



CSU
College of Law Library

Cleveland State University
EngagedScholarship@CSU

Law Faculty Articles and Essays


Faculty Scholarship

2009

Lawrence: An Unlikely Catalyst for Massive Disruption in the Sphere of Government Employee Privacy and Intimate Association Claims

Matthew W. Green Jr.
Cleveland State University, m.w.green@csuohio.edu

Follow this and additional works at: https://engagedscholarship.csuohio.edu/fac_articles

 Part of the [Civil Rights and Discrimination Commons](#), and the [Labor and Employment Law Commons](#)
How does access to this work benefit you? Let us know!

Original Citation

Matthew Green, Lawrence: An Unlikely Catalyst for Massive Disruption in the Sphere of Government Employee Privacy and Intimate Association Claims, 29 Berkeley Journal of Employment and Labor Law 311 (2009)

This Article is brought to you for free and open access by the Faculty Scholarship at EngagedScholarship@CSU. It has been accepted for inclusion in Law Faculty Articles and Essays by an authorized administrator of EngagedScholarship@CSU. For more information, please contact research.services@law.csuohio.edu.

HEINONLINE

Citation: 29 Berkeley J. Emp. & Lab. L. 311 2008

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Fri Apr 27 16:47:57 2012

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=1067-7666](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=1067-7666)

Lawrence: An Unlikely Catalyst for Massive Disruption in the Sphere of Government Employee Privacy and Intimate Association Claims

Matthew W. Green, Jr.[†]

In 2003, the U.S. Supreme Court handed down Lawrence v. Texas, the landmark decision that overturned a Texas statute proscribing homosexual sodomy. The Supreme Court held that the Texas statute infringed the right of "free adults" to engage in private, consensual, non-commercial sexual conduct in their home. In doing so, the Court overturned a prior case, Bowers v. Hardwick, which had upheld a Georgia sodomy statute.

In his Lawrence dissent Justice Scalia predicted that overruling Bowers would cause a massive disruption of the current social order. To substantiate his point, he cites numerous cases, many in the area of public employment, the foundations of which, he contends, are now undermined because of the Court's overruling of Bowers. This article presents a strong argument that the massive disruption theory is unfounded in the area of government employee privacy and intimate association claims. Such claims typically arise when a government employee is terminated or otherwise sanctioned because he or she is involved in a relationship the public employer claims conflicts with the employer's interests. Several reasons support the narrow reading of Lawrence with regard to these claims.

Despite Lawrence's invocation of cases discussing fundamental rights the Court failed to state that the right at issue in that case was a fundamental right, and the Court appeared to invalidate the Texas statute under rational basis review. Accordingly, lower courts interpreting Lawrence have held that it created no new fundamental right and likewise have analyzed privacy and intimate association claims that rely for support on Lawrence, including claims brought by public employees, under rational basis review. Such review generally results in upholding the government decision.

[†] Assistant Professor, Cleveland-Marshall College of Law; LL.M., Columbia University, Harlan Fiske Stone Scholar; J.D., University of Baltimore School of Law, Magna Cum Laude; B.A., University of Maryland, College Park; law clerk to the Hon. Eric L. Clay, U.S. Court of Appeals for the Sixth Circuit, 2001-2002. Special thanks to Mr. Kofi Asamoah for his kind assistance with this article.

The article further demonstrates that Lawrence has neither undermined the at-will employment doctrine nor the deference afforded to a government employer to make decisions regarding its workforce, even where those decisions curb a worker's right to enter into a relationship his or her employer contends conflicts with its effective functioning. This article also demonstrates that successful employee claims are rare because numerous lower courts have adopted stringent tests to analyze employee privacy and intimate association claims. Such tests rarely result in employee victories. It is, therefore, unlikely that Lawrence will have a massive effect on employee privacy and intimate association claims.

To test this thesis, the article analyzes the cases that Justice Scalia cites in his dissent as now standing on shaky foundation in the wake of Lawrence. The article demonstrates that the holdings of these cases likely survive Lawrence.

I. INTRODUCTION	313
II. THE CONSTITUTIONAL RIGHT TO PRIVACY AND INTIMATE ASSOCIATION	315
A. Substantive Due Process.....	315
B. First Amendment Rights.....	317
1. The Right of Intimate Association	317
2. Intimate Association: A Distinct Right from Privacy	318
III. PUBLIC EMPLOYMENT	319
A. Standard of Review	321
1. Direct and Substantial Burden	321
a. Generally-Applicable Test	322
b. Application of Direct and Substantial Burden Test to Employment Cases	323
2. Intermediate Scrutiny of Employer Decisions under <i>Pickering</i>	325
a. Weighing Interests in Expressive Association Cases	325
b. <i>Pickering</i> in Intimate Association Cases	327
B. Interests at Stake.....	330
1. Government Employees.....	330
2. Government Employers	331
IV. LAWRENCE: AN UNLIKELY LEVELER OF INTIMATE ASSOCIATION EMPLOYMENT CASES.....	333
A. Due Process under <i>Bowers</i> and <i>Lawrence</i>	333
1. <i>Lawrence</i> : Overruling a Precedent Not Worth Keeping ..	333

2. A Vitriolic Dissent	335
B. A Massive Social Disruption? Not Likely.....	337
1. <i>Marcum v. McWhorter</i> and <i>City of Sherman v. Henry</i>	338
2. <i>Holmes v. Cal. Army Nat'l Guard</i> and <i>Schowengerdt v. United States</i>	340
3. <i>High Tech Gays v. Defense Industrial Security Clearance Office</i>	341
V. CONCLUSION.....	343

I. INTRODUCTION

Government employees beware: A smooch or cuddle with the guy or girl in the next cubicle could cost you your job. No, not because of sexual harassment. The tryst may be mutual and might even lead to marriage—but not before a trip to the unemployment line.

The U.S. Supreme Court has long held that the government cannot arbitrarily discharge an employee in violation of her constitutional rights.¹ While there is no per se constitutional right to cuddle with a co-worker, the Court has held that the liberty interest implied in the Fourteenth Amendment's Due Process Clause grants individuals a right to engage in private, intimate conduct.² Likewise, the First Amendment bestows certain rights to associate intimately with others.³ Those rights have been held to encompass the right to marry and to date.⁴ But with coworkers? Not necessarily.

The rights of government employers to maintain a workplace of propriety generally trumps the rights of its employees to engage in private, intimate behavior with whomever they please. Justice Scalia's dissent in the seminal Supreme Court case *Lawrence v. Texas*,⁵ however, flatly but wrongly suggests otherwise.

In *Lawrence*, the Court held that a Texas statute proscribing consensual homosexual sodomy violated the Due Process Clause of the Fourteenth Amendment.⁶ The decision sounded the death knell for *Bowers v. Hardwick*,⁷ in which the Court had earlier upheld a Georgia sodomy statute as applied to homosexuals.⁸

1. See *infra* notes 56-58 and accompanying text.

2. See *infra* notes 20-35 and accompanying text.

3. See *infra* note 36 and accompanying text.

4. See *infra* notes 40-44 and accompanying text.

5. 539 U.S. 558, 589-90 (2003).

6. *Id.* at 564, 577-78.

7. 478 U.S. 186 (1986).

8. 539 U.S. at 566.

Only a few years old, *Lawrence* is still teething and its reach is unclear. For instance, Justice Scalia in his dissent ominously predicts that a still nascent *Lawrence* will stagger over to areas other than consensual adult sodomy and topple laws regulating such activity as bigamy, adult incest, masturbation, polygamy, bestiality, same-sex marriage, and prostitution.⁹ He points to a series of cases that, in his view, relied on *Bowers* and now stand on shaky ground because of its overruling.¹⁰ Scalia goes on to proclaim that overruling *Bowers* would cause a “massive disruption of the current social order.”¹¹

While it may be too soon to predict the extent of *Lawrence*’s reach, one area of the law that is not likely to undergo significant overhaul in light of *Lawrence* involves the discharge of government employees for purely private, intimate behavior. Several cases¹² to which Justice Scalia points involve government employment issues, particularly in the areas of law enforcement and the military.¹³ Justice Scalia’s citation to these cases as evidence of the massive social disruption he believes *Lawrence* will cause fails to withstand scrutiny, largely because the cases implicate the government acting as employer. *Lawrence* has done little to disturb the at-will employment doctrine.¹⁴ Where the government acts as an employer, courts traditionally have afforded great deference to decisions that affect discharge, promotion, and other terms and conditions of employment.

The judicial decisions cited by Scalia also rest on the special circumstances of certain employment settings, such as the military or law enforcement. The Supreme Court and lower courts have consistently held that the special functions that military and police employers perform require even more deference to personnel decisions that may affect even the most intimate aspects of their employees’ lives.¹⁵ *Lawrence* will likely have no

9. *Id.* at 590. Justice Scalia’s concerns regarding the leveling of such laws have proven incorrect. See *infra* note 168 and accompanying text.

10. *Lawrence*, 539 U.S. at 590 n.2.

11. *Id.* at 591.

12. See *infra* notes 173-180 and accompanying text.

13. *Id.* at 589-90, 590 n.2.

14. “At-will” employment refers to the ability of both the employee and employer to terminate the employment relationship at any time, for any reason or for no reason. BLACK’S LAW DICTIONARY 566 (8th ed. 2004). An employer, however, may not use the at-will doctrine to discharge employees on the basis of characteristics protected by federal or state law. See, e.g., 42 U.S.C.A. § 2000e-2(a)(1) (West 2003) (barring discrimination in employment on the basis of race, color, religion, sex or national origin under federal law); Gina Capua, *Marital Status Discrimination: The Status/Conduct Debate*, 50 WAYNE L. REV. 961, 962 n.8 (2004) (listing states that proscribe employment discrimination based on marital status and noting that not all states bar such discrimination); Jeremy C. Lowe, *Homosexual Discrimination and Government Employment: Shahar v. Bowers—The Government Employer’s Shield of Public Animosity*, 55 WASH. U. J. URB. & CONTEMP. L. 191, 192 n.9 (1999) (listing several states that ban discrimination in employment based on sexual orientation).

15. See *infra* pp. 331-32 and accompanying notes.

effect on those decisions despite their reliance on the case it overruled, *Bowers*.

This article discusses why Justice Scalia's massive social disturbance concerns are unfounded in the context of government employment. In light of the general deference afforded to the government as an employer, and the particular deference to military and police employers, it is unlikely that *Lawrence* will overrule or have much impact on the cases Justice Scalia cites as having relied on *Bowers*. This article demonstrates that even in the post-*Lawrence* era, courts will continue to uphold the government's decisions to reprimand, sanction or discharge its employees, despite claims that these decisions were based on constitutionally protected private behavior.

Part II of this article discusses the right to privacy and intimate association and the sources of those rights—the Due Process Clause of the Fifth and Fourteenth Amendments and the First Amendment, respectively. Part II pertains to government employment and focuses on employer decisions that restrict employee rights to marry, date, or in some cases, even befriend others—coworkers and non-coworkers alike. Such decisions are often enforced through anti-nepotism or anti-fraternization rules. These decisions allegedly infringe upon the very right at the heart of *Lawrence*—the right to enter into and maintain certain intimate, private relationships. Part III addresses the standards that courts use to review claims of alleged infringement of the right to privacy and intimate association generally, and how those standards have been modified and applied in government employment cases. Part III also discusses the interests of government employees and employers that courts consider in determining whether a particular government action infringes on the employee's privacy or intimate association rights. Part IV further discusses *Lawrence* and Justice Scalia's dissent, in which he cites several government employment cases that have relied on *Bowers*. This article demonstrates that, because of lower courts' unwillingness to read *Lawrence* broadly, and the deference afforded to government employers in employment decisions, *Lawrence* will not only leave undisturbed the cases Justice Scalia cites in his dissent, but also will not result in social disruption, massive or otherwise, in that area of the law.

II.

THE CONSTITUTIONAL RIGHT TO PRIVACY AND INTIMATE ASSOCIATION

A. *Substantive Due Process*

Employees discharged for private, intimate conduct often allege the

employment decision violated their constitutional right to privacy.¹⁶ The U.S. Constitution does not specifically contain an article or amendment referencing a right to privacy.¹⁷ Dating back to at least 1891, however, the Court has held that the Constitution implicitly contains “a right of personal privacy, or a guarantee of certain areas or zones of privacy . . .”¹⁸ While at various times the Court and various justices have found that a right to privacy arises from disparate constitutional provisions,¹⁹ the Court has explained that the privacy right as it pertains to making certain highly personal choices and engaging in certain intimate behavior is encompassed under the Fourteenth Amendment’s Due Process Clause.²⁰

In so doing, the Court has recognized that there are certain rights, although not expressly set forth in the text of the constitution, that are so “fundamental” to the person that the government may not revoke them without a compelling reason.²¹ Thus, although “a literal reading of the Due Process Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty,”²² the Supreme Court has long held that the Clause also contains a substantive component that prohibits certain government actions, even if the procedures used to implement the actions are otherwise fair.²³

The most “pertinent beginning point” of the liberty interest of privacy

16. See, e.g., *infra* note 42.

17. See *Roe v. Wade*, 410 U.S. 113, 152 (1973).

18. *Id.* (citing *Union Pacific R.R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

19. For instance, in his concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965), Justice Goldberg posited that there are fundamental personal rights “not confined to the specific terms of the Bill of Rights.” *Id.* at 486 (Goldberg, J., concurring). Justice Goldberg found support for his proposition in the language and history of the Ninth Amendment, which provides that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” *Id.*; U.S. CONST. amend. IX. According to Justice Goldberg, the Ninth Amendment demonstrates that the authors of the constitution intended for fundamental rights to exist that are not expressly enumerated in the first eight amendments and that the rights set forth in the first eight amendments are not exhaustive. *Griswold*, 381 U.S. at 482. In addition to the Ninth Amendment, support for the right to privacy has also been found in the First, Fourth, and Fifth Amendments, and “in the concept of liberty guaranteed by the first section of the Fourteenth Amendment.” *Roe*, 410 U.S. at 152 (collecting cases and explaining that the Court and individual justices have found that these and other provisions support a constitutional right to privacy).

20. *Roe*, 410 U.S. at 153. In *Roe*, a majority of the Court rejected the district court’s finding that the right to privacy was embedded in the Ninth Amendment; instead it believed the right was “founded in the Fourteenth Amendment’s concept of personal liberty . . .” *Id.*; see also *Whalen v. Roe*, 429 U.S. 589, 598-99 n.23 (1977).

21. *Roe*, 410 U.S. at 155.

22. “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV.

23. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

is set forth in the seminal case of *Griswold v. Connecticut*.²⁴ In *Griswold*, the Court invalidated a statute that made it criminal to use or assist a person in using contraceptives.²⁵ The *Griswold* Court established a right to marital privacy and held the law directly infringed on the intimate relations of husband and wife and their physician's role in one aspect of their relationship.²⁶ In a series of subsequent cases, the Court expounded upon the right to privacy as applied to certain individual choices and acts outside of marriage.

The holding in *Griswold* was extended to single persons several years later in *Eisenstadt v. Baird*.²⁷ In *Eisenstadt*, another contraception case, the Court held that a Massachusetts statute proscribing the distribution of contraceptives to unmarried adult women was unconstitutional.²⁸ Recognizing that *Griswold* involved marital privacy rights, the Court explained in *Eisenstadt* that a marriage is comprised of individuals, and each is entitled to the constitutional right to privacy.²⁹ Cases such as *Roe v. Wade*³⁰ expanded this concept. In *Roe*, the Court held that women had an individual privacy right under the Due Process Clause to terminate a pregnancy.³¹

These cases demonstrate that fundamental rights include such acts as marriage, child rearing, family relationships, and procreation.³² The Court, however, has not defined the outer boundaries of the right to privacy,³³ and government employees have asserted due process privacy rights in scenarios not enumerated here, such as the right to date.³⁴

B. First Amendment Rights

1. The Right of Intimate Association

Challenges to a government decision affecting an employee's job and intimate activity are often raised not only on Due Process grounds, but also

24. 381 U.S. 479 (1965). The Supreme Court has characterized *Griswold* as "the most pertinent beginning point in establishing the substantive reach of liberty under the Due Process Clause," although earlier cases also addressed substantive liberty rights. *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

25. *Griswold*, 381 U.S. at 480.

26. *Id.* at 482, 485.

27. 405 U.S. 438 (1972).

28. *Id.* at 440.

29. *Id.* at 453. The Court has held that the Due Process Clause actually protects "at least two different kinds of" privacy interests: 1) an interest in making certain types of intimate, personal choices; and 2) the interest in avoiding the disclosure of private information. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). This article pertains to the former right to privacy.

30. 410 U.S. 113 (1973).

31. *Id.* at 153.

32. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1978).

33. *Id.* at 688 n.5.

34. See *infra* note 42.

because the First Amendment grants a right to intimately associate with others.³⁵ The right of intimate association protects the decision to form and maintain certain private, intimate relationships.³⁶ The Court has recognized that the nature of relationships can vary from impersonal to those of the most intimate type—the latter warranting constitutional protection under the intimate association right.³⁷

Constitutional protection extends not only to family relationships, but to other intimate associations as well.³⁸ To that end, in the employment context, plaintiffs have sought constitutional protection from being discharged or otherwise penalized on account of being part of a host of varying familial and non-familial associations,³⁹ including marriage,⁴⁰ engagement,⁴¹ homosexual and heterosexual relationships,⁴² and sibling relationships.⁴³

2. *Intimate Association: A Distinct Right from Privacy?*

Whether the rights to privacy and intimate association are distinct rights hailing from two separate constitutional provisions (the Due Process Clause and the First Amendment) remains a matter of judicial debate. Several courts have found that the source of the right to intimate association has not been judicially determined. Others claim that it does not derive from

35. See *infra* note 36; see also *Parks v. City of Warner Robins, Ga.*, 43 F.3d 609, 615-16 (11th Cir. 1995) (recognizing a right to intimate association under the First Amendment) (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984)).

36. The Court has held that the First Amendment offers protection for two types of associations: (1) the right to intimate association, and (2) the right to expressive association. See *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619-20 (1984)). Expressive association refers to the right to associate and engage in activities such as speech, assembly, and the exercise of religion. See *Roberts*, 468 U.S. at 618 (The First Amendment protects groups whose activities are explicitly stated in the amendment: speaking, worshiping, and petitioning the government).

37. See *Rotary*, 481 U.S. at 545.

38. Constitutional protection extends to those relationships, “including family relationships, that presuppose ‘deep attachments and commitments to the necessary few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.’” *Id.*

39. See *Anderson v. LaVergne*, 371 F.3d 879, 882 (6th Cir. 2004) (recognizing both personal friendships and non-marital romantic relationships as the types of highly personal relationships within the ambit of intimate associations contemplated by *Roberts*).

40. See *Adler v. Pataki*, 185 F.3d 35, 42-44 (2d Cir. 1999); *Hughes v. City of N. Olmsted*, 93 F.3d 238, 240-41 (6th Cir. 1996).

41. See *Montgomery v. Stefaniak*, 410 F.3d 933, 936-37 (7th Cir. 2005).

42. See *Flaskamp v. Dearborn Public Schools*, 385 F.3d 935, 944-45 (6th Cir. 2004) (asserting rights to privacy and intimate association to maintain homosexual relationship between teacher and former student); *Anderson*, 371 F.3d at 880 (asserting intimate association right to maintain heterosexual dating relationship).

43. See *Ross v. Clayton County*, 173 F.3d 1305, 1311 (11th Cir. 1999).

the First Amendment at all, but is part of the Due Process right to privacy discussed previously.⁴⁴

It is nevertheless apparent from the Court's decisions that if the right to intimate association has roots in the First Amendment, that right overlaps with the Due Process right to privacy.⁴⁵ Indeed, in addressing the contours of the right to intimate association, the Court has explained that it is a right protected as an aspect of personal liberty, referring to such cases as *Griswold* in explaining the right.⁴⁶ Moreover, in most instances, when the lower courts address the rights distinctly in employment cases, they apply the same standard to both a plaintiff's Due Process/right to privacy claims and First Amendment/right to intimate association claims.⁴⁷ Accordingly, even where the rights are seen as having distinct sources, the analysis as to whether the rights have been infringed is most often indistinct.⁴⁸

III. PUBLIC EMPLOYMENT

While employees may believe their personal off-duty behavior is sacrosanct, most scholars agree that such a blanket belief is unfounded. However, one scholar contends that, within limits, the law is beginning to fall in line and "protect the importance of that belief."⁴⁹ Any such trend is not

44. Compare *Adler*, 185 F.3d at 42-44 (2d Cir. 1999) (holding that the source of the right of intimate association has not yet been judicially determined; language from the Court shows it may be grounded in the Due Process Clause or the First Amendment) with *IDK, Inc. v. County of Clark*, 836 F.2d 1185 (9th Cir. 1988) (source of right is the Fourteenth Amendment and not the First Amendment).

45. See *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987) (the right of intimate association "is a fundamental element of liberty protected by the Bill of Rights"); *IDK*, 836 F.2d at 1199 (Reinhardt, J., dissenting) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984)) (the right of intimate association "is coextensive with the right to privacy").

46. See *Roberts*, 468 U.S. at 618-19.

47. See *Singleton v. Cecil*, 176 F.3d 419 (8th Cir. 1999) (en banc), cert. denied, 528 U.S. 966 (1999) (affirming prior panel decision holding that whatever the source of the right, the analysis is the same); *Parks v. City of Warner Robins, Ga.*, 43 F.3d 609, 616 (11th Cir. 1995) (recognizing a right to marry under both the First Amendment and Due Process Clause and holding that the same analysis applies to both).

48. However, see Shane Wetmore, *Shahar v. Bowers: The Eleventh Circuit's One Step Forward And Two Steps Backward*, 30 U. TOL. L. REV. 159 (1998) for an argument that the Due Process right and First Amendment right are distinct. According to Mr. Wetmore, while the right of intimate association parallels the right to privacy in some respects, after *Bowers*, gays sought to rely on First Amendment associational rights for constitutional protection of their relationships because *Bowers* foreclosed the Due Process route. *Id.* at 159, 161, 163.

49. Terry Morehead Dworkin, *It's My Life—Leave Me Alone: Off -The-Job Employee Associational Privacy Rights*, 35 AM. BUS. L.J. 47, 95 (1997). See *id.* at 49-56, 63-72. Dworkin correctly acknowledges, however, that off-duty associational privacy claims present a mixed picture for employees and that courts are reluctant to expand "constitutional law to . . . encompass" privacy rights in employment. *Id.* at 81. But see Paul Secunda, *The (Neglected) Importance of Being Lawrence: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C.

evidenced in the judicial opinions addressing constitutional challenges to public employment decisions. At best, in recent years privacy and associational claims have yielded mixed results for public employee litigants challenging dismissals or other workplace decisions resulting from private, off-duty behavior.⁵⁰

As with the right to privacy in general, the Supreme Court has not definitively determined the outermost boundary of constitutional protection for private behavior in public employment.⁵¹ The Court's jurisprudence on the rights of government employees in the workplace, however, has evolved over time.

Prior to the 1960s, the Court gave the government carte blanche to retaliate against public employees who exercised their constitutional rights.⁵² As one scholar recently noted, this view was succinctly expressed by former Massachusetts Supreme Court Justice Holmes in *McAuliff v. Mayor of New Bedford*, where he wrote that "the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."⁵³

That view began to change in the 1950s, with a series of cases arising from efforts to force public employees to swear oaths of loyalty to the state to reveal the groups with which they associated.⁵⁴ By the late 1960s, the

DAVIS L. REV. 85 (2006) (contending that after *Lawrence*, "public employers should show legitimate and substantial interests before interfering with the personal and private lives of their employees"). *Contra* Neal Hutchens, *The Legal Effect of College and University Policies Prohibiting Romantic Relationships Between Students and Professors*, 32 J.L. & EDUC. 411, 426 (2003) ("[T]he extent to which *Lawrence* limits consensual relationship policies . . . remains somewhat doubtful").

50. L. Camille Herbert, *Employee Privacy Law, Constitutional Protections for Employee Lifestyle and Lawful Off-Duty Conduct*, 2 EMP. PRIVACY L. § 13:7 (2005) (collecting cases).

51. The Court has rejected challenges to lower court decisions either affirming or reversing public employment decisions that allegedly infringed on an employee's privacy rights. In *Briggs v. North Muskegon Police Department*, 563 F. Supp. 585 (W.D. Mich. 1983), the district court found that a police department had violated a plaintiff's constitutional right to privacy by discharging him upon learning that he was living with a woman while they were both married to other people. 563 F. Supp. at 590. Justice White, who authored *Bowers*, dissented from the denial of certiorari in that case, noting that the circuits were divided over whether extra-marital affairs, including adultery, enjoyed sufficient constitutional protection to prevent public employers from disciplining their employees for such behavior. *Briggs v. North Muskegon Police Dep't*, 473 U.S. 909, 910 (1985) (White, J., dissenting); *see also* *Rowland v. Mad River Local Sch. Dist.*, Montgomery County, Ohio, 470 U.S. 1009 (1985) (Brennan, J., dissenting) (dissenting from denial of certiorari in a case where a public school teacher was discharged for being bisexual, because the case presented "important constitutional questions regarding the rights of public employees to maintain and express their private sexual preferences."); *Hollenbaugh v. Carnegie Free Library*, 439 U.S. 1052, 1055 (1978) (Marshall, J., dissenting) (dissenting from denial of certiorari where lower courts upheld public employer's decision to fire librarian and custodian for cohabitating in an adulterous relationship and having a baby together, noting that the Court had "never demarcated the precise boundaries of" the right to privacy).

52. *See generally* Rosalie Berger Levinson, *Superimposing Title VII's Adverse Action Requirement on First Amendment Retaliation Claims: A Chilling Prospect for Government Employee Speech*, 79 TUL. L. REV. 669, 677-87 (2005) (explaining the "traditional view").

53. *Id.* at 677 (quoting *McAuliff v. Mayor of New Bedford*, 220, 29 N.E. 517, 517 (Mass. 1892)).

54. *See, e.g.*, *Connick v. Myers*, 461 U.S. 138, 144 (1983).

Court had completely rejected Justice Holmes' formulation. Instead, the Court embraced the view that, while the government may deny employment altogether, it may not subject government employees to unreasonable conditions.⁵⁵ Although the government as employer enjoys special deference with regard to making certain decisions about its workforce,⁵⁶ government employees, even those "at will," may enjoy protection against adverse employment actions that violate their constitutional rights.⁵⁷

Despite a shift in the Court's jurisprudence, the right to privacy and intimate association may afford the government employee little relief for at least two interrelated reasons: (1) the low standard of review imposed on most employment decisions related to privacy and intimate association, and (2) the deference given to the interests of government employers, particularly military and police employers.⁵⁸

A. Standard of Review

1. Direct and Substantial Burden

Where "certain" fundamental rights are involved, the Court has held that state action limiting these rights may be justified only if such action survives strict scrutiny review.⁵⁹ That is, the law is only sustainable where the government has a compelling interest and its action is narrowly tailored to achieve only that interest.⁶⁰ The Court has also held, however, that strict scrutiny review will be applied only where a government statute or regulation directly and substantially impairs a fundamental right.⁶¹ A statute or regulation that fails to directly and substantially impair a fundamental right

55. See *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589 (1967).

56. See *Waters v. Churchill*, 511 U.S. 661, 675 (1994) (plurality opinion) ("The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer."); see generally *Secunda*, *supra* note 49 at 97 (explaining that while "the government employer does not possess unfettered discretion" in imposing conditions on their employees' lives which may affect constitutional rights, the government possesses substantially more latitude in setting the terms and conditions of employment than it does when acting as sovereign governing the general citizenry).

57. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977).

58. See discussion *infra* pp. 321-32.

59. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (explaining that the Due Process Clause "provides heightened protection against government interference with *certain* fundamental rights and liberty interests") (emphasis added); *Roe v. Wade*, 410 U.S. 113, 155 (1973) ("Where *certain* fundamental rights are involved, the Court has held that regulation limiting these rights may be justified only by a compelling state interest") (emphasis added; internal citations omitted); *Zablocki v. Redhail*, 434 U.S. 374, 383-84 (1978).

60. *Zablocki*, 434 U.S. at 388.

61. See *infra* note 62.

receives only rational basis review.⁶² The direct and substantial burden test has been applied to government statutes and regulations, whether the right allegedly burdened by the statute or regulation is raised as a violation of a Due Process privacy right or a First Amendment right of intimate association.⁶³

a. Generally-Applicable Test

The Supreme Court explicated the direct and substantial burden test in *Zablocki v. Redhail*.⁶⁴ There, the Court invalidated on equal protection grounds a Wisconsin statute that prohibited certain individuals from marrying without a court order.⁶⁵ The statute applied to all Wisconsin citizens who were non-custodial parents of a minor child and were subject to a court order or judgment requiring payment of child support.⁶⁶ The Court reaffirmed that the right to marry is a fundamental right implicit in the Fourteenth Amendment's Due Process Clause and thus analyzed, and ultimately invalidated, the statute under strict scrutiny review.⁶⁷ The Court found the Wisconsin statute interfered directly and substantially with the fundamental right to marry because it prohibited any Wisconsin resident subject to the statute's provisions from marrying any person in any state without the court order.⁶⁸ Further, marriages held in violation of the statute were void and punishable as crimes.⁶⁹

62. See, e.g., *Lyng v. UAW*, 485 U.S. 360, 364-66 (1988) (using rational basis review rather than heightened scrutiny to analyze First Amendment claim as amendment to Food Stamp Act did not directly and significantly interfere with plaintiffs' fundamental right to associate with their families). Under rational basis review, government enactments are generally upheld if there is a legitimate basis for the law, and such laws "normally pass muster, since the Constitution presumes that even improvident decisions will eventually be rectified by the democratic process." *Lawrence v. Texas*, 539 U.S. 558, 579-80 (2003) (O'Connor, J., concurring) (citations and internal quotation marks omitted). Rational basis review permits a law to stand if there is any plausible basis for the law, whether or not the government actually relied on that basis or whether the basis has a foundation in the record. *Heller v. Doe*, 509 U.S. 312, 320-21 (1993). The party challenging the law, regulation or other action must "negative every conceivable basis which might support it." *Id.* at 320.

63. See *Lyng*, 485 U.S. at 365 (applying test to a First Amendment claim); *Parks v. City of Warner Robins, Ga.*, 43 F.3d 609, 613-16 (11th Cir. 1995) (relying on holdings of *Int'l Union* and *Zablocki*, but using a rational basis review, the Court found an anti-nepotism rule did not substantially and directly interfere with the fundamental right to marry and, therefore, did not infringe either a substantive due process right to marry or a First Amendment intimate association right). But see *Montgomery v. Stefaniak*, 410 F.3d 933, 938-39 (7th Cir. 2005) (applying direct and significant burden test to plaintiff's intimate association claim, but a "shocks the conscience" standard to the substantive due process claim).

64. 434 U.S. 374.

65. *Id.* at 375-76.

66. *Id.*

67. *Id.* at 383-84.

68. *Id.* at 387.

69. *Id.*

b. Application of Direct and Substantial Burden Test to Employment Cases

Several of the lower courts have adopted the direct and substantial burden test in the employment setting.⁷⁰ The courts have applied the test in varying manners, but most often with deference to the government employer. In practice, the direct and substantial burden test enacts an insurmountable hurdle for employees alleging that an employer action infringed their privacy or intimate association rights.⁷¹

The test has been applied such that a government decision pertaining to an employee's privacy and associational rights to date or marry does not substantially and directly burden those rights *unless* (1) a large portion of the persons affected by the government action are prevented from forming intimate associations with anyone at all, or (2) those affected by the rule are absolutely or largely prevented from forming intimate associations with a large portion of otherwise eligible persons.⁷² In addition, the test has prevented application of strict scrutiny where the allegedly aggrieved public employee could simply find a job elsewhere. As explained below, in practice, the rule has foreclosed privacy and associational claims in those instances where the plaintiff could associate with someone other than the particular person with whom the employer or its policy bars the employee from associating.

Beecham v. Henderson County,⁷³ a Sixth Circuit decision, provides a good example of how difficult it is for government employees to prove that an employment decision warrants strict scrutiny review on the grounds that it has a direct and substantial burden on their privacy or associational rights. There, the plaintiff, a deputy clerk for a county courthouse, claimed that her

70. The Sixth, Seventh, and Eighth Circuits have used the direct and substantial burden test set forth in *Zablocki* in employment cases. See, e.g., *Beecham v. Henderson County*, Tenn., 422 F.3d 372 (6th Cir. 2005); *Montgomery v. Stefaniak*, 410 F.3d at 937-38 (7th Cir. 2005); *Singleton v. Cecil*, 176 F.3d 419 (8th Cir. 1999). The Eleventh Circuit has used the test in employment cases as well. See *Parks v. City of Warner Robins, Ga.*, 43 F.3d 609, 613 (11th Cir. 1995). As explained later, the Eleventh Circuit has also employed a modified version of a test used in public speech cases to balance the interests of the government employer and the intimate association interests of the employee in intimate association cases.

71. That this article focuses on the direct and substantial burden test to analyze substantive due process claims relating to privacy and the workplace does not mean to imply that all courts have used this particular test in analyzing such claims. However, this test, which makes it extremely difficult for plaintiffs' privacy claims to prevail, is indicative of the deference courts often afford government employers to regulate the private off-duty lives of their employees.

72. *Akers v. McGinnis*, 352 F.3d 1030, 1040 (6th Cir. 2003) (quoting *Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703, 710 (6th Cir. 2001)); see also *Beecham*, 422 F.3d at 372.

73. 422 F.3d 372.

discharge for becoming engaged to a married attorney who practiced in the county where she worked violated her right of intimate association.⁷⁴ The attorney's wife worked in another office in the same building as the plaintiff.⁷⁵ The affair apparently caused some tension in the courthouse and clerk's office resulting in the plaintiff's discharge.⁷⁶ The Court of Appeals affirmed the district court's grant of summary judgment in favor of the county, reviewing the discharge decision under rational basis review.⁷⁷ The court found that the decision to fire the plaintiff did not directly and substantially burden her intimate association rights, noting that the plaintiff's "termination did not bar her from every form of employment in every sector of society."⁷⁸ She was "discharged from one position at one courthouse" and could work somewhere else.⁷⁹

The test is also notably broad for its reach into associations that may be only tangential to the workplace. In *Akers v. McGinnis*,⁸⁰ the Sixth Circuit again rejected a constitutional challenge to a Michigan Department of Corrections' workplace rule, which not only barred off-duty contact between employees and individuals in the system, i.e., parolees or probationers, but also barred employee contact with the individuals' families or visitors.⁸¹ Amicus curiae in the case argued that the rule should be analyzed using strict scrutiny, since the government was acting as sovereign—not employer—because its rule infringed associations that extended beyond the workplace.⁸² The court, however, saw no difference between the association among government employees on the one hand, and employees and offenders or the offenders' family members or visitors, on the other.⁸³ According to the *Akers* court, no precedent exists for the theory that a government employer's enhanced authority allows it to regulate only those associations between government employees and others over whom it also has enhanced authority.⁸⁴

Under the direct and substantial burden test, several types of workplace rules that may interfere with the right to privacy or intimate association generally survive constitutional scrutiny. Anti-nepotism or anti-fraternizing

74. *Id.* at 373-74.

75. *Id.* at 374.

76. *Id.*

77. *Id.* at 376-78.

78. *Id.* at 376. According to the court, while the employer's decision may have imposed an economic burden on the plaintiff since, by marrying, she would lose her job, the decision did not prevent her from marrying a particular class of persons.

79. *Id.* at 376-77.

80. 352 F.3d 1030 (6th Cir. 2003).

81. *Id.* at 1033.

82. *Id.* at 1041.

83. *See id.*

84. *Id.*

policies, which may prevent coworkers from dating or marrying, have been generally upheld in government employment despite claims that they interfere with privacy or intimate association rights.⁸⁵ Courts generally hold that such policies do not directly or substantially interfere with employee privacy and associational rights, and they therefore review such policies for a rational basis.⁸⁶ Similarly, under rational basis review, courts have upheld policies that prohibit employees of penal institutions from dating, marrying or otherwise fraternizing off-duty with inmates, parolees or probationers, or even from doing business where a parolee or probationer might work.⁸⁷ In addition to formal written workplace rules,⁸⁸ the substantial and direct inquiry has also been applied to ad hoc employment decisions.⁸⁹

Accordingly, under the direct and substantial burden test, employees face an uphill battle in seeking to have infringements on their intimate association or privacy rights reviewed under more than a rational basis review. And because of the deference afforded government action under rational basis review, a government employment decision reviewed under a rational basis standard will almost always be upheld.⁹⁰

2. *Intermediate Scrutiny of Employer Decisions under Pickering*

Because the right to intimate association has roots in the First Amendment, some courts have applied to intimate association claims a test that is generally designed for public speech or expression cases.⁹¹ Similar to the direct and substantial burden test, however, the First Amendment standard rarely tips in favor of the employee's associational rights.

a. *Weighing Interests in Expressive Association Cases*

In the area of free speech where an adverse action is taken against a

85. *Parks v. City of Warner Robins, Ga.*, 43 F.3d 609, 615 n.4 (11th Cir. 1995); *see also* *Beecham v. Henderson County, Tenn.*, 422 F.3d 376 (6th Cir. 2005) (summarizing cases affirming rationality of anti-nepotism rules under rational basis review).

86. *See Parks*, 43 F.3d 609; *Beecham*, 422 F.3d 376.

87. *See, e.g., Montgomery v. Stefaniak*, 410 F.3d 933 (7th Cir. 2005) (holding that employee was denied neither right of intimate association nor substantive due process after her termination for purchasing a car where a probationer was employed, in violation of workplace rule, although it was unclear whether she even knew of the probationer's employment); *Akers*, 352 F.3d 1030 (affirming under rational basis a rule barring employees from any non-work-related contact with prisoners, parolees, or probationers).

88. *See Montgomery*, 410 F.3d 933; *Akers*, 352 F.3d 1030.

89. *See Montgomery v. Carr*, 101 F.3d 1117, 1127 (6th Cir. 1996) (direct and substantial burden test applies to ad hoc decisions as well as formal written policies).

90. *See supra* note 62.

91. *See, e.g., Shahar v. Bowers*, 114 F.3d 1097, 1099, 1102-03 (11th Cir. 1997) (en banc).

government employee for speaking out on a matter of “public concern,” the Supreme Court has adopted a balancing test to determine whether the government’s action infringed the employee’s First Amendment rights.⁹² The Court developed the balancing test in the seminal case of *Pickering v. Board of Education of Township High School District 205, Will County, Illinois*.⁹³ There, the Court held that the government may not compel its employees to relinquish First Amendment rights they otherwise enjoy as citizens to comment on matters of public interest.⁹⁴ The *Pickering* balancing test is viewed as an intermediate scrutiny test, giving deference to government employers, but recognizing that speech touching upon issues of public concern deserves heightened protection against government encroachment.⁹⁵ Where the employee can show that his or her speech relates to a matter of public concern, therefore, the court balances the interests of the employee and those of the public employer.⁹⁶

92. *Pickering v. Bd of Educ. of Township High Sch. Dist. 205, Will County, Ill.*, 391 U.S. 563, 568 (1968).

93. *Id.*

94. *Id.* In *Pickering*, the petitioner challenged his discharge after he wrote a letter to a local newspaper criticizing the way the school board and superintendent of schools had handled certain proposals to raise revenue for schools. *Id.* at 564. *Pickering* argued that the letter was protected by the First Amendment, a position the state courts rejected. *Id.* at 565. Reversing the state court, the Supreme Court agreed with *Pickering* that he had a right under the First Amendment to comment on matters of public importance, a right he did not relinquish merely because he took a job as a teacher. *Id.* at 568. But *Pickering*’s right was not absolute. *Id.* The Court noted that the government may impose restraints on its employees that it would be unconstitutional to impose on other non-employee citizens. *Id.* The Court recognized the need to strike a balance between the First Amendment right *Pickering* asserted and the government’s right as his employer. *Id.* While the government could not force *Pickering* to relinquish the constitutional rights he held as any other citizen, it could curb his right to speech more significantly than the speech of a non-employee. *Id.* The issue, according to the Court, is arriving at the balance between the employee’s right as a citizen to comment on matters of public concern and the government employer’s right “in promoting efficiency of the public services it performs through its employees.” *Id.* The Court noted that *Pickering*’s letter did not impede performance of his daily duties or “interfere[] with the regular operation of the schools generally.” *Id.* at 572-73. Under such circumstances, the Court held the school board had no greater right to curb *Pickering*’s speech than it would if it were exercising its authority as a sovereign attempting to limit the speech of someone in the general public. *Id.* at 573.

95. See *Int’l Ass’n of Firefighters, Local 3808 v. Kansas City*, 220 F.3d 969, 973 (8th Cir. 2000) (referring to balancing test as one of intermediate scrutiny, falling short of the exacting level of proof required in other First Amendment contexts, but still requiring the government show more than mere rationality since “First Amendment rights are at stake”). The Supreme Court has held that “speech on public issues occupies the highest rung of the hierarchy of First Amendment values” and warrants special protection—i.e., the *Pickering* balancing test. *Connick v. Myers*, 461 U.S. 138, 145 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)). The Court noted that such heightened protection was warranted for public speech because the First Amendment “was fashioned to assure unfettered exchange of ideas for the bringing about of political and social changes desired by the people.” *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). Forms of expression that do not touch upon matters of public concern do not typically enjoy the heightened protection afforded by *Pickering*. Where an employee’s expression does not touch upon a matter of public concern, the government’s employment decisions based on that expression enjoys wide latitude. *Id.* at 146.

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

b. *Pickering in Intimate Association Cases*

The Court has repeatedly found the *Pickering* balancing test applicable only in cases where the employee's speech touches upon matters of public concern.⁹⁷ Because of the public concern limitation, *Pickering's* balancing test may not be proper in assessing most intimate association claims.⁹⁸ Intimate association rights are generally alleged because of government action that infringes some personal employee relationship,⁹⁹ and such claims are not usually brought to communicate issues of public concern.¹⁰⁰

Despite the "public concern" limitation, some lower courts have applied the *Pickering* test to weigh employee and employer interests in intimate association cases.¹⁰¹ These courts still recognize, however, that where the government acts as employer, and not sovereign, its interests are elevated.¹⁰² Thus, applying intermediate scrutiny to burdens placed on employee intimate association interests typically results in rulings favorable to the government.¹⁰³

The Eleventh Circuit case of *Shahar v. Bowers*¹⁰⁴ is a prime example of the type of deference afforded government employers when using the *Pickering* test to weigh employer rights against the associational rights of

97. See *San Diego v. Roe*, 543 U.S. 77, 82 (2004). In *Roe*, the Court rejected a police officer's claim that his First Amendment right to free speech was infringed or that the *Connick/Pickering* test applied to the decision to terminate him for making adult videos and selling them and other police-related paraphernalia on the Internet. *Id.* at 84. See also *Connick*, 461 U.S. at 143 (holding that a prerequisite to the *Pickering* analysis is that the public employee's speech involve issues of public concern).

98. See *Montgomery v. Stefaniak*, 410 F.3d 933, 937 (7th Cir. 2005) (holding that *Connick/Pickering* balancing test is inapplicable to intimate association claim because such right does not depend on the exercise of the distinct First Amendment right to expressive association).

99. See *id.*

100. See *id.* (explaining that "a plaintiff must first show that her associational activity relates to a matter of public concern" and only if she succeeds in doing so will the court employ the *Pickering* balancing test and balance her rights against those of her employer).

101. See *Shahar v. Bowers*, 114 F.3d 1097, 1103 (11th Cir. 1997) (applying *Pickering* balancing test to intimate association claim); see also *Wieland v. Arnold*, 100 F. Supp. 2d 984, 988 (E.D. Mo. 2000) (applying a "modified *Pickering* test"); *Kukla v. Village of Antioch*, 647 F. Supp. 799, 808-12 (N.D. Ill. 1986). But see *Via v. Taylor*, 224 F. Supp. 2d 753, 760 (D. Del. 2002) (engaging in intermediate scrutiny or *Pickering*-type balance of correctional officer's right to maintain a relationship and employer's right to terminate her because of it, but refusing to "refer" to the analysis as a *Pickering* analysis since the case did not implicate employee's free speech rights). Some courts, as in *Via*, refer to the *Pickering* test as the *Pickering-Kelley* test, the latter referencing *Kelley v. Johnson*, 425 U.S. 238 (1976). Similar to *Pickering*, the Court in *Kelley* held that when acting as employer, the government may curtail its employees' conduct to a greater extent than it may in the government's role as a sovereign regulating the conduct of private citizens. See *id.* at 245 (explaining that the Court has sanctioned "comprehensive and substantial" restrictions on First Amendment activities of public employees).

102. *Shahar*, 114 F.3d at 1102.

103. See *id.* at 1104; see also *Wieland*, 100 F. Supp.2d at 987-89 (city's interest in maintaining order of police department outweighed employee's intimate association and privacy interests). But see *Via*, 224 F. Supp. 2d at 761-62 (finding employee's interests outweighed interests of public employer).

104. 114 F.3d 1097.

employees. Sitting en banc, the *Shahar* court affirmed summary judgment against a female plaintiff who challenged, on intimate association grounds, the decision by the Georgia Attorney General to withdraw her employment offer as a staff attorney because of her marriage to another woman.¹⁰⁵

The Eleventh Circuit assumed that Ms. Shahar had a constitutionally protected right to marry another woman. The Court then rejected the assertion that her claim should be evaluated under a strict scrutiny test, i.e., that the Attorney General needed a compelling interest in his decision to withdraw her job offer and that his decision had to be narrowly tailored to effectuate only that interest.¹⁰⁶ Rather, the court held that the withdrawal of Ms. Shahar's job offer should be evaluated under the same standard used to evaluate the infringement of an employee's free speech rights—the *Pickering* balancing test.¹⁰⁷ Even considering that the *Pickering* standard subjects the employer's decision to greater scrutiny than rational basis review, after weighing the interests, the court held the balance tipped in favor of the government.¹⁰⁸ The court held that Georgia's interests, including cohesiveness of its workforce and a potential conflict of interest with the state's position on various gay rights issues, outweighed Ms. Shahar's interest in maintaining both her relationship with her lesbian partner and her job offer.¹⁰⁹

The *Shahar* court found several factors tipped the scale in the Attorney General's favor. It noted that as a staff attorney, Ms. Shahar would be privy to the confidences of the Attorney General.¹¹⁰ According to the court, employees who have access to such confidences rarely prevail in First Amendment challenges.¹¹¹ Further, Attorney General Bowers had defended Georgia's sodomy statute in *Bowers v. Hardwick*.¹¹² Allowing Ms. Shahar to represent herself as married to another woman might result in a loss of morale and cohesiveness.¹¹³ The court rejected Ms. Shahar's argument that her particular duties would have created no conflict of interest with the office's position on gay rights issues, because she would have handled only death penalty cases.¹¹⁴ According to the court, "a particularized showing of interference with the provision of public services is not required" under

105. *Id.* at 1100.

106. *Id.* at 1102.

107. *Id.* at 1103.

108. *Id.*

109. *Id.*

110. *Id.* at 1103-04.

111. *Id.* at 1103.

112. *Id.* at 1104-05.

113. *Id.* at 1108.

114. *Id.*

Pickering.¹¹⁵ The employer's mere concern about such interference suffices.¹¹⁶

In *Ross v. Clayton County*,¹¹⁷ the Eleventh Circuit again employed a *Pickering* balancing test yielding results similar to *Shahar*. The plaintiff in *Ross*, a correctional officer, challenged his termination for living with his brother, a probationer, in violation of a departmental policy forbidding its employees to fraternize with probationers without obtaining special permission.¹¹⁸ The court noted that there is a special need in law enforcement to avoid potential conflicts of interest and associations with probationers, even among those who are family members. Whether Ross's living arrangement actually created any such conflict of interest was deemed irrelevant by the court.¹¹⁹ The court held that a government employer's *belief* that a particular employee relationship might disrupt the workplace or undermine the employer's objectives may tip the balance in favor of the employer, even absent proof of such effects.¹²⁰

Cases that apply *Pickering*-type analyses to intimate association claims and find in favor of employees are rare. One such example is *Via v. Taylor*.¹²¹ After engaging in *Pickering*-type balancing, the district court found that a former correctional officer had been terminated in violation of her associational and privacy rights for her off-duty relationship with a parolee, whom she eventually married.¹²² The court found that Via's intimate relationship—a marriage—fell on the higher end of the relationship spectrum, thus warranting constitutional protection.¹²³ The court also rejected the argument that defendants could discharge Via without showing that her relationship caused some workplace disruption.¹²⁴ Adopting reasoning from Third Circuit free speech cases, the court held that a public employer must show that the challenged relationship was likely to cause disruption.¹²⁵ Ac-

115. *Id.*

116. *Id.*

117. 173 F.3d 1305 (11th Cir. 1999).

118. *Id.* at 1306-07.

119. *Id.* at 1311.

120. *Id.* (emphasis added). The Court also found it particularly relevant that Ross could have, but failed to, request special permission to live with his brother. *Id.* at 1312. That exception to the general rule forbidding fraternization of employees and probationers enhanced the reasonableness of the rule and further tilted the balance in the employer's favor. *Id.*

121. 224 F. Supp. 2d 753, 761-62 (D. Del. 2002). In *Via*, the court "hesitated" to call the intermediate-scrutiny test it applied to the plaintiff's claim a *Pickering-Kelley* balancing test. See *id.* at 761 n.4 (explaining that *Pickering-Kelley* test is used in cases involving free speech rights and not to the intimate association claim advanced by the plaintiff in *Via*). Despite the *Via* court's hesitance to refer to the test it used in the case as a *Pickering-Kelley* test, it nevertheless analyzed the plaintiff's claim using intermediate scrutiny and in doing so found *Pickering-Kelley* factors relevant to its analysis. See *id.*

122. *Id.*

123. *Id.* at 760.

124. *Id.* at 762 n.5.

125. *Id.*

according to the court, the defendants failed to make such a showing as they presented no evidence that Via's conduct had any impact on the workplace.¹²⁶ The *Via* court thus rejected cases such as *Shahar* and *Ross*, which required only the employer's belief of workplace disruption.

The aforementioned cases demonstrate that even when applying a level of scrutiny higher than rational basis to employer decisions affecting their employees' private relationships, courts still afford employers substantial deference as to such decisions. With few exceptions,¹²⁷ the mere allegation or assumption that a particular relationship might disrupt the workplace often suffices to justify the employment decision.¹²⁸

B. Interests at Stake

1. Government Employees

Applying the appropriate standard of review to the government action is only half the battle. It is also necessary to determine the interests being weighed. Generally, the interest of the public employee is to maintain, without any adverse job action, the intimate relationship or to engage in the activity he or she deems private.¹²⁹

One issue public employees face in asserting rights of intimate association is that no two intimate associations are alike. It is generally recognized that relationships outside of the family, such as friendships or engagements, may be entitled to some constitutional protection.¹³⁰ Thus, where the relationship for which protection is sought falls closer on the scale to "familial" relationships, the more likely the courts will recognize the relationship as entitled to constitutional protection.¹³¹

Further, while relationships most deserving of constitutional protection are familial in nature,¹³² some cases suggest that certain familial relationships may warrant greater protection than others. Marriage arguably enjoys

126. *Id.*

127. *See, e.g., id.* at 761-62.

128. *See id.*; *Shahar v. Bowers*, 130 F.3d 1097, 1108 (11th Cir. 1997) (holding that showing of interference not required); *see also Wieland v. Arnold*, 100 F. Supp. 2d 984, 989 (E.D. Mo. 2000) (holding that showing that relationship had actual effect on performance was not necessary).

129. *Wieland*, 100 F. Supp. 2d at 988 (discussing competing interests of the employee and employer).

130. *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987); *Akers v. McGinnis*, 352 F.3d 1030, 1039-40 (6th Cir. 2003) (citing *Corrigan v. City of Newaygo*, 55 F.3d 1211, 1214-15 (6th Cir. 1995)) (friendship protected as an intimate association); *Montgomery v. Stefaniak*, 410 F.3d 933, 938 (7th Cir. 2005) (engaged couple constitutionally protected).

131. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984).

132. *See id.*

the greatest protection.¹³³ Relationships that fall farthest from marriage and family, such as dating relationships or friendships, generally receive less constitutional protection.¹³⁴

2. Government Employers

While a government employee does not relinquish all constitutional rights at the office door, those rights are significantly more circumscribed for the public employee than for the private employee.¹³⁵ As an employer, the government can regulate various aspects of employees' lives, including their dress,¹³⁶ hair length,¹³⁷ jewelry,¹³⁸ and, despite any constitutional right to privacy and intimate association, with whom employees may enter into intimate relationships.¹³⁹

An employer's concern of the effect the relationship *might* have in the workplace may suffice to tip the scale in the employer's favor to discharge or otherwise take adverse action against the employee on account of the personal relationship.¹⁴⁰ If, therefore, the government employer believes an employee's relationship might create a conflict of interest or otherwise interfere with the goals and objectives of the employer, the employee may be fired because of the relationship.¹⁴¹

Moreover, the government's interests, while already enhanced as an employer, are even more elevated in certain settings.¹⁴² Most notably, the

133. For instance, the right of a correctional officer to live with his probationer brother may warrant less protection than a married couple claiming the wife was discharged for her association with her husband, whose interests conflicted with the wife's employer. *Ross v. Clayton County*, 173 F.3d 1305, 1312 n.12 (11th Cir. 1999). See also *Adler v. Pataki*, 185 F.3d 35, 44-45 (2d Cir. 1999); (reinstating a state employee's claim that he had been discharged for association with his co-worker wife, who had filed a lawsuit against the state, and noting that the plaintiff's "claim is grounded on the most intimate of relationships, the marriage relationship, and warrants an appropriately high degree of protection"); *Wieland*, 100 F. Supp. 2d at 988 (holding that while marriage between a police officer and a felon the officer was dating would have undoubtedly been entitled to the full scope of constitutionally protection, their "amorphous" social relationship instead warranted some protection, but not "the full scope of Constitutional protection"); see also *Kukla v. Village of Antioch*, 647 F. Supp. 799, 806-07 (N.D. Ill. 1986) ("the degree of constitutional protection for an 'intimate' association depends on exactly what relationship is involved. Only traditional relationships with a cognizable basis in law—those associated with marriage and family—receive maximum protection within this category.").

134. See, e.g., *Wieland*, 100 F. Supp. 2d at 988 (refusing to grant full constitutional protection to "amorphous social relationship" although the couple was apparently intimate).

135. See *supra* note 56.

136. *Kelley v. Johnson*, 425 U.S. 238, 245-47 (1976).

137. See *id.*

138. *Rathert v. Village of Peotone*, 903 F.2d 510, 515 (7th Cir. 1990).

139. See discussion *supra* pp. 323-30.

140. See discussion *supra* pp. 327-30 and accompanying notes.

141. See discussion *supra* pp. 327-30 and accompanying notes.

142. See *infra* note 143 and accompanying text.

government as a law enforcement, correctional institutions, or military employer is afforded greater deference in regulating the private lives of its employees than other government sectors. The rationale is that these are “heightened” settings with particular needs for order, discipline, and obedience and particular concerns regarding conflicts of interest.¹⁴³ Courts are loathe to second guess employer decisions that may affect intimate aspects of an employee’s personal life even when an employer decides to sever the employment relationship because it believes an employee’s personal life or intimate associations might interfere with the employer’s interests.¹⁴⁴ Consequently, government action that burdens an intimate relationship of a government employee outside of the military, law enforcement or a penal institution may receive less deference than would government action in one of the heightened settings.¹⁴⁵

143. *Police*—*Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (“promotion of safety of person and property is . . . at the core of the State’s police power,” and, because governments “employ a uniform police force to aid in the accomplishment of that purpose,” employer choices regarding dress, equipment, and organizational structure are entitled to a presumption of validity); *Ross v. Clayton County*, 173 F.3d 1305, 1311 (11th Cir. 1999) (explaining that “in the context of law enforcement, there is a special need to employ persons who act with good judgment and avoid potential conflicts of interest;” associations with felons or probationers undermine these objectives); *City of Sherman v. Henry*, 928 S.W.2d 464, 476 (Tex. 1996) (Spector, J., concurring) (police departments are quasi-military and “may require unquestionable obedience”); *see id.* at 477 (Owen, J. concurring) (stating that “[t]he interests of the State are even more compelling in the oversight of police officers and other quasi-military organizations because of the State’s goal in protecting the safety of the general public (citing *Texas State Employees Union v. Texas Dep’t of Mental Health and Mental Retardation*, 746 S.W.2d 203, 205-06 (Tex. 1987)). *Penal institutions*—*Keeney v. Heath*, 57 F.3d 579, 581 (7th Cir. 1995) (acknowledging prison guard’s claim she was forced to choose between marriage to prisoner and her job, and recognizing such inherent problems, but ruling that potential conflicts of interest and perceived favoritism among other prisoners justified such a burden, and holding deference to the government’s interests was not lessened even though guard did not work at the same facility as her prisoner husband). *Military*—*Parker v. Levy*, 417 U.S. 733, 743-44 (1974) (holding that the military’s role in fighting wars necessitates a specialized, separate society and that the rights of soldiers must be curtailed to meet certain overriding demands of discipline and duty); *see also Rostker v. Goldberg*, 453 U.S. 57, 67-69 (1981) (Congress is subject to the due process clause but the tests and limitations may apply differently, e.g., with more deference granted in the military context); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 n.19 (1943) (“[T]hose subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable as to those in civilian life.”). *Loomis v. United States*, 68 Fed. Cl. 503 (2005) provides an interesting discussion of the interests of the military in maintaining its “Don’t Ask, Don’t Tell” policy in light of *Lawrence*. *Id.* at 521. According to the court, discharge from the military for homosexual conduct on the basis of “Don’t Ask, Don’t Tell” is the military equivalent of being fired pursuant to an administrative proceeding. *Id.* *Loomis* cites unit cohesion and reducing sexual tension among soldiers as some of the justifications for maintaining its policy to discharge or fire individuals for homosexual behavior. *Id.*

144. *See, e.g., Keeney*, 57 F.3d at 581 (explaining that jails are not safe places and that jail administrators, not judges, should set the standard by which they are to be made safe; “[a]s long as the concerns expressed by correctional authorities are plausible, and the burden that a [decision] of a jail or prison . . . places on protected rights [is] a light or moderate one, the courts should not interfere” with safety measures set by correctional authorities).

145. *Compare Adler v. Pataki*, 185 F.3d 35, 45 (2d Cir. 1999) (holding that a decision by the New York State Office of Mental Retardation and Developmental Disabilities to terminate plaintiff-employee

IV.

LAWRENCE: AN UNLIKELY LEVELER OF INTIMATE ASSOCIATION
EMPLOYMENT CASES

Considering the wide latitude the government enjoys in regulating the private lives of members of its workforce, it is unlikely that *Lawrence v. Texas* will have much of an impact on privacy and intimate association claims in the workplace. To demonstrate why requires a critical look at *Lawrence*, with a particular focus on Justice Scalia's dissent and the cases he cites in support of his argument that *Lawrence* will cause massive social disruption.

A. Due Process under *Bowers* and *Lawrence*1. *Lawrence*: Overruling a Precedent Not Worth Keeping

Lawrence is factually similar to the case it overruled, *Bowers v. Hardwick*.¹⁴⁶ Both cases involved challenges to a state sodomy statute.¹⁴⁷ Unlike the Georgia statute in *Bowers*, however, the Texas statute in *Lawrence* expressly applied only to homosexual conduct.¹⁴⁸ In striking down the Texas statute, the Court recognized that *Bowers* was the controlling authority.¹⁴⁹ It held, however, that *Bowers* had been wrongly decided.¹⁵⁰ Moreover, in contrast to the narrow issue framed by the Court in *Bowers*—whether there was a fundamental right to commit homosexual sodomy¹⁵¹—

because of association with his wife stated a claim under First Amendment for retaliatory discharge) with *Ross*, 173 F.3d at 1311-12 (holding that correctional agency had greater interest in avoiding potential conflicts of interest than employee had in living with his probationer brother) and *McCabe v. Sharrett*, 12 F.3d 1558 (11th Cir. 1994) (holding that police chief who handled matters of great sensitivity involving issues affecting an employee's husband had interests paramount to those of his secretary to maintain her job and marriage).

146. The plaintiffs in each case, Michael Hardwick and John Lawrence, were arrested and charged with violating their respective states' sodomy laws. *Lawrence v. Texas*, 539 U.S. 558, 562, 566 (2003) (discussing the facts of each case). In both cases, the alleged offenses occurred in their respective homes. *Id.* In *Lawrence*, the police were called to check on an alleged weapons violation, and upon arriving, found Lawrence engaged in a sexual act with another adult male. *Id.* at 562. Similarly, in *Bowers* the police arrested Hardwick after observing him having sex with another adult male in Hardwick's bedroom. 478 U.S. 186, 187-88 (1986).

147. 539 U.S. at 566.

148. *Id.* at 563.

149. *Id.*

150. *Id.* at 569.

151. See, e.g., Lawrence H. Tribe, *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1894, 1951-55 (2004). Professor Tribe, who represented Michael Hardwick before the Court in *Bowers*, provides an insightful, first-hand discussion on the history of *Bowers* and how the Court went out of its way to narrowly frame the issue as being about homosexual sodomy. *Id.* Professor Tribe explains that the Court cast the issue as being about homosexual sodomy, in particular, al-

the Court in *Lawrence* framed the issue before it broadly. The issue was not about homosexual sodomy, but rather whether the petitioners “were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause.”¹⁵² Holding the Texas statute furthered no legitimate state interest that could justify its intrusion into the personal and private life of the individual, the Court invalidated the statute, and overruled *Bowers*.¹⁵³

Lawrence was striking for what it did not say as well as for what it did say. Although the decision relied on such cases as *Griswold v. Connecticut* and involved the Due Process right to privacy, the Court never once stated that the right at issue, that is, whether “free adults” may “engage” in private, consensual, non-commercial sexual conduct in their home, was a fundamental right.¹⁵⁴ Indeed, the Court appears to have invalidated the Texas statute on rational basis rather than strict scrutiny review.¹⁵⁵

In overruling *Bowers*, however, the Court explicated several reasons why it was precedent not worth keeping. The Court explained, among other things, that before overruling precedent that pertains to a liberty interest, it must weigh the individual or societal reliance that has been placed on the existence of that interest.¹⁵⁶ The Court held that the holding in *Bowers* had not caused the type of “detrimental reliance” that would give the Court pause in overruling that decision.¹⁵⁷ It went on to note that in its estimation, *Bowers* actually raised uncertainty for precedents issued before and after

though Hardwick did not plead his complaint in this manner. *Id.* Indeed, because Georgia’s sodomy statute was facially neutral and applied to both homosexuals and heterosexuals, Hardwick’s attorney argued that the statute violated due process for both heterosexuals and homosexuals. *Id.*

152. 539 U.S. at 564.

153. *Id.* at 578.

154. *See id.* at 564; *see also id.* at 567 (“It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.”).

155. *Id.* at 578 (finding no legitimate state interest to justify the Texas statute). Some scholars contend, however, that it is too simplistic an analysis to assume the Court used rational basis review to overrule the Texas statute, considering the Court invoked cases such as *Griswold* and *Roe*, which undoubtedly involved fundamental rights. *See, e.g.,* Tribe, *supra* note 151 at 1915-17. Professor Tribe contends that while there may be some confusion regarding the standard of review,

To search for the magic words proclaiming the right protected in *Lawrence* to be “fundamental,” and to assume that in the absence of those words mere rationality review applied, is to universalize what is in fact only an occasional practice [of announcing a standard of review]. Moreover, it requires overlooking passage after passage in which the Court’s opinion indeed invoked the talismanic verbal formula of substantive due process but did so by putting the key words in one unusual sequence or another—as in the Court’s declaration that it was dealing with a “protection of liberty under the Due Process Clause [that] has a substantive dimension of fundamental significance in defining the rights of the person.”

Id. at 1917 (emphasis added).

156. 539 U.S. at 577.

157. *Id.*

Bowers that contradict the central holding of the case.¹⁵⁸

The Court further adopted the rationale of Justice Stevens' dissenting opinion in *Bowers*.¹⁵⁹ One of Justice Stevens' propositions was that a state's tradition in viewing a particular practice as "immoral," such as homosexual sodomy, does not alone suffice as a basis to uphold a law banning the practice.¹⁶⁰ In a sharp dissent, Justice Scalia seized on the majority's "societal reliance" and "morality" rationales for overruling *Bowers*.

2. *A Vitriolic Dissent*

In his dissent, Justice Scalia took the majority to task for never expressly holding that the right to homosexual sodomy was fundamental.¹⁶¹ He also challenged what he refers to as the Court's most current "approach" to "overrule an erroneously decided precedent. . . ."¹⁶² He reduced the majority's approach to three criteria. "[E]rroneously decided" precedent may be overruled if: (1) "the foundations have been eroded by subsequent decisions;" (2) "it has been subject to substantial and continuing criticism;" and (3) "it has not induced individual or societal reliance that counsels against overturning" it.¹⁶³

As to the third factor in particular, Justice Scalia contends that the "'societal reliance' on the principles confirmed in *Bowers* and discarded" by the Court in *Lawrence* "has been overwhelming."¹⁶⁴ He claims that innumerable judicial decisions have relied on the proposition espoused in

158. *Id.* The Court was arguably correct in this regard. When *Bowers* was decided, cases such as *Griswold*, *Eisenstadt* and *Roe* could have allowed the Court to find a fundamental right to privacy in the intimate sexual conduct at issue in *Bowers*. These pre-*Bowers* cases addressed the fundamental right to make highly personal individual choices. *Lawrence*, 539 U.S. 564-66; see also *Williams v. Att'y Gen. of Alabama*, 378 F.3d 1232, 1253-54 (11th Cir. 2004), *cert. denied*, *Williams v. King*, 543 U.S. 1152 (2005) (Barkett, J., dissenting) (arguing cases such as *Griswold*, *Eisenstadt* and *Roe* established the existence of a right to make private decisions about one's sexual activities). The *Bowers* Court, however, narrowly framed the issue before it as being about a fundamental right to engage in homosexual sodomy and distinguished those cases involving contraception and abortion, among others. *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986); *Williams*, 378 F.3d at 1254 (Barkett, J., dissenting).

159. *Lawrence*, 539 U.S. at 577.

160. *Id.*

161. *Id.* at 586.

162. *Id.* at 587.

163. *Id.* As to the first criterion, Justice Scalia does not dispute the Court's claim that a prior decision, *Romer v. Evans*, 517 U.S. 620 (1996), "'eroded' the 'foundations' of *Bowers*' rational-basis holding." In *Romer*, the Court, applying rational basis review, struck down class-based legislation directed at homosexuals on equal protection grounds. 517 U.S. 620. Justice Scalia contends, however, that *Roe v. Wade* had been eroded by subsequent authority as well, including *Washington v. Glucksberg*, 521 U.S. 702 (1997), and that the majority was unwilling to overrule *Roe*. *Lawrence*, 539 U.S. at 587. As to the second criterion, he contends that the majority cited little, if any, non-historical criticism of *Bowers*, and that *Roe* too has been subject of unrelenting criticism. *Id.* at 588.

164. *Id.* at 589.

Bowers, that “a governing majority’s belief that certain sexual behavior is immoral and unacceptable constitutes a rational basis for regulation.”¹⁶⁵ Justice Scalia also charges that society has relied substantially on the proposition that homosexual sodomy is not a fundamental right.¹⁶⁶ Citing one statute and fourteen cases that apparently support these propositions, Justice Scalia concludes ominously, “[w]hat a massive disruption of the current social order, therefore, the overruling of *Bowers* entails.”¹⁶⁷

Justice Scalia’s concern is overstated.¹⁶⁸ Half of the fourteen cases and the one statute arise in the area of government employment.¹⁶⁹ In five of those seven cases, plaintiffs challenged governmental action based on privacy and intimate association rights.

Lawrence and its overruling of *Bowers* will not have a massive, if any,

165. *Id.*

166. *Id.* at 590 n.2.

167. *Id.* at 590 n.2, 591.

168. Justice Scalia’s massive disruption theory has proven incorrect outside of the employment context as well. Several federal courts have held that *Lawrence* not only failed to establish a fundamental right to engage in homosexual sodomy, but established *no* new fundamental rights under the U.S. Constitution. See *Williams v. Att’y Gen. of Alabama*, 378 F.3d 1232, 1235-36 (11th Cir. 2004), *cert. denied*, *Williams v. King*, 543 U.S. 1152 (2005) (“[T]he Supreme Court’s substantive-due-process precedents [have never] recognized a free-standing ‘right to sexual privacy’”; and holding that *Lawrence* did not create such a right); *Loomis v. United States*, 68 Fed. Cl. 503, 518 (2005) (noting that the Supreme Court did not hold that sodomy was a fundamental right and refusing to presume such to be the case without an explicit holding from the Court). But see *Tribe, supra* note 151, at 1917 (considering Court invoked *Griswold* and other precedents in *Lawrence*, the “relationship” right the Court protected in that case was “fundamental”). Further, *Lawrence* has provided little support to individuals challenging laws related to polygamy, incest or prostitution—conduct that Justice Scalia analogized to homosexual sodomy. See, e.g., *Reliable Consultants, Inc. v. PHE, Inc.*, 517 F.3d 738 (5th Cir. 2008) (relying on *Lawrence* and other Supreme Court cases to hold that a Texas statute that barred the selling, advertising, giving or lending of devices that provide sexual stimulation infringed the privacy rights of individuals to engage in conduct in the home without government intrusion, but also noting that its holding neither barred laws regarding commercial sex, such as prostitution, nor protected “the public display of material that is obscene as defined by the Supreme Court . . .”); *State v. Holm*, 137 P.3d 726 (Utah 2006) (affirming defendant’s conviction and rejecting argument that *Lawrence* invalidated state law against bigamy); *State v. Freitag*, 130 P.3d 544, 545-46 (Ariz. 2006) (rejecting challenge to prostitution laws and collecting cases holding the same); *Muth v. Frank*, 412 F.3d 808, 817 (7th Cir. 2005) (holding that *Lawrence* did not invalidate state incest statute); *Beard v. State*, No. M200402227CCAR3PC, 2005 WL 1334378, at *2 (Tenn. Crim. App. June 7, 2005) (same); see also *Williams*, 378 F.3d at 1235 (*Lawrence* created no free-standing constitutional right to privacy). This is not to say that *Lawrence* has not provided support to certain groups or individuals alleging violation of their constitutional rights. See, e.g., *Johnston v. Missouri Dep’t of Social Servs.*, No. 0516, 2005 WL 3465711 (Mo. Cir. Ct. May 2, 2005) (holding that lesbian could not be barred from serving as foster parent solely because of homosexuality); *Martin v. Zihlerl*, 607 S.E.2d 367, 371 (Va. 2005) (holding Virginia’s fornication statute unconstitutional, but emphasizing that its holding “like that of the Supreme Court in *Lawrence*, . . . does not affect the Commonwealth’s police power regarding regulation of public fornication, prostitution, or such other crimes”); *Goodridge v. Dep’t of Pub. Health*, 798 N.E. 2d 941 (Mass. 2003) (holding under state constitution that a ban on same-sex marriage was unconstitutional and citing *Lawrence*). But see *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1306-07 (M.D. Fla. 2005) (holding that *Lawrence* does not extend to same-sex marriage and refusing to read *Lawrence* as creating a fundamental right to same-sex marriage).

169. See discussion *infra* pp. 337-43.

effect on those decisions. Lower courts have been wary to interpret *Lawrence* so broadly as to sanction every purported right to privacy plaintiffs have thus far advanced.¹⁷⁰ Moreover, *Lawrence* and *Bowers* dealt with the government as a sovereign regulating the private conduct of its citizens. Whatever limits *Lawrence* imposes on the government's ability to curtail the sexual and privacy rights of its citizens, the government's ability to curtail such rights arguably remains at its zenith in the area of public employment.¹⁷¹ Accordingly, as explained below, the employment cases Justice Scalia cites, notwithstanding *Lawrence*, will likely do little to change the deference afforded government employers to regulate the private sexual conduct of their employees or expand employee rights in that area.¹⁷²

B. A Massive Social Disruption? Not Likely

Of the fourteen cases Justice Scalia cites in his dissenting opinion, seven pertain to government employment: *Marcum v. McWhorter*,¹⁷³ *Holmes v. California Army National Guard*,¹⁷⁴ *Schowengerdt v. United States*,¹⁷⁵ *Charles v. Baesler*,¹⁷⁶ *Walls v. City of Petersburg*,¹⁷⁷ *High Tech*

170. See *supra* note 168.

171. See *supra* note 56 and accompanying text.

172. Professor Secunda argues to the contrary. See *supra* note 49, at 119, 131-32. He points to a case decided by a state trial court to support his theory that *Lawrence* has expanded the rights of employees. *Id.* The case involved a North Carolina sheriff who informed a female employee that she might lose her job after he learned she was cohabiting with her boyfriend in violation of a state cohabitation statute. North Carolina Family Policy Council, *N.C. Judge Legalizes Adultery and Fornication*, <http://www.ncfpc.org/stories/060914s1.html> (last visited October 16, 2008). The statute, entitled "Fornication and Adultery," punished cohabitation between unmarried persons. N.C. Gen. Stat. Ann. § 14-184 (1994). The sheriff informed the employee that her living situation violated the statute and that she would either have to move out, get married, or find other employment. See *N.C. Judge Legalizes Adultery and Fornication*, *supra*. She chose instead to file a lawsuit alleging the statute violated her right to privacy in violation of *Lawrence*. *Hobbs v. Smith*, No. 05-VCS 267, 2006 WL 3103008, at *1 (Super. Ct. N.C. August 25, 2006). The Superior Court agreed with the plaintiff as to the statutory provisions that addressed fornication. *Id.* It made no ruling with regard to the provisions pertaining to adultery. *Id.* at *1 n.1. The import of this decision is unclear. What is clear is that the case does not evince a "massive disruption of the current social order." First, the North Carolina court failed to employ the direct and substantial burden test or a *Pickering-Connick* balancing test. As explained earlier, these tests have been used by numerous federal courts to analyze privacy and intimate association claims. Moreover, the court's order does not indicate whether the relationship actually or even potentially disrupted the work environment. Thus, while the court invalidated the statute, the court did not hold that a government employer is barred from considering the effect a purely private relationship may have on the workplace in deciding whether to terminate the employee. There is no suggestion that, had the plaintiff's relationship actually or potentially caused disruption in the workplace, the employer would have been unable to terminate her. Moreover, even prior to *Lawrence*, courts had held that where there was no showing of workplace disruption (as appears to have been the case in *Hobbs*), a plaintiff's right to maintain a private relationship might trump the employer's right to terminate the employee because of the relationship. See *Via v. Taylor*, 224 F. Supp. 2d 753, 762 n.5 (D. Del. 2002).

173. 308 F.3d 635 (6th Cir. 2002).

174. 124 F.3d 1126 (9th Cir. 1997).

175. 944 F.2d 483 (9th Cir. 1991).

Gays v. Defense Industrial Security Clearance Office,¹⁷⁸ and *City of Sherman v. Henry*.¹⁷⁹ Of those seven, five involve intimate association claims and four pertain to the military or law enforcement.¹⁸⁰ Critically reviewing these cases and the propositions for which they cite *Bowers* casts serious doubt on the theory that overruling *Bowers* with *Lawrence* will result in massive social disruption, let alone change the outcome of these employment cases.

1. *Marcum v. McWhorter* and *City of Sherman v. Henry*

Both *Marcum* and *Sherman* involved discharge of law enforcement officers because of adulterous conduct. Equating homosexual sodomy to adultery, the Sixth Circuit and the Texas Supreme Court relied on *Bowers* for the proposition that “much like sodomy, proscriptions against adultery have ancient roots.”¹⁸¹ Both courts held that there is no constitutional right to engage in an adulterous relationship, and that the adulterous nature of the relationships in which the officers engaged sufficed to strip those relationships of all constitutional protection.¹⁸²

It is unlikely *Lawrence* would change the outcome of these cases for at least three reasons. First, it is not at all certain that *Lawrence* even applies to adulterous relationships in general, let alone in the context of police enforcement. Indeed, the Sixth Circuit recently addressed the issue of whether *Lawrence* overruled *Marcum* and found the proposition “doubtful.”¹⁸³ While an adulterous relationship could, theoretically, be long term and deeply committed like a marriage, which receives constitutional protection,¹⁸⁴ such relationships arguably fall outside the scope of *Lawrence*. *Lawrence* itself stated that it did not “involve” situations where “persons

176. 910 F.2d 1349 (6th Cir. 1990).

177. 895 F.2d 188 (4th Cir. 1990).

178. 895 F.2d 563 (9th Cir. 1990).

179. 928 S.W.2d 464 (Tex. 1996).

180. *Charles* and *Walls* did not involve intimate association claims. *Charles*, 910 F.2d 1349, cited *Bowers* for the narrow proposition that the contractual right claimed by the plaintiff was not “fundamental”, as “[r]outine state-created contractual rights are not ‘deeply rooted in this Nation’s history and tradition . . .’” *Id.* at 1353 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 191-94 (1986)). *Walls* involved a challenge to a government questionnaire that asked employees highly personal questions and implicated a due process privacy right under the Fourteenth Amendment: the individual’s interest in avoiding the disclosure of private information. *Walls*, 895 F.2d at 192-93.

181. *Marcum v. McWhorter*, 308 F.3d 635, 641-42 (6th Cir. 2002); *Sherman*, 928 S.W.2d at 469-70.

182. 308 F.3d at 641-42; 928 S.W.2d at 469-70.

183. *Beecham v. Henderson County, Tenn.*, 422 F.3d 372, 376 (6th Cir. 2005).

184. See e.g., *Marcum*, 308 F.3d at 644 (Clay, J., concurring) (rejecting the majority opinion’s blanket holding that an adulterous relationship is devoid of any constitutional protection).

might be injured . . .”¹⁸⁵ There is ample support for the argument that adulterous relationships *hurt* innocent spouses and children and fit within the Court’s statement of what *Lawrence* “does not involve.”¹⁸⁶ In fact, *Sherman* latched onto the argument that adultery “often rips apart families,” and destroys the institution of marriage in refusing to extend constitutional protection to adulterous activity.¹⁸⁷

Second, *Lawrence* does not alter the special deference generally afforded law enforcement agencies. In fact, both concurring opinions in *Sherman* cited this special deference as a basis for upholding the officer’s discharge in that case.¹⁸⁸

Finally, for courts such as the Sixth Circuit that apply the direct and substantial burden test, it would be extremely difficult for a plaintiff to successfully challenge a workplace rule or decision that terminates an employee for engaging in an adulterous affair or indeed any intimate conduct. Even assuming the relationship was entitled to some modicum of constitutional protection, under Sixth Circuit precedent, the government action burdening that relationship would be subject to rational basis review in all but the rarest of instances. *Marcum* would likely receive such review here, as the plaintiff was not barred from forming all intimate associations (since he was already married) and could have simply found another job after being terminated on account of his extra-marital relationship.¹⁸⁹ *Lawrence* does

185. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

186. *Id.*

187. *City of Sherman v. Henry*, 928 S.W.2d 464, 469-70 (Tex. 1996); *see also* *Bowers v. Hardwick*, 478 U.S. 186, 209 n.4 (1986) (Blackmun, J., dissenting) (explaining that adultery, unlike the consensual sexual conduct at issue in *Bowers*, may “injure third persons, in particular, spouses and children of persons who engage in extramarital affairs”). The fact that marriage and family are near the end of the spectrum where intimate association rights are at their greatest has been the basis by which some courts have held that adultery is entitled to no constitutional protection at all, without discussion of any other attributes of the relationship. *See Marcum*, 308 F.3d at 641 (holding that the right to privacy does not include adultery); *Sherman*, 928 S.W.2d at 471, *cert. denied*, 519 U.S. 1156 (1997) (explaining that “adulterous conduct is the very antithesis of marriage and family” and enjoys no constitutional protection). Thus, adulterous conduct may be seen as the polar opposite of marriage and family, which suffices to usurp it of all constitutional protection.

188. 928 S.W.2d at 47-77 (Spector and Owen, JJ., concurring).

189. *See Beecham v. Henderson County, Tenn.*, 422 F.3d 372, 377-78 (6th Cir. 2005) (upholding ad hoc decision to terminate employee for adulterous affair under rational basis review since termination did not impose a direct and substantial burden on plaintiff’s right of intimate association; economic burden of losing job was not a direct and substantial burden on plaintiff’s ability to marry a particular class of persons that would trigger strict-scrutiny review); *see also* *Montgomery v. Stefaniak*, 410 F.3d 933, 938-39 (7th Cir. 2005) (holding that workplace rule forbidding probation officer from purchasing car from the employer of a probationer did not impose a direct and substantial burden on the plaintiff’s intimate association rights and passed rational basis review); *Flaskamp v. Dearborn Public Schools*, 385 F.3d 935, 941-45 (6th Cir. 2004) (holding that decision to deny tenure to teacher because of relationship with former student imposed no direct and substantial burden on the relationship and decision was rational; no violation of First Amendment association right); *Akers v. McGinnis*, 352 F.3d 1030 (6th Cir. 2003) (applying substantial and direct burden test and affirming on rational basis grounds a rule barring employees from any non-work-related contact with prisoners, parolees or probationers); *Singleton v.*

not change the direct and substantial burden test established in *Zablocki* for the circuits that have adopted that test in employment cases. For these reasons, it is unlikely that *Lawrence* will extend a constitutional right to police officers to engage in adulterous conduct.

2. *Holmes v. Cal. Army Nat'l Guard* and *Schowengerdt v. United States*

Both *Holmes* and *Schowengerdt* involved challenges to military policies that required discharge of personnel for engaging in homosexual conduct. In *Holmes*,¹⁹⁰ the Ninth Circuit rejected the plaintiffs' equal protection, First Amendment, and substantive due process challenges to the military's "Don't Ask, Don't Tell" policy.¹⁹¹ As for the due process challenge, the court held that *Bowers* and an earlier Ninth Circuit case, *Beller v. Middendorf*,¹⁹² foreclosed the argument.¹⁹³

Likewise, in *Schowengerdt*,¹⁹⁴ the court rejected the plaintiff's due process challenge to a Naval Reserve policy that required discharge of bisexuals or gays.¹⁹⁵ The *Schowengerdt* court noted that in *Beller*, a pre-*Bowers* case, the court had already upheld the constitutionality of similar Navy regulations that permitted the discharge of persons who engaged in homosexual activity.¹⁹⁶ Further, the court upheld those regulations under a level of scrutiny higher than rational basis.¹⁹⁷ The court reasoned that if the regulations were sustainable, pre-*Bowers* and under the higher level of review, then they would certainly pass muster under rational basis review.¹⁹⁸ The Ninth Circuit has not held that *Lawrence* created a fundamental right to privacy or otherwise such that the regulations reviewed in that case would today receive anything other than rational basis review.¹⁹⁹

Cecil, 176 F.3d 419 (8th Cir. 1999) (affirming panel decision, which held that decision to terminate husband based on wife's conduct posed no direct and substantial burden on the marital relationship and that termination decision was rational; no violation of "substantive due process occupational liberty interest under the Fourteenth Amendment").

190. *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126 (9th Cir. 1997).

191. *Id.* at 1131-32. Justice Scalia also cited the actual "Don't Ask, Don't Tell" statute that was addressed in *Holmes*, 10 U.S.C. § 654 (Supp.1994) ("Policy concerning homosexuality in the armed forces"), to support his societal reliance argument. *Lawrence v. Texas*, 539 U.S. 558, 590 n.2 (2003) (Scalia, J., dissenting).

192. 632 F.2d 788 (9th Cir. 1990).

193. 124 F.3d at 1136.

194. *Schowengerdt v. United States*, 944 F.2d 483 (9th Cir. 1991).

195. *Id.* at 489-90.

196. *Id.*

197. *Id.*

198. *Id.*

199. At least one judge on the Ninth Circuit has since remarked that *Lawrence* does not alter the court's holding in *Holmes*. See *Hensala v. Dep't of Air Force*, 343 F.3d 951, 959 n.1 (9th Cir. 2003) (Tashima, J., concurring in part and dissenting in part).

Perhaps the more interesting question is whether the policy and others like it would survive rational basis review today.²⁰⁰ In the unique world of the military, the policy would likely stand. The Court has long characterized the military as a “society separate from civilian society,” which by necessity, has developed its own laws and traditions.²⁰¹ Moreover, in post-*Bowers* litigation, for purposes of rational basis review, the military disavows that “Don’t Ask, Don’t Tell” is based at all on its belief that homosexuality is immoral.²⁰² Instead, it contends that its reasons for the policy include: unit cohesion, reducing sexual tension, and protecting privacy.²⁰³ Courts have found these bases distinguishable from mere disdain for gays, and therefore rational, even in light of *Lawrence*.²⁰⁴

3. High Tech Gays v. Defense Industrial Security Clearance Office

In *High Tech Gays*,²⁰⁵ the Ninth Circuit addressed a challenge to a Department of Defense (“DOD”) policy that subjected homosexual applicants vying for certain top secret security clearances to an expanded investigation and mandatory adjudications.²⁰⁶ There was also evidence that the policy denied certain clearances to gay applicants.²⁰⁷ A class of plaintiffs challenged the DOD policies on Fifth Amendment equal protection and First

200. See *Lawrence v. Texas*, 539 U.S. 558, 591 (2003) (Scalia, J., dissenting) (expounding “massive social disruption” theory).

201. See *Parker v. Levy*, 417 U.S. 733, 743 (1974); see also Diane H. Mazur, *Is “Don’t Ask, Don’t Tell” Unconstitutional After Lawrence? What It Will Take To Overturn The Policy*, 15 U. FLA. J.L. & PUB. POL’Y 423, 431 (2004) (explaining that in *Parker*, the Court characterized the military “as a separate society with a different relationship to the Constitution than civilian society”). See generally *Rostker v. Goldberg*, 453 U.S. 57, 67-69 (1981) (Congress is subject to the due process clause but the tests and limitations may apply differently, e.g., with more deference granted in the military context).

202. See, e.g., *Loomis*, 68 Fed. Cl. at 519 (arguing that “Don’t Ask, Don’t Tell” did not violate substantive due process because it was justified by purposes other than to promote “morality and private bias”).

203. See *id.* at 519. In *Loomis*, in support of its rational-basis argument for the “Don’t Ask, Don’t Tell” policy, the government pointed to the congressional findings set forth in 10 U.S.C. § 654. According to those policies the “worldwide deployment of United States military forces” makes it necessary for service members “to involuntarily . . . accept living conditions and working conditions that are often Spartan, primitive, and characterized by forced intimacy with little or no privacy.” *Id.* at 519-20 (quoting 10 U.S.C. § 654(a)(12)). The government contended that instead of discriminating against gay service members, it assumes that all service members—heterosexual and homosexual—will act in accord with their sexual desires. *Id.* at 520. Given that assumption, the military claims that it must treat gays and straights differently considering the lack of privacy and close living conditions service members may encounter. *Id.* The military can promote unit cohesion, reduce sexual tension and protect privacy in the case of heterosexuals by separating them by gender. *Id.* It cannot do so with homosexual service members. *Id.*

204. See *id.*

205. 895 F.2d 563 (9th Cir. 1990).

206. *Id.* at 565.

207. *Id.*

Amendment free association grounds.²⁰⁸ Under the DOD regulations, the Defense Industrial Security Clearance Organization ("DISCO") conducted investigations of all applicants for secret service clearance.²⁰⁹ For top secret clearance, the Defense Investigative Service ("DIS") completed a background investigation.²¹⁰ If adverse information was uncovered, DIS conducted an expanded investigation to substantiate or disprove the information and interviewed the applicant.²¹¹ If DISCO could not find that granting the security clearances was in the national interest, it referred the particular applicant's case to another arm of the agency for review and adjudication.²¹² All homosexual applicants were referred for review and adjudication.²¹³

The district court found that homosexual applicants were a suspect or quasi-suspect class and, therefore, applied strict scrutiny to the regulations.²¹⁴ Relying in part on *Bowers*, the Ninth Circuit disagreed. It held that "if there is no fundamental right to engage in homosexual sodomy under the Due Process Clause . . . it would be incongruous to expand the reach of equal protection to find a fundamental right of homosexual conduct under the equal protection component of the Due Process Clause of the Fifth Amendment."²¹⁵

It is unlikely that *Lawrence* alters the court's basic holding, i.e., that rational basis review versus strict scrutiny was applicable to the DOD's regulations.²¹⁶ Further, the government's purported rationale for its regulations in *High Tech Gays* was not moral disapproval of or disdain for gays, but rather national security.²¹⁷ The government claimed and presented proof

208. *Id.*

209. *Id.* at 566.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 568.

214. *Id.* at 571.

215. *Id.* The Court did not only rely only on *Bowers*, however, to find that gay individuals were not a suspect or quasi-suspect class. It also found support in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), holding that classifications based on race, alienage, or national origin are subject to strict scrutiny, while classifications based on gender and illegitimacy are subject to a heightened standard of review. *Id.* at 573. The court noted, however, that homosexuality had never been subjected to a heightened standard of review. *Id.* Further, while the court acknowledged that homosexuals had suffered a history of discrimination, it did not believe that homosexuality was an immutable characteristic such as race or gender. *Id.* at 573-74. The court also stated that gays were not without political power and thus had the ability to attract lawmakers to address their particular concerns of discrimination. *Id.* at 574.

216. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

217. *High Tech Gays*, 895 F.2d at 576-78. In other contexts, "national security" has been held to constitute a compelling interest that has justified racial classifications that might otherwise have been unconstitutional. See *Grutter v. Bollinger*, 539 U.S. 306, 351 (2003) (Thomas, J., dissenting) (citing *Korematsu v. United States*, 323 U.S. 214 (1944)).

that the K.G.B. sought out, targeted and exploited gays, such that this group presented a security risk.²¹⁸ Under those particular circumstances, the Ninth Circuit held at the time that the regulations were rational, given the “special deference” due to the Executive Branch “when adjudicating matters involving their decisions on protecting classified information.”²¹⁹ This result may seem unfair, but not necessarily unconstitutional, particularly in the area of public employment. Moreover, nothing in *Lawrence* demands a different result.²²⁰

V. CONCLUSION

An analysis of the cases Justice Scalia cites involving privacy and intimate association claims in public employment supports the *Lawrence* majority’s proposition that *Bowers* has not engendered the type of societal reliance that would caution the court against overruling it. These cases do not support the proposition that reliance on *Bowers* was such that its overruling will cause massive social disruption.

First, *Lawrence* did not expressly hold that the right of privacy was a fundamental right in that situation. The Court may later clarify that point and hold that *Lawrence* did establish such a right. Such a holding, however, would do little to disturb the fact that an employer’s interests in maintaining an orderly, conflict-free workforce often trump the interests of employees to maintain their job and an intimate relationship that the employer believes clashes with its objectives. Indeed, even government decisions that place burdens on the marital relationship—the most intimate of associations deserving constitutional protection—are often reviewed for a rational basis, by way of the substantial and direct burden test, and upheld. Likewise, where courts employ a *Pickering* balance test to an employee’s intimate association interests and the government employer’s interests, the scale often tips in favor of the employer, particularly where there is a poten-

218. *High Tech Gays*, 895 F.2d at 576-78.

219. *Id.* at 577.

220. If it is uncertain whether the Ninth Circuit would reach the same result today that it did in 1988 when *High Tech Gays* was argued, it would likely have more to do with the fall of the K.G.B. than with *Lawrence*, the overruling of *Bowers*, or whether rational basis or strict scrutiny would be applicable to the DOD regulations. See *Buttino v. FBI*, 801 F. Supp. 298, 307 (N.D. Cal. 1992) (refusing, pre-*Lawrence*, to find as a matter of law, based solely on *High Tech Gays*, that the FBI’s decision to strip an agent of his clearance and fire him for being gay was rational; the rationality of the DOD justification in *High Tech Gays* had become questionable “in light of the post-*High Tech Gays* demise of the Soviet Union and the uncertain future of the Soviet Secret Police”). Moreover, the court in *Buttino* also noted that, subsequent to the date of arguments in *High Tech Gays*, a DOD study found that the pre-service suitability of gays was every bit as good, if not better than it was for heterosexuals. *Id.* at 307 n.17. Thus, if the rationality of the government’s regulations in *High Tech Gays* is doubtful, it has to do with other pre-*Lawrence* factors.

tial for disruption in the workplace or interference with the employee's duties. Moreover, the employer's interests, which are already reviewed deferentially, are afforded even greater weight when the employer is the military or law enforcement. In sum, if it can be said that *Lawrence* will cause a "massive disruption of the current social order," the ripples will be felt the least in the area of privacy and intimate association claims in government employment.