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Consitutional Law: Defining the Boundaries of Protected Intimate Associations

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CONSTITUTIONAL LAW: DEFINING THE BOUNDARIES OF PROTECTED INTIMATE ASSOCIATIONS

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

Louis Norvell[*]

Appellee, the Attorney General of Georgia, offered Appellant an attorney position with the Georgia Department of Law.[1] Appellant accepted this offer,[2] but the Attorney General withdrew it[3] after learning that Appellant planned to participate in a self-described "Jewish, lesbian-feminist, out-door wedding."[4] Appellant sued the Attorney General in a section 1983 action, alleging that he had violated her right of intimate association.[5] The district court found that Appellant possessed a protectable interest in intimate association with her female partner[6] and applied a balancing test to her claim.[7] The court found that Appellant's interest was outweighed by the state's concerns about her employment, and held that the Attorney General had not violated Appellant's associational rights.[8] On appeal, a three-judge panel of the

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* To my wife, Carolyn.

1. *See* Shahar v. Bowers, 114 F.3d 1097, 1100 (11th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 693 (1998).

2. *See id.*

3. *See id.* at 1101.

4. *Id.* at 1100. The Attorney General offered several reasons for withdrawing the employment offer. He asserted that retention of Appellant would imply tacit approval of her "marriage" to another woman; that the employment would be perceived by the public as condoning now criminal homosexual sodomy; that Appellant's conduct indicated bad judgment as her actions constituted political conduct advocating legal acceptance of homosexual marriage and sodomy; and that Appellant's actions may be disruptive to department activities such as sodomy prosecutions and child deprivation cases involving homosexual couples. *See* Brief of Appellee at 10-13, Shahar v. Bowers, 70 F.3d 1218 (11th Cir. 1995) (No. 93-9345).

5. *See Shahar*, 114 F.3d at 1101. Appellant also claimed that the Attorney General's action violated her rights to equal protection, free exercise of religion, expressive association, and substantive due process. *See id.*

6. *See* Shahar v. Bowers, 836 F. Supp. 859, 863 (N.D. Ga. 1993). The district court found that Appellant had a constitutionally protected interest in intimate association with her female partner which had been burdened by the Attorney General's action. *See id.* at 864. The district court, however, deemed that this interest was outweighed by the Attorney General's legitimate employment interests. *See id.*

7. *See id.* at 864 (court applied the balancing test set forth in *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) (involving a public employee terminated for First Amendment activity)).

8. *See id.* at 865. The court granted summary judgment for the Attorney General on all of Appellant's constitutional claims. *See id.* at 866.

Eleventh Circuit Court of Appeals reversed, and held that the district court should have applied a strict scrutiny standard of review, rather than a balancing test, to evaluate Appellant's intimate association claim.[9] On rehearing en banc, the Eleventh Circuit accepted the district court's finding of a protected relationship for the purpose of argument and, applying the balancing test, HELD, that the Attorney General did not violate Appellant's right to intimate association by withdrawing her job offer based on Appellant's homosexual wedding.[10]

The United States Constitution does not contain an express right of association. However, the Supreme Court has interpreted the First, Fifth, and Fourteenth Amendments as protecting certain associations.[11] The Court initially recognized this right only in cases involving political association.[12] In recent years, however, the Court has recognized that the scope of associational protection extends beyond political association to certain family-based associations.[13] Specifically, the Court repeatedly has held that a traditional marriage union is an association most deserving of constitutional protection.[14] For example, in *Zablocki v. Redhail*,[15] the Court held that a person has a right to enter into a marital association, based not on the First Amendment, but on the Fourteenth Amendment's substantive Due Process Clause.[16]

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9. *See* Shahar v. Bowers, 70 F.3d 1218, 1224 (11th Cir. 1995), *vacated*, 78 F.3d 499 (11th Cir. 1996) (en banc).

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

11. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces the freedom of speech.").

12. *See id.* at 462 (holding that the compelled disclosure of the NAACP membership list constitutes a restraint on the protected right of association).

13. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.41, at 1118-19 (5th ed. 1995) (describing three separate aspects of the right of association: economic, intimate, and expressive). The Court's protection of family and personal relationships, at first, did not expressly mention a freedom of association but rather relied on the concept of liberty in the Due Process Clause and the right of privacy. *See id.*; *see also, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 506 (1977) (holding that right of extended family to live together protected by substantive due process); Loving v. Virginia, 388 U.S. 1, 12 (1967) (determining that marriage protected as a fundamental liberty right); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding that access to contraception by married couples protected by right to privacy).

14. *See, e.g., Loving*, 388 U.S. at 12 (invalidating state miscegenation law as an unconstitutional restraint on the right to marry).

15. 434 U.S. 374 (1978).

16. *See id.* at 384.

In *Zablocki*, a Wisconsin statute required state residents, who were under court order or judgment to pay child support,[17] to petition a court for permission to marry.[18] A court would grant a petition only if the petitioning resident proved that his children were not, and were not likely to become, public charges.[19] Appellee, an indigent Wisconsin resident, was under court order to pay child support.[20] He filed an application for a marriage license with Appellant, the county clerk,[21] who denied the application because he failed to obtain court permission.[22]

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17. *See id.* at 375. The statute concerned minor children who were not in the custody of the petitioning parent. *See id.*

18. *See id.* (citing WIS. STAT. § 245.10 (1973)). The statute provided in part:

> (1) No Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment, may marry in this state or elsewhere, without the order of either the court of this state which granted such judgment or support order, or the court having divorce jurisdiction in the county of this state where such minor issue resides or where the marriage license application is made.

Id. at 375-76 n.1 (quoting WIS. STAT. § 245.10(1) (1973)).

19. *See id.* at 375. The statute stated:

> Upon the hearing, if said person submits such proof and makes a showing that such children are not then and are not likely thereafter to become public charges, the court shall grant such order, a copy of which shall be filed in any prior proceeding . . . or divorce action of such person in this state affected thereby; otherwise permission for a license shall be withheld until such proof is submitted and such showing is made, but any court order withholding such permission is an appealable order. Any hearing under this section may be waived by the court if the court is satisfied from an examination of the court records in the case and the family support records in the office of the clerk of court as well as from disclosure by said person of his financial resources that the latter has complied with prior court orders or judgments affecting his minor children, and also has shown that such children are not then and are not likely thereafter to become public charges.
> . . . .
> (4) If a Wisconsin resident having such support obligations of a minor, as stated in sub. (1), wishes to marry in another state, he must, prior to such marriage, obtain permission of the court. . . .
> (5) This section shall have extraterritorial effect outside the state. . . . Any marriage contracted without compliance with this section, where such compliance is required, shall be void, whether entered into in this state or elsewhere.

Id. at 376-77 n.1 (citing WIS. STAT. § 245.10(1), (4) (5) (1973)).

20. *See id.* at 378.

21. *See id.* Appellee and the woman he desired to marry were expecting a child and wished to be lawfully married before the child was born. *See id.* at 379.

22. *See id.* at 378. The Appellee had not requested court permission. *See id.* It was

The Appellee sued in federal district court alleging that the statute violated his constitutional right to marry by requiring him to obtain judicial permission before it would grant him a marriage license.[23] The district court agreed with the Appellee and held that the statute was an invalid infringement on his Fourteenth Amendment fundamental right to marry.[24] On direct appeal, the United States Supreme Court affirmed the lower court's ruling,[25] holding that marriage was a constitutionally protected fundamental right.[26] The Court stated that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[27] Further, the Court noted that marriage was " 'the foundation of the family and of society,' "[28] and that the right " 'to marry, establish a home and bring up children' " was a liberty right protected by the Fourteenth Amendment's Due Process Clause.[29] Additionally, the Court implied that the Appellee had an intimate association right in marriage, stating that marriage was a union, "*intimate* to the degree of being . . . sacred, . . . an *association* that promotes a way of life."[30] Because the statute interfered with this fundamental right, the Court

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stipulated that, due to his failure to make child support payments and his arrearage for past payments, any request for permission would have been denied. *See id.*

23. *See id.* at 379. The Appellee asserted that the ability to marry was a substantive due process right secured by the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution. *See id.* The state, in defense of the statute, asserted that the statute provided an opportunity to counsel the petitioner regarding the need for continued support payments and to ensure that the welfare of the children was protected. *See id.* at 388-89.

24. *See id.* at 381.

25. *See id.* at 381-82.

26. *See id.*

27. *See id.* at 383 (quoting Loving v. Virginia, 388 U.S. 1, 12 (1967) (quoting Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942))).

28. *See id.* at 384 (quoting Maynard v. Hill, 125 U.S. 190, 211 (1888)).

29. *See id.* (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

30. *See id.* (emphasis added) (quoting *Griswold*, 381 U.S. at 486). The Court in *Griswold* stated:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id. The *Zablocki* Court's protection of marriage was grounded largely on the concept of the inherent privacy shield surrounding marriage which was derived from the Fourteenth Amendment's Due Process Clause. *See id.* The Court also stated that the right to procreate was specifically implicated by Wisconsin's criminal prohibition on fornication. *Id.* at 386. Because Wisconsin criminalized sexual activities outside of marriage, the right to enter into a marriage relationship was necessary to exercise the protected right of procreation. *See id.*

applied a strict scrutiny analysis[31] and held that the state's interest in promoting the payment of child support was not sufficiently compelling and that the statute was not narrowly tailored to serve that interest.[32] Therefore, the statute was unconstitutional.[33]

Six years after *Zablocki*, in *Roberts v. United States Jaycees*,[34] the Court expressly recognized that familial and quasi-familial relationships were protected by a right of intimate association.[35] In *Roberts*, the national chapter of the Jaycees notified two local Jaycees chapters that it planned to revoke their charters because they had admitted female members in violation of the organization's male-only membership policy.[36] Members of both local chapters filed charges against the national chapter with the Minnesota Department of Human Rights for allegedly violating the Minnesota Human Rights Act, which prohibited discrimination on the basis of sex.[37] Before the Department began hearings, the national chapter filed suit in federal district court seeking declaratory and injunctive relief to prevent the Department from enforcing the Act.[38] The national chapter asserted that enforcement of the Act would violate its male members' constitutional rights of free speech and association.[39] The court of appeals reversed the district court's judgment against the members[40] and held that enforcement of the Act would violate the members' rights of free association guaranteed by the First Amendment.[41]

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31. *See id.* at 388. The Court stated, when a statute interferes with the exercise of a fundamental right, "sufficiently important" state interests and a means "closely tailored" to serve those interests are necessary to sustain the statute. *See id.*

32. *See id.*

33. *See id.* at 390-91.

34. 468 U.S. 609 (1984).

35. *See id.* at 618-20. *See generally* Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980) (discussing the contours of intimate association).

36. *See Roberts*, 468 U.S. at 614. The Jaycees, a national charitable and civic organization, maintained a membership policy which excluded women from regular membership. *See id.* at 613. The Jaycees limited regular membership to men aged 18 to 35. *See id.* Associate membership status was available to women and older men. *See id.* Associate members paid reduced membership dues but could not vote, hold local or national office, or participate in certain leadership training and award programs. *See id.*

37. *Id.* at 614. The Minnesota Human Rights Act, MINN. STAT. § 363.03(3) (1982) provided in part: " 'It is an unfair discriminatory practice: To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex.' " *Roberts*, 468 U.S. at 615.

38. *See Roberts*, 468 U.S. at 615.

39. *See id.*

40. *See id.* at 616.

41. *See id.* at 616-17.

On writ of certiorari, the United States Supreme Court stated that the right of association encompassed two distinct categories: expressive association based on the First Amendment[42] and intimate association based on the Fourteenth Amendment's substantive Due Process Clause.[43] Under the former category, the Constitution protected political or public interest associations.[44] Under the latter category, the Constitution protected certain intimate relationships such as those within a family.[45] The Court explained that a family relationship exemplifies those intimate associations deserving of protection,[46] and used the family as a reference to suggest limitations on the scope of protectable interests.[47] A relationship protected as an intimate associational right would have to be similar to a family in its "relative smallness, [a] high degree of selectivity . . . and seclusion from others in critical aspects of the relationship."[48]

The Court refrained from defining any precise boundaries of protected intimate associations.[49] The Court indicated that to evaluate the extent of protection that a relationship deserved, it was necessary to consider the aspects of the relationship, including "size, purpose,

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42. *See id.* at 617-18.

43. *See id.* at 618. The Court held that certain intimate relationships necessarily receive protection as an essential element in personal liberty. *See id.* In extending the scope of protection formerly recognized in marriage and other close family relationships, the Court's recognition of a right to intimate association merged with the Court's prior protections under the right to privacy. *See id.* at 617-19; *see also* NOWAK & ROTUNDA, *supra* note 13, § 16.41, at 1119-20.

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

45. *See id.* at 617-19.

46. *See id.* at 619; *see also* Karst, *supra* note 35, at 629 (defining intimate association as "a close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship").

47. *See Roberts,* 468 U.S. at 619 (citing *Zablocki,* 434 U.S. at 383-86 (marriage); Carey v. Population Servs. Int'l, 431 U.S. 678, 684-86 (1977) (childbirth); Smith v. Organization of Foster Families, 431 U.S. 816, 844 (1977) (raising and education of children); and Moore v. City of East Cleveland, 431 U.S. 494, 503-04 (1977) (plurality opinion) (co-habitation with relatives)).

48. *See id.* at 620.

49. *See id.* at 618, 620. The Court stated that there was "a broad range of human relationships that *may* make greater or lesser claims to constitutional protection." *See id.* at 620 (emphasis added). The Court specifically expressed that it was not marking those points "with any precision." *See id.* Justice O'Connor's concurrence noted the associational interests in "marriage, procreation, contraception, family relationships, and child rearing and education . . . 'while defying categorical description' " were protected from state interference. *See id.* at 631 (O'Connor, J., concurring) (quoting Paul v. Davis, 424 U.S. 693, 713 (1976)); *see also* Neal E. Devins, *The Trouble with Jaycees,* 34 CATH. U. L. REV. 901, 904 (1985) (stating that the Court's recognition of a protected intimate association in *Roberts* may be as "narrow as the family and as broad as anything more private than the Jaycees").

policies, selectivity, [and] congeniality."[50] Applying this family-based standard, the Court found that the Jaycees were too large and inclusive to possess an intimate association right.[51] Therefore, the Court reversed the appellate court's decision, thereby allowing Minnesota to require that females be admitted to the local chapters.[52]

Two years after *Roberts*, the Court considered whether the right of intimate association encompassed homosexual sexual relationships. In *Bowers v. Hardwick*,[53] the respondent was charged with violating Georgia's criminal sodomy law[54] after committing sodomy with another male in his home.[55] Although the state prosecutor did not seek an indictment,[56] the respondent sued the state alleging that the law violated his Fourteenth Amendment substantive due process rights.[57] The Eleventh Circuit Court of Appeals reversed the district court's dismissal of the respondent's claim.[58] The Eleventh Circuit stated that protected intimate associations were not limited to those involving marriage or procreation.[59] The court found that the "sexual activity in question here serves the same purpose as the intimacy of marriage."[60] It also determined that the respondent's homosexual relationship "l[aid] at the heart of an intimate association."[61] The Eleventh Circuit noted

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50. *Roberts*, 468 U.S. at 620.

51. *See id.* at 620-21.

52. *See id.* at 621. The Court did recognize that the Jaycee's expressive association interests were burdened by the Minnesota Act. *See id.* at 623. The Court applied a strict scrutiny analysis and determined that Minnesota's compelling interest in eliminating discrimination justified the burden on the Jaycee members' right of expressive association. *See id.*

53. 478 U.S. 186 (1986). For a critical discussion of the majority opinion in *Hardwick*, see LAWRENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 55-60, 117 (1991).

54. GA. CODE ANN. § 16-6-2 (1984) provided that:

> (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . .
> (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years.

Hardwick v. Bowers, 760 F.2d 1202, 1204 n.1 (11th Cir. 1985), *rev'd sub nom.*, 478 U.S. 186 (1986) (citing GA. CODE ANN. § 16-6-2 (1984)).

55. *See Hardwick*, 478 U.S. at 188.

56. *See id.*

57. *See id.*

58. *See id.* at 189.

59. *See Hardwick*, 760 F.2d at 1212.

60. *Id.*

61. *Id.*

the protected marriage association as recognized by *Zablocki*,[62] and found that the respondent's conduct resembled the intimate association of marriage.[63] In sum, the court found that the state statute had burdened the respondent's right of association, and remanded the case instructing the district court to apply a strict scrutiny standard of review.[64]

On writ of certiorari, the United States Supreme Court reversed the remand,[65] rejecting the lower court's reasoning that homosexual sodomy was protected as an intimate association.[66] The majority neither found the respondent's interest to be similar to that in *Zablocki* nor evaluated the respondent's association utilizing the family-based factors articulated in *Roberts*.[67] Rather, the *Hardwick* Court limited its discussion to whether the respondent had a fundamental right to commit homosexual sodomy.[68] The Court stated that the lower court misconstrued the limits of the Fourteenth Amendment's Due Process Clause.[69] The Court explained that the substantive Due Process Clause protected relationships involving family, marriage, and procreation.[70] Moreover, the Court found "[n]o connection between family, marriage, or procreation on the one hand and *homosexual activity* on the other."[71]

The *Hardwick* Court then explained the criteria necessary for an interest to receive protection as a fundamental right.[72] According to the Court, rights deserving heightened protection included those liberties which are "deeply rooted in this Nation's history and tradition."[73] The

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62. *See id.*
63. *See id.*
64. *See Hardwick*, 478 U.S. at 189.
65. *See id.* at 187.
66. *See id.* at 190-91.
67. *See id.* at 190.
68. *See id.*
69. *See id.* at 191.
70. *See id.*
71. *Id.* (emphasis added). Specifically, the Court explained:

> No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent. Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable.

Id.

72. *See id.*
73. *See id.* at 192 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)). These rights also "include[d] those fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.' " *See*

Court explained that homosexual conduct was not deeply rooted in this nation's history and, in fact, had been proscribed by societies since ancient times.[74] The majority noted that protecting homosexual conduct would open the door to attacks on other traditionally prohibited activity such as adultery, incest and other sexual crimes.[75] The Court asserted that it was "unwilling to start down that road."[76] Finding no fundamental right to engage in homosexual sodomy, the Court applied a rational basis standard of review and upheld the Georgia law.[77]

The instant court did not follow the *Hardwick* approach to Appellant's claim that her relationship was a protected association. Although stating that "considerable doubt exists that Plaintiff has a constitutionally protected federal right to be 'married' to another woman,"[78] the instant court assumed for analytical purposes that the district court correctly had identified a protected association.[79] The district court had applied the *Roberts* factors[80] and determined that Appellant's relationship was a protected intimate association.[81] Rather than assuming a protected interest in association, however, the instant court should have concluded, as did Judge Tjoflat in his concurring opinion, that Appellant's relationship did not merit constitutional protection.[82]

The district court's reliance on the *Roberts* factors, and therefore, the instant court's assumption, are misplaced. The district court determined that Appellant's relationship was a close, personal relationship and, therefore, worthy of protection.[83] *Roberts*, however, did not hold that all relationships rise to the level of constitutional protection. Rather, the *Roberts* Court explained that a family relationship both exemplified, and

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id. at 191-92 (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).

74. *See id.*

75. *See id.* at 195-96.

76. *Id.* at 196.

77. *See id.*

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

79. *See id.* at 1100. The court stated that the existence of a protected association would not change the outcome of the court's decision. *See id.*

80. *See Shahar*, 836 F. Supp. at 862. These factors included "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspect of the relationship." *See id.* (quoting Roberts v. Jaycees, 468 U.S. 601, 618 (1984)).

81. *See id.* at 863. The district court stated that Shahar's "wedding" ceremony signified that her relationship was "a lifetime commitment which cannot end unless formally dissolved within her religion." *See id.*

82. *See Shahar*, 114 F.3d at 1113 (Tjoflat, J., specially concurring).

83. *See Shahar*, 836 F. Supp. at 863.

marked limitations to, protected intimate associations.[84] The *Roberts* Court's imprecise language suggests consideration of extended family arrangements,[85] not the embracement of alternative lifestyles.

Merely establishing a close, personal relationship is not sufficient to warrant constitutional protection. The Court expressly has stated that the Constitution does not recognize a "generalized right of 'social association.' "[86] The Constitution requires much more. The Court has noted that "traditional personal bonds," protected as an intimate association, must have " 'played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs.' "[87] Unlike those protected relationships, Appellant's same-sex relationship lacks a foundation either in tradition or society.[88] On this point, Justice Harlan wrote: "[L]aws forbidding . . . homosexual practices . . . form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis."[89] The *Hardwick* Court also noted that laws prohibiting homosexual conduct[90] are firmly established and have "ancient roots."[91]

In comparison, *Zablocki* involved a traditional marriage relationship which the Supreme Court recognized as " 'the most important relation in life,' "[92] and " 'the foundation of the family and of society, without which there would be neither civilization nor progress.' "[93] The *Zablocki* Court recognized the sanctity of traditional marriage as being older than our Nation and older than the Bill of Rights.[94] As Judge

84. *See Roberts*, 468 U.S. at 619. According to the *Roberts* Court, constitutional protection has been provided for the "personal bonds [which] have played a critical role in the culture and traditions of the Nation." *See id.* at 618-19.

85. *See id.* at 619-20 (For example, the Court makes repeated reference to *Moore v. City of East Cleveland*, 431 U.S. 494, 503-05 (1977) (protecting the right of a grandmother to live with her two grandsons who were unrelated by blood).).

86. *See* Dallas v. Stanglin, 490 U.S. 19, 25 (1989).

87. *See* FW/PBS v. Dallas, 493 U.S. 215, 237 (1990) (quoting *Roberts*, 468 U.S. at 618-19).

88. *See Hardwick*, 478 U.S. at 196-97 (Burger, C.J., concurring).

89. *See* Poe v. Ullman, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting).

90. The instant court concluded that the Attorney General's action was based on Appellant's conduct, not status. *See Shahar*, 114 F.3d at 1110; *see also id.* at 1111 (Tjoflat, J., specially concurring). For the Supreme Court's latest discussion on homosexual status, see generally Romer v. Evans, 517 U.S. 620 (1996).

91. *See Hardwick*, 478 U.S. at 192.

92. *See Zablocki*, 434 U.S. at 384 (quoting Maynard v. Hill, 125 U.S. 190, 211 (1888)).

93. *See id.* (quoting Maynard v. Hill, 125 U.S. 190, 211 (1888)). Justice Powell's concurrence in *Zablocki* is also particularly noteworthy. Powell listed incest, bigamy, and homosexuality as relationships which were permissibly subject to state prohibition. *See id.* at 399 (Powell, J., concurring).

94. *See id.* at 384 (quoting *Griswold*, 381 U.S. at 486).

Tjoflat noted in his concurrence: "Homosexual relationships have not played the same role as marital or familial relationships in the history and traditions of the Nation."[95] Moreover, the *Hardwick* Court specifically found "[n]o connection between family, marriage, or procreation . . . and homosexual activity."[96] Consequently, Appellant's same-sex relationship should not be accorded the special constitutional status as traditional family-based relations.

Hardwick should have disposed of Appellant's claim, not simply because *Hardwick* approved criminal sanctions for homosexual sodomy, but because *Hardwick* rejected an intimate association argument analogous to that raised by Appellant. In *Hardwick*, the lower court found that the respondent's conduct was protected as an intimate association.[97] The Eleventh Circuit focused not on the physical act, but on the private and intimate nature of the association.[98] The court found a "resemblance between Hardwick's conduct and the intimate association of marriage."[99] The court claimed that the plaintiff's physical act "serve[d] the same purpose as the intimacy of marriage"[100] and that the activity occurred in the private sanctuary of the home.[101] The court concluded that the plaintiff's activity was "quintessentially private and l[aid] at the heart of an intimate association."[102] The Supreme Court, however, has rejected these arguments.[103] The *Hardwick* Court insisted that rights entitled to heightened judicial protection must be restricted to those "implicit in the concept of ordered liberty"[104] and those " 'deeply rooted in this Nation's liberty and tradition.' "[105] The *Hardwick* plaintiff's homosexual relationship failed those tests in *Hardwick* as Appellant's relationship fails the tests today.

The *Hardwick* Court warned that the "Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[106] In light of this warning, the *Shahar* court should have rejected Appellant's claim outright. The Supreme Court's

95. *See Shahar*, 114 F.3d at 1115 (Tjoflat, J., specially concurring).
96. *Hardwick*, 478 U.S. at 191.
97. *Hardwick*, 760 F.2d at 1212.
98. *See id.* at 1211-12.
99. *See id.* at 1212.
100. *See id.*
101. *See id.*
102. *See id.*
103. *See Hardwick*, 478 U.S. at 191.
104. *See id.* (quoting Palko v. Connecticut, 302 U.S. 325, 326 (1937)).
105. *See id.* at 192 (quoting *Moore*, 431 U.S. at 503 (opinion of Powell, J.)).
106. *See id.* at 194.

pronouncements on intimate association indicate that the Court has taken a restrictive approach to claims for protected relationships. Consequently, courts should refrain from treating non-traditional relationships as protected associations, and should defer to democratic resolution of these innovative claims.