otherwise constitutionally protected.[104] The Court thus rendered the clause a sort of glorified echo of the Free Speech and Equal Protection Clauses.[105] Justice Scalia's five-to-four majority opinion in *Smith,* however, attempted to reconcile, and purported not to overrule, a line of employment-related religious freedom cases in which the Court has required the government to demonstrate a compelling justification to burden (even on an evenhanded and nondiscriminatory basis) an employee's religiously-motivated conduct.[106] Shahar's claim would seem more analogous to the latter—and even if governed by *Smith,* Shahar's claim identifies the need to reconsider that decision.

It is unfortunate that the *en banc* dissents in *Shahar* declined to explore Shahar's religious freedom claim, given the debatable applicability of *Smith* and the claim's otherwise strong grounding in constitutional text and doctrine. Judge Godbold did expound eloquently on the indisputably sincere religious roots and nature of the Shahars' marriage ceremony,[107]

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104. *See id.* at 876-85. Congress attempted to legislatively overrule the effect of *Smith* in the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb-2000bb-4 (1994)), but the Court struck the Act down as applied to state and local governments in *City of Boerne v. Flores,* 521 U.S. 507 (1997).

105. This is not the place for an extended discussion of *Smith* or the law of religious freedom, but the decision was rendered over exceptionally strong dissents, and has been widely condemned by scholarly commentators. *See Smith,* 494 U.S. at 891-903 (O'Connor, J., concurring in the judgment but dissenting from the majority's analysis); *id.* at 907-21 (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting); *Flores,* 521 U.S. at 516-25 (O'Connor, J., dissenting); *see also, e.g.,* Michael W. McConnell, *Religious Freedom at a Crossroads,* 59 U. CHI. L. REV. 115, 137-40 (1992).

106. *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963). Justice Scalia found this line of case law relevant only in the area of unemployment compensation, "a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct." *Smith,* 494 U.S. at 884; *cf. id.* at 897-901 (O'Connor, J., concurring in the judgment) (criticizing Justice Scalia's distortion of the case law).

107. Courts have been notably reluctant to second-guess the sincerity of religious freedom claims. *See Smith,* 494 U.S. at 886-87; *cf.* United States v. Meyers, 95 F.3d 1475, 1479-84 (10th Cir. 1996), *cert. denied,* 118 S. Ct. 583 (1997) (accepting sincerity of claimed belief in "Church of Marijuana," which allegedly required claimant "to use, possess, grow and distribute marijuana for the good of mankind and the planet earth," *id.* at 1479, but finding that it did not qualify as a "religion"). In any event, the Shahars are veritable poster-children for religious sincerity. Their commitment to Judaism dates from early childhood, the Reconstructionist branch of Judaism to which they have long adhered

though his discussion was limited to demonstrating the unfounded nature of Bowers's assumptions about the alleged potential negative impact on his office. Judge Godbold did not discuss *Smith* or any other case law regarding religious freedom, or otherwise engage the majority's assumptions about the required elements of a religious freedom claim.[108] The other dissents completely avoided the religion issue.[109]

The majority's treatment of Shahar's equal protection claim—that she was fired because of her sexual orientation—was even more cursory. Judge Edmondson required only a single short sentence at the end of the last footnote in his opinion to dispose of it.[110] By contrast, Judge Birch's dissent demonstrated at persuasive length that Bowers treated Shahar less favorably on account of her lesbian status in numerous ways—for example, by drawing "status-based inferences [about her], unsupported by any facts in the record and explained only by animosity toward and stereotyping of homosexuals."[111] This discriminatory treatment of Shahar was reflected quite openly

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has endorsed (and even encouraged, for gay and lesbian couples) same-sex marriage as a religious sacrament, they approached their own marriage in close consultation and association with their rabbi and synagogue congregation, and the ceremony itself (performed by their rabbi) resembled a traditional Jewish wedding in every way other than the genders of the participants. *See* Shahar v. Bowers, 114 F.3d 1097, 1118-22 (11th Cir. 1997) (Godbold, J., dissenting).

108. *See Shahar*, 114 F.3d at 1118-22 (Godbold, J., dissenting).

109. *See id.* at 1125 n.7 (Kravitch, J., dissenting) (declining to address issues other than intimate association because "Shahar's other claims would not warrant relief beyond that to which Shahar would be entitled pursuant to her intimate association claim"); *id.* at 1125-29 (Birch, J., dissenting); *id.* at 1129-34 (Barkett, J., dissenting). In her panel opinion, Judge Kravitch went so far as to assert (without explanation) that "this case is not about the free exercise of religion," Shahar v. Bowers, 70 F.3d 1218, 1235 (11th Cir. 1995) (Kravitch, J., concurring in part and dissenting in part), a statement in some tension with her later decision to join Judge Godbold's *en banc* dissent, *see Shahar*, 114 F.3d at 1118.

110. "Because Shahar fails to point us to enough evidence to support such an inference, we also affirm the district court's holding on Shahar's equal protection claim." *Shahar*, 114 F.3d at 1111 n.27. The way in which Judge Edmondson described the disputed "inference" (whether Bowers "revoked Shahar's offer because of her sexual orientation—as opposed to her conduct in 'marrying' another woman," *id.*) suggests the poverty of whatever analysis might have lain behind his unsupported conclusion, since firing a woman for marrying another woman could hardly be said to have nothing to do with her sexual orientation. Judge Tjoflat also took a single sentence to merely state his agreement with the majority's conclusion on this issue. *See id.* at 1111 (Tjoflat, J., concurring in the judgment).

111. *Id.* at 1129 (Birch, J., joined by Barkett, Godbold, and Kravitch, JJ., dissenting).

in Bowers's post hoc rationalizations for revoking her employment.[112] The dissenters, perhaps for reasons of collegiality, refrained from pointing out that the Eleventh Circuit majority itself, by endorsing Bowers's rationalizations in its *Pickering* analysis, indulged in similar stereotyping.[113] At the same time, it is plausible (as suggested earlier) that Bowers's original decision was primarily motivated not by Shahar's status as a lesbian but, as his revocation letter put it, by her "purported marriage [to] another woman."[114] It is well to remember that the case was resolved on summary judgment at the trial court level, before any factfinder had an opportunity to determine what inferences to draw from the evidence presented, making the majority's decision all the more indefensible.[115]

A strong argument exists that even a revocation based purely on Shahar's "purported marriage" would inherently constitute discrimination based on sexual orientation. The *en banc* dissenters endorsed this argument with surprising forthrightness.[116] Viewed pragmatically, it is difficult to divorce

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112. *See generally id.* at 1125-29 (Birch, J., joined by Barkett, Godbold, and Kravitch, JJ., dissenting). For example, Bowers claimed that Shahar would be likely to violate Georgia's "sodomy" law, even though the law on its face applied (before being recently struck down by the Georgia Supreme Court, see *supra* note 70) to "sodomy" between married heterosexuals, and Bowers exhibited no comparable concern about "sodomy" or "fornication" (*i.e.,* sexual relations between unmarried persons, also a criminal offense in Georgia, *see infra* note 118) possibly engaged in by heterosexuals on his staff. Bowers also argued that Shahar would be subject to various conflicts of interest in representing the Department and upholding Georgia law because of her sexuality, again without exhibiting equivalent concern regarding heterosexual staff attorneys. *See* Appellant's Principal Brief, *supra* note 17, at 53-55; Appellee's Brief, *supra* note 19, at 7, 52 n.9; *see also infra* Part III.C.

113. *See Shahar,* 114 F.3d at 1131-34.

114. *Id.* at 1101.

115. *See* Shahar v. Bowers, 836 F. Supp. 859, 869 (N.D. Ga. 1993). In granting summary judgment for Bowers, the court was, of course, supposed to draw all inferences and construe all evidence in the light most favorable to Shahar. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

116. *See Shahar,* 114 F.3d at 1126-27 n.2 (Birch, J., joined by Barkett, Godbold, and Kravitch, JJ., dissenting) (arguing that the distinction "between Shahar's status as a homosexual and her conduct in entering into a homosexual marriage is truly a distinction without a difference" and that the latter criterion "reaches homosexuals only and distinguishes among similarly situated people on the basis of one trait only: that they are homosexual"). Even more provocatively, Judge Birch went on to analogize from the equal protection analysis in *Loving v. Virginia*, 388 U.S. 1, 7-9 (1967), in which the Court, in striking down the denial of marriage rights to interracial heterosexual couples, rejected arguments that the ban merely reached conduct and not racial status and that it applied equally to blacks and whites since members of each group were denied the

Shahar's status as a lesbian from the conduct and symbolism of her marriage. The ultimate import of Bowers's action is that a gay attorney working for the Department is, at best, prohibited from carrying on an ordinary personal life in a manner taken for granted by heterosexuals. A moment's consideration of the prospect of Bowers firing a heterosexual employee for getting married illustrates the fundamental inequality of his treatment of Shahar.

Events immediately following the release of the Eleventh Circuit's *en banc* decision in *Shahar*, on May 30, 1997, posed a dramatic irony that could scarcely have been improved upon by a Hollywood screenwriter. Bowers resigned as State Attorney General on June 1 to concentrate on his campaign for the Republican nomination for Governor of Georgia. On June 5, he held a press conference to reveal, after years of rumors and to preempt any attacks by political opponents, that he had carried on an adulterous affair for more than a decade that began when the woman involved was an employee in his office.[117] Adultery, like "sodomy" and "fornication," was (at least at that time) a criminal offense in Georgia.[118] Bowers himself conceded the hypocrisy of his stance in both *Hardwick* and *Shahar* in light of this revelation.[119] Nevertheless, the Eleventh Circuit, on August 1, 1997, over the dissent of Judges Birch, Barkett, and Godbold,

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right to marry into the other. The latter analysis in *Loving* was the underpinning of the Hawaii Supreme Court's analysis (since mooted by referendum) suggesting the invalidity, under Hawaii's state constitutional equal protection clause, of the denial of legally, recognized marriage to same-sex couples. *See* Baehr v. Lewin, 852 P.2d 44, 61-63, 67-68 (Haw. 1993). *See generally supra* note 2.

117. *See* Kevin Sack, *Georgia Candidate For Governor Admits Adultery and Resigns Commission in Guard,* N.Y. TIMES, June 6, 1997, at A29.

118. *See* O.C.G.A. § 16-6-2 (1996) ("sodomy," *i.e.,* oral or anal sex between anyone, male or female, married or unmarried, punishable as felony by up to 20 years in prison); *id.* §§ 16-6-18 to -19 (1996), 17-10-3 (1997) ("fornication," *i.e.,* sex between unmarried persons, and adultery, punishable as misdemeanors by up to $1000 fine and a year in prison). *But see supra* note 70 (discussing Georgia Supreme Court's recent decision in *Powell v. State* striking down "sodomy" law); Powell v. State, 270 Ga. 327, 337, 510 S.E.2d 18, 27 (1998) (Carley, J., dissenting) (suggesting that *Powell* casts doubt on validity under Georgia state constitution of adultery and "fornication" laws as well). Furthermore, to carry on an affair with a subordinate employee in the same office, as Bowers confessed, would seem far more ethically problematical and far more job-related than Shahar's marriage to a person with no connection to the office. *See, e.g.,* Editorial, *Judging the Bowers Affair*, ATLANTA J. & CONST., June 6, 1997, at 20A ("Conflicts of interest would come up every day when an employer is involved in a sexual relationship with a subordinate.").

119. *See* Sack, *supra* note 117.

denied Shahar's petition for rehearing and her motion to supplement the record with this new information.[120] On July 21, 1998, Bowers was defeated in Georgia's Republican gubernatorial primary.[121]

The most difficult hurdle faced by any equal protection claim like Shahar's is the Supreme Court's refusal, to date, to subject classifications based on sexual orientation to anything more than "rational basis" scrutiny.[122] The Court's 1996 decision in *Romer v. Evans*[123] adhered to the rational basis standard, but as noted above, the Court held that sheer "animosity toward" gay people as a class was not a legitimate governmental objective capable of rationally justifying anti-gay discrimination.[124] The *Shahar* majority held that Bowers was entitled to base his action, in part, on his claimed concerns about public animosity to employing Shahar, a conclusion

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120. *See* Shahar v. Bowers, 120 F.3d 211, 212-14 (11th Cir. 1997) (*per curiam*); *id.* at 215-16 (joint opinion of Birch, Barkett, and Godbold, JJ., dissenting). The majority indicated that even if the record were supplemented, "we cannot readily say that the result of the case probably would be different." *Id.* at 214. There was a certain consistency to this, since the majority had already considered evidence of Bowers's refusal to concern himself with possible illegal sexual conduct by heterosexual staff attorneys of the type he imputed to Shahar. *See Shahar,* 114 F.3d at 1129 n.7 (Birch, J., dissenting) (recounting Bowers's opposition, in post-*Hardwick* "sodomy" case in state court, to habeas petitioner's motion to discover whether any of Bowers's staff attorneys had themselves ever violated the "sodomy" law; Bowers contended, successfully and quite correctly of course, that such information was totally irrelevant). The dissent ridiculed the majority's refusal to take judicial notice of Bowers's revelation, highlighting its "suspicious" timing just days after the decision on the merits in *Shahar* and noting that Bowers deliberately publicized his own admission and request for forgiveness, which was made "known to millions" "nationwide by newspapers, radio, television, and magazines of national circulation." *Shahar,* 120 F.3d at 215. Bowers himself, while opposing rehearing, did not object to "including the proffered information in the record of this case." *Id.* (quoting Bowers's Response to Shahar's Motion to Supplement the Record or for a Remand to Do So at 7).

121. *See Republican Concedes in Georgia Primary,* N.Y. TIMES, July 29, 1998, at A13; *G.O.P. Front-Runner May Face Runoff in Georgia Governor Race,* N.Y. TIMES, July 23, 1998, at A15. The Bowers affair prompted renewed efforts to repeal Georgia's antiquated laws on private, consensual, adult sexual behavior (since struck down by the Georgia Supreme Court, *see supra* note 70). *See* Christina Nifong, *Georgia Adultery Debate Shows Shift in Morality,* CHRISTIAN SCI. MONITOR, June 27, 1997, at 3. It also renewed national debate about the relevance of politicians' sexual indiscretions, a topic of obvious salience during the Clinton Presidency. *See, e.g.,* Richard L. Berke, *In New Climate, More Politicians Surmount Imperfect Private Lives,* N.Y. TIMES, Apr. 19, 1998, § 1, at 1.

122. *See* Romer v. Evans, 517 U.S. 620, 631-32 (1996).

123. 517 U.S. 620 (1996).

124. *Id.* at 634.

questionable, at best, in light of *Romer* and other cases holding that the government may not give effect to private prejudices.[125] Further discussion of this point is postponed to Part III.C, since it relates somewhat inextricably to the proper application of the *Pickering* balancing test.

The remaining issue raised by the facts of Shahar, but not by the litigants—the dog that didn't bark[126]—is freedom of speech. Part II of this Article explores why Shahar chose not to raise such a claim, and how it would have fared under current law. Part III explores why such a claim is central to this case, and how it should have fared were the law of public employee free speech as it should be.

II. *CONNICK V. MYERS* AND THE PROBLEM OF OFF-THE-JOB, NON-JOB-RELATED SPEECH

The Supreme Court's primary concern in *Connick v. Myers*[127] was to prevent every workplace dispute concerning working conditions or employment relationships from becoming a potential First Amendment lawsuit. Sheila Myers was an Assistant District Attorney fired for circulating a questionnaire to co-workers criticizing office policies.[128] In the view of New Orleans District Attorney Harry Connick, who fired her, Myers was simply a disgruntled employee trying to stage a "mini-insurrection" in the workplace.[129] The Court accepted this view, holding that Myers's speech was simply an effort "to gather

125. *Compare Shahar*, 114 F.3d at 1109-10 (making brief and notably unpersuasive effort to distinguish *Romer*), *with id.* at 1126-28 (Birch, J., dissenting) (relying on *Romer, inter alia,* to conclude that "Bowers' 'concern' for the public's perception of homosexuals . . . is entitled to no weight in [applying *Pickering*] balancing"); *see also* Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 448 (1985) (citing and applying *Palmore* in case involving discrimination against mentally retarded people scrutinized under rational basis standard).

126. *See* ARTHUR CONAN DOYLE, *Silver Blaze, in* THE COMPLETE SHERLOCK HOLMES 335, 347 (1988) (Colonel Ross to Holmes: "Is there any point to which you would wish to draw my attention?"; Holmes: "To the curious incident of the dog in the night-time."; Colonel Ross: "The dog did nothing in the night-time."; Holmes: "That was the curious incident.").

127. 461 U.S. 138 (1983).

128. *See id.* at 141.

129. *Id.* at 140-41, 155-56.

ammunition for another round of controversy with her superiors," and merely "reflect[ed] one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause célèbre."[130]

However one views the particular facts of *Connick*,[131] there is a common-sense appeal to this concern. Professor Toni Massaro has referred to "[t]he whistle blowers, the whiners, and the weirdos" that one may come across in any workplace.[132] An employee who views himself as a First Amendment martyr may in fact be nothing more than a disruptive pain in the neck whose dismissal is entirely justifiable. As the Court somewhat impatiently concluded in *Connick*, "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs."[133]

The *Pickering* balancing test described in Part I.A already sharply limited free speech rights in the public employment context and allowed courts to take generous account of public employers' legitimate concerns. But the *Connick* Court, apparently fearful that even *Pickering* allowed too much "intrusive oversight by the judiciary in the name of the First Amendment," went further and embraced a sweeping, categorical rule that if a public employee's speech "cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize [even under *Pickering*] the reasons for [the adverse employment action]."[134]

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130. *Id.* at 148.

131. The dissenters in *Connick* argued persuasively that Myers's speech in fact addressed matters of substantial public concern and was entitled to First Amendment protection. *See id.* at 163-69 (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting).

132. Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace,* 61 S. CAL. L. REV. 1, 63-64 (1987). Professor Massaro, while strongly criticizing the *Connick* decision and defending a broad conception of public employee free speech, concedes that " '[p]ersistent troublemakers' who dare to violate the workplace rules of discourse—written and unwritten—may indeed be unattractive people." *Id.* at 63. As the Fourth Circuit has noted, constitutional rights "have in fact undoubtedly been hammered out largely in behalf of the temperamentally unforbearing." Berger v. Battaglia, 779 F.2d 992, 1001 (4th Cir. 1985).

133. *Connick,* 461 U.S. at 149.

134. *Id.* at 146. The Court offered a definition of speech of "public concern" as that which could be "fairly considered as relating to any matter of political, social, or other concern to the community." *Id.*

The *Connick* "public concern" test has been subjected to powerful and sustained scholarly criticism, perhaps most notably by Professors Cynthia Estlund[135] and Toni Massaro.[136] As Professor Estlund has noted, the test is deceptively appealing in light of longstanding rhetoric in the theory and jurisprudence of free speech placing speech on "public"—and especially political—matters "at the 'highest rung of the hierarchy of First Amendment values.' "[137] As she demonstrates, however, "[t]he public concern test is a dangerous innovation in First Amendment doctrine."[138] While some analysis of the relative value or public importance of the content of speech has long played a role in that doctrine, this was generally confined to marginal categories of "excluded or disfavored speech at some remove from speech on public issues,"[139] such as defamation, "obscenity," and commercial speech.[140] In

135. *See* Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category,* 59 GEO. WASH. L. REV. 1 (1990).

136. *See* Massaro, *supra* note 132.

137. Estlund, *supra* note 135, at 1 (quoting Carey v. Brown, 447 U.S. 455, 467 (1980)). As Professor Estlund noted, this strand of First Amendment theory reached its almost parodic extreme in Professor (later Judge) Robert Bork's view (which he repudiated during his unsuccessful 1987 Supreme Court confirmation hearing) that only explicitly political speech is constitutionally protected. *See id.* at 2 & n.11 (citing articles).

138. *Id.* at 28.

139. *Id.* at 3.

140. *See id.* at 20; Massaro, *supra* note 132, at 25. Furthermore, even such marginal areas of First Amendment law have proved troubling precisely because they have sometimes embraced content-based value judgments about the worthiness of certain speech. One need not dwell, surely, on the contortions the Court has put itself through attempting to define "obscenity." In the defamation area, the Court had actually tried to avoid a content-based approach, preferring to base heightened protection for allegedly defamatory speech on the status of the plaintiff as a "public figure." *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967); New York Times Co. v. Sullivan, 376 U.S. 254 (1964). As Professor Estlund described, a plurality of the Court, in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), toyed with the idea of making *Sullivan*'s speech-protective "actual malice" standard hinge upon whether the content of allegedly defamatory speech was of public concern, over Justice Marshall's strong objection that courts should not presume "to somehow pass on the legitimacy of [public] interest in a particular event or subject." *Rosenbloom,* 429 U.S. at 79 (Marshall, J., dissenting). This tentative experiment was cut short, however, by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). It was only after *Connick* that a majority of the Court (the same 5-4 majority as in *Connick*) resurrected a content-based public concern test in the defamation area. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (holding that *Gertz*'s prohibition on presumed or punitive damages in private-figure defamation lawsuits applies only if disputed speech is of public concern). *See generally* Estlund, *supra* note 135, at 8-12.

mainstream First Amendment analysis, the Court has generally been emphatic in rejecting content-based restrictions,[141] and has accorded full constitutional protection to an almost limitless range of "expression about philosophical, social, artistic, economic, literary, or ethical matters."[142]

It is true that *Pickering* spoke of the public employee's interest in speaking on "matters of public concern."[143] But as Professor Estlund notes, that formulation allowed, at most, consideration of "the extent to which the employee's speech implicated important public issues [as] only one element in the equation."[144] It did not, as *Connick* did, "creat[e] an absolute threshold of 'public concern' below which the employer need not assert any interest whatsoever to justify discharging the employee."[145] In effect, "what was, in *Pickering*, the announced purpose for protecting public employee speech became the minimum threshold for gaining protection in *Connick*."[146]

The theoretical and practical problems of the public concern test are deep and obvious. It tends inevitably toward creation of "a judicially approved catalogue of legitimate subjects of public discussion[, which] alone should condemn the entire undertaking, for the Constitution empowers the people, not any branch of the government, to define the public agenda."[147] Whether speech is of public concern is a question both disturbingly subjective and prone to far too narrow an

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141. Such restrictions are generally allowed, if at all, only when they survive "strict scrutiny," *i.e.*, if the court finds "that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.' " Boos v. Barry, 485 U.S. 312, 321 (1988) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)). Outside such special categories of "unprotected" speech like "obscenity," "fighting words," or incitements to imminent lawless action, it is, in fact, debatable whether *any* content-based restriction can *ever* properly pass constitutional muster. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 124-28 (1991) (Kennedy, J., concurring in the judgment) (urging negative answer to that question).

142. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977), *quoted in* Massaro, *supra* note 132, at 29. As a general rule, such "fully protected" speech can be regulated "only through reasonable, content-neutral limitations on 'time, place and manner.' " Estlund, *supra* note 135, at 20 (citing LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 940-41 (2d ed. 1988)).

143. Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

144. Estlund, *supra* note 135, at 8.

145. *Id.*

146. *Id.*

147. *Id.* at 3. *See generally id.* at 30-39.

answer.[148] Finally, even if such a test were theoretically defensible, its day-to-day practical application by courts, with the inevitable mistakes that involves, threatens to "do real damage to the system of freedom of speech."[149] This is because, unlike other content-based tests which "define out" certain marginal categories of speech from full (or any) constitutional protection, the public concern test "defines in" a category of speech at the core of First Amendment concerns "that the speaker has to get *into* rather than stay *out* of."[150] Consequently,

> every mistake of oversuppression will cut to the quick. Every erroneous exclusion of speech from the public concern category, by definition, will deny protection to speech at the core of our system of freedom of expression: speech that many speakers and potential speakers, listeners, judges, lawyers, and scholars would consider to be of concern to the public.[151]
>
> . . . .
>
> . . . For once the outer limits of protection are defined by the same boundaries that surround the very core of the First Amendment, any underinclusiveness on the part of judges or overcaution on the part of speakers necessarily cuts into the core itself.[152]

Professors Estlund and Massaro therefore make a convincing argument that the public concern test has no proper place even within the typical public employee cases involving speech that occurs on the job or is clearly job-related, or (as in *Connick* itself) both.[153] The more modest thesis of this Article is that, at a minimum, such a content-based test is intolerable as

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148. *See* Massaro, *supra* note 132, at 27-29; *see also* Estlund, *supra* note 135, at 36-39 (arguing that Court's formulation of "public concern" in *Connick* and other cases tends to privilege "generalized political or social commentary" unrelated to speaker's self-interest, *id.* at 37, and thus "discounts the importance, and undermines the claim to constitutional status, of speech grounded in the real, everyday experience of ordinary people," *id.*).

149. Estlund, *supra* note 135, at 3.

150. *Id.* at 41 (emphasis in original) (citing Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts,* 34 VAND. L. REV. 265, 279-81 (1981), for "define in"/"define out" framework).

151. *Id.* at 48.

152. *Id.* at 51.

153. *See id.* at 52-54; Massaro, *supra* note 132, at 67.

applied to speech that *neither* occurs at the workplace *nor* relates to the employee's job.

Indeed, it is not at all clear that the Supreme Court ever intended that *Connick* be extended to cover such cases.[154] As noted above, the *Connick* Court dwelled repeatedly on the factual context of that case as (in its view) a classic "employee grievance concerning internal office policy."[155] Regardless of whether Myers's speech did (or should have to be found to) implicate matters of public concern, it was "job-related" twice over, in that the venue of the speech was at the workplace and the content of the speech concerned employment conditions and relationships.[156] Of course, considering whether speech is "job-related" in the latter sense is itself a form of "content-based" analysis. Such a limited consideration of content, however, seems unavoidable. And it is less problematical, since it does not involve carving out any *a priori* substantive categories of speech, but, rather, is contextually tied to the speaker's choice of employment.

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154. This specific aspect of the *Connick* doctrine has received surprisingly little attention in the scholarly literature (even as *Connick* and public employee free speech rights generally have been widely discussed). The only prior discussion of the issue in the scholarly legal literature appears to be a brief passage in a student note published in 1994. *See* Mike Harper, Comment, Connick v. Myers *and the First Amendment Rights of Public Employees,* 16 HASTINGS COMM. & ENT. L.J. 525, 541-42 (1994) (asserting that, "[a]lthough there are decisions to the contrary, the better view is that the *Connick* threshold test should only apply to expression occurring at or relating to work"). Harper defends this conclusion by quoting *Flanagan v. Munger*, 890 F.2d 1557, 1564 (10th Cir. 1989), a case discussed below in text, and stating:

> The reason that the *Connick* test is inappropriate in situations not either occurring at or concerning the workplace is found in the policies underlying the *Connick* decision. *Connick* denies scrutiny of employee grievances so that public employers need not defend their decisions in federal court. If an expressive activity is not one which might be motivated by a desire to air an employment grievance, the *Connick* test should not apply.

Harper, *supra,* at 542.

155. Connick v. Myers, 461 U.S. 138, 154 (1983). The dissent in *Connick* contended that "whether a public employee's speech addresses a matter of public concern is relevant to the constitutional inquiry only when the statements at issue—by virtue of their content or the context in which they were made—may have an adverse impact on the government's ability to perform its duties efficiently." *Id.* at 157 (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting). Justice Brennan, perhaps somewhat hopefully, did not read *Connick* as "imply[ing] that a governmental employee's First Amendment rights *outside the employment context* are limited to speech on matters of public concern." *Id.* at 157 n.1 (emphasis added).

156. *See id.* at 140-41, 154-56.

Post-*Connick* decisions have, logically enough, extended its analysis along two axes: (1) to cases in which the subject matter of the speech has nothing to do with employment conditions or relationships but does take place at the workplace, with, therefore, at least some risk of disruption;[157] and (2) to cases in which the speech did *not* take place at the workplace but *did* relate to internal employment matters, again creating plausible concern about disruption.[158] But what about those cases in which the employee's speech was neither on-the-job nor job-related? The Supreme Court has never plenarily addressed such a case, although it has arguably implied—and some lower-court decisions have stated or held outright—that both *Pickering* and its *Connick* corollary *must* apply in all cases in which a public employee is subjected to employment-related sanctions for engaging in speech.[159]

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157. The paradigm case of this type is the Supreme Court's decision in *Rankin v. McPherson*, 483 U.S. 378 (1987), in which a clerical employee in a constable's office was fired for a remark she made, at the office during working hours, regarding the 1981 assassination attempt on President Reagan: "if they go for him again, I hope they get him." *Id.* at 381. The Court, in a 5-4 decision, found that this comment was speech of public concern, *see id.* at 384-87, and proceeded to apply *Pickering* and ultimately conclude that the firing violated the First Amendment, *see id.* at 388-92. See also *Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444, 446 (6th Cir. 1984), which upheld the firing of a school guidance counselor for stating to a school secretary in a private office conversation that she was bisexual. *Rowland* is discussed further *infra* Parts III.B and C, because it illustrates both the elusive boundary between "public" and "private" speech regarding sexual orientation and the fact that whether speech truly is "on the job" (do coffee breaks count?, etc.) may itself (as is even more obvious regarding the issue whether speech is truly "job-related") be an ambiguous issue requiring analysis under the *Pickering* balancing test.

158. *See, e.g.*, Melton v. Oklahoma City, 879 F.2d 706 (10th Cir. 1989), *modified in nonrelevant part on reh'g*, 928 F.2d 920 (10th Cir. 1991) (*en banc*) (involving police officer who disclosed in trial testimony exculpatory material obtained through his employment and withheld from defense by prosecution); Kurtz v. Vickrey, 855 F.2d 723 (11th Cir. 1988) (relating to professor who published letters critical of university president's employment policies). *Pickering* itself fell within this subcategory. *See* Pickering v. Board of Educ., 391 U.S. 563, 566 (1968) (regarding teacher who published letter critical of school superintendent's handling of bond-issue election).

159. *See, e.g.*, Board of County Comm'rs v. Umbehr, 518 U.S. 668, 675 (1996) ("The First Amendment's guarantee of freedom of speech protects government employees from termination *because of* their speech on matters of public concern.") (emphasis in original). *Umbehr*, however (which extended the *Pickering-Connick* framework to independent contractors), involved speech which, while outside the public workplace, did relate to the speaker's contractual relationship with the public agency. *See id.* at 671-73; *see also, e.g.*, Schneider v. Indian River Community College Found., 875 F.2d 1537, 1542 (11th Cir. 1989) (holding, in case involving college radio station employees allegedly fired over station broadcasts and speech relating thereto, that a "public employee who

The Fourth Circuit decision in *Berger v. Battaglia*[160] is perhaps the best example of courts feeling compelled to apply the *Connick* public concern test in a context where it has no proper place.[161] *Berger* involved a Baltimore police officer prohibited from engaging in off-duty musical performances in "blackface" that offended some community members.[162] Both the district and appeals courts felt compelled to analyze at some length whether Officer Berger's "merely artistic"[163] expression was a matter of public concern.[164] Although both courts concluded it was, why should that even matter? More to the point was that it bore no direct relation to his job performance or the police department's operations.[165]

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asserts that his activity was protected by the First Amendment . . . *must* show that the speech addresses a matter of public concern") (emphasis added); Maples v. Martin, 858 F.2d 1546, 1552 (11th Cir. 1988) (same, in case involving university professor's critical comments about department head); McMullen v. Carson, 754 F.2d 936, 939 (11th Cir. 1985) (applying *Connick*, though apparently assuming without analysis that speech at issue was of public concern, in case involving off-the-job, non-job-related speech, namely, statement by sheriff's clerical employee on TV news show that he was a Ku Klux Klan member). *McMullen* is discussed further *infra* Part III.C, since the *Shahar en banc* majority relied so heavily and provocatively upon it in conducting its *Pickering* analysis.

160. 779 F.2d 992 (4th Cir. 1985). The *Berger* court provided a superb model of *Pickering* balancing, especially in connection with the "heckler's veto" problem, *see id.* at 999-1002, as discussed *infra* Part III.C.

161. Equally troubling in many ways was the Sixth Circuit's cursory use of *Connick* to reject the bisexual counselor's claim in *Rowland*, 730 F.2d at 449. *See supra* note 157.

162. *See Berger*, 779 F.2d at 993-96.

163. *Id.* at 996.

164. *See id.* at 998-99.

165. *See id.* at 993 ("In none of his performances did Berger identify himself as a police officer; offer any comment on Department policies or operations; make any reference to any other member of the Department; nor claim to be speaking for or in any way representing the Department. Although various media, in commenting on or describing his performance, referred to him as 'the singing cop,' that designation was, so far as the record reveals, theirs, not Berger's."). The police department did have to provide extra security at one of Berger's performances, in light of protests that raised some concern about possible violence, *see id.* at 995, but the department would have had the same duty with regard to any similar public event; Berger's status as an off-duty officer was irrelevant.

Of course, to the extent that a police officer engages in overtly racist speech, an argument may be made that such speech is necessarily job-related. *See infra* note 316. That in turn raises troubling issues somewhat beyond the scope of this Article. It is at least debatable whether Berger's speech could fairly be viewed as racist in such a strong sense. He apparently intended his performances, in which he impersonated the late Al Jolson, as a celebration of a musical tradition he admired. *See Berger*, 779 F.2d at 993. It is not my intention to enter such a debate in this Article. This discussion of *Berger* is

The Fourth Circuit, upholding Berger's claim, bowed in the end to the mainstream First Amendment principle that artistic expression and entertainment fall well within the core of constitutional protection.[166] But the district court, in rejecting the claim, had "ascribed less than core [F]irst [A]mendment value to the merely artistic as distinguished from political content of Berger's public entertainment."[167] This was because, plausibly enough, it "read the *Pickering*... and *Connick* Courts' emphasis on the importance attached to speech on matters involving public affairs and the operations of government as implying that employee speech on other matters lying within the [F]irst [A]mendment's general protection should be accorded little weight in the . . . *[Pickering]* balancing process."[168] This troublingly close call confirms Professor Estlund's fears about *Connick*'s inherent bias toward narrowing the protected range of public employee speech to overtly political issues,[169] while "tending toward the exclusion of less-exalted messages."[170]

The Fourth Circuit's analysis in *Berger* rested in part on a strained though understandable attempt to equate *Connick*'s conception of "speech of public concern" with *any* speech *not* concerning internal employment matters.[171] The Eleventh Circuit has also suggested such a dichotomy, noting in one case that "the question is close as to whether [the] statements [at issue] are better characterized as criticisms of internal

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intended solely to illustrate the general tendency of *Connick* to narrow protection of artistic speech.

166. *See Berger*, 779 F.2d at 999. For just two recent Supreme Court reaffirmations of that hornbook principle, see, for example, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 569 (1995) (describing "painting of Jackson Pollock, music of Arnold Schonberg, [and] Jabberwocky verse of Lewis Carroll" as "unquestionably shielded" by the First Amendment), and *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment.").

167. *Berger*, 779 F.2d at 996 (recounting district court's unpublished decision).

168. *Id.* at 999-1000.

169. *See* Estlund, *supra* note 135, at 32-39.

170. *Id.* at 39.

171. *See Berger*, 779 F.2d at 998-99. The Fourth Circuit struggled admirably, though not convincingly, to convert the *Connick* test from (as Professors Schauer and Estlund would put it, *see supra* note 150) a "define in" to a "define out" test: "[T]he 'public concern' . . . inquiry is better designed—and more concerned—to identify a narrow spectrum of employee speech that is not entitled even to qualified protection than it is to set outer limits on all that is." *Id.* at 998.

management decisions or as relating to matters of public concern."[172] The dichotomy makes sense and fits well with the view, elaborated below in Part III.C, that off-the-job, non-job-related public employee speech should be presumptively entitled to near-absolute protection, while speech relating to internal employment matters may be more properly subject to employment sanctions under a *Pickering*-style balancing test. But the dichotomy does not really square with any convincing understanding of the public concern concept, or with how *Connick* itself applied that concept.

The *Connick* Court, while finding most of Myers's speech not of public concern, conceded that one aspect of her questionnaire, asking if other employees felt "pressured to work in political campaigns," clearly was.[173] And yet that aspect of Myers's speech was no less job-related than the rest. Furthermore, much speech with no conceivable job connection might also be utterly private and of no interest to the public by any common-sense standard. Yet, outside the public employment context, purely private speech is not only protected, it has sometimes been given *greater* protection *because of* its private character.[174]

Other cases have adopted the more persuasive view that *Connick* is, or should be, inapplicable to off-the-job, non-job-related speech. In *Flanagan v. Munger*,[175] for example, the Tenth Circuit dealt with a case involving several Colorado Springs police officers who operated a video rental store while off duty and who were officially reprimanded by their police chief for renting out sexually explicit (but non-obscene)

172. Kurtz v. Vickrey, 855 F.2d 723, 730 (11th Cir. 1988).

173. Connick v. Myers, 461 U.S. 138, 149 (1983). The Court proceeded, however, to find Myers's firing justified under *Pickering* even for that aspect of her speech. *See id.* at 149-54.

174. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557 (1969) (protecting, under First and Fourth Amendments, private possession and viewing at home of sexually explicit expression deemed "obscene" and constitutionally proscribable outside private home context); David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319, 346 (1994); *see also* Bowers v. Hardwick, 478 U.S. 186, 195 (1986) (insisting that *Stanley* "was firmly grounded in the First Amendment," in attempt to limit its protection to private speech as opposed to other types of private conduct).

175. 890 F.2d 1557 (10th Cir. 1989).

videotapes as a small part of the store's inventory.[176] The court found the *Connick* test "nearly impossible to logically apply"[177] in this context, indeed, "simply irrelevant."[178] The court noted that sexually explicit but non-obscene speech has long been protected under the First Amendment,[179] although these enterprising officers probably did not intend to offer commentary on any subject, much less one of high-minded public concern, by renting out naughty videos.[180] The court found it more appropriate to simply ask directly whether "expression which is not at work nor about work" is protected under generic First Amendment principles.[181] When such expression does not involve "a personal personnel grievance, . . . it makes little sense to ask whether th[e] speech is of public concern."[182] Likewise, the district court in *Rothschild v. Board of Education of Buffalo*[183] relied on *Flanagan* to conclude that *Connick* should not apply to a drama teacher fired for acting in a privately financed film made on school grounds after hours, the contents of which had no bearing on the workplace.[184]

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176. *See id.* at 1560-61. The officers removed the sexually explicit videos from the store's shelves on the chief's orders. *See id.* The chief also invoked a department rule requiring approval for any off-duty employment, but conceded that the officers would not have been reprimanded under that rule but for their alleged "conduct unbecoming an officer" in renting out the sexually explicit videos. *See id.* at 1561.

177. *Id.* at 1562.

178. *Id.* at 1564; *see also supra* note 154. *Flanagan* also found support in some of the ambiguous tea leaves in *Connick* itself, which stated:

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Connick, 461 U.S. at 147, *quoted in Flanagan*, 890 F.2d at 1564. This passage would seem to allow, though not compel with any great clarity, treating *Connick* as inapplicable to off-the-job, non-job-related speech, on the theory that the employee in that situation is not speaking "as an employee," see *Flanagan*, 890 F.2d at 1564, although it still leaves in limbo the scenario in which an employee speaks "as a citizen" on (non-job-related) matters of *private* concern.

179. *See Flanagan*, 890 F.2d at 1565.

180. *See id.* at 1563.

181. *Id.* at 1565.

182. *Id.* The court proceeded to apply the *Pickering* balancing test and found that the officers' free speech rights had been violated. *See id.* at 1565-67.

183. 778 F. Supp. 642 (W.D.N.Y. 1991).

184. *See id.* at 644-47, 653-55. The school principal had given permission for the filming without knowing of the film's content, which turned out to include lewd language and

For the reasons stated above, cases like *Flanagan* and *Rothschild* have properly curtailed *Connick*'s reach. If *Connick* cannot be so limited, it must be overruled as blatantly out of line with core First Amendment values. The public concern test—at the very least as applied to off-the-job, non-job-related speech—amounts either to a judicial repeal of a huge swathe of First Amendment protection, or a selective return to the old view that, for public employees, freedom of speech is a "privilege" revocable at will, and not a right.[185]

Looking past *Connick* to *Pickering* itself, it is not clear that even *Pickering* was originally intended to apply outside the context of on-the-job or job-related speech. Justice Brennan suggested in his *Connick* dissent that it was not.[186] The alternative, presumably, would be a direct and traditional application of strict scrutiny, as urged by Shahar in her intimate association claim.[187] While courts have struggled with whether, and how, to apply *Pickering* balancing to constitutionally protected activity by public employees other than speech,[188] there has been somewhat less analytical focus on whether, and how, *Pickering* balancing should apply to off-the-job, non-job-related exercises of constitutional rights. This issue is explored in Part III.C.

Connick thus posed a serious dilemma for Shahar's litigation strategy. Under current doctrine, if Shahar had chosen to raise a free speech claim, it appears quite likely that she

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sexually suggestive scenes, including one in which an actor portraying a high school student (though not a student at the school involved) "is shown writhing on a mat in bikini briefs while Rothschild [the drama teacher] tells him, 'Don't just lay there playing with yourself.' " *Id.* at 646. Upon viewing a videotape of the film, the superintendent became incensed and "notified . . . Ms. Rothschild that her services would no longer be required by the School System." *Id.* at 647 (internal quotation marks omitted). Finding that the film makers had obtained proper permission to make after-hours use of the school, and that the film was a demonstration pilot never intended to be shown to the public or to students or other staff at the school, nor to portray or comment upon the school, the court concluded under *Pickering* that Rothschild's First Amendment rights had been violated. *See id.* at 655-56.

185. *See* discussion *supra* note 35.

186. *See* Connick v. Myers, 461 U.S. 138, 157 (1983) (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting) (citing Pickering v. Board of Educ., 391 U.S. 563, 574 (1968)).

187. *See* Appellant's Principal Brief, *supra* note 17, at 28-31; *see also supra* note 141 (discussing strict scrutiny standard applied to content-based speech restrictions).

188. *See* Wiener, *supra* note 41, at 567 (collecting cases dealing with substantive due process, privacy, freedom of religion, and freedom of association).

would have been required to demonstrate that the speech[189] involved in her marriage to Francine was of public concern, even though it took place off the job and had nothing to do with her employment.[190] Yet any attempt to make such a showing would have clashed with Shahar's characterization of her marriage ceremony as an intensely personal and private religious event, a characterization at the core of her freedom of association and religion claims.[191] Thus, it is not surprising that Shahar chose to forego a free speech claim, however desirable and interesting it may have been to see the courts explore the free speech implications of the case.

At the same time, it should be noted, Bowers would have faced a symmetrical dilemma of his own had Shahar chosen to press a speech claim. He would have been sorely pressed to *deny* that her marriage ceremony was of public concern, given his arguments in support of his decision to revoke her employment. It appears he would have tried, however. In the course of arguing that his action should not even be subjected to *Pickering* scrutiny (in the context of Shahar's intimate association claim), Bowers endorsed with alacrity Shahar's characterization of her conduct as private, thus supposedly precluding, under *Connick,* any further *Pickering* review.[192] Alternative inconsistent arguments are of course not unknown in legal briefs, but there is something almost whiplash-inducing about Bowers's diametrically opposed argument, just three pages later, fervently disputing Shahar's "private" characterization of her marriage and stoutly maintaining that he

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189. This is premised on the proposition that Shahar's conduct, which precipitated Bowers's revocation of her employment, can fairly be characterized as a form of constitutionally protected speech. That thesis is defended *infra* Part III.A.

190. To date, the Eleventh Circuit has not found *Connick* inapplicable to off-the-job, non-job-related speech. Indeed, there was Eleventh Circuit precedent already in existence at the time Shahar filed suit suggesting that *Connick* would perforce apply. *See supra* note 159. Furthermore, in another precedent disturbingly close on point, the Sixth Circuit had held in the 1984 *Rowland* case (applying *Connick*) that a school guidance counselor could be fired for privately stating to a coworker that she was bisexual. *See* Rowland v. Mad River Local Sch. Dist., 730 F.2d 444, 449 (6th Cir. 1984); *supra* notes 157, 161; *infra* Parts III.B-C.

191. *See supra* note 90.

192. *See* Appellee's Brief, *supra* note 19, at 40-41. Bowers was, at best, mixing apples and oranges here because it is highly doubtful that *Connick*'s public concern rule could properly apply to a public employee intimate association claim. *See* Strauss, *supra* note 64, at 495 (concluding it could not apply and noting lower court consensus on this point).

had to prevail in any *Pickering* balance because Shahar's marriage was too publicly visible and threatened to undermine the "*public* credibility and internal efficiency" of the Department.[193]

Bowers contended that "Shahar's *public* status as 'married' to another woman was likely to" (1) undermine both her "credibility" as a prospective Department attorney and that of the Department as a whole, "both in the public's eyes and in the eyes of judges around the State of Georgia"; (2) "interfere with" the Department's ability to handle cases involving same-sex marriage claims, gay parental rights, "domestic partner" benefits, and so forth, not to mention its ability to enforce Georgia's "sodomy" law, "which members of the public could reasonably assume Shahar was permitted to violate without prosecution or even investigation"; and (3) "harm the public perception of [the Department] and, in turn, . . . disrupt the Attorney General's ability to enforce Georgia law."[194] Bowers further noted that legally recognized "same-sex marriage is a highly-charged issue both in Georgia and nationwide,"[195] and that "the public could reasonably . . . view Shahar's 'marriage' as an endorsement by the Attorney General's office of [legally recognized] same-sex 'marriage.' "[196] These certainly sound like matters of rather intense public concern!

The truth, of course, is somewhere in between these two extremes. There is no reason to doubt the sincerity of Shahar's characterization of her marriage as intensely private. And yet Bowers's points about its public character (however inconsistent and self-serving) are not without force. As discussed in Part III.B, the boundaries between public and private in matters of sexual orientation and personal relationships are more elusive and ambiguous than we often recognize. What is clear, however, is that no one's freedom of speech—not Shahar's or anyone else's—can properly be shoehorned into *Connick*'s cramped conception of "public concern." Once freed of that arbitrary distraction, the significance of Shahar's marriage ceremony as

193. Appellee's Brief, *supra* note 19, at 43-45 (emphasis added); *see also id.* at 7-10, 15; *infra* Part III.B (discussing how Shahar was caught on the horns of the public/private dilemma).

194. Appellee's Brief, *supra* note 19, at 7 (emphasis added).

195. *Id.* at 8; *see also id.* at 8-10 (providing a detailed summary of the issue).

196. *Id.* at 15.

an act of free expression under time-honored First Amendment principles becomes apparent.

III. MARRIAGE AS SPEECH, OR WHAT *REALLY* GOT MICHAEL BOWERS'S GOAT?

A. "What's In a Name?"[197]: Gay Marriage as Subversive Speech

The marriage ceremony in which the Shahars participated together on July 28, 1991—the announced plans for which triggered Bowers's revocation of Shahar's prospective employment—was in part, this Article contends, a form of speech that should be protected under the First Amendment. This is not meant to suggest, however, that such a ceremony amounts to mere words. Nor is it meant to minimize the substance and reality and meaning of the Shahars' marriage, both to themselves and to their social and religious community. The Shahars might well object that their marriage is necessarily more than the expression of an idea, it is the bringing forth into reality of an idea, the sealing of a real commitment between two real people—"a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred," in Justice Douglas's words in *Griswold v. Connecticut.*[198]

All this is true. But at the same time, we should not make the mistake of viewing *ideas* as lacking substance and heft in their own right—and of having profound significance in people's lives. Words are not "mere,"[199] and the word "marriage" is quite obviously freighted with exceptionally heavy baggage—and carries an extraordinary emotional punch—in our culture. Marriage is an ideal, indeed a sacrosanct icon, in our society. Marriage in the religious sense is an idea, indeed a sacrament, of great importance in virtually every known faith. However, the endorsement of the Shahars' marriage by Reconstructionist

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197. "That which we call a rose, By any other name would smell as sweet." WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2 (Juliet). Yet, perhaps not. And it might also get you fired. Or such is the point of this Article.

198. 381 U.S. 479, 486 (1965).

199. *See, e.g.,* Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement."); Pindar, IV *Nemean Odes,* line 10, *quoted in* BARTLETT'S FAMILIAR QUOTATIONS 64 (J. Kaplan ed., 16th ed. 1992) ("Words have a longer life than deeds.").

Judaism[200] and the condemnation of same-sex marriage by many other faiths[201]—not to mention the endorsement of polygamous marriages in numerous faiths and cultures[202]—illustrate that there is no religious consensus on any one model of marriage.[203] In sum, marriage is an *idea* of transcendent importance, albeit an idea with different meanings for different people—as should hardly be surprising in a pluralistic society.

Marriage in our society (or at least one of its many meanings) is also, of course, a concrete civil status regulated by secular law. But that legal status, as we know, is so far limited to different-sex couples.[204] Since all, including Shahar herself, are agreed that her marriage accomplished nothing in the eyes of the law,[205] what else could it be, at least to an outside observer, than the expression of an idea? And what is more central to the First Amendment than the expression of ideas?[206] The sheer profundity and importance of an idea to the lives of real people cannot denude it of First Amendment protection.

Indeed, it was precisely the supposed offensiveness of the *idea* of same-sex marriage (even a religious marriage with no legal sanction) to the people of Georgia on which Bowers so critically and ultimately relied in justifying his action.[207] If one takes Bowers's own contentions at face value, he did not punish

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200. *See supra* Part I.A. Religious organizations and individual clergy members from a wide variety of other faiths, including Unitarian Universalists, Buddhists, Reform Jews, Methodists, Episcopalians, Lutherans, and Baptists, also perform or support same-sex marriages or similar "union" ceremonies. *See* Lynn D. Wardle, *A Critical Analysis of Constitutional Claims For Same-Sex Marriage,* 1996 BYU L. REV. 1, 10-11 & n.28; Tyche Hendricks, *Clergy Join Hands For Same-Sex Unions; Leaders of Many Faiths Show Support,* S.F. EXAMINER, Sept. 16, 1998, at A6; Gustav Niebuhr, *Laws Aside, Some in Clergy Quietly Bless Gay 'Marriage,"* N.Y. TIMES, Apr. 17, 1998, at A1.

201. *See, e.g.,* Raymond C. O'Brien, *Single-Gender Marriage: A Religious Perspective,* 7 TEMPLE POL. & CIV. RTS. L. REV. 429, 483 (1998) (citing Roman Catholic doctrine).

202. *See, e.g.,* PHILIP L. KILBRIDE, PLURAL MARRIAGE FOR OUR TIMES: A REINVENTED OPTION? 41-43 (1994). *See generally* JOHN CAIRNCROSS, AFTER POLYGAMY WAS MADE A SIN: THE SOCIAL HISTORY OF CHRISTIAN POLYGAMY (1974).

203. *See generally* SULLIVAN, *supra* note 4, at 46-85.

204. *See supra* note 2.

205. *See supra* Part I.A (especially text accompanying *supra* note 29).

206. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414 (1989).

207. *See* Appellee's Brief, *supra* note 19, at 7, 15, 43-45, 51-53.

Shahar for living with or committing herself to Francine.[208] Nor did he do so, one might hazard to say, because the Shahars and their family and friends planned to throw a party in a public park in South Carolina. Rather, it was *the verbal and symbolic way in which the Shahars characterized their commitment and their associated celebration*—as a "purported marriage,"[209] in his dismissive words—that offended Bowers.

In any event, even taking Bowers's contentions with a healthy shake of salt, he did not penalize Shahar *only* for her underlying conduct. He may well have retaliated against her, in part, for simply being a lesbian or for openly maintaining an intimate relationship of any sort with another woman. But if Shahar had raised a speech claim based on her marriage ceremony, she would not have faced any "*Mt. Healthy* problem" in trying to prove that her speech, as opposed to other factors, was the critical and dispositive motivation for Bowers's action.[210] Bowers eagerly avowed, as memorialized in his letter to Shahar quoted in Part I.A of this Article,[211] that his revocation of her employment was motivated specifically and *only* by her verbal and symbolic description of her planned ceremony, and of the lesbian relationship it was to celebrate and signify, as a marriage. He was thereby hoisted by his own petard. What Justice Brennan once said of a flag-burning law might well be said of Bowers's announced policy toward Shahar's conduct: "This is indeed a narrowly drawn [rule]; it is drawn so that everything it might possibly prohibit is constitutionally protected expression."[212]

It is worth analyzing the extent to which Bowers and the Eleventh Circuit's *en banc* majority seemed unsettled by Shahar's subversive use of the word "marriage." They seemed

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208. *See id.* at 51-53.

209. Shahar v. Bowers, 114 F.3d 1097, 1101 (11th Cir. 1997).

210. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (holding that public employee, in order to succeed in claim of unconstitutional employment action, must show that "constitutionally protected . . . conduct was . . . a 'motivating factor' in" employer's decision, and survive any effort by employer to show "that it would have reached the same decision . . . even in the absence of the protected conduct").

211. And as reiterated in his brief. *See* Appellee's Brief, *supra* note 19, at 50-53.

212. Kime v. United States, 459 U.S. 949, 954 (1982) (Brennan, J., dissenting from denial of certiorari). Justice Brennan's views in *Kime* were later vindicated in *Texas v. Johnson*, 491 U.S. 397 (1989), and *United States v. Eichman*, 496 U.S. 310 (1990).

unable to grasp at some level the basic distinction between marriage as a legally sanctioned status and marriage as a freely chosen description of a certain kind of conduct or relationship with religious, social, or personal meanings to the individuals involved. Terminology in this area can, of course, be confusing. One commonly hears references to statutes like the so-called "Defense of Marriage Act"[213]—and its growing brood of state-law spawn[214]—as "banning" same-sex marriage.[215] In fact, of course, they do not ban any sort of personal conduct or speech, but rather deny governmental certification to same-sex marriages, along with the many legal duties and benefits that flow from the officially certified forms of marriage.[216]

Bowers's brief discussed at some length the debate over legalizing same-sex marriage[217] and argued that the Shahars' marriage "could reasonably be viewed by the public at large and within the Bench and Bar as inconsistent with Georgia law."[218] Judge Edmondson began the *en banc* majority opinion in *Shahar* by questioning Shahar's "right to be 'married' to another woman,"[219] observing that "no federal appellate court or state supreme court has recognized the federal rights of same-sex marriage claimed by [Shahar]."[220] Noting that Shahar "hold[s]

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213. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. III 1997)).

214. *See, e.g.,* Barbara J. Cox, *Are Same-Sex Marriage Statutes the New Anti-Gay Initiatives?,* 2 NAT'L J. SEXUAL ORIENTATION L. 194, 196-97 (1996), *available in* <http://sunsite.unc.edu/gaylaw/issue4/cox3.html>. Georgia itself has enacted a state "mini-DOMA." *See* O.C.G.A. § 19-3-3.1 (Supp. 1998), *cited in* Shahar v. Bowers, 114 F.3d 1097, 1106 (11th Cir. 1997).

215. Such references are commonplace in the popular media and can even be found in the legal literature. *See, e.g.,* Craig W. Christensen, *If Not Marriage?: On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage,"* 66 FORDHAM L. REV. 1699, 1705-06 (1998).

216. *See, e.g.,* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception,* 106 YALE L.J. 1965, 1999-2000 & n.125 (1997).

217. *See* Appellee's Brief, *supra* note 19, at 8-10.

218. *Id.* at 15; *see also id.* at 44-45.

219. *Shahar,* 114 F.3d at 1099.

220. *Id.* at 1099 n.2. Judge Edmondson indicated that "[f]or clarity's sake, we use the words 'marriage' and 'wedding' (in quotation marks) to refer to Shahar's relationship with her partner; we use the word marriage (absent quotation marks) to indicate legally recognized heterosexual marriage." *Id.* at 1099 n.1. "Clarity" was the first casualty of Judge Edmondson's opinion, however, since we can only speculate whether his omission of quotation marks around "marriage" in his reference to "the federal rights of same-sex marriage claimed by [Shahar]," *id.* at 1099 n.2, was intentional or merely an oversight. As noted below in text, Shahar in fact never claimed any right in this litigation to "legally recognized" marriage.

herself out as 'married' "[221]—without defining or acknowledging what that meant for her—the majority took the unwarranted further leap of implying that she was thereby deceptively claiming *legal* marital status.[222] Strangely, it also grudgingly acknowledged that Shahar "disclaims benefits . . . based on marriage,"[223] yet denigrated that as a merely "technical acknowledgment" that did not "coun[t] for much in the balance."[224]

In reality, of course, Shahar's lawsuit had nothing whatsoever to do with the issue of legalizing same-sex marriage. She did not merely disavow the "benefits" of legal marriage, she had disclaimed from the beginning *any* legally married status.[225] The conduct cited by the court to suggest the contrary was utterly lawful and unremarkable with no necessary connection to legal marital status.[226] Quite strangely, it was the court, not Shahar, that seemed to insist she was somehow "really" married, arguing that "[e]ven if [she] is not married to another woman, she, for appearance purposes, might as well be."[227]

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221. *Id.* at 1107.

222. *See id.* Bowers also implicitly leveled this accusation. *See* Appellee's Brief, *supra* note 19, at 4, 15-16.

223. *Shahar,* 114 F.3d at 1106.

224. *Id.* at 1107.

225. *See id.* at 1118 (Godbold, J., dissenting); *id.* at 1122-23 (Kravitch, J., dissenting); Appellant's Principal Brief, *supra* note 17, at 7, 16-17; Appellant's Reply Brief, *supra* note 29, at 9-11 & n.3.

226. *See Shahar,* 114 F.3d at 1107 (discussing, for example, the Shahars' wedding invitations, exchange and wearing of rings, name change, and joint house purchase); *see also supra* note 29 (discussing how Shahars properly obtained "married rate" on insurance). The only point on which Shahar might conceivably be criticized on this score was that, as recounted *supra* Part I.A, she indicated her "marital status" as "engaged" and listed Francine as her "future spouse" on a personnel form filed with the Department in 1990. But since the purpose of the form was to identify any potential conflicts of interest, *see* Appellant's Principal Brief, *supra* note 17, at 8, Shahar quite properly erred (if at all) on the side of full disclosure, and since she gave an obviously female name as her "spouse," it would be implausible to think she was attempting to claim or imply a legal marriage.

227. *Shahar,* 114 F.3d at 1107. Note again the lack of quotation marks around "married." Intended? Who knows. Also curious in this light was Bowers's argument (in the course of trying to demonstrate the "public" nature of the Shahars' ceremony) that "the *event* of [Shahar's] 'wedding' [was] followed by the status of 'marriage.' Thus, Shahar's 'wedding' was followed by a permanent change in Shahar's 24-hour-a-day status." Appellee's Brief, *supra* note 19, at 44 (emphasis in original). In a legal sense, of course, the Shahars' "status" after their ceremony was and is nothing more nor less than that of a couple who have participated in a religious marriage ceremony with no legal significance whatsoever (except insofar as it has been found to warrant denial of

Capping off the muddle, the court stated that Bowers "could conclude that [Shahar's] acts would give rise to a likelihood of confusion in the minds of . . . the public . . . about her marital status."[228] The public may well be confused about such issues, but the court's own confusion is more troubling.

In essence, the Eleventh Circuit majority was just as offended as Bowers himself by Shahar's perceived transgression in daring to appropriate the term "marriage." The court's opinion reflects the cultural tug-of-war over marriage as a word and as an idea. That cultural struggle, and the cognitive dissonance at its root, are captured in public opinion polls that suggest rather widespread sympathy for granting gay couples most of the legal rights of marriage, while indicating that the public still bridles, by a decisive margin, at using the *word* "marriage" to describe committed gay relationships.[229]

That the *Shahar* case would ultimately revolve around the verbal symbolism of marriage was already apparent in the original district court decision, and even in the original district court briefs, as Professors Kenneth Schneyer and Amy Ronner observed in passages from two articles written before the decisions on appeal.[230] Professor Schneyer found it evident from the trial court papers that "the apparently simple binarism between 'married' and 'not married' is all, in one sense, that this

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employment with the Georgia Department of Law). It was the expression inherent in both the "event" and the "status" that Bowers targeted.

228. *Shahar*, 114 F.3d at 1107. To the extent the court was suggesting that such alleged public "confusion" constituted a "disruptive" effect of Shahar's acts justifying Bowers's action under the *Pickering* balancing test, the justification seems far from sufficient under a proper application of *Pickering*. *See infra* Part III.C (especially *infra* note 318).

229. *See* SULLIVAN, *supra* note 4, at xxii (citing polls indicating that Americans support inheritance rights for gay couples by a 61% to 29% margin, and spousal social security benefits by 48% to 43%, while opposing legal recognition of same-sex "marriage" by 58% to 33%).

230. *See* Kenneth L. Schneyer, *Avoiding the Personal Pronoun: The Rhetoric of Display and Camouflage in the Law of Sexual Orientation*, 46 RUTGERS L. REV. 1313, 1344-71 (1994); Amy D. Ronner, Amathia *and Denial of "In the Home" in* Bowers v. Hardwick *and* Shahar v. Bowers: *Objective Correlatives and* The Bacchae *as Tools for Analyzing Privacy and Intimacy*, 44 KAN. L. REV. 263, 299-310 (1996). Professor Ronner's article made no mention of the December 20, 1995, appellate panel decision in *Shahar*, having been completed before it was handed down. Professor Schneyer took note of the October 7, 1993, district court decision in *Shahar*, which appeared before the publication of his article, but he otherwise "deliberately avoided any mention of [it]." Schneyer, *supra*, at 1345 n.105.

lawsuit is about."[231] Professor Ronner observed that the district court, "through omission, . . . implicitly denied that Shahar's prospective relationship would have been a marriage."[232] Indeed, in Professor Ronner's view, the court treated her marriage as "a nonmarital, nonfamilial, inhuman anomaly, a *something* which the court . . . wished to isolate and banish from consciousness itself."[233]

As Judge Kravitch observed in dissent, "Shahar used words, such as 'marriage' and 'wedding,' in a generic, not a legalistic, sense," and "[s]uch generic meanings are an established part of the English language."[234] Even the otherwise

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231. Schneyer, *supra* note 230, at 1362.

> Shahar's case . . . is based on the assertion that there is a difference between a religious marriage ceremony, entered into for personal reasons of faith, and a legal marriage as controlled by the state. Bowers's case, to a large extent, is based on the converse proposition that to call oneself 'married' is necessarily to raise the legal and political issues presented by civil marriage and the state's regulation of it. Bowers's claim is that 'marriage' is essentially indivisible, that one either claims to be married or not; Shahar claims that there are different, complex meanings of marriage. . . . In this limited sense, Bowers's whole case rests on seeing human relationships and institutions as simple, while Shahar's rests on seeing them as complex.

Id.

232. Ronner, *supra* note 230, at 305 (citing, *inter alia,* Shahar v. Bowers, 836 F. Supp. 859, 863-65 (N.D. Ga. 1993)).

233. *Id.* at 307-08 (emphasis in original).

234. Shahar v. Bowers, 114 F.3d 1097, 1122-23 & n.1 (11th Cir. 1997) (Kravitch, J., dissenting) (citing WEBSTER'S NEW COLLEGIATE DICTIONARY 698 (1979) ("[G]iving 'an intimate or close union' as one definition of marriage."); *id.* at 1318 ("[N]oting that wedding is defined, *inter alia*, as 'an act, process, or instance of joining in close association.' ")); *see also* 1 NEW SHORTER OXFORD ENGLISH DICTIONARY 1701 (1993) (defining "marriage," in addition to "[l]egally recognized personal union entered into by a man and a woman," as "[a]n intimate union" without reference to gender); *id.* at 1702 (defining "married," as applied to an antique, as "put together from parts of two or more different articles, sometimes of different dates"); *id.* at 1701 (defining "marriage," *inter alia,* as "[a] married antique").

"Boston marriage" was a term commonly used in late-19th century New England for certain long-term relationships between unmarried or widowed women. While such relationships, touched upon in novels like Henry James's *The Bostonians,* were typically discreet and their sexual aspect was somewhat ambiguous and may have varied, their intense emotional significance was widely acknowledged and the women involved typically shared homes, travelled together, and slept in the same bed. The famous social reformer Jane Addams and her partner Mary Rozet Smith lived together for forty years in such a relationship. *See* FRANCIS MARK MONDIMORE, A NATURAL HISTORY OF HOMOSEXUALITY 59-61 (1996); *see also Out of the Past* (PBS-TV documentary, Oct. 1998) (describing three-decade "Boston marriage" of novelist Sarah Orne Jewett and Annie Fields).

sympathetic Judge Kravitch, however, expressed irritation at Shahar's choice of words, scolding her that "it would have been more prudent . . . to have consistently used terms, such as 'commitment ceremony' and 'partnership,' to refer to her relationship."[235] Judge Godbold, more perceptively, noted the "duality of meaning" of words like "marriage" and "wedding" and observed that

> the decision of the *en banc* court is based upon, and approves, [Bowers's] attribution to these words of only a single meaning, . . . and his perception that any other meaning is either false or non-existent. . . . The court simply adopts one perception and excludes the other as though it did not exist for Shahar and for others of her faith.[236]

The First Amendment, however, does not recognize ownership of words or ideas, at least not outside the realm of copyright, trademark, or allied doctrines, which obviously could not properly apply in this context.[237] (Yet, it may be noted only half-humorously, some kind of copyright or trademark upon the word "marriage" seems to be precisely what many opponents of same-sex marriage, whether state-recognized or not, think they are entitled to have.) This principle is so obvious as applied to ordinary words or verbalizable ideas that it seems never to have been seriously challenged in the Supreme Court. The Court has, however, squarely rejected governmental claims to, in effect, a patriotic trademark on the symbol of the American flag.[238] It has

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More recently, a high school friend of mine cheerily announced by email his "marriage by mortgage" (an apparently original coinage), on the occasion of his and his male partner's decision to buy a house together. They had never had a formal commitment ceremony, and found the house closing, with all its paperwork and signing, a somewhat surreal substitute.

235. *Shahar,* 114 F.3d at 1123 n.2 (Kravitch, J., dissenting).

236. *Id.* at 1121 (Godbold, J., dissenting).

237. Furthermore, even within the realm of copyright, one cannot claim ownership of an idea. *See, e.g.,* Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 556 (1985).

238. *See, e.g.,* Texas v. Johnson, 491 U.S. 397 (1989) (striking down prohibition on burning the flag); Spence v. Washington, 418 U.S. 405 (1974) (striking down prohibition on altering or defacing the flag by adding additional symbols, in the case at bar a "peace sign," to it); *cf.* Hornell Brewing Co. v. Brady, 819 F. Supp. 1227 (E.D.N.Y. 1993) (striking down federal statute banning use of name of revered Native American leader Crazy Horse, who was opposed to alcohol consumption, on commercial alcohol products).

also squarely rejected the argument that a particular lewd and offensive word might be banned altogether.[239]

Oddly enough, perhaps the Court's closest approach to this kind of issue occurred in another case involving an attempt by gay people to lay claim to a word imbued with deep and positive significance in our culture—albeit a case easily distinguishable since it arose in the context of commercial trademark law. In *San Francisco Arts and Athletics, Inc.* (*SFAA*) *v. United States Olympic Committee* (*USOC*),[240] the Court upheld the USOC's statutory trademark of the word "Olympic," thus allowing the USOC to deny its use to the organizers of the "Gay Olympic Games."[241] Justice Brennan protested in dissent that the result prevented the organizers from "promot[ing] a realistic image of homosexual men and women that would help them move into the mainstream of their communities."[242]

Justice Brennan also provided as good an answer as any to those who may question why people like the Shahars insist on using the word "marriage" rather than some alternative like "commitment ceremony" or "holy union." He seconded Judge Kozinski's view on the Ninth Circuit that, "just as a jacket reading 'I Strongly Resent the Draft' would not have conveyed [the] message [at issue in *Cohen v. California*[243]], so a title such as 'The Best and Most Accomplished Amateur Gay Athletes Competition' would not serve as an adequate translation of [the Gay Olympic Games'] message."[244] By the same token, the word "marriage," as already noted, carries a uniquely intense,

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239. *See* Cohen v. California, 403 U.S. 15, 23-26 (1971) (reversing man's conviction for walking through courthouse corridor wearing jacket emblazoned with words "Fuck the Draft").

240. 483 U.S. 522 (1987).

241. *Id.* at 525, 527-28. The games went on under the shortened title of the "Gay Games," which remain a popular quadrennial event to this day.

242. *Id.* at 569 (Brennan, J., joined by Marshall, J., dissenting).

243. 403 U.S. 15 (1971); *see supra* note 239.

244. *SFAA,* 483 U.S. at 569 (Brennan, J., joined by Marshall, J., dissenting) (quoting International Olympic Comm. v. San Francisco Arts and Athletics, Inc., 789 F.2d 1319, 1321 (9th Cir. 1986) (Kozinski, J., dissenting from denial of *en banc* rehearing)). It is interesting to contemplate the intense appeal of emblematic, "mainstream" words like "the Olympics" and "marriage" to a people long marginalized and mistreated. It is no coincidence that one of the most popular gay novels of all time features a romance involving an Olympic runner who participates in a marriage ceremony with his male lover. *See* PATRICIA NELL WARREN, THE FRONT RUNNER 192-95 (Wildcat Press 1995) (1974).

resonant, and emotional force in our language and culture. Many gay people find the proffered alternative terms to be pallid, unsatisfactory substitutes for "the real thing."[245] And while the First Amendment may not guarantee the right to governmental recognition of "the real thing" itself,[246] it surely guarantees the right to use the word.

Professor James Boyd White captured well in the following passage both the aspiration of speech like Shahar's and the threat posed to those who fear and oppose the ideas expressed by such speech:

> When we look at particular words, it is not their translation into statements of equivalence that we should seek but an understanding of the possibilities they represent for making and changing the world. . . . [W]ords do not operate in ordinary speech as restatable concepts but as words with a life and force of their own. They cannot be replaced with definitions, . . . and their translation into other terms would destroy their nature. Their meaning resides not in their reducibility to other terms but in their irreducibility. . . .[247]

Of course, the proposition that the expression associated with Shahar's marriage is constitutionally protected speech necessarily rests on the premise that such protection extends generally to all speech, including the "merely personal," and is not limited to the realm of political or public affairs.[248] That the

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245. As Justice Harlan wrote for the Court in *Cohen*:

> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

Cohen, 403 U.S. at 26.

246. Equal protection principles may do so. *See supra* note 2; *see also* Mark Tanney, Note, *The Defense of Marriage Act: A "Bare Desire to Harm" an Unpopular Minority Cannot Constitute a Legitimate Governmental Interest*, 19 T. JEFFERSON L. REV. 99 (1997).

247. JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING 11 (1984), *quoted in SFAA*, 483 U.S. at 570 n.33 (Brennan, J., joined by Marshall, J., dissenting).

248. Of course, as that ubiquitous saying goes, "the personal is political." *See, e.g.*, Barbara J. Cox, *A (Personal) Essay on Same-Sex Marriage*, 1 NAT'L J. SEXUAL ORIENTATION L. 87, 89 (1995), *available in* <http://sunsite.unc.edu/gaylaw/issue1/

Supreme Court has generally so applied the First Amendment, for example to artistic expression and entertainment, as noted in Part II, is not a matter of much controversy, at least outside the area of public employee speech. A distinguished line of scholars has ably made the case that the "self-fulfillment"[249] or "self-realization"[250] of the individual is properly seen as a central goal of any system protecting free expression.[251] It seems self-evident that Shahar's speech fits quintessentially into that conception.[252]

In sum, Shahar was fired not because of what she *did,* but because of what she *said* she did. What she *did* was to enter into and maintain a relationship with her lover. What she *said,* and what seems to have been viewed by the State of Georgia (through its duly elected and appointed officials) as transgressive, even subversive—on a par with burning the flag or advocating the violent overthrow of the government—was that this relationship was a marriage.

B. Daring to Speak Its Name: The Public/Private Dilemma

As noted at the end of Part II, Shahar and Bowers sharply disputed the public or private character of Shahar's marriage. Parts II and III.A have essentially argued that any such categorization should not matter, but it is worth exploring the issue further because it touches upon a dichotomy, and a dilemma, that go to the heart of much thinking and argument about sexual orientation.

Gay sexuality has historically been marked by extreme concern for secrecy and privacy, and this continues, though to a steadily lessening extent, to the present day. The cause of this concern has, of course, been the longstanding (though now diminishing) social and legal disapproval, suppression, and

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249. THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4 (1966); *see id.* at 4-7.

250. MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 11 (1984); *see id.* at 9-29; Brian C. Murchison, *Speech and the Self-Realization Value,* 33 HARV. C.R.-C.L. L. REV. 443 (1998).

251. *See* Massaro, *supra* note 132, at 46-50 (discussing application of "self-fulfillment" and "self-realization" theories to public employee free speech).

252. Part IV, *infra,* elaborates on the importance of free speech to the self-fulfillment and self-realization of gay people.

punishment of any expression of gay sexuality. This has been true for the full range of gay "expression," from the forms most easily recognizable as "speech" in classic First Amendment terms, to the milder physical gestures of affection, to actual sexual intercourse.[253] We often speak of mistreated minorities being "silenced" by their oppression, and that is surely most strikingly true of gay people, for whom speaking about their very identity or existence (let alone protesting their lot) has carried extreme danger. A poem by Oscar Wilde's lover, Lord Alfred Douglas, famously articulated this by referring to "the love that dare not speak its name."[254]

Professor Eve Kosofsky Sedgwick, in her groundbreaking book *Epistemology of the Closet,*[255] explored the contradictory dangers swirling around any gay person who dares to express his or her identity, as reflected in two notorious public employee speech cases. In *Acanfora v. Board of Education,*[256] a Maryland teacher was removed from the classroom when it was discovered he was gay, and when he publicly protested his treatment, was fired altogether.[257] As described by Professor Sedgwick, the district court upheld the firing on the grounds that "Acanfora's recourse to the media had brought undue attention to himself and his sexuality, to a degree that would be deleterious to the educational process."[258] An Ohio school guidance counselor similarly ran afoul of the approved

253. *See generally* MARTIN DUBERMAN, ABOUT TIME: EXPLORING THE GAY PAST (rev. ed. 1991); JONATHAN NED KATZ, GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A. (rev. ed 1992); HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST (Martin Duberman, Martha Vicinus & George Chauncey, Jr. eds., 1989); MONDIMORE, *supra* note 234, at 193-250.

254. Alfred Douglas, "Two Loves," 1 *The Chameleon* 28 (1894), *quoted in* EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 74 (1990). For some excellent insights into the days, not long past in America, when being lesbian or gay (especially openly so) carried extreme risk, see generally (in addition to the sources cited *supra* note 253) PHYLLIS LYON & DEL MARTIN, LESBIAN AND GAY MARRIAGE: PRIVATE COMMITMENTS, PUBLIC CEREMONIES 42-48 (Suzanne Sherman ed., 1992), *excerpted in* WILLIAM B. RUBENSTEIN, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 705-08 (2d ed. 1997) (interview with lesbian couple who became pioneering gay activists in the 1950s), and PETER M. NARDI, DAVID SANDERS & JUDD MARMOR, GROWING UP BEFORE STONEWALL: LIFE STORIES OF SOME GAY MEN (1994) (especially the interview with longtime Los Angeles activist Morris Kight, *id.* at 15-34).

255. SEDGWICK, *supra* note 254.

256. 359 F. Supp. 843 (D. Md. 1973), *aff'd,* 491 F.2d 498 (4th Cir. 1974).

257. *See id.*

258. SEDGWICK, *supra* note 254, at 69; *see also Acanfora,* 359 F. Supp. at 853-57.

public/private boundary in *Rowland v. Mad River Local School District,*[259] when she confessed her bisexuality in a private office conversation with a school secretary, only to have the information become "public" knowledge (at least within the school hierarchy) and result in her firing as well.[260] The court found Rowland's statement unprotected under *Connick* on the ground that it was not of public concern.[261]

And yet, as dangerous as it can be to come out of the closet, staying in can be equally risky. As Professor Sedgwick recounted, the Fourth Circuit in *Acanfora* disagreed with the district court's analysis and, applying *Pickering,* found "Acanfora's public disclosures to be protected speech under the First Amendment."[262] However, the appeals court affirmed the district court's decision on the ground that Acanfora had failed to reveal to school officials when he was hired that he had been a leader of a gay student group in college, which would, of course, if known, have caused the school not to hire him in the first place.[263] "The rationale for keeping Acanfora out of his classroom was thus no longer that he had disclosed too much about his homosexuality, but quite the opposite, that he had not disclosed enough."[264] Thus, "the space for simply existing as a gay person who is a teacher [was] in fact bayonetted through and through, from both sides, by the vectors of a disclosure at once compulsory and forbidden."[265]

Shahar was likewise "bayonetted through and through" by the public/private dilemma, even as she attempted to navigate it to her own benefit. As noted in Part II, Bowers taunted her with her implicit concession that her marriage was not a "matter

259. 730 F.2d 444 (6th Cir. 1984).

260. *See id.* at 446; *see also supra* notes 157, 161, 190; SEDGWICK, *supra* note 254, at 70. Justice Brennan, joined by Justice Marshall, dissented from the Court's denial of certiorari in *Rowland,* offering the first detailed argument in a Supreme Court opinion that the First Amendment and Equal Protection Clause provide protection against adverse governmental treatment based on sexual orientation. *See* Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1009-18 (1985).

261. *See Rowland,* 730 F.2d at 449; SEDGWICK, *supra* note 254, at 70.

262. SEDGWICK, *supra* note 254, at 69; *see also Acanfora,* 491 F.2d at 500-01.

263. *See Acanfora,* 491 F.2d at 501-04; SEDGWICK, *supra* note 254, at 69.

264. SEDGWICK, *supra* note 254, at 69.

265. *Id.* at 70. Professor Halley has also noted the dilemmas faced by employees like Acanfora and Rowland. *See* Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity,* 36 UCLA L. REV. 915, 959-61, 972 (1989).

of public concern," and therefore supposedly unprotected under *Connick*.[266] And indeed, Shahar seems to have been preemptively intimidated by the *Connick* bayonet from even attempting to argue that her marriage ceremony constituted protected speech. And yet she found no refuge in the "private" side of the dichotomy, for Bowers also accused her, successfully, of foisting her marriage upon the public to an excessive degree.[267] As with Rowland's speech, Shahar's expression was, on the one hand, belittled as private in the sense of unimportant and unworthy of protection, and yet, somehow, deemed to be of sufficient public concern to justify the government's revocation of both plaintiffs' public employment.

It is fascinating and instructive to analyze the ways in which Bowers and the Eleventh Circuit *en banc* majority accused Shahar of being excessively and improperly "public" in her relationship with Francine. She had the effrontery to invite people, even coworkers in the Department, to her wedding.[268] She wore a wedding ring as "an outward sign of having entered into marriage."[269] She openly, "in statements to coworkers," "represent[ed] herself to be 'married' to a person of the same sex."[270] She did not hide her marriage "when in the office, at a ballgame, or . . . in court."[271] In sum, she did not keep her marriage, as Bowers and the *en banc* majority quite directly implied she should have, a "secret."[272] She was punished, quite literally, for "daring to speak the name" of her love.

And yet, to be fair, it is not just Bowers's definition of "public" that breaks down under scrutiny, but also Shahar's definition of "private." Shahar was doubtless sincere in protesting that her marriage "was not something she sought to push into the public sphere,"[273] and that she was "not hiding

266. *See* Appellee's Brief, *supra* note 19, at 40-41.

267. *See id.* at 44-45. As a result, according to Professor Ronner, "Shahar lived in a fish bowl and thus had no private reality whatsoever. . . . In denying Shahar's private reality, in effectively divesting her of a home, the *Shahar* [district] court stripped her of her humanity." Ronner, *supra* note 230, at 307.

268. *See* Appellee's Brief, *supra* note 19, at 44.

269. Shahar v. Bowers, 114 F.3d 1097, 1107 (11th Cir. 1997).

270. *Id.* at 1108.

271. Appellee's Brief, *supra* note 19, at 44-45.

272. *Shahar,* 114 F.3d at 1107 ("These things were not done secretly, but openly."); Appellee's Brief, *supra* note 19, at 45 ("[H]er 'marriage' was no secret.").

273. Appellant's Principal Brief, *supra* note 17, at 12.

[her] relationship but simply living out her private life as we all do."[274] And yet, anyone living life in a normal manner in today's society will eventually and inevitably publicize much about his or her "private" relationships and identity. Heterosexuals do this so naturally and unself-consciously—holding hands and kissing in public, talking about spouses and children, *etc.*—that they often seem genuinely oblivious of the degree to which they constantly "come out," and even "flaunt" themselves (to use a buzzword irksomely familiar to many gay people), as heterosexual.[275]

In sum, the Shahars' marriage, like all marriages and similar relationships, was and is a complex and ambivalent mixture of public and private aspects. As Professor Schneyer asked, after surveying Shahar's and Bowers's early strategic positioning in the trial court briefs along the public/private fault-line:

> But what is a wedding, or a marriage? Certainly it is a personal and intimate thing, and frequently a religious thing; but the personal and intimate aspects of a marriage can be had without those trappings we call a wedding. . . . The wedding does something more. . . . [I]t signifies the involvement of a wider community in the relationship of the couple getting married.[276]

Professor Barbara Cox, in an essay describing her own same-sex marriage, has eloquently described the public significance of such marriages within that "wider community."[277] Professor Cox and her wife got married for seemingly much the same reasons as the Shahars: "to express

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274. Appellant's Reply Brief, *supra* note 29, at 20 n.6.

275. Indeed, Shahar's attorney, Ruth E. Harlow, has been quoted (apparently before the Eleventh Circuit panel decision) as explaining that Shahar pursued an intimate association claim under the First Amendment, rather than a "traditional privacy" claim, because she sought, not so much the right to live her life privately, as the right to "live in the public realm, just like everyone else does . . . . Shahar was doing the same thing that heterosexual people do all the time. . . . These are the kinds of things that people talk about every day, but if it happens to be in the context of a lesbian or gay relationship, it becomes a different issue. So the right to privacy just doesn't mesh with our whole theory of what the case is about." Russell, *supra* note 66, at 1530 (quoting Ruth E. Harlow, *in* ELLEN ALDERMAN & CAROLINE KENNEDY, THE RIGHT TO PRIVACY 299 (1995)).

276. Schneyer, *supra* note 230, at 1364.

277. *See* Cox, *supra* note 248, at 89-90.

the love and caring that we feel for one another, to celebrate that love with our friends and family, and to express that love openly and with pride."[278] But, responding to the arguments of some that marriage is an antiquated straitjacket that will lead to invisibility and assimilation for gay people,[279] Professor Cox pointed out that "[s]ome of the most politically 'out' experiences I have ever had happened during those months of preparing for and having that ceremony."[280] These included discussions with her sister and a faculty colleague about explaining the concept of a same-sex wedding to their children, inviting her faculty colleagues to the ceremony, explaining to more than a hundred of her law students why she had to leave town early, and even talking to clerks in jewelry stores when shopping for wedding rings.[281]

These same kinds of ordinary, day-to-day, community interactions were what got Shahar into trouble in the eyes of Bowers and the *en banc* majority. But the alternative—silence—would not merely have pushed her marriage from the public sphere to the private. "What does it mean," asked Professor Schneyer, "to demand that a person be silent about her marriage?"[282] The answer he suggested: "[I]t denies [the] marriage itself. . . . By insisting on silence, it denies community, and therefore humanity."[283] That is yet another unacceptable cost of the *Connick* public concern doctrine and the artificial public/private boundary it imposes on people like Shahar.

C. Love in the Balance: How (Not) to Apply Pickering

It remains to consider whether and how to apply *Pickering* and its venerable "balancing test" to a public employee speech claim like the one Shahar might have brought. Even though

278. *Id.* at 89.
279. *See id.* at 88-89.
280. *Id.* at 89.
281. *See id.* at 89-90. Touching humorously on the terminology issues discussed *supra* Part III.A, Professor Cox observed that she told people she was getting " 'married' because saying I was getting 'committed' just didn't quite have the right ring to it." *Id.* at 90.
282. Schneyer, *supra* note 230, at 1365.
283. *Id.* Or, as Professor Schneyer put it rather bluntly, a "marriage is not a marriage unless somebody else knows about it." *Id.*

Shahar did not in fact bring such a claim, we have a very good idea how the *en banc* Eleventh Circuit would have analyzed it under *Pickering,* since, as noted in Part I.A, all twelve judges agreed that *Pickering* applied to the intimate association claim that Shahar did bring.[284] As discussed below, the majority's application of *Pickering* was deeply problematical,[285] and, if applied in that manner to a speech claim, it would violate core principles of First Amendment law. But it is appropriate first to work through some basic, general issues concerning whether and how *Pickering* should apply in the area of off-the-job, non-job-related speech.

Shahar continued to argue before the *en banc* court that "strict scrutiny" rather than *Pickering* balancing should apply to her intimate association claim, although she maintained the choice of standards was "not decisive" since she should prevail under either.[286] She noted that "there is no routine and direct tension between a public employee's most personal associations and the employer's needs in managing a workplace."[287] In other words, such conduct simply is not job-related, and takes place fundamentally off the job. But while the point is sound, is it a convincing argument for rejecting the *Pickering* standard altogether in that context, or simply an argument for why such a claimant should ultimately prevail in the *Pickering* balance?

Justice Brennan suggested in his *Connick* dissent that

> [t]he balancing test articulated in *Pickering* comes into play only when a public employee's speech implicates the government's interests as an employer. When public employees engage in expression unrelated to their employment while away from the workplace, their First Amendment rights are, of course, no different from those of the general public.[288]

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284. *See supra* note 41.

285. *See supra* note 57 (citing *en banc* dissenters' critiques of majority's *Pickering* analysis). Toward the end of Part I.B, *supra,* it was also noted how the majority's *Pickering* analysis both reflected and magnified Bowers's discriminatory treatment of Shahar as raised in her equal protection claim.

286. Appellant's Principal Brief, *supra* note 17, at 29.

287. *Id.* at 30.

288. Connick v. Myers, 461 U.S. 138, 157 (1983) (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting).

Justice Brennan supported this statement with a "see" citation to *Pickering,* but the cited page was ambiguous at best on the issue:

> [I]n a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be.[289]

This statement occurred at the conclusion of what was, by definition, the Court's first exercise in "*Pickering* balancing," and was not given as a reason for such balancing not to "come into play" in the first place.[290]

It would seem that some form of *Pickering* balancing must of necessity come into play even in cases involving off-the-job, non-job-related speech or other protected conduct.[291] This is because the very issues whether speech or conduct is "off-the-job" or "non-job-related" are often subtle and uncertain and well-suited to the sort of fact-sensitive, case-by-case analysis inherent in *Pickering* balancing. *Pickering* thus has an appropriate threshold role in such cases.

Whether or not speech or conduct is truly "job-related" can be an especially thorny question. For example, while Shahar was surely correct that intimate personal associations will ordinarily have no relevance to job performance or working relationships, what about a case in which a police officer starts dating the daughter of a convicted felon and known organized-

289. Pickering v. Board of Educ., 391 U.S. 536, 574 (1968).

290. *See id.* at 568-74.

291. The Supreme Court has, however, eschewed *Pickering* balancing and adopted a categorical approach closely akin to strict scrutiny in striking down political patronage systems (*i.e.,* conditioning public employment on political party affiliation) for public employees and contractors falling outside certain narrow policy-making job categories. *See* O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712, 718-19 (1996); Rutan v. Republican Party, 497 U.S. 62 (1990); Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976). Of course, political affiliation is nothing more nor less than some combination of speech and expressive association, albeit a type of expression that the Court has apparently judged categorically unlikely to be job-related (as long as, presumably, it remains off the job). Justice Scalia has criticized this arguable incongruity, urging, at the very least, the application of *Pickering* in the political patronage cases. *See, e.g., O'Hare,* 116 S. Ct. at 2369-71 (Scalia, J., joined by Thomas, J., dissenting).

crime leader,[292] or in which a police chief's personal secretary marries an officer under his command?[293] The Eleventh Circuit in *Harris v. Evans*[294] addressed a challenge to a Georgia Department of Corrections rule prohibiting prison guards from making parole recommendations regarding individual prisoners to the state parole board without first clearing them with the prison warden.[295] On the one hand, such recommendations would not concern employment conditions or relationships, and (but for the challenged rule) would not even be addressed to any supervisor or fellow employee. On the other hand, such recommendations would necessarily be based on information acquired on the job, and would seem inextricably related to a guard's official duties, such as "monitoring the inmate's behavior and evaluating and reporting the inmate's comportment with regard to institutional regulations."[296]

Even the seemingly simple question whether speech takes place on or off the job may require fact-sensitive inquiry. Consider the *Rowland* case discussed in Part III.B, in which a school counselor was fired for speaking about her bisexuality in a private office conversation with a coworker.[297] In a sense, any speech occurring within the four walls of the workplace may

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292. *See* Wilson v. Taylor, 733 F.2d 1539, 1540-44 (11th Cir. 1984) (finding officer's discharge on that ground to violate his freedom of intimate association). Wiener, *supra* note 41, at 579, posited a similar hypothetical involving a police officer who "become[s] involved romantically with a known drug dealer," and noted that such an association might undermine "public confidence in the police department's ability to enforce the drug laws . . . [and] the ability of the department's officers to work together smoothly."

293. *See* McCabe v. Sharrett, 12 F.3d 1558 (11th Cir. 1994) (finding secretary's transfer to different job justified on that basis). As Wiener, *supra* note 41, at 580, observed: "Because any right that a public employee exercises may potentially disrupt the workplace and thus justify adverse employment action, *Pickering* balancing should not be limited to the free speech context."

294. 920 F.2d 864 (11th Cir. 1991).

295. *See id.* at 865-67.

296. *Id.* at 873 (Brown, J., dissenting). Judge Brown also noted in dissent that the policy was supported by concerns over the "potential for corruption . . . when a guard is in a position to do favors for an inmate without the knowledge of prison supervisors." *Id.* at 874. The *per curiam* majority in *Harris,* because of the posture of the case, found no need to address these issues and simply affirmed the district court's denial of summary judgment (sought on the basis of *Connick*) on the ground that the speech at issue was "of great public concern," dealing as it did with "the release of convicted criminals into society." *Id.* at 867-68.

297. *See supra* notes 157, 161, 190; Part III.B.

pose at least a potential threat of disruption.[298] But surely private, non-job-related comments during a break or lunch hour are of far less likely or legitimate concern to employers than speech (even away from the workplace) that directly addresses job-related matters.[299] Attempting to draw bright lines in these cases is often difficult, and may be no more productive than simply sensitively weighing in the *Pickering* balance both the spatial and subject-matter dimensions of "job-relatedness."[300]

However, if *Pickering* analysis yields the threshold conclusion that the speech at issue is neither on-the-job nor job-related—and Shahar's was neither[301]—there should be little scope for further "balancing" the public employer's alleged interests in punishing it. Rather, there should be a near-absolute presumption that the public employee cannot properly be punished for such speech. This is because it is difficult to imagine any legitimate basis for the government to concern itself with speech that takes place off the job and is simply not addressed to job performance, conditions, or relationships. This is not to say such speech may not in fact threaten some disruption of the workplace or interference with the performance of public services. It may indeed. But by far the most likely cause for any such potential disruption will be sheer hostility or adverse reactions by supervisors, coworkers, or the public at large to the *content* or *message* of the disputed speech. And that is a categorically impermissible basis to punish speech, as the Supreme Court has long emphasized in its treatment of the "heckler's veto" problem.

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298. *See, e.g.*, Rankin v. McPherson, 483 U.S. 378 (1987) (discussed *supra* note 157).

299. Indeed, the case for rejecting the *Connick* public concern standard is almost as strong in the case of on-the-job, but non-job-related speech, as in the case of off-the-job, non-job-related speech. It certainly seems inappropriate to apply *Connick* as it was in *Rowland*. *See supra* note 161. But then, as argued *supra* Part II, the *Connick* doctrine should be rejected entirely in any event.

300. That is exactly what the Court in *Rankin* did. *See* 483 U.S. at 381, 388-89 (emphasizing "manner, time, and place" of disputed speech in private conversation with employee's boyfriend and that employee's firing was "unrelated to the functioning of the office").

301. This is clear from the facts described *supra* Parts I.A and III.B. To the extent that some of Shahar's speech about her marriage might have taken place on the job (once she had started the job), such speech would have been routine and inconsequential by any nondiscriminatory standard, as argued *supra* Part III.B.

The *en banc* majority in *Shahar*, in applying the *Pickering* test, quite openly based its approval of Bowers's action, in prominent part, on "his concern about the public's reaction . . . to his having a Staff Attorney who is part of a same-sex 'marriage.' "[302] The majority also indicated that the possible impact of Shahar's marriage on "cohesion within the office"—obvious code words for a theorized negative reaction by her prospective coworkers—was a legitimate factor to consider.[303] Such reasoning flies in the face of the principle that expression may not be punished simply because "an audience . . . takes serious offense at [it]."[304] "[A] principal 'function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.' "[305] The *Berger* case discussed in Part II heeded this principle in protecting the public employee speech at issue there against the "heckler's veto." Noting that the alleged risk of disruption in that case "was caused not by the speech itself but by threatened reaction to it by offended segments of the public," the Fourth Circuit held that this "simply may not be allowed to serve as justification for public employer disciplinary action directed at that speech."[306]

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302. Shahar v. Bowers, 114 F.3d 1097, 1108 (11th Cir. 1997).

303. *Id.* at 1109.

304. Texas v. Johnson, 491 U.S. 397, 408 (1989). Of course, the *Shahar* majority so reasoned, not in the context of a speech claim (which Shahar never brought), but in the context of her intimate association claim. But allowing a "heckler's veto" was equally improper in that context, as it also was in the context of Shahar's equal protection claim, as discussed *supra* Part I.B.

305. *Johnson,* 491 U.S. at 408-09 (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)); *see also* Edwards v. South Carolina, 372 U.S. 229, 237-38 (1963); Feiner v. New York, 340 U.S. 315, 321-29 (1951) (Black, J., dissenting); *id.* at 331 (Douglas, J., dissenting) ("When unpopular causes are sponsored from the public platform, there will commonly be mutterings and unrest and heckling from the crowd. . . . But those extravagances . . . do not justify penalizing the speaker by depriving him of the platform or by punishing him for his conduct."). *Feiner,* which upheld the conviction of a street-corner speaker for "disorderly conduct," when the only (and rather weak at that) evidence of threatening conduct was on the part of a hostile surrounding crowd, was the product of a repressive era when the Court failed generally to protect basic First Amendment values. *See, e.g.,* Dennis v. United States, 341 U.S. 494 (1951) (upholding convictions of American Communist Party leaders for advocating Communist doctrine). *Feiner* was pretty much limited to its facts in *Edwards,* 372 U.S. at 236.

306. Berger v. Battaglia, 779 F.2d 992, 1001 (4th Cir. 1985); *accord* Flanagan v. Munger, 890 F.2d 1557, 1566 (10th Cir. 1989).

Adding insult to injury, the *Shahar* majority relied extensively on an earlier Eleventh Circuit case, *McMullen v. Carson,*[307] which upheld the firing of a clerical employee in a sheriff's office because he stated in a TV news interview that he was a member of and recruiter for the Ku Klux Klan.[308] The *en banc* dissents found *McMullen* easily distinguishable,[309] and commentators after *Shahar* came down expressed outrage at the comparison.[310] I agree, but at risk of taking what may seem an extremist pro-free-speech position, I have to say that I also find *McMullen* itself a deeply troubling decision.

There was no evidence in *McMullen* that the employee had ever engaged in or endorsed violence, or that his (apparently) entirely off-the-job Klan activities constituted anything other than classically protected speech and association,[311] or that they affected in any way what the court found was his "exemplary," "courteous," and "conscientious" performance of his job duties, which did not involve any direct role in law enforcement. Indeed, the news conference that got McMullen in trouble was called in order to disclaim Klan involvement in a recent act of vandalism, and was apparently the first time any of his coworkers learned of his Klan activities.[312] To infer from the history of violence by other Klan members that all Klan-related speech and association are properly punishable would be unconstitutional guilt-by-association, condemned by hornbook First Amendment jurisprudence.[313] Yet that was pretty much

307. 754 F.2d 936 (11th Cir. 1985).

308. *See id., discussed in Shahar,* 114 F.3d at 1108-09.

309. Judges Kravitch and Barkett emphasized that there was far more direct and substantial evidence of actual harm to public functions in *McMullen. See Shahar,* 114 F.3d at 1125 (Kravitch, J., dissenting); *id.* at 1131 (Barkett, J., dissenting).

310. *See, e.g.,* Lisa Keen, *Court Compares Lesbian to Ku Klux Klan Recruiter,* WASHINGTON (D.C.) BLADE, June 6, 1997, at 1.

311. Of course, even the advocacy of unlawful activity by Klan members has been held protected by the Court, as long as it does not amount to imminent incitement. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

312. *See McMullen,* 754 F.2d at 937, 939.

313. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 920 (1982) (holding mere membership in group or association with others insufficient to find individual responsible for violent or unlawful acts of group, absent evidence that individual had specific intent to further illegal group aims); *see also* Whitney v. California, 274 U.S. 357, 372-80 (1927) (Brandeis, J., joined by Holmes, J., concurring). Furthermore, the embarrassing fact must be acknowledged that, in recent years, Klan members have sometimes been peaceful and lawful in their public expression, while Klan opponents have sometimes engaged in violent and unlawful attempts to suppress Klan members'

what the Eleventh Circuit did in allowing McMullen's discharge based on public hostility to his continued employment.[314]

To be sure, the racist views of the Klan, combined with the exceptionally sensitive need of a law enforcement agency to maintain both the reality and the perception of non-discriminatory treatment of the public, made the situation in *McMullen* combustible in the extreme. The sheriff's office in that case faced the prospect of a complete breakdown in relations with the African-American community.[315] Perhaps *McMullen* does suggest the possibility of certain extreme and unusual cases in which purely off-the-job, non-job-related speech might justify employment sanctions.[316] But it underscores the importance, in public employee speech cases raising the "heckler's veto" problem, of "assessing the validity of public perceptions and the nature of the effect those perceptions would have on [the public employer]."[317] The *Shahar* majority failed utterly in that duty. Even assuming the complete validity of *McMullen* and applying an entirely

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First Amendment rights. This appeared to be the case in a march in which McMullen himself participated ten days after he was fired. *See McMullen,* 754 F.2d at 937; *see also, e.g.,* David Shepardson, *Klan Melee Cost Ann Arbor $136,000 in Damages, Overtime,* DETROIT NEWS, May 15, 1998, at C6 (describing "violent, rock-throwing protest [that] forced police to use tear gas and pepper spray to quell anti-Klan protesters"; anti-Klan protesters not only attacked Klan marchers, but also "assaulted and spat upon" a team of neutral volunteers trying to keep the peace; city officials nonetheless considered trying to bill the Klan for police costs associated with the violence).

314. *See McMullen,* 754 F.2d at 938-39. The court, applying *Connick,* seemed to assume that McMullen's speech was of public concern. *See id.* at 939.

315. *See id.*

316. Indeed, it may well be that the need for law enforcement officers to be free of racial bias is so critical that racist speech, even off the job, must be deemed inherently job-related to some degree. The Supreme Court cited *McMullen* with apparent approval in *Rankin v. McPherson,* 483 U.S. 378 (1987), stating that "clerical employees are [not] insulated from discharge where their speech, taking the acknowledged factors into account, truly injures the public interest in the effective functioning of the public employer." 483 U.S. at 391 n.18. A striking test of this issue arose recently in New York City, which fired a police officer and two firefighters for riding on a float in a Labor Day parade in blackface and "Afro" wigs, while off duty and apparently out of uniform. The float generally mocked African-Americans, even including a shockingly callous reenactment of the infamous June 1998 murder in Texas of James Byrd, Jr., a black man dragged to death behind a pickup truck. Litigation is underway. *See* Kit R. Roanne, *Police Officer Is Dismissed Over Float,* N.Y. TIMES, Oct. 11, 1998, § 1, at 37; Monte Williams, *2 Firefighters Who Rode Float in Blackface Are Dismissed,* N.Y. TIMES, Oct. 27, 1998, at B6.

317. Shahar v. Bowers, 114 F.3d 1097, 1131 (11th Cir. 1997) (Barkett, J., dissenting).

traditional form of *Pickering* balancing, the majority's decision was simply indefensible.[318]

In one of the most deservedly oft-quoted passages in the United States Reports, Justice Jackson summarized, in a decision handed down on Flag Day at the height of World War II, why schoolchildren could not be forced to salute the American flag: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."[319] Yet that is precisely what Attorney General Bowers did in dismissing Robin Joy Shahar from public service for daring to sanctify her love with the word "marriage."

IV. SOME CONCLUDING THOUGHTS ON THE FIRST AMENDMENT AND GAY LIBERATION

The Eleventh Circuit, like American society at large, seems of two minds (if not more) on the subject of gay rights. This is not just reflected in the deep split on the *en banc* court in *Shahar.* Almost exactly a month before sending Shahar packing, a three-judge panel of the Eleventh Circuit strongly and unanimously upheld the free speech rights of gay college students in *Gay Lesbian Bisexual Alliance v. Pryor.*[320] The author of *Pryor* was Judge Joel F. Dubina, and he was joined by Judge Susan H. Black—both Republican appointees and members of the *Shahar* majority.[321]

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318. There is not much to add in this regard to what the *en banc* dissents have said. Judge Barkett, for example, noted that Bowers simply did not satisfy his "evidentiary burden [under *Pickering*] to offer credible predictions of harm or disruption based on more than mere speculation." *Id.* at 1133-34. And even assuming Georgia could have properly enforced its "sodomy" law (since struck down by the Georgia Supreme Court, *see supra* note 70) only against gay people, there was simply no reasonable basis for believing, based on Shahar's marriage, that she was any more likely to violate Georgia law than any heterosexual employee. *See, e.g., Shahar,* 114 F.3d at 1128 n.6 (Birch, J., dissenting) ("I trust that no one would find unreasonable . . . the assumption that Georgia's fornication law is frequently disregarded by the citizenry of Georgia or perhaps even the unmarried staff of its Department of Law.").

319. West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

320. 110 F.3d 1543 (11th Cir. 1997). Alabama State Attorney General Pryor did not seek *en banc* review or a writ of certiorari from the Supreme Court.

321. Judge Dubina was appointed to the district court in 1986 by President Reagan and elevated to the Court of Appeals in 1990 by President Bush. Judge Black was appointed a district judge in 1979 by President Carter and also elevated to the Court of Appeals by

Judge Dubina's opinion in *Pryor* struck down a recently-enacted Alabama state law prohibiting any college student organization directly or indirectly receiving public funds or using public facilities (as almost all do) from (1) "foster[ing] or promot[ing] a lifestyle or actions prohibited by [Alabama's] sodomy and sexual misconduct laws,"[322] or (2) "directly or indirectly . . . permit[ting] or encourag[ing] its members or encourag[ing] other persons to engage in any such unlawful acts or provid[ing] information or materials that explain how such acts may be engaged in or performed."[323] The court found this to be "blatant viewpoint discrimination" and dismissed as "feeble" the Alabama State Attorney General's arguments to the contrary.[324] Finding that "[w]e would have to ignore the Supreme Court's instructions and rewrite the statute for it to pass constitutional muster," the court found it invalid on its face.[325]

Pryor is an important free-speech and gay-rights precedent. It built with alacrity, and in a controversial area, upon the speech-protective potential suggested by the Supreme Court's landmark 1995 decision in *Rosenberger v. Rector and*

President Bush, in 1992. The third member of the *Pryor* panel, who also joined Judge Dubina's opinion, was Senior District Judge William C. O'Kelley of the Northern District of Georgia, sitting by designation. *See Pryor*, 110 F.3d at 1545 n.*. He was appointed by President Nixon in 1970.

322. ALA. CODE § 16-1-28 (1995).

323. *Id.*, *quoted in Pryor*, 110 F.3d at 1545. Alabama's "sodomy" law, like Georgia's recently-struck-down law (*see supra* note 70), prohibits both heterosexual and homosexual oral and anal sex, but the Alabama law applies only to "persons not married to each other," thus exempting a heterosexual married couple, but presumably covering, say, a sex orgy involving two such couples. *See Pryor*, 110 F.3d at 1545 (quoting ALA. CODE § 13A-6-60(2) (1994)). As a result, the Gay Lesbian Bisexual Alliance at the University of South Alabama, alone among more than 100 student groups, was denied various routine university privileges and types of funding. The university attempted to accommodate the group within the framework of the law, but then-Alabama State Attorney General (now U.S. Senator) Jefferson Sessions ruled that it could not receive funds under the law, without specifying how or why it violated the law. *See id.* at 1545-46.

324. *Pryor*, 110 F.3d at 1549.

325. *Id.* at 1550. The Alabama law included a proviso which disclaimed any intended impact on purely "political advocacy of a change in the sodomy . . . laws of this state." *Id.* at 1545 (quoting ALA. CODE § 16-1-28(c) (1995)). The court found that entirely inadequate to save the law, however, in view of case law protecting the right to advocate illegal conduct, and because, even as so qualified, the other parts of the statute were hopelessly broad. *See id.* at 1547-48.

Visitors of University of Virginia[326]—which, ironically, upheld the right of a conservative Christian student newspaper to receive university funding on an equal basis with other student groups.[327] *Pryor* also forms a fascinating historical sequel to one of the earliest major gay-rights victories in the federal courts—the Eighth Circuit's decision two decades ago in *Gay Lib v. University of Missouri*.[328] The free speech principles so crisply enunciated and applied in *Pryor* in 1997 were, however, far from settled in 1977.

In *Gay Lib*, as in *Pryor*, the court upheld the right of a gay student group at a public university to meet without restriction or discrimination based on the content of its speech, and over the objection that its speech would promote violations of a state "sodomy" law.[329] But it did so in a two-to-one panel decision, with the deciding vote cast by then-Judge, later F.B.I. Director, William H. Webster, in a notably reluctant concurring opinion.[330] The panel decision just barely escaped the *Shahar* panel's fate when the petition for rehearing *en banc* failed by a tie vote on the full Eighth Circuit.[331] The Supreme Court then denied certiorari over the lengthy dissent of Justice Rehnquist (joined, oddly enough, by Justice Blackmun, the great dissenter in *Hardwick*), who declared that "our past precedents do not conclusively address the issues central to this dispute."[332]

What a difference twenty years makes! As Chief Justice, Rehnquist formed part of the five-to-four majority in *Rosenberger*,[333] and a conservative panel of a conservative appeals court then unanimously and forcefully applied that decision to uphold the 1990s version of gay liberation on

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326. 515 U.S. 819 (1995).

327. *See id., discussed in Pryor*, 110 F.3d at 1548-50.

328. 558 F.2d 848 (8th Cir.), *reh'g en banc denied by equally divided court*, 558 F.2d 859 (8th Cir. 1977), *cert. denied sub nom.* Ratchford v. Gay Lib, 434 U.S. 1080 (1978).

329. *See Gay Lib*, 558 F.2d at 850-57.

330. *See id.* at 857 (Webster, J., concurring) (opining that the university "will survive even the most offensive verbal assaults upon traditional moral values"); *see also id.* at 859 (Regan, J., dissenting) ("In my opinion, the University was entitled to protect itself and the other students on campus, in this small way, against abnormality, illness and compulsive conduct of the kind here described in the evidence.").

331. *See id.* at 859; *see also id.* at 859-61 (Gibson, C.J., joined by Henley and Stephenson, JJ., dissenting from denial of *en banc* rehearing).

332. Ratchford v. Gay Lib, 434 U.S. 1080, 1082 (1978). Chief Justice Burger also indicated that he would have granted certiorari. *See id.* at 1080.

333. 515 U.S. at 822.

campus. And indeed, the intervening generation has seen a number of striking victories for the freedom of speech of gay people.

In perhaps the most important state court decision ever on gay rights, the California Supreme Court ruled in 1979, in *Gay Law Students Association v. Pacific Telephone and Telegraph Company (PT&T),*[334] that discrimination on the basis of sexual orientation was illegal in all public and most private employment.[335] The basis for the court's decision was, in critical part, two sections of the California Labor Code originally passed to guarantee freedom of political speech for both public and private employees.[336] Justice Tobriner's majority opinion held that "[t]hese statutes cannot be narrowly confined to partisan activity," and declared:

> A principal barrier to homosexual equality is the common feeling that homosexuality is an affliction which the homosexual worker must conceal from his employer and his fellow workers. Consequently one important aspect of the struggle for equal rights is to induce homosexual individuals to "come out of the closet," acknowledge their sexual preferences, and to associate with others in working for equal rights.[337]

In 1984, the Tenth Circuit ruled in *National Gay Task Force v. Board of Education of Oklahoma City (NGTF)*[338] that public school teachers could not be barred, pursuant to an Oklahoma law, from "advocating, . . . encouraging or promoting . . . homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees."[339] The court, noting that this would put at risk "[a] teacher who went before the Oklahoma legislature . . . to urge the repeal of the Oklahoma anti-sodomy

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334. 595 P.2d 592 (Cal. 1979).

335. *See id.* The full import of the *PT&T* case was confirmed in a 1986 opinion by the California State Attorney General, and the California Legislature codified the decision in 1992. *See* RUBENSTEIN, *supra* note 254, at 438-40; 1992 Cal. Stat. ch. 915, § 2 (codified at CAL. LABOR CODE § 1102.1).

336. *See PT&T,* 595 P.2d at 609-11 (citing CAL. LABOR CODE §§ 1101-1102).

337. *Id.* at 610.

338. 729 F.2d 1270 (10th Cir. 1984), *aff'd by equally divided Court,* 470 U.S. 903 (1985) (Powell, J., not participating).

339. 70 OKLA. STAT. § 6-103.15(A)(2), *quoted in NGTF,* 729 F.2d at 1272.

statute," found the law overbroad and unconstitutional on its face under the First Amendment.[340] It is noteworthy that both the *PT&T* and *NGTF* cases had ramifications well beyond a mere abstract right to speak freely, but heralded important, substantive protections for gay people in employment—an area regarded by many as a central concern of the modern gay-rights movement.[341] One federal court even used the First Amendment to protect a high school boy's right to take his boyfriend to the senior prom.[342]

One of the most important victories for gay speech was a case which, ironically, involved a defeat for the particular gay litigants involved. The Supreme Court's 1995 decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*[343] rejected a gay organization's attempt to use a state non-discrimination law to participate in Boston's St. Patrick's Day Parade, which the Massachusetts courts had found to be a privately organized exercise of free speech and assembly.[344] Justice Souter's unanimous opinion for the Court was the first in history to consistently use the words "gay" and "lesbian" rather than "homosexual."[345]

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340. *NGTF*, 729 F.2d at 1274. The court briefly discussed *Pickering* and noted that the State had "made no . . . showing" that the speech covered by the law would necessarily cause any "material or substantial interference or disruption in the normal activities of the school." *Id.* The court did not mention *Connick* at all, apparently because it was obvious the law covered speech of public concern. *NGTF*, like *Gay Lib*, was a two-to-one panel decision. *See id.* at 1276 (Barrett, J., dissenting) (objecting that majority was allowing teachers to "incit[e] school children to participate in the abominable and detestable crime against nature").

341. Many would regard passage of the proposed federal Employment Non-Discrimination Act (ENDA)—which came within a single vote of passage in the U.S. Senate in 1996—as the single highest priority of the movement. *See* Jonathan Weisman, *Close Senate Vote on Jobs Bill Buoys Gay Rights Supporters*, 54 CONG. Q. WKLY. REP. 2597 (Sept. 14, 1996); RUBENSTEIN, *supra* note 254, at 466-68 (providing text of bill).

342. *See* Fricke v. Lynch, 491 F. Supp. 381 (D.R.I. 1980); *see generally* AARON FRICKE, REFLECTIONS OF A ROCK LOBSTER: A STORY ABOUT GROWING UP GAY (1981).

343. 515 U.S. 557 (1995).

344. *See id.* at 566. The gay group called "GLIB" declined to challenge that finding before the Supreme Court. The case also did not address the very important issue of the city's obligation to act impartially in granting parade permits to the traditional parade organizers, GLIB, or any other private group that might seek to celebrate St. Patrick's Day. *See id.*

345. "Homosexual" is not generally regarded as a slur, even by gay people, but it is regarded with distinct distaste by many gay people. Despite its spurious "scientific" aura, it is an awkward, hybrid neologism coined by German psychologists in the late 19th century to label what they viewed as a pathological condition; "gay" as a term

In properly recognizing that the homophobic message conveyed by the parade organizers' exclusion of the gay group fell within First Amendment protection, Justice Souter clarified a principle of free expression that will serve gay people well.[346] Indeed, it has already done so. In a somewhat farcical stunt in 1994, an anti-gay group called "Normal People," led by former San Diego Mayor Roger Hedgecock, attempted to join the San Diego gay pride parade, and, when rejected, sued under the city's human rights ordinance. The lawsuit was abandoned after *Hurley* was decided.[347]

But *Hurley* reaches farther still. Justice Souter's opinion validated, as lying at the core of First Amendment protection, speech that—even though sometimes "not wholly articulate"[348]—proclaims the innermost identity of the speaker. Justice Souter recognized that gay people "come out" and march in parades for the simple but transcendent purpose of "celebrat[ing] [their] identity as openly gay, lesbian, and bisexual . . . [and] to show that there are such individuals in the community."[349]

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relating to sexuality actually has far older linguistic roots. *See* Sherman, *supra* note 12, at 122-23 & n.7; JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY 42-44 & n.6 (1980). *See generally supra* note 12 (discussing linguistic use of various terms). The first prominent use of "gay" as a reference for homosexuality in mainstream American culture occurred more than 60 years ago in (of course) a Hollywood screwball comedy, when Cary Grant, caught wearing a frilly bathrobe after Katharine Hepburn hides his clothes, exclaims sarcastically, "I just went *gay* all of a sudden!" *Bringing Up Baby* (RKO Radio Pictures, 1938), *cited in* BOSWELL, *supra,* at 43 n.6.

346. *See Hurley*, 515 U.S. at 574-75. For a fascinating analysis of the way in which Justice Souter, through his narrative presentation of the facts, brought to light the process of "self-realization" going on in the mutually opposed speech of the parade organizers and the gay group, see Murchison, *supra* note 250, at 457-61.

347. *See* RUBENSTEIN, *supra* note 254, at 394.

348. *Hurley*, 515 U.S. at 574.

349. *Id.* at 570. As Professor Eskridge has noted, "*Hurley* . . . is an eloquent precedent for the proposition that the state cannot censor identity speech. If gays have the right to express their sexual orientation, straights have a right to express their disapproval." William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2457-58 (1997). *But see id.* at 2461-62 (criticizing *Hurley* for "obscur[ing] th[e] collision" between the "identity speech . . . implicated on both sides of the controversy," and for paying insufficient attention to "the nondiscrimination principle" implicated by the case); Darren Lenard Hutchinson, *Accommodating Outness:* Hurley, *Free Speech, and Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85 (1998) (arguing that *Hurley* endangers nondiscrimination protections for sexual minorities by problematically distinguishing between expression of sexual identity and identity itself).

Hurley underscores that it is both wrong constitutionally and hopeless philosophically to rigidly subdivide speech along lines of personal versus political or public versus private. In the struggle for gay rights, the personal has indeed become the political[350]—and not by any choice of gay people. Shahar simply sought to live her life. It was Bowers, on behalf of the State of Georgia, who deemed her life a public issue warranting denial of public employment.

For gay people, speech has been, if anything, an even more important device for social change than it has been for other minority groups who have taken advantage of American liberty to press America toward greater justice. Sexual orientation, lacking the visibility of race or gender as a characteristic, has been defined largely through speech.[351] It is through "coming out"—a quintessential speech act—that gay people identify themselves.[352] Often wounded by speech, beginning with playground epithets heard as children, gay people have proven adept at seizing the reins of linguistic discourse and using speech to turn the tables on their opponents. This is evident in the happily widespread use of the word "gay" itself, the adoption of "marriage" by people like the Shahars, and even the recent reclaiming of "queer" as a term of aggressive, in-your-face pride.[353]

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350. *See supra* note 248.

351. *See* Nan D. Hunter, *Identity, Speech, and Equality,* 79 VA. L. REV. 1695, 1718 (1993). Sexual behavior reflecting orientation usually occurs in private, and for the many gay people who, at various times and for various reasons, choose to be celibate, speech may be the *only* manifestation of the identity that they internally experience as fundamental, but which otherwise might remain invisible and unknown to others. Indeed, Professor Hunter carried this point even further, arguing that "[s]elf-identifying speech does not merely reflect or communicate one's identity; it is a major factor in constructing identity. Identity cannot exist without it." *Id.*

352. *See generally* Eskridge, *supra* note 349, at 2438-47.

353. On "gay," see discussion *supra* notes 12, 345. On "queer," see Sherman, *supra* note 12, at 123 n.6:

> This seeming revival of an old pejorative term is, in fact, an effort . . . to seize from . . . adversaries the naming initiative (and thereby the power that the act of naming represents), so that a weapon once used against lesbians and gays now becomes a lesbian and gay weapon and an instrument of their self-realization.

Id. As an anonymous pamphlet distributed at a New York pride parade argued: "Being queer is not about a right to privacy; it is about the freedom to be public, to be just who we are. . . . Using 'queer' is a way of reminding us how we are perceived by the rest of the world." Anonymous Queers, *Queers Read This* (1990), excerpted in RUBENSTEIN, *supra*

I am certainly not the first scholar to suggest the central importance of free speech in the lives of gay people, and more particularly, in legal strategies to advance gay rights. Professors Nan Hunter, David Cole, and William Eskridge, for example, have made similar arguments.[354] Professor Janet Halley has also noted the successes achieved in litigating gay rights under the First Amendment,[355] though, like me, she has not been slow to criticize decisions that "are simply bad first amendment law."[356] Recognizing that "[t]he mere disclosure of one's gay, lesbian, or bisexual identity ineluctably accumulates political significance,"[357] Professor Halley has suggested that an analysis carefully distinguishing between identity-related speech on the one hand, and nonspeech conduct on the other, might support heightened protection for gay identity even in the face of rulings like *Hardwick*.[358] However, I may be the first scholar to articulate at length, in light of a lawsuit like Shahar's, how freedom of speech can (or should, at least) empower gay people to claim an equal stake in traditional social institutions and the very language signifying them.

Professor Toni Massaro, however, dashed some cold water on any First Amendment fixation in the course of an article suggesting general avoidance of what she called "thick doctrinal arguments" based on appeals to freedom of speech, privacy, association, or heightened equal protection scrutiny.[359] Rather, she suggested reliance on "thin" arguments that invite minimal rationality review and thereby "encourage judges and lawmakers to challenge their own beliefs and feelings about homosexuality"—in other words, arguments like those that

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note 254, at 79-81; *see also* Steve Silberman, *We're Teen, We're Queer, and We've Got E-Mail,* WIRED, Nov. 1994, at 76, *excerpted in* RUBENSTEIN, *supra* note 254, at 293-97.

354. *See generally* Cole & Eskridge, *supra* note 174; Hunter, *supra* note 351; *see also* Jeffrey G. Sherman, *Love Speech: The Social Utility of Pornography,* 47 STAN. L. REV. 661 (1995) (criticizing antipornography censorship advocates and praising value of gay male erotica in promoting self-realization of gay men); Bobbi Bernstein, Note, *Power, Prejudice, and the Right to Speak: Litigating "Outness" Under the Equal Protection Clause,* 47 STAN. L. REV. 269 (1995) (urging more attention to gay people's free speech interests under the fundamental rights strand of heightened equal protection scrutiny).

355. *See, e.g.,* Halley, *supra* note 265, at 968-70 (discussing *NGTF* case).

356. *Id.* at 972.

357. *Id.* at 973.

358. *See id.* at 973-76.

359. Toni M. Massaro, *Gay Rights, Thick and Thin,* 49 STAN. L. REV. 45, 47-48 (1996) (citing Romer v. Evans, 517 U.S. 620 (1996)).

prevailed in *Romer v. Evans*.[360] It is an intriguing thesis, and it is difficult to gainsay that "[a]s an all-encompassing metaphor or a complete theory of constitutional rights for gays, lesbians, and bisexuals, [freedom of expression] falls far short."[361]

Rectifying *Hardwick* and the law of privacy would, for example, be an essential element of any such "complete theory." And it appears unlikely that free speech arguments will persuade the courts to right the grotesque injustice of the military gay ban. This despite the fact, as Judge Reinhardt's dissent in a recent Ninth Circuit case demonstrated, that the bizarre, so-called "Don't Ask, Don't Tell" policy punishes self-identifying speech by gay service members in a manner surely unthinkable outside the military context.[362]

But *Pryor* illustrates that when First Amendment doctrine develops in a coherent, speech-protective manner in the first place (as it generally has outside such areas as military service or public employee rights), it provides a relatively secure basis

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360. *Id.*

361. *Id.* at 63. Well, perhaps not *far* short, as this Article suggests. It should be noted that Professor Massaro's reservations about a "free speech strategy" for litigating gay rights are based, in significant part, on the very *Connick* doctrine which she and I have both criticized; to that extent, we are very much in accord. *See id.* at 61 & n.84; discussion *supra* Part II. Professor Massaro also argues that

> there is something unsatisfying and even distasteful about recasting all same-sex conduct as political speech or expressive conduct in a First Amendment sense. Such a move ironically reinforces the pernicious ways in which society tends to treat being "out" as necessarily political or as an attention-getting antic. For some advocates, the point of pursuing gay rights is to undermine this popular tendency to treat gay and lesbian couples as spectacles; the point is to defy treatment of a gay couple's arm-in-arm stroll as a parade, or their commitment vows as a soapbox oration.

Massaro, *supra* note 359, at 62. *Connick* aside, however, free speech protections have long been extended, as discussed in this Article, beyond the "political" or "public" sphere, though admittedly in an uneven and incomplete way (and a key point of this Article is to argue that they *should* be so extended more consistently and generously). And, as suggested above in text, it is not gay people or gay rights advocates, but rather their opponents, who have politicized gay sexuality, in a way that unavoidably implicates First Amendment rights and calls for a First Amendment defense.

362. *See* Holmes v. California Army Nat'l Guard, 124 F.3d 1126, 1137-40 (9th Cir. 1997) (Reinhardt, J., dissenting); *see also* Massaro, *supra* note 359, at 61 & nn.86-87 (noting weak enforcement of First Amendment in military context); Francisco Valdes, *Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct*, 27 CREIGHTON L. REV. 381 (1994) (comprehensive overview and analysis of modified gay ban codified in 1993); Kurt D. Hermansen, Comment, *Analyzing the Military's Justifications for Its Exclusionary Policy: Fifty Years Without a Rational Basis*, 26 LOY. L.A. L. REV. 151 (1992) (comprehensive overview and analysis of pre-1993 policy).

on which even judges who may be personally unsympathetic are likely to support well-founded gay rights claims. First Amendment law has an advantage in that regard over constitutional doctrines dealing with substantive due process or privacy, because of the relatively uncontested grounding of free speech rights in constitutional text and history. As *Hardwick* illustrates, substantive due process or privacy rights have proved dangerous terrain on which to litigate gay rights, because the underpinnings of the doctrine are viewed as suspect by so many judges, and because, to the extent it has developed in the case law, it has remained far more incoherent and malleable than First Amendment doctrine.[363]

The latter has developed a fairly logical, resilient, and even elegant (if complex) superstructure. And, as Professor Massaro concedes, the Court's protection of free speech has recently been quite "robust."[364] Indeed, notwithstanding the generally illiberal trend of the Rehnquist Court and the flaws in public employee speech law discussed in this Article, I am mostly quite sanguine about the likely future state of free speech protection by the Court[365]—in sharp contrast to my deep disquiet about other areas, such as constitutional criminal procedure. Furthermore, *Pryor* and other cases demonstrate that gay-rights claims not only can prosper under First Amendment doctrine, but that (when made) they have pushed and prodded the courts to clarify and expand that doctrine in ways benefitting free expression in general. It has been, on the whole, a mutually beneficial interaction.

Yet, because of the incoherent and impoverished state of constitutional protection for public employee speech, and Shahar's consequent avoidance of that issue, the Eleventh

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363. The Court's doctrinal contortions in the abortion area are one illustration. For example, the Court in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), maintained that it had "reaffirmed" *Roe v. Wade*, 410 U.S. 113 (1973), when in fact it eviscerated most of *Roe*'s analysis and flatly overruled two critical post-*Roe* cases: *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

364. *See* Massaro, *supra* note 359, at 58-59 & nn.73-74.

365. The Court's seven-to-two decision (unanimous in essential result) in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (striking down restrictions on "indecent" speech over the Internet), was deeply reassuring because of the way it sturdily applied established, speech-protective doctrine in a new, unfamiliar, and (for many) bewildering technological context.

Circuit was unable to draw the obvious connection between *Shahar* and its month-old precedent in *Pryor*. Both cases, after all, fundamentally involved the question whether the government may withhold a privilege granted to others on the basis of speech concerning or expressing a gay identity. It appears that public employees, gay or straight, must await the day when the Supreme Court will bring the law governing their rights into line with the deeper First Amendment principles it has, on the whole, so honorably espoused.