

HOMOSEXUAL DISCRIMINATION AND GOVERNMENT EMPLOYMENT: *SHAHAR V. BOWERS*—THE GOVERNMENT EMPLOYERS’ SHIELD OF PUBLIC ANIMOSITY

INTRODUCTION

Homosexual discrimination is a disease in this country.¹ In both the public and private sectors, individuals and businesses legally discriminate against homosexuals in employment, public housing, and public accommodations.² Moreover, the Supreme Court upheld state laws prohibiting same-sex sodomy in *Bowers v. Hardwick*.³ Because of the lack of adequate protection from civil rights statutes and from the courts, homosexuals must fight for individual rights on every front.

Homosexuals have instigated grass roots campaigns to fight this class-wide discrimination. The 1996 decision by the Hawaii Supreme Court in *Baehr v. Leulu*, for example, held that denial of same-sex marriage licenses potentially violates Hawaii’s constitution.⁴

1. In five major cities that kept records of hate crimes, including murder, against those perceived to be gay, there was a 127% increase in anti-gay violence between 1988 and 1993. See AMERICAN CIVIL LIBERTIES UNION, BRIEFING PAPER 18 LESBIAN AND GAY RIGHTS 2 (1996) [hereinafter AMERICAN CIVIL LIBERTIES UNION].

2. See MOHR, *infra* note 180, at 173.

3. 478 U.S. 186, 196 (1986) (upholding Georgia’s prohibition of homosexual sodomy).

4. *Baehr v. Lewin*, 852 P.2d 44 (1996) (evaluating the prohibition of same-sex marriages under a “strict scrutiny” standard), *reh’g granted in part* 875 P.2d 225 (Haw. 1993). After rehearing, the trial court determined that denial of same-sex marriage failed to satisfy the Hawaii Supreme Court’s strict scrutiny standard. *Baehr v. Miiike*, No. 91-1394, 1996 WL 694235, at *21 (Hawaii Cir. Ct. Dec. 3, 1996). On April 29, 1997, “[b]oth houses of the Hawaii legislature . . . approved a constitutional amendment that would expand the power of state

Although *Baehr* represented a partial victory for the homosexual movement, it also instigated much anti-gay legislation. Since Hawaii's decision, legislators in 49 states have proposed prohibitions of same-sex marriages, and have succeeded in 25 of those states.⁵ Likewise, the United States Senate quickly passed the Defense of Marriage Act ("DOMA"), which permitted states to refuse to recognize same-sex marriages performed in other states.⁶

Efforts against employment discrimination are at the forefront of the homosexual rights agenda as most individuals in a free-market economy need employment to survive. In 1996, the United States Senate considered employment discrimination against homosexuals when it voted on the Employment Non-Discrimination Act ("ENDA").⁷ Notwithstanding the ardent support of civil rights activists, ENDA failed by one vote to pass into legislation.⁸ Compounding this defeat, only 9 states have passed legislation similar to ENDA that makes it illegal to revoke a person's employment because of actual or perceived sexual orientation.⁹ Because federal and state legislatures have failed to protect adequately homosexuals' employment, homosexuals have taken the fight to the courts to protect their rights.

In this anti-gay climate, the U.S. Court of Appeals for the

lawmakers to restrict marriages to opposite-sex couples, while also granting lesbian and gay couples a portion of the benefits available to married couples." See AMERICAN CIVIL LIBERTIES UNION, April 1997 Press Releases, *Hawaii Sends Constitutional Amendment to Voters to Ban Lesbian and Gay Marriages* (Apr. 29, 1997) <<http://www.aclu.org/news/n042997b.html>>.

5. See AMERICAN CIVIL LIBERTIES UNION, *Lesbian and Gay Rights: Marriage, Statewide Anti-Gay Marriage Laws* (last modified Jan. 1998) <<http://www.aclu.org/Issues/gay/gaymar.html>>. The states that have passed anti-gay marriage laws in response to the *Baehr* decision are: Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Maine, Michigan, Minnesota, Missouri, Mississippi, Montana, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah and Virginia. See *id.* In 1996, for example, the Georgia Legislature passed a bill that prohibited same-sex marriages and denied recognition of same-sex marriages licensed by other states. GA. CODE ANN. § 19-3-3.1 (1998).

6. 1 U.S.C. § 7 (Supp. II 1996).

7. S. 2056, 104th Cong. (1996). Proponents reintroduced the Act in 1997. S. 869, 105th Cong.

8. S. 2056, 142 CONG. REC. 10, 129-39 (daily ed. Sept. 10, 1996).

9. See AMERICAN CIVIL LIBERTIES UNION, *supra* note 1, at 1. "Nine states, the District of Columbia, and over 200 municipalities . . . ban homosexual discrimination in employment." *Id.* These states are: California, Connecticut, Hawaii, Massachusetts, Minnesota, New Jersey, Rhode Island, Vermont and Wisconsin. See *id.*

Eleventh Circuit, sitting *en banc*, held that a government employer could permissibly revoke an employment offer to a lesbian due to her sexual orientation.¹⁰ The court in *Shahar v. Bowers* concluded that the government employer's interest in maintaining a non-controversial office outweighed the employee's First Amendment right to intimate association.¹¹ *Shahar's* significance lies in the court's tacit approval of apparent public animosity toward homosexuals as a justification for the discriminatory decision by the government employer.

Denying homosexuals equal employment opportunities because of their sexual orientation amounts to denying them their constitutional rights on a class-wide basis. This discrimination is a regressive step in the civil rights movement. The only potential benefit of the *Shahar* decision is the possibility that the heterosexual majority will realize the widespread discrimination aimed at homosexuals and, perhaps, push for adequate legislation putting homosexuals on an equal footing in employment matters with the rest of the public.

This note analyzes the *Shahar* case in terms of government employment in general and in terms of the public perception of homosexuals as an unconstitutional justification for government employment decisions in particular. Part I examines the judicial doctrine of First Amendment rights and government employment and establishes the background of judicial doctrine under *Pickering v. Board of Education* and its progeny, including the general factors derived from these cases. Part II of the note begins by describing in detail the majority opinion from the *Shahar* case and also delineates its concurring and dissenting opinions as these opinions relate to public perception of homosexuals. Part III compares the majority's opinion in *Shahar* with the case law detailed in Part I and with the dissenting opinions in Part II. Part IV proposes that *Shahar* prevents homosexuals from having equal government employment opportunities, which denies homosexuals their First Amendment rights. Finally, the conclusion analyzes the implications of *Shahar* in reference to Parts III and IV of the note, and suggests that

10. *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998). See *infra* notes 108-25 and accompanying text.

11. *Id.* See *infra* notes 112-25 and accompanying text.

employment protection for homosexuals should come not only from legislatures, but also from the courts.

I. HISTORY

A. The First Amendment and Government Employment

In *Pickering v. Board of Education*, the United States Supreme Court addressed the conflict between a government employer's interests in maintaining an efficient and productive office and a government employee's First Amendment right to freedom of speech.¹² The Board of Education for a high school in Illinois dismissed an instructor because he sent a letter to a local newspaper, in connection with a proposed tax increase that criticized past allocation of funds by the Board.¹³ The Board claimed that the letter was "detrimental to the efficient operation and administration of the schools of the district," and that the relevant Illinois statute required the instructor's dismissal.¹⁴ The instructor argued that the First Amendment right of free speech protected his writing the letter.¹⁵

The Court held that, absent proof of false statements, a teacher's exercise of free speech on matters of public concern does not justify his dismissal from public employment.¹⁶ The Court reached its holding by balancing the First Amendment interests of the teacher, as

12. 391 U.S. 563 (1968).

13. *See id.* at 564. In December 1961, the voters passed a Board proposal that raised \$5,500,000 to build two new schools within the district. *Id.* at 565. In May and September 1964, the taxpayers rejected two other Board proposals to raise additional funds. *Id.* at 566. Marvin Pickering, an instructor for the school district, wrote a letter to a local newspaper after the funding proposals failed. *Id.* The letter criticized the Board's handling of the 1961 bond issue proposals and its allocation of funds between the school's educational and athletic programs. *Id.* The letter also accused the superintendent of attempting to prevent teachers from criticizing or opposing the bond issue proposal. *Id.* The Board dismissed Pickering for publishing the letter in a local newspaper. *Id.*

Pursuant to Illinois law, the Board held a hearing on the dismissal and found the statements in Pickering's letter to be false. The Board failed to introduce evidence that the letter adversely affected the community or the administration. *Id.* at 566, 567. The Illinois courts, including the Illinois Supreme Court, held that Pickering's dismissal was constitutional and affirmed the Board's dismissal of Pickering. *Id.* at 565, 567. Pickering appealed to the United States Supreme Court on the free speech claim. *Id.* at 565.

14. *Id.* at 564-65.

15. *Id.* at 565.

16. *Id.* at 574.

a citizen, against the state's interests, as an employer, in promoting the effectiveness of the public service rendered through its employees.¹⁷

According to the Court's reasoning, the instructor's statements were not directed toward any person with whom the instructor had close contact in the course of his employment.¹⁸ Furthermore, the Court recognized that the relationship between teachers and the Board lacked personal loyalty.¹⁹ In dictum, however, the Court noted the possibility that, for some positions in government employment, even true statements made by an employee might provide proper grounds for dismissal.²⁰

The Supreme Court carved out an exception to the *Pickering* rule in *Elrod v. Burns*.²¹ In *Elrod*, a county sheriff's office discharged Republican non-civil-service employees because they were not affiliated with or sponsored by the newly elected sheriff's Democratic Party.²² The Court held that patronage dismissals were

17. *Id.* at 568.

18. *Id.* at 569-70.

19. *Id.* at 570.

20. *Id.* at 570 n.3. The Court stated:

It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined.

Id.

21. 427 U.S. 347 (1976) (plurality opinion).

22. *Id.* at 350-51. In December 1970, a Democrat replaced the incumbent Republican Sheriff of Cook County, Illinois and fired several Republican non-civil-service employees, as was the standard practice. *Id.* at 350, 351. The Department fired the public employees solely because they did not support, belong to, or obtain the sponsorship of, the Democratic Party. *Id.* The employees brought suit in the United States District Court for the Northern District of Illinois and sought declaratory, injunctive, and other relief for violations of the First and Fourteenth Amendments. The District Court dismissed the complaint for failure to state a claim upon which relief could be granted. *Id.* at 349, 350. The Court of Appeals for the Seventh Circuit reversed and remanded with instructions to grant the employees the appropriate preliminary injunctive relief. *Burns v. Elrod*, 509 F.2d 1133, 1137 (7th Cir. 1975). The Supreme Court granted the public employer's petition for certiorari. *Elrod v. Burns*, 423 U.S. 821 (1975).

unconstitutional under the First and Fourteenth Amendments.²³ The benefit gained through patronage dismissals by the sheriff did not outweigh, in the Court's perception, the loss of the employees' constitutionally protected rights.²⁴ According to the Court in *Elrod*, patronage dismissals were not the least restrictive means of fostering government efficiency in this case, and these dismissals severely restricted political belief and association.²⁵ However, the Court noted that public employers retain the power, in some cases, to dismiss *policy-making* employees, who serve as advisers or long term planners, due to political affiliation in order to bar potential obstruction of political administration.²⁶

The Supreme Court refined the "policymaker" description in *Branti v. Finkel*.²⁷ In *Branti*, two Republican Assistant Public Defenders brought suit to enjoin the Democratic Public Defender from discharging them based on their political affiliation.²⁸ Upholding the judgment of the court below, the Court held that the position of assistant public defender fails to qualify as the type of public office that can include a particular party affiliation as a job

23. *Elrod*, 427 U.S. at 373.

24. *Id.* at 363-73.

25. *Id.* at 372.

26. *Id.* at 367. The Court stated that:

No clear line can be drawn between policy-making and nonpolicy-making positions. While nonpolicy-making individuals usually have limited responsibility, that is not to say that one with a number of responsibilities is necessarily in a policy-making position. The nature of the responsibilities is critical. . . . In determining whether an employee occupies a policy-making position, consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals.

Id. at 367-68.

27. 445 U.S. 507 (1980).

28. *Id.* at 508-09. The Rockland County Legislature appoints a County Public Defender for a term of six years. The Public Defender, in turn, appoints nine at-will assistants. Branti, a Democrat, succeeded a Republican incumbent in the County Public Defender office, and began executing termination notices for six assistants then in office. *Id.* at 509. Aaron Finkel and Alan Tabakman, Republican assistants to Branti's predecessor, were among those terminated in favor of Democratic assistants brought suit in the District Court for the Southern District of New York in order to enjoining their dismissal. *Id.* at 508. The District Court entered a temporary restraining order against Branti and, after an eight day hearing, permanently enjoined Branti from terminating the assistants' employment because of their political beliefs. *Id.* at 508-09. The Second Circuit Court of Appeals affirmed the judgment. *Finkel v. Branti*, 598 F.2d 609 (2d Cir. 1979).

requirement.²⁹ According to the Court, the assistant public defender's primary responsibility involved representing individual citizens in adversarial proceedings against the State.³⁰ Moreover, the Court determined that although an assistant could obtain confidential information from attorney-client relationships, such information would not pertain to the public defender's office and would not implicate political partisanship.³¹ Under these circumstances, the Court concluded that to permit tenure in the public defender's office to be dependent upon political affiliation undermined the effective performance of the office.³² The Court qualified its holding, however, by stating that it did not necessarily apply to District Attorneys.³³

Three years after *Branti*, in *Connick v. Myers*, the Supreme Court refined *Pickering* and established a multi-stage analysis for evaluating First Amendment free speech claims within the realm of government employment.³⁴ In *Connick*, the Court applied its *Pickering* test to the claim of an Assistant District Attorney who was discharged because she expressed discontent with the District Attorney's staffing decisions and distributed an office questionnaire concerning office policy and morale.³⁵ First, the Court determined

29. *Branti*, 445 U.S. at 520.

30. *Id.* at 519.

31. *Id.*

32. *Id.* at 519-20.

33. *Id.* at 519 n.13. The public defender's responsibilities were "in contrast to the broader public responsibilities of an official such as a prosecutor. . . . We express no opinion as to whether the deputy of such an official could be dismissed on grounds of political party affiliation or loyalty." *Id.*

34. 461 U.S. 138, 147-48 (1983).

35. *Id.* at 140-41. Petitioner, New Orleans District Attorney Harry Connick, employed Sheila Myers as an Assistant District Attorney responsible for trying criminal cases. *Id.* When Connick informed Myers of his plan to transfer her to prosecute cases in a different section of the criminal court, she strongly opposed his plan, expressed her discontent to several of her supervisors, and distributed a questionnaire to other Assistant District Attorneys in the Department, which concerned several Department deficiencies, including whether employees felt pressured to work on political campaigns. When Connick learned of Myers' actions, he terminated her employment with the Department. *Id.*

Myers filed a § 1983 action in Federal District Court, claiming that Connick violated her First Amendment right to free speech by terminating her employment. *Id.* The district court agreed with Myers and ordered her reinstated. *Myers v. Connick*, 507 F. Supp. 752, 760 (E.D. La. 1981). The court of appeals later affirmed the district court's decision. *Myers v. Connick*, 654 F.2d 719 (5th Cir. 1981). The Supreme Court granted Connick's writ of certiorari. *Connick v. Myers*, 455 U.S. 999 (1982).

that the Assistant District Attorney's speech was a matter of public concern.³⁶ Second, the Court determined that under the *Pickering* test the State's interests in promoting efficiency in the public service it performs through its employees outweighed the employee's First Amendment interests in this case.³⁷ The Court noted that, although the public employer's burden to justify the discharge of a public employee varied depending upon the nature of the employee's expression, a government employer need not wait for the disruption or destruction of the office's function before discharging the censurable party.³⁸

To summarize, the courts use the *Pickering* balance test to assess a public employee's First Amendment claim against an adverse employment action.³⁹ If a public employee is a policymaker, then the claim is governed by *Elrod*⁴⁰ and *Branti*.⁴¹ Finally, free speech cases trigger an analysis of the public concern implicated by the adverse employment decision, as established in *Connick*.⁴²

36. *Connick*, 461 U.S. at 149. The Court held that:

[W]hen 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. . . .

[W]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.

Id. at 147-48. The Court concluded that respondent's inquiry regarding pressure upon employees to work in political campaigns fell under the rubric of matters of public concern. *Id.* at 149.

37. *Id.* at 149-54. *Connick*'s interest in maintaining an efficient office outweighed Myers' limited First Amendment interests. *Id.* In *Connick*'s favor, the Court noted that: (1) the statement could undermine office relations; (2) *Connick* could reasonably have believed that Myers endangered the Department's effectiveness by exercising her rights; and, (3) considering the timing of the questionnaire, *Connick* could reasonably have believed that Myers threatened his authority to lead the Department. *Id.* at 151-53.

38. *Id.* at 149-51.

39. *See supra* notes 12-20 and accompanying text.

40. *See supra* notes 21-26 and accompanying text.

41. *See supra* notes 27-33 and accompanying text.

42. *See supra* notes 34-38 and accompanying text.

B. General Factors

After analyzing the balance that occurs between the government employers' interests and the employees' First Amendment rights, the next step in understanding the First Amendment/government employer issue requires an examination of the factors that the courts use to make factual determinations in this type of case. Government employers must justify the discharge of the government employee on legitimate grounds.⁴³ In performing the *Pickering* balance, courts consider the manner and time, as well as the place, of the employee's expression, and the context in which the dispute arose.⁴⁴ Within this framework, the courts look to whether the expression: [1] impairs discipline by superiors or harmony among co-workers; [2] has a detrimental impact on close working relationships for which personal loyalty and confidentiality are necessary, or (3) interferes with the performance of the employee's duties or the regular operation of the agency, including the public's perception of the agency.⁴⁵ The preceding factors establish a test for assessing the harm to the employer.

In *Waters v. Churchill*, the Supreme Court addressed the question of whether the government employer's perception of the facts must be reasonable in order to outweigh an employee's rights under the First Amendment.⁴⁶ Using the *Connick* test, the Court reviewed a government-funded hospital's decision to discharge a nurse.⁴⁷ The plurality considered both the facts as the employer perceived them and the reasonableness of the employer's perception, and suggested that when an employer's based upon extremely weak evidence, or no evidence at all, such decisions might be unreasonable.⁴⁸

43. See *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (citing *Connick*, 461 U.S. at 150).

44. See *id.* (citing *Connick*, 461 U.S. at 152-53, and *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410, 415, n.4 (1979)).

45. See *id.* (citing *Pickering*, 391 U.S. at 570-73).

46. 511 U.S. 661 (1994) (plurality opinion).

47. *Id.* at 675-82.

48. *Id.* at 677. The plurality opinion by Justice O'Connor stated:

We think employer decision making will not be unduly burdened by having courts look to the facts as the employer *reasonably* found them to be. It may be unreasonable, for example, for the employer to come to a conclusion based on no evidence at all.

Cases arising out of law enforcement apparently ignore the *Pickering* balancing text altogether, to the advantage of the law enforcement agency.⁴⁹ Federal courts allow greater restrictions of police officers' activities than of any other type of public employee,⁵⁰ and some circuits have even compared the need for discipline and uniformity required in a police force with that required in the military.⁵¹ The Supreme Court, however, stated that police departments cannot subject officers to a "watered down version" of the Constitution in a case in which officers exercised their freedom of speech.⁵²

Likewise, it may be unreasonable for an employer to act based on extremely weak evidence when strong evidence is clearly available—if, for instance, an employee is accused of writing an improper letter to the editor, and instead of just reading the letter, the employer decides what it said based on unreliable hearsay.

Id. (emphasis in original).

49. See *infra* note 50.

50. Compare, e.g., *Eggar v. Phillips*, 710 F.2d 292, 315-23 (7th Cir. 1983) (*en banc*) (holding that FBI could permissibly transfer agent after he publicly accused another agent of giving false testimony); *Shawgo v. Spradlin*, 701 F.2d 470, 483 (5th Cir. 1983) (finding rational connection between necessities of police department discipline and rule forbidding police personnel from cohabiting with each other); *Byrd v. Gain*, 558 F.2d 553, 554 (9th Cir. 1977) (stating that police power justifies use of a standard different from school employment cases); *Baron v. Meloni*, 602 F. Supp. 614, 618 (W.D.N.Y. 1985) (holding that sheriff could permissibly discharge a deputy for associating with the wife of a crime figure currently under investigation); *Jackson v. Howell*, 577 F. Supp. 47, 50-51 (W.D. Mich. 1983) (finding no constitutional infringement in discharge of a police officer because the officer manipulated Department procedures by using an investigation of a woman's complaint to start a sexual affair with the woman); *Suddarth v. Slane*, 539 F. Supp. 612, 618 (W.D. Va. 1982) (upholding Department regulations that were designed to prevent employees' conduct that could bring the Department into disrepute); *Fabio v. Civil Service Comm'n*, 414 A.2d 82, 91 (Pa. 1980) (holding that Department properly dismissed police officers because of conduct, which cast poor light on Department), *with Thorne v. City of El Segundo*, 726 F.2d 459, 471-72 (9th Cir. 1983) (holding that Department infringed police department clerk-typist's right to privacy when it removed her from list of eligible applicants because she once had an affair with a married policeman); *Briggs v. North Muskegon Police Dept.*, 563 F. Supp. 585, 590-91 (W.D. Mich. 1983), *aff'd mem.*, 746 F.2d 1475 (6th Cir. 1984) (finding unconstitutional the discharge of police officer for adulterous cohabitation); *Swope v. Bratton*, 541 F. Supp. 99, 108-09 (W.D. Ark. 1982) (holding that Department could not demote a patrolman who cohabited with a dispatcher).

51. See, e.g., *Shawgo v. Spradling*, 701 F.2d 470, 483 (5th Cir. 1983); *Vorbeck v. Schnicker*, 660 F.2d 1260, 1263 (8th Cir. 1981).

52. See *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).

C. Public Perception Generally

In several peculiar cases, a governmental agency claimed harm because an employee's expression tarnished the public's perception of the agency.⁵³ The courts vary as to the appropriate evidentiary burden, but all mandate that the prediction of harmful public perception be reasonable.⁵⁴

For example, in *Lumpkin v. Jordan*,⁵⁵ the Mayor of San Francisco removed a pastor from the city's Human Rights Commission for publicly stating that homosexuality was an "abomination" and implying that all homosexuals should be put to death.⁵⁶ The court found, in light of the public uproar, that the pastor's statements compromised the Commission's reputation for promoting equal opportunity and good will for all people.⁵⁷

Furthermore, in *Zook v. Brown*, a Sheriff disciplined a deputy, according to pertinent regulations, for publishing a letter endorsing one of several ambulance services used by the Department.⁵⁸ The Seventh Circuit held that the Sheriff Department's interest in maintaining the appearance of impartiality outweighed the deputy's First Amendment rights.⁵⁹

Likewise, in *Wood v. Ruppe*, the court upheld the discharge of a Peace Corps volunteer who violated Peace Corps policy by publicly demonstrating against American foreign policy, recognizing the vital importance of the Corps' neutral image within the realm of politics.⁶⁰

53. See *infra* notes 55-65 and accompanying text.

54. See *infra* notes 55-65 and accompanying text.

55. No. C-93-4338 F75, 1994 WL 669852 (N.D. Cal. Nov. 22, 1994).

56. *Id.* at *2.

57. *Id.* at *4. The court determined that the case file within *Elrod's* "policymaker" exception because the city entrusted the pastor with an advisory role. *Id.* at *3. Because the pastor's statement compromised the effectiveness of the Commission, the court held that his removal did not violate his First Amendment rights to free speech and free exercise of religion. *Id.* at *4-7.

58. 865 F.2d 887, 889 (7th Cir. 1989).

59. *Id.* at 891-92. The court reasoned that the rule regulating testimonial speech was necessary to prevent the commercial and residential communities' perceptions of kickback arrangements or conflicts of interest, and concluded that government employees must avoid undue influence both in fact and in appearance. *Id.* at 891.

60. 659 F. Supp. 403, 406-12 (D.D.C. 1987). The court suggested that where the evidence suggested that a volunteer's speech directly threatened the Peace Corps' policy on neutrality, courts must uphold the enforcement of such policies. *Id.* at 411-12.

The factor of public perception, however, does not always favor the public employer. In *Briggs v. North Muskegon Police Department*, the court held unconstitutional a city police department's dismissal of a married police officer for cohabiting with a married woman who was not his wife.⁶¹ The court reasoned that the purpose of the constitutional protection of association was to prevent "majoritarian coercion," and that, therefore, the general community disapproval failed to justify the department's discharge of the police officer.⁶²

Similarly, in *Latino Officers Association, New York, Inc. v. City of New York*,⁶³ the court granted plaintiff's request for a preliminary injunction and held that the New York City Police Department violated certain Latino officers' constitutional rights by refusing to allow the officers to participate in several parades in an official capacity in organizations not recognized by the department.⁶⁴ For lack of evidence, the court rejected the department's argument that the police officers inability to choose unrecognized organizations as a forum for expression would potentially create a public perception of the department as disunited.⁶⁵

The remainder of this note focuses on the Eleventh Circuit's jurisprudence under the *Pickering* balancing test. As have other Circuits, the Eleventh Circuit has developed a significant body of case law interpreting *Pickering* and its progeny.

D. Overview of the Eleventh Circuit

The Eleventh Circuit imposes a greater proof requirement upon a government employer than that suggested by the plurality of the

61. 563 F. Supp. 585, 586-92 (W.D. Mich. 1983). The court rejected the police department's argument that the public would lose faith in the department because of the officer's illegal off-duty conduct. *Id.* at 590.

62. *Id.* at 592 (citing *Fabio v. Civil Service Comm'n*, 414 A.2d 82, 88 (Pa. 1980)). The court warned that public employers should not transform public notions of unacceptable social behavior into legal conformity. *Id.*

63. 97 Civ. 1384 (KMW) 1997 WL 473972 (S.D.N.Y. Aug. 19, 1997).

64. *Id.* at *1-6.

65. *Id.* at *5. The court stated that the department needed to present evidence showing the differences in the impact on public perception by recognized organization as opposed to an unrecognized organization. *Id.* Because the Department presented no such evidence, the *Pickering* balance tipped in favor of the police officers' constitutional rights. *Id.*

Supreme Court in *Waters v. Churchill*.⁶⁶ For example, in *McCabe v. Sharrett*, the Eleventh Circuit held that a police chief permissibly transferred a personal secretary who married a lower-level police officer.⁶⁷ Because the police chief submitted substantial evidence that an effective personal secretary must demonstrate both loyalty to the employer and the ability to keep work-related information confidential, the court found that the police chief's considerations of disloyalty were not merely subjective but were objectively reasonable as a matter of his attenuated experience.⁶⁸

In addition, consistent with the Supreme Court's decisions in *Branti* and *Elrod*, the Eleventh Circuit has given little weight to a policy-making government employee's interest in working in a policy-making position when the employee's political affiliation differs from that of the employer. For example, in *Bates v. Hunt*, the Eleventh Circuit concluded that the Governor of Alabama could permissibly discharge an assistant without unconstitutionally burdening the employee's free speech rights.⁶⁹ In *Bates*, the Governor's assistant signed an affidavit supporting a former employee who brought suit against the Governor.⁷⁰ Because the assistant's position constituted a policy-making role, the *Bates* court reasoned that the Governor "is not required to let [an adversary] represent him."⁷¹

The Eleventh Circuit also takes a more critical view of police agencies than other circuits.⁷² In *Waters v. Chaffin*, the Eleventh Circuit held that a police chief violated a subordinate officer's First Amendment rights by disciplining the officer, who criticized him while off duty, out-of-uniform, in another jurisdiction, and to another officer.⁷³ The *Chaffin* court recognized that cases that have arisen from law enforcement contexts stand for the proposition that a police

66. 511 U.S. 661 (1994) (plurality opinion). See also *supra* notes 46-48 and accompanying text.

67. 12 F.3d 1558, 1573 (11th Cir. 1994).

68. *Id.* at 1571-73.

69. 3 F.3d 374, 378 (11th Cir. 1993).

70. *Id.* at 376.

71. *Id.* at 378.

72. See *supra* notes 49-52 and accompanying text.

73. 684 F.2d 833, 834 (11th Cir. 1982).

chief needs only a reasonable prediction of harm to justify the challenged act.⁷⁴ This rule, however, seemed to the Eleventh Circuit to be less appropriate in cases in which the subordinate police officer and the police chief had never worked closely together.⁷⁵ Finally, because the subordinate police officer's expression occurred outside his official capacity, the *Chaffin* court weighed the subordinate's First Amendment rights more heavily than the police chief's interest in loyalty.⁷⁶

Contrary to the result in *Chaffin*, however, the Eleventh Circuit decided in *McMullen v. Carson* that a police chief could fire a low-level at-will employee after the community strongly protested the employee's televised announcement that he recruited for the Ku Klux Klan.⁷⁷ In balancing the respective interests, the *McMullen* court noted that the Klan has a history of violent activity, both actual and perceived, and intended to sow fear and tension between white and Black Americans.⁷⁸ The court also recognized that the Black

74. *Id.* at 839-40.

75. *Id.*

76. *Id.* at 837-40.

77. 754 F.2d 936 (11th Cir. 1985). The Duval County Sheriff's Department hired McMullen as a temporary full-time clerk in the records office in October 1981. *Id.* at 937. At about the same time, McMullen applied to join the Invisible Empire of the Knights of the Ku Klux Klan. *Id.* By January 1992, McMullen recruited for the Klan on his own time by distributing literature in various public areas. *Id.*

Sometime after the plaintiff joined the Klan, vandals left a cross in the yard of a black woman's residence. *Id.* The Klan subsequently held a press conference to deny any involvement in the vandalism. *Id.* The evening news broadcasted the conference, and McMullen identified himself as a Klan recruiter and as a Sheriff's Office employee. *Id.*

The Black community instantly protested the Sheriff's Office's ties with the Klan. *Id.* Many live comments suggested that Black citizens should resist arrest by Sheriff's personnel for "fear of their lives." *Id.* Sheriff Carson immediately discharged McMullen, fearing the erosion of the Department's credibility in the Black community. *Id.* Ten days after his dismissal, McMullen, his wife, and four others donned their Klan robes and protested at the county courthouse. *Id.* A crowd gathered outside the courthouse where some minor violence broke out. *Id.* In late 1982 or early 1983, McMullen resigned from the Klan. *Id.*

78. *Id.* at 938. From testimony and uncontested evidence, the record revealed that:

[T]he nature, both actual and perceived, of the Klan [is] a violent, criminal, and racist organization dedicated to the sowing of fear and mistrust between white and black Americans. . . . [T]he public makes no distinction in its perception of the Klan as a monolithic entity composed of a "small group of violent extremists who are imbued with fanatic dedication to racist ideas." The perception exists widely throughout the country[.]

community's relationship with the Sheriff's Office had been severely strained over the years.⁷⁹ Balancing the history of the Klan and the community situation against the employee's First Amendment rights, the court concluded that the sheriff's need for the community's trust outweighed the employee's constitutional rights.⁸⁰

E. Summary

Case law formulated under *Pickering* and its progeny established a broad spectrum of analysis in cases involving the First Amendment and government employment. On one end of the spectrum, a government employer has no compelling interest to require its low-level, non-civil service employees to relinquish their constitutional rights.⁸¹ On the other end of the spectrum, however, a government employer retains significant interest in censoring upper-level, policy-making employees whose constitutional rights compromise both the inner functions and the public image of the agency.⁸² Evidently, courts give great deference to government employers in discharging at-will employees. The following case illustrates how courts often misapply the *Pickering* balance to reach a seemingly unjust result.

79. *Id.*

80. *Id.* at 940. The court stated:

The reaction of the community cannot always dictate constitutional protections to employees. We hold only that a law enforcement agency does not violate the First Amendment by discharging an employee whose active participation in an organization with a history of violent activity, which is antithetical to enforcement of the laws by state officers, has become known to the public and created an understandably adverse public reaction that seriously and dangerously threatens to cripple the ability of the law enforcement agency to perform effectively its public duties.

Id. Moreover, the court suggested that whether or not McMullen made any arrests, the Black community would still "categorically distrust the Sheriff's Office if a known Klan member" were permitted employment. *Id.* at 939. Likewise, McMullen's coworkers knew that "serious conflict was inevitable considering the number of blacks working" close to McMullen. *Id.*

81. *See supra* notes 72-76 and accompanying text.

82. *See supra* notes 21-33, 55-57 and accompanying text.

III. *SHAHAR V. BOWERS*⁸³

A. *History*

Attorney Robin J. Shahar is a lesbian.⁸⁴ While attending Emory University law school, Shahar worked as a law clerk for the Attorney General's office for the State of Georgia (the "Department") during the summer of 1990.⁸⁵ In September 1990, during her final year in law school, Shahar accepted an employment offer as a staff attorney from the Department.⁸⁶ Shahar's offer required her to begin working in September 1991, after she graduated from law school.⁸⁷

In November 1990, Shahar indicated on her public employment forms that she was engaged and planned to marry Francine M. Greenfield.⁸⁸ In June of 1991, Shahar told Deputy Attorney General Robert Coleman that she was getting married at the end of July and could start her employment near the end of September.⁸⁹ Soon after this conversation, Coleman learned from a colleague that Shahar intended to marry another woman.⁹⁰

83. 114 F.3d 1097 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998).

84. *Id.* at 1100.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* Shahar was known as Robin Brown during her clerkship in the summer of 1990 and also when the Department offered her an employment position. *Id.* n.4. In response to the "marital status" question on the employment application, Shahar wrote "engaged." *Id.* Furthermore, Shahar changed "spouse's name" to read "future spouse's name" and wrote in her partner's name, "Francine M. Greenfield." *Id.* at 1100.

Shahar started arranging wedding plans during the summer of 1990. *Id.* at 1100. Her Rabbi announced her marriage to the congregation in Atlanta. *Id.* Approximately 250 people were invited to the wedding, including two employees from the Department. *Id.* The invitations indicated that the wedding was a "Jewish, lesbian-feminist, out-door wedding" to take place in a public park in South Carolina in June 1991. *Id.*

Shahar married her fiancée under a reorganized branch of the Jewish faith, which supported gay marriages. Shahar's religious foundations come from the Reconstructionist Movement of Judaism. *Id.* Shahar and Greenfield have been significant participants in their synagogue throughout their entire lives. *Id.* Their Rabbi, Sharon Kleinbaum, counseled them in eight formal premarital sessions and many informal meetings. Rabbi Kleinbaum considers that the union in which they joined is a public affirmation of their commitment to each other and to the Jewish people, having no legal significance, but only personal and religious significance, and that it can be terminated only by the church. *Id.* at 1119.

89. *Id.* at 1101.

90. *Id.* During the spring of 1991, Shahar and Greenfield were working on their wedding

Acting according to his aides' advice, Attorney General Bowers canceled Shahar's employment agreement in writing.⁹¹ The letter indicated that Shahar's lesbian marriage would disrupt the Department's function and that inaction by the Department would indicate "tacit approval" of such marriages.⁹²

Shahar brought an action in the United States District Court for the Northern District of Georgia, claiming that Attorney General Bowers violated her constitutional rights by canceling the employment agreement because of her marriage to another woman.⁹³ Shahar alleged that Bowers, individually and in his official capacity, violated her constitutional rights to freedom of association, freedom of religion, equal protection, and substantive due process.⁹⁴ Shahar sought injunctive relief, including reinstatement, and compensatory and punitive damages.⁹⁵ Both parties moved for summary judgment.⁹⁶

invitations at a local restaurant in Atlanta. *Id.* During this meeting, they came across Elizabeth Rowe, a paralegal in the Department, and Susan Rutherford, an attorney in the Department. *Id.* The four women briefly discussed the wedding. *Id.* Rowe received an invitation to, and attended, the wedding. *Id.*

In June 1991, Shahar told Deputy Attorney General Coleman that she was "getting married at the end of July, changing her last name . . . and . . . would not be starting work with the Department until mid-to-late September." *Id.* Shahar did not tell Coleman that she planned to marry another woman. *Id.* Senior Assistant Attorney General Jeffrey Milsteen witnessed this discussion between Shahar and Coleman and overheard Coleman congratulate Shahar on her marriage. *Id.* Milsteen later learned from Rutherford, the attorney who had met Shahar's fiancée, that Shahar planned to marry another woman. Milsteen informed the Attorney General's senior aides of Shahar's wedding plans. *Id.*

91. *Id.* Viewing Shahar's lesbian marriage as potentially disruptive to the Department's function, Bowers' senior aides held several meetings to discuss possible implications of allowing a married lesbian to work in the office. Bowers did not attend these meetings because of out-of-town obligations. *Id.*

92. *Id.* at 1101. The letter read:

[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 function of this office.

Id.

93. Shahar v. Bowers, 836 F. Supp. 859, 862 (N.D. Ga. 1993).

94. 114 F.3d at 1101.

95. *Id.*

96. *Id.*

B. Position of the Parties and Procedural History

Attorney General Bowers contended that he did not cancel Shahar's employment contract because of her lesbian status.⁹⁷ Bowers stated, rather, that Shahar had exercised poor judgment by claiming to be married.⁹⁸ In addition, Bowers and his aides summarily concluded that Shahar's marriage affected the credibility of the Department because her potential employment indicated conflicting interpretations of Georgia law as it pertained to issues regarding same sex marriage.⁹⁹ Bowers claimed that reasonable Georgia citizens might suspect that having a lesbian Staff Attorney married to another woman was equivalent to having a Staff Attorney

97. *Shahar*, 836 F. Supp. at 867 ("Defendant [Bowers] argues that the withdrawal of his offer was motivated by neither plaintiff's classification as a homosexual nor by an intent to discriminate against plaintiff on the basis of her sexual orientation.").

98. *Shahar*, 114 F.3d at 1105-06.

99. *Id.* at 1105. These interpretations of Georgia law include claims to "same-sex marriage licenses, homosexual parental rights, employee benefits, and insurance coverage of 'domestic partners.'" *Id.* The Eleventh Circuit cited a number of events which indicated these interpretations:

The controversy in the State of Georgia and the Attorney General's involvement at the heart of that controversy, both as the State's litigator and its legal advisor, have not let up since the Attorney General's 1991 decision to revoke the offer to Shahar. *See In re R.E.W.*, 472 S.E.2d 295 (Ga. 1996) (three-judge dissent from denial of certiorari to review court of appeal decision holding restriction on father's visitation rights inappropriate where based on his homosexual relationship); *Christensen v. State*, S.E.3d 188, 190 (Ga. 1996) (in case involving same-sex solicitation in public rest area, upholding—against challenge based on state constitution—statute criminalizing solicitation of sodomy); *City of Atlanta v. McKinney*, 454 S.E.2d 517, 521 (Ga. 1995) (striking down portion of Atlanta ordinance mandating provision of benefits to registered "Domestic Partners"); *Van Dyck v. Van Dyck*, 425 S.E.2d 853 (Ga. 1993) (live-in lover statute inapplicable to attempt to modify alimony where former spouse lived in meretricious same-sex relationship); Op. Att'y Gen. 96-7, 1996 WL 180274 (Ga.A.G.) (Attorney General called on to advise whether state college newspaper may refuse to publish advertisement suggesting that homosexuals are not "born gay" and "[t]here is another way out" and containing text which "might be perceived to 'derogatorily describe homosexuals'"); Op. Att'y Gen. 94-14 (1994 Ops. Att'y Gen. Ga. 32 (Darby 1994)) (Attorney General called on to advise Insurance Commissioner as to approval of proposed policy amendment affording group accident and health coverage to "domestic partners"); Op. Att'y Gen. 93-26 (1993 Ops. Att'y Gen. Ga. 72 (Darby 1993)) (Attorney General called on to advise Insurance Commissioner regarding "group health insurance provided pursuant to municipal ordinances which create the status of domestic partnership").

Id. at 1104-05 n.16.

who violates the State's laws against "homosexual" sodomy.¹⁰⁰

Shahar argued that Bowers: (1) illogically equated her lesbian relationship with sodomy, even though the Attorney General never made the same assumption about heterosexual relationships; (2) viewed Shahar's private life as inherently activist and political in contrast to the deference accorded a heterosexual employee's private life; and (3) considered Shahar too biased to handle controversial cases involving homosexuality whereas heterosexuals were not considered to have a similar conflict.¹⁰¹

The district court found that Shahar had a constitutional right to intimate association with her lesbian partner.¹⁰² However, the court

100. *Id.* at 1105 n.17. Georgia actually makes no distinction between "homosexual" sodomy and "heterosexual" sodomy. Under the Criminal Code of Georgia, "[a] person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." GA. CODE ANN. § 16-6-2(a) (1996). Likewise, "[a] person commits the offense of solicitation of sodomy when he solicits another to perform or submit to an act of sodomy." GA. CODE ANN. § 16-6-15 (1996). Since the conclusion of Shahar's case, *Bower v. State* held that Georgia's sodomy laws violate the state constitution's "Right to be left alone" and are therefore unconstitutional. 510 S.E.2d 18, 26 (Ga. 1998).

Bowers also suggested that Shahar's marriage would, disrupt the Department's ability to handle controversial matters and conflict with the Department's duty to enforce Georgia's sodomy laws. *Shahar*, 114 F.3d at 1101. Bowers stated that Shahar had "set him up" and intended to use her position as a staff attorney "to advance a homosexual agenda." *Id.* at 1116 n.9 (Tjoflat, J., concurring).

101. See *Shahar v. Bowers*, 70 F.3d 1218, 1233 n.16, 70 (11th Cir. 1995). Shahar never claimed that her marriage was legal under the Georgia's laws, and conceded that Georgia does not recognize same-sex marriages. See *Shahar*, 114 F.3d at 1106. Shahar claimed that she married outside the context of her employment and never asked the Department for marriage benefits. *Id.* Bowers' predictions, according to Shahar, relied solely upon the Department's and the public's prejudice. See *Shahar*, 70 F.3d at 1233-34.

102. *Shahar*, 836 F. Supp. at 863. The Supreme Court placed the right of intimate association within the gamut of First Amendment protections in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). In *Roberts*, a non-profit membership corporation brought suit to prevent enforcement of a state law would compel two of its chapters to admit women in violation of the corporation's bylaws. *Id.* at 615. On appeal, the Court distinguished two separate association rights; namely, the right of intimate, and the right of expressive association. *Id.* at 617-18.

The right of intimate association involved relationships with qualities such 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." *Id.* at 619-20. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978) (regarding marriage); *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977) (pertaining to the raising and education of children); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (concerning childbirth); *Moore v. East Cleveland*, 431 U.S. 494 (1977) (regarding cohabitation with relatives).

The right of expressive association involved activities such as "speech, assembly, petition

held that Bowers' interest as a public employer outweighed Shahar's constitutional rights under the *Pickering* balancing test.¹⁰³ Accordingly, the district judge entered summary judgment on all claims in favor of Bowers.¹⁰⁴

On appeal, a panel of the Eleventh Circuit Court of Appeals affirmed the summary judgment finding for Bowers on the free exercise of religion, equal protection, and substantive due process

for the redress of grievances, and the exercise of religion." See *Roberts*, 468 U.S. at 618. In *Roberts*, the Court held that the corporation lacked the distinctive characteristics both entities afforded intimate, and entities afforded expressive, association rights. *Id.* at 621-29.

Whether *Roberts* actually placed the right of intimate association within the First Amendment has been the subject of substantial debate by the courts. See *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 5-7 (1988) (relying on both *Roberts* and *Rotary International* as precedent for the right of intimate association but without discussing specific constitutional provisions); *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544-47 (1987) (stating that *Roberts* stood for the proposition that intimate association was a First Amendment right); *Shahar v. Bowers*, 114 F.3d 1097, 1102 n.9 (11th Cir. 1997), *cert. denied*, No. 97-751, 1998 WL 6489 (Jan. 12, 1998) (stating that *Rotary Int'l* located the origin of the right of intimate association within the First Amendment); *Hvamstad v. Suhler*, 727 F. Supp. 511, 517 (D. Minn. 1989), *aff'd*, 915 F.2d 1218, 1220 (8th Cir. 1990) (stating that the constitutional basis for a right of intimate association under the First Amendment is "somewhat amorphous").

Scholars debate whether *Roberts* actually placed the right of intimate association within the Fourteenth, rather than the First Amendment. See, e.g., Cornelia Sage Russell, Comment, *Shahar v. Bowers: Intimate Association and the First Amendment*, 45 EMORY L.J. 1479, 1489-90 (1996), which stated:

[I]n contrast to [the Court's] treatment of expressive association, [it] did not identify the particular provision(s) in the Constitution protecting intimate association. However, the language [it] used to describe intimate association and the cases [it] cited to support the doctrine come from the privacy cases traditionally associated with Fourteenth Amendment substantive due process.

This lack of specificity leaves *Roberts* open to several possible interpretations: (1) intimate association is closely related to expressive association; like expressive association it is encompassed within the First Amendment; (2) because the Supreme Court has specifically identified expressive association with the First Amendment but said nothing with respect to intimate association, the latter is not protected by the First Amendment; (3) from the way intimate association is described in *Roberts* and the cases cited in support of it, one can infer that it has constitutional sources, most likely in the Fourteenth Amendment right to privacy; and (4) intimate association derives its constitutional support from more than one source—that is, it is built on elements of both the First and Fourteenth Amendments.

Id.

103. *Shahar v. Bowers*, 836 F. Supp. at 864-66.

104. *Id.*

claims.¹⁰⁵ A majority of the panel found that Shahar had a valid claim to expressive association and vacated summary judgment on this claim for possible reconsideration by the district court.¹⁰⁶ All three judges upheld the district court's finding that Shahar had a right to intimate association and vacated summary judgment on that claim, remanding that portion of the decision to the district court for evaluation under a strict scrutiny standard.¹⁰⁷

C. Judgment of the Eleventh Circuit Court of Appeals Sitting En Banc

The Eleventh Circuit granted Bowers a rehearing en banc and vacated its previous decision.¹⁰⁸ A twelve-judge panel affirmed the district court's holding on all counts.¹⁰⁹ The court, however, issued one concurring opinion and four dissenting opinions.¹¹⁰ The Supreme Court denied Shahar's petition for certiorari.¹¹¹

1. The Majority Opinion

To avoid an unnecessary decision on the constitutional issues, the majority assumed *arguendo* that Shahar had a First Amendment right to intimate association with her lesbian partner and decided that the *Pickering* balancing test applied in evaluating the constitutional implications of Bowers' decision to cancel Shahar's employment based on her lesbian marriage.¹¹² Under *Pickering*, the court held that

105. Shahar v. Bowers, 70 F.3d at 1226.

106. *Id.*

107. *Id.* For an in depth analysis of the Eleventh Circuit's opinion, see Russell, *supra* note 102.

108. Shahar v. Bowers, 78 F.3d 499, 500 (11th Cir. 1996).

109. Shahar v. Bowers, 114 F.3d 1111.

110. *Id.* at 1111-34 (Tjofflat, J., concurring and Godbold, S.J.; Barkett, J.; Kravitch, S.J.; Birch, J., dissenting).

111. Shahar v. Bowers, 118 S. Ct. 693 (1998).

112. *Shahar*, 114 F.3d at 1102-03. Senior Circuit Judge Edmondson wrote for the majority. *Id.* at 1099. Edmondson relied on two cases for the proposition that a court could properly presume a party's constitutional right for purposes of the *Pickering* balancing test. *Id.* at 1106 n.19. In *Kemp v. State Board of Agriculture*, 803 P.2d 498 (Colo. 1990) (en banc), *cert. denied*, 501 U.S. 1205 (1991) the plaintiff, an employee of Colorado State University, invoked a grievance proceeding claiming that the University gave her an insufficient pay increase because of sex and race discrimination. *Id.* at 500. The employee requested a closed rather than an open forum for her grievance proceeding. *Id.* After the closed proceedings were initiated, the

Bowers did not violate Shahar's First Amendment right of intimate association.¹¹³

The majority claimed to afford great weight to Shahar's presumed First Amendment right of intimate association when it applied the *Pickering* balance.¹¹⁴ Judge Edmonson, writing for the majority, admitted, however, that the weight afforded to intimate association under the *Pickering* balance does not result from a precise mathematical formula.¹¹⁵ Further, the court explained that, under the *Pickering* balance, the factors weighing in favor of the government need only be based on a reasonable assessment of the facts, and the court must give substantial weight to the government officer's

employee contacted United States Senator William Armstrong (R. Colorado) and complained about the irregularities of the grievance process. *Id.* When the University's officer in charge of the investigation learned of the employee's attempt to bring in an outside party to the closed forum, he canceled the proceeding, and the University's president affirmed the officer's decision. *Id.* at 501. After the president's action, the employee sued the University for alleged violation of her First Amendment rights of free speech and petition for grievances. *Id.*

The Colorado Supreme Court used the *Pickering* balance test, but never decided whether the employee had waived her rights to free speech and petition of grievances by voluntarily choosing a closed proceeding. *Id.* at 501-06. Instead, the Court applied the *Pickering* balance and determined that the plaintiff's free speech argument did not implicate a matter of public concern under *Connick*. *Id.* at 505. *See also supra* notes 34-38 and accompanying text. Therefore, *Pickering* afforded her no protection. *Kemp*, 803 P.2d at 505. The court conclusions in consideration of the employee's right to petition the government. *Id.* at 506.

In *Shahar*, Judge Edmondson also relied upon *Barnard v. Jackson County*, which presumed a party's constitutional right for purposes of applying the *Pickering* balancing test. 43 F.3d 1218 (8th Cir. 1995), *cert. denied*, 516 U.S. 808 (1995); *Shahar*, 114 F.3d at 1106 n.19. In *Barnard*, an auditor hired by the Jackson County Legislature to conduct an internal audit leaked the results of his audit to a local, highly circulated newspaper. *Shahar*, 114 F.3d at 1222. When the legislature learned of the auditor's activities, it terminated his employment. *Id.* The auditor sued the county, claiming violation of his First Amendment right to free speech. *Id.* The Eighth Circuit applied the *Pickering* balance, presuming that the leaks touched on matters of public concern, and concluded that the employer's interest outweighed the rights of the employee. *Id.* at 1223-27.

113. *Id.* at 1110-11.

114. *Id.* at 1106.

115. *Id.* Judge Edmondson stated that:

Pickering balancing is never a precise mathematical process: it is a method of analysis by which a court compares the *relative* values of the things before it. A person often knows that "x" outweighs "y" even without first determining exactly what either "x" or "y" weighs. And it is this common experience that illustrates the workings of a *Pickering* balance.

Id. (footnotes omitted).

view.¹¹⁶

According to the majority, Bowers acted reasonably in relying upon the information conveyed to him by his senior aides, even without having personally consulted with Shahar.¹¹⁷ The reasonableness of Bowers' predictions, though, was the main focus of the opinion.¹¹⁸

First, the majority noted that no appellate decision ever reinstated

116. *Id.* at 1106 (citing *Waters v. Churchill*, 511 U.S. 661, 673-81 (1994) (plurality opinion) (“[f]or *Pickering* balance, facts to be weighed on government’s side merely need to be reasonable view of facts or reasonable predictions; manager’s view of circumstances is entitled to substantial weight”).

117. *Shahar*, 114 F.3d at 1106 n.18.

118. *Id.* at 1103-10. According to the majority, courts must allow public officials, such as Bowers, to trust employees who help make policy decisions or handle confidential information on the official’s behalf. *Id.* at 1103-4 (citing *Bates v. Hunt*, 3 F.3d 374, 378 (11th Cir. 1993); *Sims v. Metropolitan Dade County*, 972 F.2d 1230, 1237-38 (11th Cir. 1992); *Kinsey v. Salado Independent School Dist.*, 950 F.2d 988 (5th Cir. 1992) (en banc); *Pickering v. Board of Ed.*, 391 U.S. 563, 570 n.3 (1968)).

Judge Edmondson stated:

Livas involved the termination of an assistant state’s attorney for political patronage reasons and, accordingly, the Seventh Circuit analyzed that claim under the test developed by the Supreme Court for such cases. Though Shahar’s case is not a political patronage case and does not trigger the precise same concerns as those cases, her case is analogous to *Livas* (and other political patronage cases involving prosecutors). That is, the chief attorney . . . must have a faith and confidence in his professional legal staff that might not ordinarily be required in other areas of government employment. . . . So, in balancing the parties’ interests, the chief attorney must be given greater deference in his employment decisions than might be appropriate in other areas of government employment. . . .

At least before the Government Employee Rights Act of 1991, we, in our Title VII and Age Discrimination in Employment Act jurisprudence, held that assistant state attorneys and the like—lawyers who serve at the pleasure of their policy-making chief—were not employees protected by the statutes, but were members of the personal staff of the chief lawyer: the position is one of policy-making level, involving one who necessarily advises, and acts upon, the exercise of constitutional and legal powers of the chief’s office. . . . This “personal staff” . . . idea embodies the general and traditional proposition that positions of confidentiality, policy-making or acting and speaking before others on behalf of the chief are truly different from other kinds of employment. This point is central to the case now before us.

In deciding the present case, we put aside all other kinds of public employment; but, in doing so, we do not say today that other kinds of employment would necessarily lead to different results.

Id. at 1104 n.15.

The majority concluded that because of Bowers’ elected position, he retained significant discretion in hiring his office staff. *Id.* at 1104.

a subordinate lawyer's employment over the chief lawyer's objection.¹¹⁹ Moreover, the court suggested that the weight afforded to the government employer's interest in maintaining effective office functioning may overcome the employee's intimate association rights.¹²⁰ In support of this contention, the majority relied upon *McCabe v. Sharrett*, in which the Eleventh Circuit held that a police chief permissibly transferred a secretary to a less desirable position without violating her First Amendment right of intimate association, because the secretary married an officer of the Sheriff's department.¹²¹

Furthermore, the majority observed that Shahar's suit transpired against the backdrop of Georgia's aggressive efforts to enforce anti-homosexual laws and the ongoing controversy of homosexual marriage.¹²² The court determined that Bowers reasonably concluded the following: (1) Shahar's intimate involvement with her lover would interfere with the Department's ability to enforce Georgia's sodomy laws; (2) the public would perceive Shahar's marriage to another woman as synonymous with violating Georgia's sodomy laws, thereby harming the department's public image; (3) Shahar's acts would confuse the public about her marital status and about Bowers' attitude towards same-sex marriages; (4) Shahar's ability to make good judgments on behalf of the Department was in doubt because she failed to appreciate the Department's need to avoid controversy, such as the controversy caused by her homosexual

119. *Id.* at 1104 (citing *Connick v. Myers*, 461 U.S. 138, 154-56 (1983), and *Livas v. Petka*, 711 F.2d 798, 801 (7th Cir. 1983) ("One of the problems faced by a prosecutor such as Petka, however, is that his policies are implemented by subordinates That Petka lost confidence in Livas, for whatever reasons, is therefore sufficient justification for Livas' dismissal.")).

120. 114 F.3d at 1106 (citing *McCabe v. Sharrett*, 12 F.3d 1558, 1569-70) (11th Cir. 1994) (upholding transfer of Sheriff's secretary to less desirable job based on her marriage to an officer in Sheriff's department).

121. 12 F.3d 1558, 1570 (11th Cir. 1994). *See also supra* notes 67-68 and accompanying text. The *McCabe* court reasoned that, "the employer's interest will weigh more heavily in the *Pickering* balance the more closely the challenged employment action serves the employer's interest in the efficient and effective functioning of the office." *Id.*

122. *Shahar*, 114 F.3d at 1104-05. *See, e.g.*, *Bowers v. Hardwick*, 478 U.S. 186, 190-92 (1986) (holding that the Georgia statute that criminalized homosexual sodomy does not violate substantive due process), and *Christensen v. Georgia*, 468 S.E.2d 188, 190 (Ga. 1996) (holding that the Georgia statute that criminalized homosexual solicitation of sodomy is constitutional).

marriage.¹²³ In light of the overall circumstances, the court concluded that Bowers reasonably interpreted the facts and that his interest as a public employer outweighed Shahar's constitutional rights.¹²⁴ The majority's rationale and conclusions, however, met strong opposition by five of the twelve judges sitting *en banc*.¹²⁵

2. Concurring and Dissenting Opinions

Judge Tjoflat, concurring, questioned whether the majority should have applied the *Pickering* balance without first resolving the constitutional issues raised by Shahar, stating that balancing cannot occur without first identifying a constitutional right accruing to a government employee and assigning a weight to that right.¹²⁶ Judge

123. *Shahar*, 114 F.3d at 1105-06. In support of his contention that Bowers could speculate as to the reactions of the public, regarding the Department's commitment to enforce Georgia's sodomy laws, Judge Edmondson stated:

About public perception, we accept that the fact the Shahars are professed lesbians and see themselves as "married" does not prove beyond reasonable doubt that either of them has engaged in sodomy within the meaning of Georgia law. But we also accept that, when two people say of themselves that they are "married" to each other, it is reasonable for others to think those two people engage in marital relations.

A United States Circuit Judge . . . has written: "Sodomy is an act basic to homosexuality." We cannot say that Georgia's Attorney General is clearly wrong to worry that reasonable people—inside and outside the Law Department—in Georgia could think along these same lines. . . . We acknowledge that some reasonable persons may suspect that having a Staff Attorney who is part of a same-sex "marriage" is the same thing as having a Staff Attorney who violates the State's law against homosexual sodomy. So, we accept that Shahar's participation in a same-sex "wedding" and "marriage" could undermine confidence about [Bowers'] commitment to enforce the State's law against homosexual sodomy[.]

Id. at 1105 n.17 (citations omitted).

124. *Id.* at 1110-11.

125. *Id.* at 1111-34 (Tjoflat, J., concurring and Godbold, S.J.; Barkett, J.; Kravitch, S.J.; Birch, J., dissenting).

126. *Id.* at 1116 (Tjoflat, J. concurring). Judge Tjoflat agreed with the majority's conclusion that the district court properly granted Bowers summary judgment motion on all claims. *Id.* at 1111. However, Judge Tjoflat stated that the majority should not have applied the *Pickering* balance without first addressing the constitutional issues raised by Shahar. *Id.* at 1111-12. Judge Tjoflat asserted the following in support of this contention:

I believe the court must reach the constitutional question in order to determine under *Pickering* whether the Attorney General's action was lawful [T]he court must describe qualitatively the constitutional right it is placing on the scale in order to determine whether, on balance, the government's interest is to prevail. [T]he court

Godbold disagreed with the majority, stating that because he did not investigate Shahar's constitutional rights for religious expression, Bowers' revocation of her employment was unreasonable. In support of this conclusion, Judge Godbold observed that Shahar's religion

does not do this—it does not tell us, with respect to each of Shahar's remaining claims, where the assumed right ranks in the constitutional hierarchy.

Id. Judge Tjoflat further stated:

When a court engages in *Pickering* balancing, it must identify the constitutional source of the right the employee exercised and assign weight to that right. Otherwise, balancing cannot occur. It cannot occur any more than the local butcher can weigh five pounds of hamburger without placing a five pound weight on the other side of the scale. In the case at hand, the court, with respect to each of Shahar's claims, assumes Shahar's exercise of a constitutional right without describing the right and telling us the weight it has assigned to it. It then places on the other side of the scale the Attorney General's interest in operating an efficient Department of Law that can command the public's respect, and concludes that such interest outweighs what the court has assumed and placed on Shahar's side of the scale.

I submit that if one assumes that the First Amendment protects the homosexual relationship between Shahar and her partner as an intimate association, summary judgment on the intimate association claim was inappropriate on the record before us.

Id. at 1113 (footnotes omitted). In support of his proposition that Shahar lacked a First Amendment claim, Judge Tjoflat relied on two Supreme Court cases which address intimate association as a First Amendment right. *Id.* In *Roberts v. United States Jaycees*, the Court authoritatively positioned the right to intimate association within the gamut of the First Amendment. 468 U.S. 609, 618 (1984). The *Roberts* Court stated that certain kinds of highly personal relationships received constitutional protection from unjustified interference from the state. *Id.* To determine whether the First Amendment protects personal relationships, the Court laid out certain factors, "includ[ing] size, purpose, policies, selectivity, congeniality, and other characteristics in a particular case [that] may be pertinent." *Id.* at 620. Finally, the Court in *Roberts* noted that relationships "that attend the creation and sustenance of family—marriage, childbirth, the raising and education of children, and cohabitation with one's relatives" represent intimate relationships protected by the First Amendment. *Id.* at 619 (citations omitted).

Judge Tjoflat also cited *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990), to refine his interpretation of *Roberts*. *Shahar*, 114 F.3d at 114. Tjoflat relied heavily upon the Court's notion that "[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*, 493 U.S. at 237. Furthermore, Judge Tjoflat explained that homosexual relationships were inconsistent with the family relationships enumerated by *Roberts* and failed to play a role in the development of the Nation's culture and traditions. *Shahar*, 114 F.3d at 1115. Although he would not restrict the right of intimate association to familial relationships, Judge Tjoflat noted that no constitutional protection existed for social association. *Id.* at 1114. Because homosexuals occupied an insignificant role in our Nation's ideals and culture, Judge Tjoflat concluded that the right of intimate association for homosexuals falls short of constitutional dimensions. *Id.* at 1115.

recognizes homosexual marriage as an expression of faith.¹²⁷ Similarly, Judge Kravitch dissented from the majority's opinion and argued that the *Pickering* balance, according to *Waters v. Churchill* Bowers advanced insufficient evidence in support of his action.¹²⁸

127. *Id.* at 1118-22 (Godbold, J. dissenting). Judge Godbold observed that the Reconstructionist Movement of Judaism, to which Shahar belonged, recognizes homosexual marriage as an accepted expression of faith. *Id.* at 1119-20. Judge Godbold further noted that Bowers refused to investigate Shahar's religious beliefs, which caused Bowers to make an ignorant interpretation of Shahar's motives. *Id.* at 1121-22. As a result, Judge Godbold concluded that Bowers acted unreasonably in revoking Shahar's employment. *Id.* Judge Godbold stated:

If the Attorney General had made reasonable investigation this case might never have arisen. But not only did he make no further investigation, he closed the door to knowledge. It would have been easy to confer with Shahar, or have an assistant do so, and explore her desire to use the term "marriage" and his concern about this usage. If she had then explained that she used the term as recommended and accepted by her faith, the Attorney General, correctly enlightened, might have been satisfied. On the other hand, he might have rejected her explanation as insufficient to ameliorate his concerns. He might have explained to her his fear of possible impact on his office and could have explored with her ways in which she might disseminate knowledge of the religious nature of her intimate association. What we do know is that neither the Attorney General, nor the staff members on whom this court implies he relied, made inquiry into the religious nature of her plans. . . . The Attorney General walled himself off, forbade comment or inquiry by staff members who met with Shahar, and terminated the agreement with Shahar on his erroneous perception of the association that she was asserting. Whatever views about possible adverse effects on his office, he did not act reasonably.

Id. at 1222.

128. *Id.* at 1122 (Kravitch, S.J. dissenting). As support for her contention, Judge Kravitch reasoned that under the Supreme Court's decision in *Waters v. Churchill*, 511 U.S. 661 (1994), Bowers based his decision on insufficient or weak evidence at the time of the discharge. *Shahar*, 114 F.3d at 1124. Judge Kravitch rejected the majority's argument that Bowers could reasonably conclude that Shahar would disrupt the workings of the Department. *Id.* Although Judge Kravitch agreed with the majority that courts should give substantial weight to government employers' reasonable predictions for disruptions, Kravitch argued the court need not blindly accept all claims of harm conjured by government employers. *Id.* (citing *Waters v. Churchill*, 511 U.S. 661, 673 (1994)). Judge Kravitch's dissenting opinion contains the following excerpt from *Waters*:

On the other hand, we do not believe that the court must apply the [balancing] test only to the facts as the employer thought them to be, without considering the reasonableness of the employer's conclusions. Even in situations where courts have recognized the special expertise and special needs of certain decision makers, the deference to their conclusions has never been complete. . . . We think employer decision making will not be unduly burdened by having courts look to the facts as the employer *reasonably* found them to be. It may be unreasonable, for example, for the employer to come to a conclusion based on no evidence at all. Likewise, it may be unreasonable for an employer to act based on extremely weak evidence when strong

Judge Barkett also dissented, because she believed that the majority

evidence is clearly available—if, for instance, an employee is accused of writing an improper letter to the editor, and instead of just reading the letter, the employer decides what it said based on unreliable hearsay.

Id. (quoting *Waters*, 511 U.S. at 667 (emphasis in original)).

Moreover, Judge Kravitch argued that the Department's concern about negative public perception should not afford significant weight to Bowers stated interests under *McMullen v. Carson*, because catering to prejudice is not a legitimate government interest. *Id.* at 1125. In *McMullen*, the Eleventh Circuit held that a sheriff's interest in public credibility outweighed the Sheriff's clerical employee's First Amendment interest, which arose from the employee's off-duty statement that he recruited for the Ku Klux Klan. 754 F.2d 936, 938-40 (11th Cir. 1985). Recognizing that *McMullen* differed significantly from *Shahar's* case, the majority in *Shahar* nevertheless relied on *McMullen* for guidance and stated:

In *McMullen*, both public perception and the anticipated effect that the employee's constitutionally protected activity would have on cohesion within the office were crucial in tipping the scales in the sheriff's favor. Nothing indicates that the employee had engaged in a criminal act or that he had joined an organization . . . that had engaged in any criminal act. Given that it was additionally undisputed that neither the employee's statements nor his protected expressive association hindered his ability to perform his clerical duties and that the specific clerk performed his duties in exemplary fashion, . . . the two factors—public perception and anticipated effect—seemed to be the only ones weighing on the sheriff's side of the scale. . . . But that was enough.

114 F.3d at 1109 (internal quotations omitted).

By comparison, Judge Kravitch argued that *McMullen* bore no relationship to *Shahar's* claim. *Id.* at 1125. In support of his argument, Judge Kravitch stated:

First, unlike *McMullen*, where the employee publicized his association with the Klan on a television news broadcast, in this case, *Shahar* did not make any public statements. Further, the sheriff's decision in *McMullen* was not simply based on his prediction that the public would be biased against the Klan-affiliated employee. Rather, the record established that "violent racism has become the Klan's trademark . . . [that] [d]ivisive, confrontational tactics are used by the Klan during periods of racial unrest in order to promote recruitment [and that] [t]hose tactics are still being used in Florida." The sheriff and the community thus reasonably could conclude that the Klan recruiter sanctioned such inflammatory, often illegal, activities. In contrast, Bowers simply baldly asserted that public reaction to *Shahar's* pending employment with his office would have prevented him from serving the state effectively. In light of the Klan's undisputed history of criminal violence, public reaction in *McMullen* was not only more certain, but also would have been more severe than anything which reasonably might have been projected in this case. Finally, although public concern over the Klan's criminally violent activities is a legitimate basis for governmental action, the Supreme Court has now held that animosity toward gay people is an illegitimate purpose for state policy, and thus, to prevail in the balancing of interests, Bowers must cite more than perceived, public distaste for homosexuals.

Id. at 1125 (citations omitted) (emphasis in original).

Therefore, Judge Kravitch concluded that *Shahar's* constitutional intimate association interest outweighed any threat to the Department under *Pickering*. *Id.*

gave great deference to Bowers' subjective views without considering the objective standard, established in Eleventh Circuit precedent, for finding the discharge of a public employee constitutional.¹²⁹

Finally, Judge Birch's key dissent from the majority's opinion was based on his conclusion that the recent Supreme Court decision in *Romer v. Evans* compelled the conclusion that the *Pickering* balance weighed in favor of Shahar.¹³⁰ In *Romer*, the Court

129. *Id.* at 1129-31 (Barkett, J., dissenting). Judge Barkett believed that the court should analogize deference afforded to Bowers under the *Pickering* balance with the deference afforded to law enforcement officials under Eleventh Circuit precedent. See *McCabe v. Sharrett*, 12 F.3d 1558, 1571-74 (11th Cir. 1994) (noting that the police chief produced substantial evidence that the proper performance of the secretary's job required "loyalty and keeping confidences" and that his concerns were not merely subjective, but objectively reasonable as a matter of common experience); *Stough v. Gallagher*, 967 F.2d 1523, 1529 (11th Cir. 1992) (noting the absence of actual evidence that the speech in question adversely affected the sheriff's work environment); *McMullen v. Carson*, 754 F.2d 936, 940 (11th Cir. 1985) (holding that a law enforcement agency's discharge of an employee was valid under the First Amendment because the employee recruited for the Ku Klux Klan, and this behavior would adversely affect the agency's ability to perform its public duties); *Waters v. Chaffin*, 684 F.2d 833, 839-40 (11th Cir. 1982) (indicating that reasonable predictions of harm, rather than actual evidence of harm, held less weight where a police chief and subordinate officer did not work closely together).

In dissent, Judge Barkett argued that the ultimate inquiry when a *Pickering* balance is applied in a government employment case depends on the nature of the government employer demonstrating that the employee's constitutional rights hinder job performance, not on the nature of the employment. *Shahar*, 114 F.3d at 1132-33. Additionally, Judge Barkett criticized the majority for providing Bowers with "after-the-fact reasons" to support his position. *Id.* at 1133. Judge Barkett explained:

[T]he majority cites to four state court decisions decided after Shahar's termination (three of which did not involve the Attorney General's office), and three short Attorney General opinion letters, also written after Shahar's termination. However, the majority fails to mention post-termination evidence of Shahar's apparently successful performance within the legal community as a staff attorney for the City of Atlanta.

Similarly, the majority indicates that the public might reasonably conclude that Shahar engages in sodomy, and that such a belief would undermine the Department's efforts to enforce Georgia's "laws against homosexual sodomy." The relevant Georgia statute, however, does not define sodomy in terms of sexual orientation. The public cannot reasonably assume therefore that homosexuals in the Attorney General's office are more likely to engage in prohibited activity than any other member of that office.

Id. (internal citations and footnotes omitted).

Finally, Judge Barkett stated that Bowers should have the "evidentiary burden to offer credible predictions of harm or disruption." *Id.* at 1133-34.

130. 114 F.3d at 1125-26 (Birch, J., dissenting) (citing *Romer v. Evans*, 517 U.S. 620 (1996)).

invalidated, under the Equal Protection clause of the Fourteenth Amendment, an amendment to the Colorado state constitution that discriminated against homosexuals.¹³¹ Because *Romer* declared that malice directed at homosexuals as a class could not legitimate state action, Judge Birch concluded that Bowers' predictions, based on mere speculation and lacking evidentiary support, failed to tilt the *Pickering* balance in his favor.¹³² Judge Birch contended that Bowers' prediction of negative public perception concerning Shahar's homosexual status failed to legitimate his action.¹³³ Judge Birch relied upon the Supreme Court's decision in *Palmore v. Sidoti*, which held that courts cannot convert private biases into lawful government interest by relying on the prejudice of the public.¹³⁴ In conclusion,

131. *Romer v. Evans*, 517 U.S. 620, 631-36 (1996).

132. *Shahar*, 114 F.3d at 1126 (Birch, J. dissenting). Judge Birch believed that the Supreme Court's pronouncement in *Romer* should have informed the court's consideration of Shahar's intimate association claim and stated:

The import of *Romer* . . . is to elucidate what the Supreme Court considers *not* to be a rational basis for discrimination against homosexuals. The state argued that the rationale for the law included "respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality." Over a vigorous dissent by Justice Scalia, a six-justice majority of the Court rejected the state's rationale, declaring that "animosity toward homosexuals" is not a legitimate basis for state action.

Id. (citations and footnotes omitted). Judge Birch further stated that:

Although the discriminatory conduct that occurred in *Romer* arose in a different factual context than this case, I disagree with the majority's attempt to distinguish *Romer* to the extent that it finds it to be wholly irrelevant. The reasoning and principles enunciated in *Romer* are, in my view, highly relevant to this case and provide a directive that, at least, should inform our analysis.

Id. n.1.

133. *Id.* at 1127-8.

134. 466 U.S. 429, 433 (1984). In *Shahar*, Judge Birch explained that:

In applying the principle of *Palmore* to this case, the key question is not whether the government official reasonably could assume that the public might have a negative reaction to the employee's presence; it is whether the public's perception upon which the official relies is itself a legitimate basis for government action. If the public's perception is borne of no more than unsupported assumptions and stereotypes, it is irrational and cannot serve as the basis of legitimate government action. In this instance, the public's (alleged) blanket assumption that "if it's homosexual, it would have to be sodomy" is based not on anything set forth in the record but rather on public stereotyping and animosity toward homosexuals. Under the principles articulated in *Romer*, this does not provide the state with a legitimate, rational basis to discriminate against Shahar. Bowers' "concern" for the public's perception of homosexuals,

Judge Birch argued that Bowers failed to infer reasonably that the public would perceive Shahar's conduct within her marriage to be illegal without inferring the like perception for heterosexual employees.¹³⁵

D. Subsequent History

On the same day the Eleventh Circuit handed down its *en banc* decision, Bowers resigned from his office as the Attorney General of Georgia.¹³⁶ Ironically, a week after his resignation, Bowers publicly confessed that he had engaged in a decade long extra-marital relationship with a woman who worked in the Department.¹³⁷ When asked about the apparent double standard after revoking Shahar's employment offer, Bowers called himself a hypocrite.¹³⁸ Shahar, on

therefore, is entitled to no weight in balancing Shahar's right of intimate association.

Shahar, 114 F.3d at 1128 (quotations in original) (footnotes omitted).

Judge Birch pointed out, for example, that Bowers did not assume that unmarried heterosexual employees who openly dated had engaged in the illegal act of fornication under Georgia law. *Id.* at 1128-29. See GA. CODE ANN. § 16-6-18 (1996) ("[a]n unmarried person commits the offense of fornication when he voluntarily has sexual intercourse with another person."). Bowers also did not assume that married employees had engaged in the illegal act of sodomy. *Shahar*, 114 F.3d at 1128-29.

Judge Birch elaborated this point by describing the Department's response to a discovery motion arising out of a habeas petition by a married heterosexual convicted of sodomy: "Bowers' Department of Law moved to strike the petitioner's motion to discover whether any of Bowers' attorneys had themselves ever violated the sodomy law because '[t]he personal conduct [of Department attorneys] is no more relevant than the personal conduct of Petitioner's counsel or the Court.'" *Id.* n.7 (quoting Brief for the Department of Law at 2-4, *Moseley v. Esposito*, No. 89-6897-1 (Super. Ct. DeKalb Co.)). Judge Birch explained that: "Bowers has no reason for believing that Shahar's personal conduct would affect her abilities to ethically represent the state, except based on an impermissible inference from her status as a homosexual. Lawyers are trained to be advocates of legal positions with which they may personally disagree." *Id.*

With these obvious discrepancies of assumption, Judge Birch concluded that Bowers' animosity toward homosexuals did not constitute a legitimate interest that outweighed Shahar's constitutional rights. *Id.*

135. *Id.* at 1128.

136. See Bill Rankin, *Lesbian's Claims Rejected Bowers Backed: Appeals Court Rules the Ex-Attorney General Had Right to Withdraw Robin Shahar's Job Offer*, THE ATLANTA JOURNAL/CONSTITUTION, May 31, 1997, at D1.

137. See Dick Pettys, *Bowers Confesses to Lengthy, Adulterous Affair, Ex-Attorney General Offers No Excuses*, THE ATLANTA JOURNAL, June 5, 1997, at D1.

138. *Id.* ("Asked how his conduct was different legally from Shahar's, he said, 'In a moral sense, it's not.' Asked whether it was hypocritical for him to withdraw the job offer to Shahar,

the other hand, has built a successful career in public employment.¹³⁹

III. ANALYSIS OF THE MAJORITY OPINION

This part highlights and analyzes the logical errors committed by the majority in *Shahar* as they relate to the weight accorded to the alleged adverse public perception advanced by Bowers. Sections A through C address the proper standard of review in the *Shahar* case and Section D analyzes the public perception factor in light of that standard.

A. *The Constitutional Question*

What weight should the majority have afforded to Shahar's assumed constitutional rights? In the opinion, the majority claimed to give substantial weight to Shahar's constitutional rights, but never defined these rights.¹⁴⁰ The Eleventh Circuit precedent has left unresolved the question whether homosexuals possess the First Amendment right to intimate association.¹⁴¹ Without controlling precedent, the *Shahar* majority cannot assign weight to an abstract constitutional right without first analyzing it under the maximum weight possible. The maximum weight possible, as Judge Tjoflat suggested, is the weight assigned to heterosexual marriage.¹⁴² Summary judgment against Shahar hardly seems proper if homosexual marriage is assigned the same weight as heterosexual marriage.

he said, "In a moral sense, yes. But legally, I do not believe there was any . . . alternative. Did that make me a hypocrite? Yes."").

139. See *Ideas For Our Community; Shahar Still Fighting For Principle*, Editorial, THE ATLANTA JOURNAL/CONSTITUTION, November 3, 1997, at A10.

140. *Shahar*, 114 F.3d at 1106. See also *supra* note 114 and accompanying text.

141. See *McCabe v. Sharrett*, 12 F.3d 1558 (11th Cir. 1994); *Bates v. Hunt*, 3 F.3d 374 (11th Cir. 1993); *McMullen v. Carson*, 754 F.2d 936 (11th Cir. 1985); *Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982). See also *supra* notes 66-80 and accompanying text.

142. *Shahar*, 114 F.3d at 1115-16 (Tjoflat, J., concurring). See also *supra* notes 126-27 and accompanying text.

B. The Logical Error

Should the *Shahar* majority have relied on the fact that, in the case law, a subordinate attorney has never successfully challenged a chief attorney's adverse employment decision to conclude that Bowers acted reasonably when he discharged Shahar? The majority opinion observed that no reported decision has ever reinstated a subordinate lawyer's employment over the chief lawyer's objection.¹⁴³ However, the cases relied upon by the majority, such as *Bates v. Hunt*¹⁴⁴ and *McMullen v. Carson*,¹⁴⁵ simply do not support such a proposition.

Bates, for example, involved a political affiliation question.¹⁴⁶ In *Shahar*, however, political affiliation was never an issue. Moreover, had political affiliation been the focus of *Shahar*, then the court should have examined the case under controlling authority from the Supreme Court, such as *Elrod v. Burns*¹⁴⁷ and *Branti v. Finkel*,¹⁴⁸ which, as discussed above, stand for the proposition that a public employer can permissibly dismiss policymaking employees due to their political affiliation. The majority's decision to ignore *Elrod* and *Branti* amply demonstrates that the conclusion that a chief attorney possesses unrestrained power to fire subordinate attorneys is fictional, because these cases limited such power.

Moreover, *McMullen* stood for the proposition that a government employer's prediction of future harm is reasonable if it is based upon present, actual, and adverse public perception.¹⁴⁹ In *Shahar*, Bowers never presented evidence that the public, at the time of discharge, would have had an adverse reaction. Granted, as *Connick v. Myers*, established, the government employer need not wait for adverse public reaction before discharging an employee; however, such predictions of adverse public reaction must be reasonable.¹⁵⁰ The following section sets forth this reasonableness standard.

143. *Shahar*, 114 F.3d at 1104. See also *supra* note 119 and accompanying text.

144. 3 F.3d 374 (11th Cir. 1994). See also *supra* notes 69-71 and accompanying text.

145. 754 F.2d 936 (11th Cir. 1985). See also *supra* notes 77-80 and accompanying text.

146. *Bates*, 3 F.3d at 376. See also *supra* note 69-71 and accompanying text.

147. 427 U.S. 347 (1976). See also *supra* notes 21-26 and accompanying text.

148. 445 U.S. 507 (1980). See also *supra* notes 27-33 and accompanying text.

149. 754 F.2d 936, 940 (11th Cir. 1985). See also *supra* notes 77-80 and accompanying text.

150. 461 U.S. 138, 149-54 (1983). See also *supra* notes 34-38 and accompanying text.

C. The Legal Standard

Which legal standard should the *Shahar* court have used to analyze the reasonableness of Bowers' decision to revoke Robin Shahar's employment offer? The court relied on a subjective standard to weigh the reasonableness of Bowers' predictions of adverse public perception.¹⁵¹ In doing so, the majority ignored Eleventh Circuit precedent from *McCabe v. Sherritt*¹⁵² and *McMullen v. Carson*.¹⁵³ For example, in *McCabe*, the court recognized as decisive the police chief's submission of substantial and objectively reasonable evidence that his personal secretary's proper performance required loyalty and the ability to keep confidences.¹⁵⁴ Similarly, in *McMullen*, the court held that because the KKK has a history of violent activity a police chief could reasonably conclude that retaining a member of the Klan as a staff member would result in tension between the police department and the Black population.¹⁵⁵ Eleventh Circuit precedent, therefore, stands for the proposition that courts must use an objective legal standard to determine reasonableness in employment contexts.

A subjective standard makes the *Pickering* balance superfluous because under such a standard, the balance always weighs in favor of the public employer. The subjective standard actually transforms the *Pickering* balance into a rebuttable presumption in favor of the government employer, which circumvents controlling authority from the Supreme Court. As the following Section suggests, according to an objective standard, summary judgment against Shahar was improper.

D. Public Perception

The *Shahar* court held that Bowers' conclusion that the public would negatively perceive Shahar's marriage to another woman as equivalent to violating Georgia's sodomy laws, thereby harming the

151. See *Shahar*, 114 F.3d at 1129-31 (Borlect, J., dissenting). See also *supra* note 129 and accompanying text.

152. 12 F.3d 1558 (11th Cir. 1994).

153. 754 F.2d 936 (11th Cir. 1985).

154. *McCabe*, 12 F.3d at 1572-73. See also *supra* note 68 and accompanying text.

155. *McMullen*, 754 F.2d at 938. See also *supra* notes 78-80 and accompanying text.

Department's public image was reasonable.¹⁵⁶ Further, the majority held that Shahar's ceremony would confuse the public about her legal marital status and about Bowers' attitude regarding same-sex marriages.¹⁵⁷ In light of an objectively reasonable standard regarding public perception, these holdings are clearly in error.¹⁵⁸

Under an objectively reasonable standard, the majority lacked any reason to find Bowers' conclusion that Shahar's intimate involvement with her lover was equivalent to the public's perception of such involvement as violating Georgia's laws against sodomy.¹⁵⁹ First, the Georgia law against sodomy does not distinguish between homosexual and heterosexual sodomy.¹⁶⁰ Though homosexuals have long been the subjects of prejudice in this country, the law cannot, directly or indirectly, give effect to such discrimination.¹⁶¹ Likewise,

156. *Shahar*, 114 F.3d at 1104-06. See also *supra* note 123 and accompanying text.

157. *Id.* See also *supra* note 123 and accompanying text.

158. For example, Bowers claimed that he revoked Shahar's employment offer not because of her sexuality, but rather because of her same-sex marriage. *Shahar*, 114 F.3d at 1105-06. Why, then, did Bowers claim that Shahar's involvement with her lover would interfere with the Department's ability to enforce Georgia's sodomy laws? Apparently, the *Shahar* court concluded that homosexuals have an ulterior motive to advance a homosexual agenda while employed by the government. *Id.* at 1108 ("[T]he Attorney General's worry about his office being involved in litigation in which Shahar's special personal situation might appear to be in conflict with the State's position has been borne out in fact."). Even assuming that Shahar strongly opposed laws against sodomy, this did not distinguish her from many attorneys who feel strongly about controversial subjects such as abortion, gun control, sexual harassment, assisted suicide, pornography, capital punishment, etc. The Department expects staff attorneys to uphold the law of the state regardless of their personal beliefs. Moreover, a staff attorney is asked to be taken off a case because of strong personal beliefs. Even so, it is hard to believe that Shahar would have had many occasions to ask to be taken off cases involving violations of Georgia's sodomy laws.

159. See, e.g., *supra* note 123 and accompanying text.

160. GA. CODE ANN. § 16-6-2(a) (1996). See also *supra* note 100 and accompanying text. In *Shahar*, the court implied that the public perceived homosexuals as having a greater tendency to engage in illegal sexual conduct than heterosexuals, especially if homosexuals consider themselves to be married. *Shahar*, 114 F.3d at 1104-06. Under *Romer*, though, a court cannot find erroneous assumptions about a class of individuals to be a rational basis for discriminating against such persons, even if such erroneous assumptions are widespread. *Romer*, 517 U.S. 620, 635-36 (1996). Also, if these assumptions about homosexuals are true, the court must then infer that the public perceives non-married heterosexuals as violating Georgia's laws against fornication, especially if heterosexual individuals became involved in intimate relationships. See GA. CODE ANN. § 16-6-18 (1996). The *Shahar* majority impermissibly weighed the prejudice of the public against homosexuals on Bowers' side of the *Pickering* balance.

161. See *Shahar*, 114 F.3d at 1128 (Birch, J., dissenting). See also *supra* note 134 and accompanying text.

Bowers could not reasonably conclude that Shahar's acts would confuse the public about her legal marital status and about his position on same-sex marriage, especially considering that Shahar neither married within Georgia nor attempted to claim any marriage benefits from the state.¹⁶²

Finally, Bowers claimed to lose confidence in Shahar's ability to make good judgments for the Department because she failed to appreciate the fact that her same-sex marriage would bring controversy to the Department. Bowers' line of reasoning resembles the arguments in *Lumpkin v. Jordan*,¹⁶³ *Zook v. Brown*¹⁶⁴ and *Wood v. Ruppe*.¹⁶⁵ Unlike the parties in those cases, however, Shahar never exploited her position in the Department to advance her views on homosexuality or same-sex marriage. The only controversy that Shahar could have brought to the Department would have derived from public animosity against homosexuals. Under *Latino Officers Association*, Bowers would have needed to present some credible evidence to show the injury to his department that adverse public perception could cause.¹⁶⁶ With or without such evidence, *Briggs v. North Muskegen Police Department* would have rejected the department's justification of its discharge of Shahar based upon nothing more than the community's animosity.¹⁶⁷ As in *Romer v. Evans*, the Government has no permissible interest in maintaining the prejudicial whims of the public.¹⁶⁸ The *Shahar* court shaped the law

162. See *Shahar*, 114 F.3d at 1106. See also *supra* note 101 and accompanying text. Even assuming that the public gained knowledge of the facts surrounding Shahar's marriage, people often recognize that marriage within a religious faith is not synonymous with marriage under a state license. Even if the facts surrounding Shahar's marriage status were uncertain due to a lack of evidence, the majority claimed to accept Shahar's view of the facts. *Shahar*, 114 F.3d at 1100. Nevertheless, the *Shahar* court did not follow those facts to their logical conclusion. Finally, if Bowers failed either to submit to the court any finding of public confusion, or to state reasons for such confusion, then the court should not repair this deficiency by post-hoc determinations.

163. No. C-93-4338, 1994 WL 669852 (N.D. Cal. Nov. 22, 1994). See also *supra* notes 55-57 and accompanying text.

164. 865 F.2d 887 (7th Cir. 1989). See also *supra* notes 58-59 and accompanying text.

165. 659 F. Supp. 403 (D.C. 1987). See also *supra* note 60 and accompanying text.

166. *Latino Officers Ass'n*, 1997 WL 473972, at *4-*6. See *supra* notes 63-65 and accompanying text.

167. 563 F. Supp. 585, 592 (W.D. Mich. 1983). See also *supra* notes 61-62 and accompanying text.

168. 517 U.S. 620, 636 (1996). See also *supra* notes 130-31 and accompanying text.

to advance public prejudices at the expense of an individual's constitutional rights, and opened the door for government employers to turn a speculative public murmur into a discriminatory sonic boom.¹⁶⁹

The following Section proposes a calibrated scale to balance the government employer's interest in maintaining public support against the government employee's interest in constitutional protection. In addition, the Section sets forth the reasons why, absent legislative anti-discrimination statutes, courts should grant homosexuals constitutional protection.

IV. CONSTITUTIONAL FACTORS

The *Pickering* rule balances the constitutional rights of a government employee against a government employer's interest in maintaining a functional and non-controversial office.¹⁷⁰ As the preceding Section suggests, the *Pickering* balance becomes illusory when a subjective fear of adverse public perception weighs in favor of the government employer. An objective standard for analyzing the government employer's predictions of adverse public perception better serves the balancing purposes of the *Pickering* rule.¹⁷¹ The following set of objective factors would guide courts in determining whether, in a given case, the guise of adverse public perception would impermissibly shield government employers who infringed upon their employees' constitutional rights.

169. Courts should not erect a burdensome judicial barrier that government employers must hurdle when faced with the discharge of an untrustworthy employee. However, it hardly seems burdensome to require government employers to act reasonably in advancing their interests in a challenged discharge, or to prevent government employers from justifying discriminatory action under the guise of adverse public perception. For example, it is difficult to imagine that the *Shahar* court would have upheld Bowers' decision if Shahar had married a Black male, which used to be illegal in Georgia.

The Warren Court held miscegenation statutes unconstitutional in the late 1960's and barred the government from using public outcry against inter-racial marriage to justify such class-wide discrimination. See *Loving v. Virginia*, 388 U.S. 1 (1967). Statutes against homosexual sodomy, however, have been upheld by the Supreme Court as constitutional under state police power. See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

170. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). See also *supra* notes 12-20 and accompanying text.

171. See *supra* Part III.C.

1. Has the Government Employer Adequately Investigated Whether the Employee's Conduct Would Harm the Department?

An inquiry by the government employer to determine whether the acts of the employee in question would harm the Department would, at least, open communication between the two parties. The government employer needs to first ascertain whether the rights that the employee asserts enjoy constitutional support and, if so, the employer should convey to the employee the its policy on such matters. If the government employer decides to discharge the employee after this dialogue, then the employer should set forth in writing the reasons for the discharge.¹⁷² This simple procedure prevents the government employer from making post-hoc rationalizations for his/her decision. Furthermore, the government employer's inquiry into the employee's rights potentially saves significant amounts of tax dollars defending the employment decision.¹⁷³ Finally, this inquiry might produce some credible evidence of the reasonableness of a decision to discharge the employee in question, which evidence will constitute the second factor.

2. Has the Government Employer Sustained the Evidentiary Burden of Producing Credible Predictions of Adverse Public Perception?

The government employer should bear this evidentiary burden because adverse public perception is easy for the employer to claim and difficult for the employee to refute. The government employer's presentation of credible evidence of harm would ensure that judges possess the facts necessary to rule on the issue adverse of public

172. Whether reasonableness exists in an adverse employment decision depends on the employer's thoughts at the time of the decision. *See, e.g.,* *Shahar v. Bowers*, 114 F.3d 1097, 1120 (11th Cir. 1997) (Godbold, J. dissenting) ("[P]ost-event rationalizations of what [Bowers] might have done, thought up afterwards in ivory towers, will not do.").

173. Had Bowers discussed his concerns with Shahar, the parties might have established a working relationship to serve better both the Department and the public. A government employer who acts in ignorance necessarily risks an irrational decision.

perception. Granted, in cases like *McMullen v. Carson* no reasonable trier of fact would find a lack of adverse public perception.¹⁷⁴ In cases where public perception is unclear, however, credible evidence presented by the employer helps to clarify some of the uncertainty.¹⁷⁵

3. Is Public Perception Based Upon Class-Wide Prejudice or Upon Legitimate Government Concerns?

Courts must determine whether a government employer's adverse employment action relies on public prejudice or on a legitimate government concern. This determination ensures that government employers cannot act according to their own personal biases under the guise of public prejudice.¹⁷⁶ Under this factor, no governmental entity would be able to adopt public prejudice as a rationale for discharging an employee motivated, in fact, by arbitrary discrimination.¹⁷⁷ Without an assessment of the reasonableness of a

174. See 754 F.2d 936 (11th Cir. 1985). See also *supra* notes 77-80 and accompanying text.

175. Credible evidence of public opinion becomes especially significant when the government employer initiates a double standard toward various classes of employees under the guise of adverse public perception. This problem is self-evident in associating the status of an individual with the individual's sexual conduct. For example, firing a homosexual based upon alleged sexual conduct without determining whether heterosexuals engage in the same conduct establishes a double standard. Firing a homosexual based upon public perception of alleged sexual conduct without determining whether the public perceives heterosexuals in the same manner also establishes a double standard. Any double standard reeks of discrimination, and evidence based on such a double standard cannot constitute the type of credible evidence necessary to permit a government employer to compromise the constitutional rights of a government employee.

176. This country, since its inception, has struggled against class wide discrimination. Although many walls of prejudice have tumbled, many obstacles remain. Discrimination against homosexuals remains one of the few prejudices still endorsed by large segments of the public. Some public officials likely hold private biases against homosexuals. These private biases, however, must not be converted into law under the guise of an alleged prejudice of the public. See *Shahar*, 114 F.3d at 1128 (Birch, J., dissenting). Public malice toward a class of individuals is not a legitimate government action. See *Romer v. Evans*, 517 U.S. 620, 631-36 (1996).

177. See, e.g., Chris Bull, *War of the Words*, THE ADVOCATE, July 21, 1998, at 13. The article cited a letter from Sen. Alfonse D'Amato (R-N.Y.) to Sen. Trent Lott (R-MS), which stated:

I fear that Mr. Hormel's nomination [for U.S. ambassador to Luxembourg] is being obstructed for one reason, and one reason only: the fact that he is gay. In this day and age, when people ably serve our country in so many capacities without regard to sexual orientation, for the United States Senate to deny an appointment on that basis is simply wrong. What's more, on a personal level, I am embarrassed that our

government employer's interest in avoiding adverse public reaction, the heterosexual majority can refuse homosexuals the safeguards that other individuals enjoy. Moreover, unlike most minority classes, homosexuals receive no protection from federal legislation.¹⁷⁸ Without protection from arbitrary discrimination, homosexuals are forced to seek justice from the courts, which must refuse to convert public prejudice into a legitimate governmental interest.¹⁷⁹

4. Does Public Perception, as a Justification for Adverse Employment Decisions, Deny a Government Employee His or Her Constitutional Rights?

The Constitution protects individual action, not lifestyles.¹⁸⁰ Legislatures pass laws to compel or prohibit certain individual actions. The judiciary determines, *inter alia*, whether legislative acts pass constitutional muster. In the absence of judicial or legislative action, however, influencing public perception becomes the only way for minorities to safeguard their constitutional rights.¹⁸¹ But what happens if, and when, the majority denies individuals their constitutional rights?

The answer to this question comes from history of the civil rights movements of Black people and women. Because homosexuality

Republican Party, the Party of Lincoln, is seen to be the force behind this injustice.

Id.

178. *See supra* notes 5-9 and accompanying text (discussing legislative attempts to protect homosexuals).

179. *See, e.g., Romer*, 517 U.S. at 631-36. *See also supra* notes 130-34 and accompanying text.

180. *See* RICHARD D. MOHR, *GAYS JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* 131 (1988). Mr. Mohr stated:

[T]he Constitution does not protect lifetimes or even lifestyles. Rather it protects particular instances of actions from legal coercion. As in the case of associations, if a lifestyle is protected, it is so because an individual has rights to perform certain actions; a person does not have a right to perform certain actions because she has a certain lifestyle.

Id.

181. *See id.* at 179.

differs from race and gender in that homosexuals are present in every cross-section of society, the answer will inevitably have distinguishing characteristics from Black people and women, and must then be addressed *ab initio* as it applies to homosexuals.

For homosexuals, denial of their individual rights arises from public stigma and willful ignorance about homosexuality.¹⁸² The heterosexual majority's willful ignorance about homosexuals allows widespread hatred to veil the irrationality of their beliefs. With this stigmatization of homosexuals established, the heterosexual majority does not need a compelling reason to justify its discrimination.¹⁸³

Because homosexuals do not have physical features to set them apart from the majority, as do ethnic minorities, they are able to conceal their status from employers, neighbors, family, and friends.¹⁸⁴ In that light, homosexuals can avoid social animosity by deciding not to participate in the political forum.¹⁸⁵ If, for instance, homosexuals assembled or petitioned the government, they might inadvertently reveal their status to unwitting eyes, such as their employers.¹⁸⁶ Accordingly, homosexuals risk losing their employment and, hence, their means of earning a living if they reveal their homosexuality. Without adequate protection from legislatures or courts, homosexuals cannot obtain for themselves the constitutional rights enjoyed by the

182 For example, homosexuals often are the brunt of jokes, physical and mental abuse, religious intolerance and media stereotyping. *See id.* at 22-27. Society stereotypes homosexuals as child-molesters, sexual deviants, cross-dressers, gender psychotics, etc. *See id.* Stereotypes keep the stigmatized group in conformity with the status quo of the majority's society. *See id.* at 24.

183. *See id.* at 179.

184. This ability to conceal one's homosexual identity makes "coming out" such a paradigm shift in the homosexual lifestyle. *See id.* at 22. This decision means accepting one's homosexuality, which is often the most difficult step, and freeing one's self from the prison of public condemnation. More often than not, homosexuals "come out" only partially (i.e., only to friends and family), and continue to hide their status from banks, insurance companies, hospitals and employers. The purpose of a "partial closet" comes from homosexuals' desire to get loans, insurance policies, adequate health care and employment without discrimination. Because of public stigmatization, hiding in a half-open "closet" remains the only rational short-term solution for homosexuals to achieve non-discriminatory treatment. Granted, homosexuals may be unwitting participants in their own oppression, but the choice between life and livelihood is difficult.

185. *See id.* at 173.

186. *See id.*

majority.¹⁸⁷ As a consequence, public stigmatization deprives homosexuals of their constitutional rights and freedoms.

Thus, absent legislative action, courts must protect homosexuals from a political system that denies them the constitutional rights afforded to the majority. Courts need not don the legislative hat and make new law. In the case of government employment, though, reference to public prejudice to justify the discharge of a homosexual employee simply fails to create a compelling argument.¹⁸⁸ Using the *Pickering* balancing test, class-wide discrimination based on public hatred should not outweigh the constitutional rights of a homosexual government employee. Denying public employment to homosexuals denies them constitutional freedoms, something the courts cannot sanction.

CONCLUSION

Absent adequate anti-discrimination legislation to protect homosexuals from arbitrary employment decisions, the courts must refuse to shape the law according to public prejudice and to the detriment of constitutional protections. Giving public prejudice the force of law both abandons all notions of justice and establishes a legal foundation to discriminate on a class-wide basis. *Shahar v.*

187. *See id.* Mohr stated:

Only when the government protects gays against discrimination in housing, employment, and public accommodation will gays have first amendment rights as powers. For all potentially effective political strategies involve *public* actions. More specifically, all the actions protected by the first amendment are public actions (speaking, publishing, petitioning, assembling, associating). Now, a person who is a member of an invisible minority and who must remain invisible, hidden, and secreted in respect to her minority status as a condition for maintaining a livelihood is not free to be public about her minority status or to incur suspicion by publicly associating with others who are open about their similar status. And so she is effectively denied all political power—except the right to vote. But voting aside, she will be denied the freedom to express her views in a public forum and to unite with or organize other like-minded individuals in an attempt to compete for votes which would elect persons who will support the policies advocated by her group. She is denied all effective use of legally available means of influencing public opinion before voting and all effective means of lobbying after elections are held.

Id. at 173.

188. *See, e.g., Romer v. Evans*, 517 U.S. 620, 631-36 (1996). *See also supra* notes 130-34 and accompanying text.

Bowers stands as but one example of a vast array of anti-homosexual discriminatory conduct. Before this country can evolve into a society of true individual freedoms, it must eradicate the virus of homosexual discrimination.

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* J.D. 1999, Washington University. I would like to dedicate this Note to my parents, Ron and Cheri Stoneraft, for all their love and support.

