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ARTICLE: A TALE OF TWO CITIES IN THE GAY RIGHTS KULTURKAMPF: ARE THE FEDERAL COURTS PRESIDING OVER THE CULTURAL BALKANIZATION OF AMERICA?

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SUMMARY:

... The Connick Court provided a definition that requires a circumstantial inquiry: "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." ... In weighing the State's interest in discharging an employee based on any claim that the content of a statement made by an employee somehow undermines the mission of the public employer, some attention must be paid to the responsibilities of the employee within the agency. ... In the wake of ensuing controversy generated by the comment, Mayor Jordan issued a press release in which he affirmed Lumpkin's constitutional right to express his religious beliefs and highlighted Lumpkin's "solid and unambiguous record as a member of the Human Rights Commission," stating that "as a commissioner he has protected and advanced gay and lesbian civil rights." ... For example, in *Cantwell*, the Court struck down a content-based ordinance that purported to regulate religious solicitation, holding that while the state is free to regulate the time and manner of solicitation generally, "to condition the solicitation of aid for the perpetuation of religious views or systems upon a license... is to lay a forbidden burden upon the exercise of liberty protected by the Constitution." ... "The only interest distinctively served by [a] content limitation is that of displaying [the government's] special hostility towards the particular biases thus singled out. ...

The Article centers on two recent federal appeals court cases, *Lumpkin v. Brown* and *Shahar v. Bowers*, which addressed free speech and free exercise claims by public employees who were terminated for speaking on public issues relating to homosexuality. Both courts upheld district court decisions applying the constitutional analysis set out in *Pickering v. Board of Education* for balancing the free speech rights of public employees with the need for orderly administration of government. In *Lumpkin*, the Ninth Circuit ruled against a San Francisco Human Rights Commissioner who sued after being terminated by the Mayor for refusing to

publicly disavow his belief in the Bible's teaching against homosexuality (he was also a minister). Although the record was clear that he did not discriminate against homosexual claimants in administering his responsibilities on the Human Rights Commission, the Ninth Circuit stated that "the First Amendment does not assure [Lumpkin] job security when he preaches homophobia while serving as a City official charged with the responsibility of "eliminating prejudice and discrimination.'" In *Shahar*, the Eleventh Circuit likewise ruled against a former employee of the Attorney General of the State of Georgia who had an offer of employment withdrawn after staging a lesbian "wedding" ceremony pursuant to her Jewish Reformed beliefs. The court noted that the case arose "against the backdrop of an ongoing controversy in Georgia about homosexual sodomy, homosexual marriages, and other related issues, including a sodomy prosecution - in which the Attorney General's staff was engaged - resulting in the well-known Supreme Court decision in *Bowers v. Hardwick* (criminal prosecution of homosexual sodomy does not violate substantive due process)." Based in part on this history, the court concluded that *Bowers* had the right to fire *Shahar* for her expressive conduct despite the fact that she would not have been working in the division charged with enforcing the sodomy law.

It appears from a comparison of the results in these two cases that the Pickering test - which permits termination of an employee based on mere speculation by the government employer that the employee's speech will interfere with the performance of the agency's function, and not on actual proof of interference - is malleable to the point of allowing a Christian public employee to be fired in San Francisco for remarks interpreted as disparaging of homosexuality and allowing a lesbian public employee to be refused employment in the heart of the "Bible belt," Atlanta, for religious conduct expressive of her sexual orientation. The Article argues that a constitutional rule should reliably predict outcomes regardless of the political climate in which it is applied and should, at a minimum, require a showing of actual conflict between a public employee's personal beliefs and his or her public job performance. The Article analyzes the outcomes in these two cases, together with other appellate court decisions applying the Pickering test in the context of religious speech by public employees, and proposes a rephrasing of the standard to require that a more compelling demonstration of the public employer's interests and the danger posed by the employee's views be made before a public servant may be terminated for his or her beliefs.

TEXT:

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I. An Aerial Reconnaissance of the Battle Lines

A. From *Bowers v. Hardwick* n1 to *Romer v. Evans* n2

In his acerbic dissent in *Romer v. Evans* from the majority's conclusion that the State of Colorado had classified homosexuals not to further a proper end but to make them unequal to everyone else in violation of the Fourteenth Amendment's guarantee of equal protection, n3 Justice Antonin Scalia harkened back to the Court's 1985 decision in *Bowers v. Hardwick*. n4 Scalia asserted that the Georgia anti-sodomy statute that was upheld against Fourteenth Amendment attack in *Bowers* was the functional equivalent of the Colorado anti-homosexuality Amendment 2 struck down in *Romer*. n5 He argued **[*297]** that:

In holding that homosexuality cannot be singled out for unfavorable treatment, the Court contradicts [*Bowers v. Hardwick*], unchallenged here [and] pronounced only 10 years ago... and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias. Whether it is or not is precisely

the cultural debate that gave rise to the Colorado constitutional amendment (and to the preferential laws against which the amendment was directed). n6

In Justice Scalia's view, the gay and religious citizens of Colorado were engaged in a Kulturkampf, an epic, moral struggle between sectarian and progressive forces over the soul of the body politic. n7 The Court had tipped the balance of power in favor of the gay rights movement, Justice Scalia contended, "imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected [by] pronouncing that animosity toward homosexuality is evil." n8 Justice Scalia extended his martial metaphor:

I think it no business of the courts (as opposed to the political branches) to take sides in this culture war. But the Court today has done so, not only by inventing a novel and extravagant constitutional doctrine to take the victory away from traditional forces, but even by verbally disparaging as bigotry adherence to traditional attitudes. n9

[*298] "The Court has mistaken a Kulturkampf for a fit of spite" was Justice Scalia's pointed summation. n10

If Justice Scalia can fairly be characterized as having employed apocalyptic rhetoric, its use was certainly deliberate. The term culture war and the martial tone adherent to it have been consciously adopted by fundamentalists and anti-progressive forces for years. The term came into vogue in the early 1990s, chiefly via the influence of Professor James Hunter's use of it in his book entitled *Culture Wars: The Struggle to Define America*, to describe the struggle between fundamentalism and progressivism. n11 Before the modern employment of the term, its most recent historical usage related to Otto Bismarck's attempt to bring Catholic institutions under Prussian state control in the 1870s. n12 The author is not persuaded that a full-scale, declared culture war can be said to be ongoing between religionists and progressives. n13 However, the metaphor is certainly apt, at least in the instance of localized battles over homosexuality in public life, and it is difficult to conceive of a more polemicized debate.

This war is one that has only been unilaterally declared by religious conservatives. n14 The Amendment 2 issue that climaxed in *Romer v. Evans* is one example. The impetus for the amendment, and the cause of its success, was the support of numerous conservative religious groups on its behalf. The list of amici in the United States Supreme Court arguing for upholding Amendment 2 reads like a roll call of the "religious right;" Concerned Women for America, the Christian Legal Society, the Family Research Council, a group called Colorado for Family Values, and the religious legal organization American Center for Law and Justice all filed briefs on behalf of Colorado, in addition to the attorneys general of several **[*299]** conservative states, including Virginia, South Carolina, Alabama, and Idaho. n15 Amici on behalf of the plaintiffs included the United Methodists for Gay, Lesbian and Bisexual Concerns, Gay and Lesbian Lawyers of Philadelphia, and numerous other attorneys general. n16 Professors Lawrence Tribe, Kathleen Sullivan, John Hart Ely, and others filed pro se briefs as well. n17 Professor Tribe had argued the respondent's position unsuccessfully in *Bowers v. Hardwick*. n18

This Article centers on two recent federal appellate court decisions, *Lumpkin v. Brown* n19 and *Shahar v. Bowers*, n20 which are strikingly similar in many respects. Each represents a skirmish in the Kulturkampf that long predated *Bowers v. Hardwick* and continues well after *Romer v. Evans*. In both cases, the appellate courts addressed free speech and free exercise claims by religiously motivated public employees who were terminated for publicly airing their religious views on the homosexual lifestyle. n21 Both courts upheld district court decisions applying the constitutional analysis set out in *Pickering v. Board of Education* n22 for balancing the free speech rights of public employees with the need for the orderly

administration of government. n23 In Lumpkin v. Brown, the United States Court of Appeals for the Ninth Circuit ruled against a member of the San Francisco Human Rights Commission, who was also a fundamentalist Baptist minister, whom the Mayor removed from the Commission for refusing to publicly disavow his belief that the Bible teaches against homosexuality. n24 Although the record was clear that the minister did not discriminate against homosexual claimants in administering his responsibilities on the Human Rights Commission, the Ninth Circuit agreed that he could be dismissed on the basis of his speech alone, stating that "the First Amendment does not assure [Lumpkin] job security when he preaches homophobia while serving as a City official." n25

At the same time, across the country in the heart of the "southern Bible-belt," a similar case worked its way through the courts. Shahar v. Bowers involved identical principles of constitutional law, but diametrically opposed views on homosexual rights n26 - and included [*300] a career soldier in the Kulturkampf, Georgia Attorney General Mike Bowers, who had carried his crusade against gay rights to the United States Supreme Court in Bowers v. Hardwick. n27 In Shahar v. Bowers, the United States Court of Appeals for the Eleventh Circuit ruled against an applicant for a position in Bowers' office whose offer of employment was withdrawn after she staged a lesbian "wedding" ceremony under the auspices of her Jewish Reformed religion. n28 The court of appeals noted that the case arose against the "backdrop of an ongoing controversy in Georgia about homosexual sodomy, homosexual marriages, and other related issues, including a sodomy prosecution - in which the Attorney General's staff was engaged - resulting in the well-known Supreme Court decision in Bowers v. Hardwick." n29 Despite that Shahar's position had no role in the litigation or policy issues surrounding these public debates, the Eleventh Circuit, based in large part on the significance of the Attorney General's position to his electorate, n30 concluded that Bowers had the right to refuse to hire Shahar for her expressive conduct alone.

When the Attorney General viewed Shahar's decision to "wed" openly - complete with changing her name - another woman (in a large "wedding") against this background of ongoing controversy, he saw her acts as having a realistic likelihood to affect her (and, therefore, the Department's) credibility, to interfere with the Department's ability to handle certain kinds of controversial matters (such as claims to same-sex marriage licenses, homosexual parental rights, employee benefits, insurance coverage of "domestic partners"), to interfere with the Department's efforts to enforce Georgia's laws against homosexual sodomy, and to create other difficulties within the Department which would be likely to harm the public perception of the Department. n31

A comparison of the results in these two cases suggests that the Pickering test - which permits termination of an employee based on mere speculation by the government employer that the employee's speech will interfere with the performance of the agency's function and not on actual proof of interference n32 - is malleable to the point of allowing a fundamentalist Christian public employee to be fired by the San Francisco city government for remarks interpreted as disparaging [*301] of homosexuals, and a lesbian public employee to be refused employment by the State of Georgia for religious conduct expressive of her sexual orientation.

A constitutional rule ostensibly crafted to protect free speech should reliably predict outcomes, regardless of the cultural and political climate in which it is applied and, at a minimum, should require a demonstration of an actual conflict between the public employee's personal beliefs and the administration of his or her public duties. This Article analyzes the outcomes in these two cases, together with other appellate court decisions applying the Pickering test, and proposes a rephrasing of the standard to require that a more compelling demonstration of the public employer's interests and the danger posed by the employee's

views be made before a public servant may be terminated for his or her beliefs. The constitutional rules set forth in *Pickering v. Board of Education* and *Elrod v. Burns* n33 should be subjected to more rigid scrutiny to insulate religious employees from arbitrary results depending upon the political pressures specific to a particular jurisdiction. The Supreme Court's restrictive reading of public employees' free speech rights has unwittingly lent dry powder to the ground forces on both sides of the Kulturkampf between gay rights advocates and religious citizens. By permitting local authorities to apply the weight of government imprimatur to majoritarian opinion on this highly divisive issue, the Court's application of the *Pickering* test may be contributing to a kind of cultural Balkanization as America's demographic regions are becoming increasingly polarized along ideological lines.

B. A Brief History of the Civil Service System, Government Employment, and the *Pickering* Test

The demands of representative government since the beginning of the republic have required elected officials to rely upon the services of subordinates to enact their policies. One of the key questions with which federal, state, and local governments have struggled is whether the electorate is best served by public employees who are appointed by their elected officials and serve at their pleasure or those who are hired according to merit or other politically neutral criteria. n34 Although the "spoils system" method of appointing public employees was the dominant model for the nation's first century, the actions of an infamous "disappointed job seeker" ended its preeminence. n35 In 1881, a man who had hoped for an appointment by James Garfield's rival in the presidential election of 1880 assassinated the newly inaugurated President. n36 The assassination provided [*302] the public support needed by advocates of "merit-based" hiring reforms, and the subsequent passage of the Pendleton Act placed the bulk of the federal service under a neutral civil service whose members serve without fear of removal for political reasons. n37

The merit system has prevailed in American public service, not only through federal and state legislative enactments, but also in large part due to the Supreme Court's landmark decision in *Elrod v. Burns*. In *Elrod*, the Court invalidated political patronage dismissals on the basis that they violated the First Amendment right to freedom of association. n38 Nonetheless, the Court recognized that "policymaking positions" could continue to be subject to patronage dismissal so that "representative government [could] not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." n39

However, in what would become an ongoing point of contention, the Court found it difficult to distinguish between "policymaking" and "nonpolicymaking" positions:

No clear line can be drawn between policymaking and nonpolicymaking positions.... The nature of the responsibilities is critical.... An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals. n40

In *Branti v. Finkel*, n41 the Court reaffirmed *Elrod* and addressed the policymaker exception once again: "The ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate [*303] that party affiliation is an appropriate requirement for the effective performance of the public office involved." n42

While the public service at federal, state, and local levels struggled over the question of patronage, a parallel question was also being addressed: Are public employees protected from job loss in the face of the exercise of their other First Amendment freedoms? Furthermore, if they are protected, are employees in policymaking positions again exempted from that protection in the name of politically responsive government?

In *Connick v. Myers*,ⁿ⁴³ the Court examined its history of dealing with questions of public employment and First Amendment freedoms and characterized it as being properly represented by a statement Justice Holmes made while sitting on the Supreme Judicial Court of Massachusetts: "A policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."ⁿ⁴⁴ However, the Court also noted that Justice Holmes' statement was no longer an accurate representation of its view of the relationship between public employment and the First Amendment.ⁿ⁴⁵ As *Connick* recounts, the Court's position began to change with the oath cases brought under the right of association.ⁿ⁴⁶ With decisions such as *Torcaso v. Watkins*,ⁿ⁴⁷ the Court expressly repudiated the Holmes position: "The fact, however, that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution."ⁿ⁴⁸ The Court forcefully drove its point home in *Sherbert v. [*304] Verner*,ⁿ⁴⁹ a public benefits case, when it wrote that it was "too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."ⁿ⁵⁰

The seminal decision by the Court is *Pickering v. Board of Education*. After proclaiming that the state's interests in regulating the speech of its employees differs significantly from its interests in regulating the speech of citizens, the Court set up the variables of a balancing test.ⁿ⁵¹ "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."ⁿ⁵² In clarifying the weight of the variables of the test, the Court stated that when "a matter of legitimate public concern" is at issue, "it is essential that [public employees] be able to speak out freely on such questions without fear of retaliatory dismissal."ⁿ⁵³

Connick v. Myers further clarified the *Pickering* test by analyzing the operation of the balancing test in a case where only part of a speech touched on a matter of public concern.ⁿ⁵⁴ In *Connick*, a "limited First Amendment interest" was found based on a single question about pressure to work on political campaigns contained in an internal survey of office practices with regard to employment decisions.ⁿ⁵⁵ Accordingly, the Court compared the public concern element of asking fellow employees for their views on pressure to work on political campaigns against the time, place, and manner in which the surveys were distributed.ⁿ⁵⁶ Finding that the survey was disruptive to the office's operation, the Court determined that the balance fell in the employer's favor.ⁿ⁵⁷ The Court stated, "the limited First Amendment interest... does not require that [the employer] tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships."ⁿ⁵⁸

Clearly, *Pickering* and *Connick* make the definition of "public [*305] concern speech" the fulcrum upon which the free speech of state employees will turn. The *Connick* Court provided a definition that requires a circumstantial inquiry: "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."ⁿ⁵⁹ However, the Court was quick to point out that the inquiry is one of law, not fact.ⁿ⁶⁰ Therefore, a primary lesson of *Connick* is that the employee's intent and methods of speaking will be used to determine whether speech is a "legitimate matter of public concern" and, therefore, worth full protection. If the motives are to air employee grievances or build support against a superior, the speech is likely to be

downgraded to a "limited First Amendment interest" that will not trump the state's interest as an employer in running an efficient office.

The public employment cases dealing with speech and religious rights culminated in Rankin v. McPherson. n61 While Elrod v. Burns provided the first broad recognition of the need for policymaking employees to be exempted from full First Amendment protections because of the need for responsive representative government, n62 McPherson went further toward making a distinction between employees who must always be protected from dismissal as retaliation for their exercise of free speech on matters of public concern and those who, because of their role within the agency, may not be protected. n63

In weighing the State's interest in discharging an employee based on any claim that the content of a statement made by an employee somehow undermines the mission of the public employer, some attention must be paid to the responsibilities of the employee within the agency. The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails. Where, as here, an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal. n64

By including employees with roles that are "confidential" or involve "public contact" along with "policymaking" employees, the Court offered greater clarity to the states in evaluating which employees may be held accountable for speech even on matters of public concern.

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II. The Western Front: San Francisco and Lumpkin v. Brown

A. History and Context of the San Francisco Gay Rights Movement

The 1970s brought "liberation" and a measure of political empowerment to San Francisco's gay community. n65 Beginning in the late 1960s and early 1970s, the host of rights movements, psychedelic aesthetics, labor organization, anti-war movements, and other calling cards of the 1960s revolution precipitated new militancy among Bay area gays. n66 Helping foster the movement into the late seventies was the election of progressive mayor George Moscone in 1975 and the election of Harvey Milk to the San Francisco Board of Supervisors in 1977. n67 Moscone appointed many openly gay people to administrative posts. n68 Another political victory came with the defeat of Proposition 6, a measure introduced by California State Senator John Briggs that would have forbidden homosexuals from teaching in California public schools. n69 However, shortly after the defeat of Proposition 6, former San Francisco Police Department officer and San Francisco City Supervisor Dan White murdered Milk and Moscone in their City Hall offices. n70 The murders capped off many years of anti-gay violence that had surrounded the liberation movement. n71 When White was acquitted on questionable grounds, 5000 gays rioted, causing more than a million dollars worth of damage to public property, including City Hall. n72 San Francisco police retaliated by attacking a gay bar. n73

The decade's end marked real political progress for Bay area gays, even as new obstacles arose before them. n74 In May 1979, 20,000 homosexuals turned out for "Gay Night" at a local amusement park, and a week later 1500 men took to the streets in the Castro district to protest police posting of anti-gay signs on public property. n75 Meanwhile, nearby Berkeley enacted a comprehensive **[*307]** gay-rights ordinance providing, among other things, gay-spousal benefits. n76 Additionally, lesbian mothers began winning child-custody cases in Alameda County. n77 However, a federal appeals court later ruled that homosexuals were not protected from employment discrimination. n78

The 1980s brought AIDS and more political activism among Bay area homosexuals. In 1984, the city's Department of Public Health closed gay bath houses under the aegis of its emergency powers despite opposition by civil liberties proponents. n79 The power of gay leaders in the city's bureaucracy helped form a joint effort between the city and volunteer organizations to deal with AIDS and its aftermath, including the provision of medical and social services. n80 Meanwhile, area residents tried to keep national attention focused on AIDS and AIDS funding issues by participating in the National March for Lesbian and Gay Rights, staged a day before the Democratic National Convention in 1984, and the AIDS/ARC Vigil on the United Nations Plaza in 1985. n81 In 1986, Bay area residents helped thwart Proposition 64, which called for quarantining AIDS patients. n82

Other notable advances included the appointment of Mary Morgan, the first openly lesbian judge, to San Francisco's Municipal Court in 1981 and the establishment of the Bay Area Non-Partisan Alliance, California's largest homosexual political action committee in 1983. n83 Berkeley instituted the nation's first homosexual spousal benefits package for city employees in 1984 and, in San Francisco, numerous homosexual politicians took office, including Harry Britt, Tom Ammiano, Pat Norman, Roberta Achtenberg, and Carole Migden. n84 The growth of homosexuals in city government culminated with a "Lavender Sweep" in the city Board of Supervisors election. n85 Additionally, in 1988, Proposition 102, requiring mandatory reporting of HIV-infected individuals to state authorities, failed to pass. n86 The 1980s also spawned anti-gay activism on the right that homosexuals met actively through the establishment of such groups as AIDS Action Coalition, ACT-UP/SF, and the AIDS Coalition to Unleash Power ("ACT-UP"), which was part of a network of organizations [*308] in cities including New York and Los Angeles. n87 ACT-UP defined itself through various acts of civil disobedience regarding AIDS issues. n88

The 1990s may well be called the "queer" decade, inasmuch as the term "queer" became the popular referent during this time for the gay rights movement. n89 Queer Nation, a prominent national gay-rights activist group, founded its San Francisco chapter in 1990 and orchestrated over forty actions in the city to hammer home the gay identity and presence. n90 The city passed an ordinance forbidding discrimination against transgendered persons in 1995, following increasing transsexual and transgender activism. n91 Recently, conservative forces have reigned in the movement somewhat. In 1991, California Governor Pete Wilson vetoed Assembly Bill 101, which banned employment discrimination based on sexual orientation. n92 Additionally, in 1995, the San Francisco Police Department raided a Visual AIDS benefit party without a search warrant. n93 They beat guests and confiscated private property, even though the party was held at a private residence. n94

B.

"That's What God Sayeth:" Lumpkin v. Brown n95

Reverend Lumpkin's statements explicitly condemning homosexuality as a sin and implicitly endorsing violence against homosexuals are not simply hostile to the [Human Rights] Commission's charge, they are at war with it. n96

The Reverend Eugene Lumpkin, pastor of Ebenezer Baptist Church in San Francisco and a longtime acquaintance of the city's Mayor, Frank M. Jordan, n97 was appointed by Jordan to the San Francisco Human Rights Commission ("Commission") on August 13, 1992, for a term of approximately two years. n98 The position was documented as a civil service appointment, by which Lumpkin became [*309] an employee of the City and County of San Francisco.

n99 Lumpkin was compensated at a flat rate for each Commission meeting that he attended.
n100

In a June 26, 1993, article in the San Francisco Chronicle, Lumpkin, an African-American, was quoted on his views of homosexuality in the context of the non-acceptance of gay men among the African-American community. His response was reported as follows:

"It's sad that people have AIDS and what have you, but it says right there in the scripture that the homosexual lifestyle is an abomination against God," said the Rev. Eugene Lumpkin, pastor of the Ebenezer Baptist Church in San Francisco. "So I have to preach that homosexuality is a sin." n101

In the wake of ensuing controversy generated by the comment, Mayor Jordan issued a press release in which he affirmed Lumpkin's constitutional right to express his religious beliefs and highlighted Lumpkin's "solid and unambiguous record as a member of the Human Rights Commission," stating that "as a commissioner he has protected and advanced gay and lesbian civil rights." n102

In response to the Mayor's announcement, the San Francisco Board of Supervisors called for Lumpkin's resignation or removal **[*310]** from the Commission. n103 The Board demanded that Mayor Jordan "restore public confidence in the role and mission of the Commission, especially with regards to the ability of the Commission to consider complaints and lead the community toward equality and respect for all lesbian and gay San Franciscans." n104

Lumpkin appeared on a local television show on August 20, 1993, to clarify his views. n105 In a five minute interview that included inquiries into Reverend Lumpkin's personal beliefs, his role as a pastor, his compassion for homosexuals with AIDS, and his record as a Human Rights Commissioner, Lumpkin clearly distinguished **[*311]** his personal and pastoral religious views on homosexuality from his commitment as a Human Rights Commissioner to uphold the rights of all San Franciscans. Harkening back to Lumpkin's statement in the Chronicle, the interviewer asked him, "Do you believe homosexuality is an abomination?" n106 The balance of this exchange was as follows:

Lumpkin: Sure. That - the Bible say [sic] it is.

Interviewer: Do you believe?

Lumpkin: Sure, I believe. I believe everything the Bible sayeth. All I can understand (inaudible).

Interviewer: Leviticus also says that a man who sleeps with a man should be put to death. Do you believe that?

Lumpkin: That's what it sayeth.

Interviewer: Do you believe that?

Lumpkin: That's what God sayeth. n107

Lumpkin then sought to clarify the historical and theological context for the Leviticus passage, stating:

Now, first of all, you have to understand the setting. God was at Mt. Sinai with the nation of Israel, who had just come out of bondage 430 years, and God was setting, giving the law on

how he wanted them to conduct themselves in the new setting. And he says, "Now, I don't want you acting as the way that they did in Egypt where we came from," and He gave these laws, and said, this is a holy people following a holy God in fellowship, "these are the things you need to refrain from." n108

Later that day, Mayor Jordan telephoned Lumpkin to inform him that Jordan had heard Lumpkin had advocated violence against gays and lesbians, and he requested Lumpkin's resignation. n109 Lumpkin responded that Jordan's information was inaccurate, that Lumpkin did not advocate and had never advocated such violence, and that his remarks were either misunderstood or misinterpreted. n110 Lumpkin explained:

I meant that I believed that is what the Bible said, and that the passage did in fact state the law that was in effect at that time; I did not state that I believed that this was now or should be the law, nor did I state that homosexuals should be killed or harmed. n111

[*312] Lumpkin asked the Mayor for an opportunity to explain his position. n112 Arrangements were made to meet on August 23, 1993. n113 Despite his professed willingness to consider Lumpkin's explanation further, and without having reviewed the tape of the interview, the Mayor issued a press release on August 20th in which he publicly called for Lumpkin's resignation. n114 Jordan's statement cast Lumpkin's statements as "advocacy of violence:"

While religious beliefs are constitutionally protected and cannot be the grounds to remove anyone from elected or appointed public office, the direct or indirect advocacy of violence is not, cannot and will not be condoned by this administration.

Reverend Lumpkin, by affirming his literal interpretation of the Bible this morning on a television talk show, implied that stoning to death was the appropriate punishment for violation of "God's law" as stated in the Book of Leviticus.

His direct response "That is what the Bible teaches" to the question whether or not stoning is justified punishment for **[*313]** homosexuality is insufficient to distance himself from the violence inherent in the biblical passage. n115

At the August 23rd meeting, Lumpkin reiterated that he was strongly opposed to violence against gays, lesbians, and bisexuals, that he did not believe in a death penalty for homosexuality, and that he would continue to uphold all the provisions of the Charter of the Human Rights Commission. n116 Lumpkin also offered to assist in any way he could to publicly clarify his beliefs. n117 The Mayor continued to insist on Lumpkin's resignation, and when he refused to do so, the Mayor terminated him. n118

After the termination, Mayor Jordan's office issued a press release reiterating Jordan's assertion that Lumpkin had implicitly justified violence:

Religious beliefs are still sacrosanct in this country and are given the broadest range of protection. But when those beliefs are volunteered in a way that negatively influences the operation of a state function, or suggests a justification for actions which may lead to violence, I believe it crosses the line between church and state.

Reverend Lumpkin chose to make his beliefs a part of the political process, and in so doing crossed the line from belief to behavior advocacy. Reverend Lumpkin, by failing to disassociate himself from specific biblical passages which may appear to justify stoning persons or groups of people, implied that he condoned physical harm. n119

Lumpkin filed suit against the Mayor, the City, and the County of San Francisco. n120 Lumpkin's First Amended Complaint ultimately alleged two causes of action, the first under the California Fair Employment and Housing Act ("FEHA"), n121 and the second under 42 U.S.C. 1983, n122 claiming violations of the freedom of speech, the Free Exercise Clause, and the Establishment Clause under the First [*314] and Fourteenth Amendments. n123 The second cause of action alleged similar violations of Lumpkin's rights under Article I, Sections 4 and 8 of the California Constitution. n124 Lumpkin requested declaratory relief, reinstatement as a Commissioner, compensatory damages, and attorneys' fees pursuant to 42 U.S.C. 1988. n125

Mayor Jordan and San Francisco moved for summary judgment, which was granted by the district court on November 22, 1994. n126 The court held that, as a government employee under the "policymaking" exception to the rule against patronage dismissals enunciated in *Elrod v. Burns*, Lumpkin could be fired for personal statements on matters of public concern. n127 The district court rejected Lumpkin's argument that the *Elrod* "policymaking" exception, which allows a public employer to dismiss a high-level employee for exercising his or her First Amendment rights, should be limited to political affiliation and patronage cases, and applied the exception to Lumpkin's religious views. n128

In finding Lumpkin a "policymaking employee," the court took note of a commissioner's statutory responsibilities, which included "broad responsibilities for formulating, implementing and explaining policy," as well as the power vested in the Commission to "prescribe reasonable rules and regulations" for the conduct of its department's affairs, officers, and employees. n129 In considering whether Lumpkin's remarks were antithetical to the Commission's mandate, the court looked to its statutory responsibility:

The Human Rights Commission is charged with eliminating prejudice and discrimination; with advising City agencies on how to keep peace; and with encouraging private persons to [*315] "promote and provide equal opportunity for and good will toward all people." Reverend Lumpkin's televised remarks regarding homosexuality could reasonably have been interpreted by the Mayor as undermining the very policies of the Commission: to promote good will toward all people. n130

The court concluded:

Reverend Lumpkin's failure to renounce violence against this group was "highly disruptive to the operations of the City and the agency he served." Indeed, in light of the public uproar surrounding Lumpkin's comments, the Mayor could reasonably have concluded that members of San Francisco's gay and lesbian community "would be loathe to discuss their disputes and grievances with" the Commission after one of its members not only publicly condemned homosexuality but failed to renounce violence against members of that community. n131

Lumpkin appealed to the United States Court of Appeals for the Ninth Circuit. n132 The Ninth Circuit affirmed the district court on April 3, 1997, n133 using language considerably more pointed and direct than that of the district court. The Ninth Circuit bluntly stated that "the First Amendment does not assure [Lumpkin] job security when he preaches homophobia while serving as a City official charged with the responsibility of "eliminating prejudice and discrimination.'" n134 The court further stated:

We agree with the district court that neither the First Amendment nor the Religious Freedom Restoration Act require San Francisco to tolerate members of its Human Rights Commission who make public statements that are antithetical to the Commission's official charge "to

eliminate prejudice and discrimination because of race, religion, color, ancestry, age, sex, sexual orientation, disability, or place of birth... and to officially encourage private persons and groups to promote and provide equal opportunity for and good will toward all people." Reverend Lumpkin's statements explicitly condemning homosexuality as a sin and implicitly endorsing violence against homosexuals are not simply hostile to the Commission's charge, they are at war with it. n135

[*316] The appeals court took note of the deference it considered due a public employer in protecting its interests as an employer:

The First Amendment strictly protects freedom of expression. Nonetheless, when the government acts as an employer, it has certain latitude to protect its operations and policies from being subverted by its own personnel. That is not to say that Reverend Lumpkin left his First Amendment rights at the door of City Hall when he took office as a Human Rights Commissioner. It is to say, however, that his First Amendment rights may be trumped by important interests of the City he agreed to serve. n136

The court agreed that the Pickering analysis was appropriately applied to a claim of religious speech and held that the balance of interests weighed by the test favored San Francisco:

When we apply Pickering and weigh the City's interest in eliminating prejudice and discrimination against Reverend Lumpkin's First Amendment interest in condemning homosexuality as a sin while serving as a voting member of the Human Rights Commission, the conclusion is inescapable that the City's interests prevail. As a private citizen, Reverend Lumpkin is perfectly free to preach vigorously and robustly that homosexuality is a sin. But he did not enjoy that same unrestrained freedom while he occupied the important and prestigious office of a Human Rights Commissioner. n137

The court also affirmed the application of the Elrod policymaker exception:

Because the Human Rights Commission, as the District Court put it, "formulates, implements and explains" the City's antidiscrimination policies, the City has not only a legitimate, but a heightened expectation that its Human Rights Commissioners refrain from speaking publicly in a way that mocks the City's antidiscrimination policy. Government employees who occupy policymaking positions may even be removed solely on the basis of political affiliation, whether or not the employees make public statements, because of "the need for political loyalty of employees, not to the end that effectiveness and efficiency be insured, but to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration...."

....

Applying the Pickering balancing test, we hold that the City's interest in having commissioners who work to promote City **[*317]** policies far outweighs any commissioner's First Amendment interest in publicly expressing views that subvert those policies. n138

Lumpkin sought review of the decision of the Ninth Circuit by petition for writ of certiorari to the United States Supreme Court. n139 The Supreme Court denied certiorari on December 1, 1997. n140

III. The Southern Front and *Shahar v. Bowers*

The Attorney General was... entitled to conclude that the public may think that employment of a Staff Attorney who openly purports to be part of a same-sex "marriage" is, at best, inconsistent with the other positions taken or likely to be taken by the Attorney General as the state's chief legal officer. The Attorney General has a right to take steps to protect the public from confusion about his stand and the Law Department's stand on controversial matters, such as same-sex marriage. n141

Robin Shahar worked as a law clerk for the Georgia Department of Law during the summer of 1990, which preceded her third [*318] year at Emory Law School. n142 After she completed her clerkship, the Department offered her a permanent position as a Department attorney starting in the fall of 1991. n143 She completed law school with the distinctions of having served as an editor of the Emory Law Review and finishing sixth in her graduating class. n144 Although she completed a conflict of interest form for the Department prior to graduation that indicated her intention to marry a woman, the form was filed without being fully reviewed and the upcoming marriage went unnoticed. n145 According to press reports, "Robin Shahar's summer mountain wedding was filled with singing, religious services and Torah study. Enriched by the presence of family and friends and presided over by a rabbi, the Jewish ceremony lasted an entire weekend." n146 The ceremony was steeped in the traditions and observances of Shahar's faith, reformed Judaism. n147 Shahar later expressed, "Our ceremony, and the entire weekend, was an extremely moving expression of both our commitment to each other and our commitment to Judaism." n148 After the ceremony, "both women legally adopted the name Shahar, which means 'the act of seeking God,' in Hebrew." n149 The rabbi who performed the ceremony reportedly found the couple "deeply committed to each other and to their religion." n150 Robin Shahar repeatedly maintained that the marriage ceremony was religious, not civil, and acknowledged it had no legal effect. n151

Shortly before the wedding, in the course of a conversation with a Senior Assistant Attorney General, the Deputy Attorney General found out that Shahar's marriage would be to a woman. n152 The Deputy then informed the Attorney General of the upcoming wedding, [*319] which two other staff members confirmed based on a conversation they had with Shahar and her intended spouse in the spring of 1991. n153 At a meeting held on July 10, 1991, the Deputy gave Shahar a letter from Attorney General Bowers withdrawing the Department's employment offer on the basis of her intention to marry another woman. n154 Bowers explained his reasoning for the withdrawal by saying:

If we had hired Ms. Shahar, given this marriage, even if she were not going to handle the cases, the fact that she might be perceived as taking or making a statement contrary to what some of the other lawyers had to do in defending this or that law or that position... would be highly disruptive. n155

Shahar brought suit "against the Attorney General, individually and in his official capacity, seeking both damages and injunctive relief (including 'reinstatement')." n156 Shahar's pleadings emphasized that her decision to marry another woman was partially the result of her sincerely-held religious beliefs and carried the support of both her rabbi and religious community, the Reconstructionist Movement of American Judaism. n157 Her chief contention was that by revoking her offer of employment, the Attorney General violated her "free exercise of religion, free association, equal protection and substantive due process" rights. n158

Bowers' firing of Shahar and her ensuing lawsuit engendered considerable public controversy in Atlanta and throughout the state. n159 Bowers publicly continued to defend the firing, stating:

[*320]

The law does not consist solely of what's set down in black and white. There are no words in the law that say, "Thou shalt not engage in a homosexual marriage," but I couldn't hire someone who was holding herself out as engaged in a homosexual marriage in view of the laws of the state of Georgia. n160

The Attorney General claimed that overhauling Georgia's anti-homosexuality laws would constitute "the most significant societal change in this state in 100 years." n161

Bowers and Shahar filed cross-motions for summary judgment. n162 The district court granted the Attorney General's motion and denied Shahar's. n163 In granting summary judgment in favor of the Law Department, the court found, as matters of fact, that Shahar's marriage was public in nature, could lead the public to view Bowers as acting inconsistently when he argued cases against homosexual unions (especially considering the ongoing controversy in the wake of the Department's involvement in the landmark Bowers v. Hardwick decision), and that suspected sexual conduct of Department attorneys could be called into public question as it was in a previous Department case where opposing counsel sought to disqualify all Department attorneys who had violated the sodomy law. n164 The court also found that Shahar's conduct could be reasonably called into question because of the "fish bowl" nature of working for the Department and the need "to refrain from conduct which could be interpreted as contrary to a Department position on a particular issue." n165 Oddly, the court found a lack of discriminatory intent on Bowers' part:

(1) He has never inquired as to the sexual orientation of a Department employee, (2) he would never exclude a homosexual from employment solely on the basis of his or her sexual orientation, (3) he in the past refused to inquire into the sexual orientation of an allegedly homosexual attorney accused of [*321] abusing his position as a Department attorney to protect a same-sex lover, and (4) when he extended plaintiff an offer of employment, he had constructive knowledge of plaintiff's sexual orientation through plaintiff's disclosures to various Department employees. n166

The district court concluded that the impetus for Bowers' refusal to hire Shahar was not her sexual orientation, but her determination to hold herself out as "married" to another woman. n167 The court restated Bowers' reasons for withdrawing the offer as (1) public credibility, specifically the need to avoid the appearance of endorsing conflicting interpretations of Georgia law, and (2) internal efficiency, specifically the need to employ attorneys who act with discretion, good judgment, and in a manner which does not conflict with the work of other Department employees. n168

Turning to Shahar's free exercise of religion claim, the court noted Shahar emphasized that her decision to marry her female partner was motivated "in part by a sincerely held religious belief and supported by her rabbi and synagogue" in the Reconstructionist Movement of American Judaism. n169 The court rejected Bowers' argument that Shahar's claim failed in light of the United States Supreme Court's constriction of the Free Exercise Clause in Employment Division, Department of Human Resources v. Smith, n170 reasoning that "the case at bar involves an office policy and not a religion-neutral, generally-applicable criminal statute." n171 However, the court did find Smith "relevant to the extent that it places sharp limits on the compelling interest test articulated in Sherbert v. Verner," upon which Shahar had relied. n172 The district court declined to apply Sherbert "beyond the realm of unemployment compensation cases." n173

In lieu of applying the Sherbert compelling government interest standard to Shahar's free exercise claim, the court again fell back on the Pickering test and concluded perfunctorily, "assuming without deciding that [Bowers] indirectly burdened [Shahar's] right to freely exercise her religion... any burden suffered by [Shahar] was justified in light of the above-discussed unique governmental concerns involved in the efficient operation of the Department." n174

Shahar appealed to the Eleventh Circuit Court of Appeals. n175 **[*322]** Previously, the Eleventh Circuit had struck down Georgia's criminal sodomy statute in *Bowers v. Hardwick*, holding "the activity [Hardwick] hopes to engage in is quintessentially private and lies at the heart of an intimate association beyond the proper reach of state regulation." n176 Nonetheless, although the three-judge panel of the appellate court ruled in Shahar's favor, n177 the full Eleventh Circuit approved of Bowers' actions, vacating the panel decision and ruling against Shahar. n178 The en banc court reasoned that "the Attorney General - who is an elected official with great duties and no job security except that which might come from his office's performing well - may properly limit the lawyers on his professional staff to persons in whom he has trust." n179 As the Ninth Circuit had in *Lumpkin v. Brown*, the Eleventh Circuit particularly emphasized the discretion required of government officials who act as employers:

Even when we assume, for argument's sake, that either the right to intimate association or the right to expressive association or both are present, we know they are not absolute. Georgia and its elected Attorney General also have rights and duties which must be taken into account, especially where (as here) the State is acting as employer. We also know that because the government's role as employer is different from its role as sovereign, we review its acts differently in the different contexts. In reviewing Shahar's claim, we stress that this case is about the government acting as employer. n180

The Eleventh Circuit, like the Ninth, concluded that the Pickering test supplied the appropriate standard of review for Shahar's First Amendment free speech and free exercise of religion claims:

We conclude that the appropriate test for evaluating the constitutional implications of the State of Georgia's decision - as an employer - to withdraw Shahar's job offer based on her "marriage" is the same test as the test for evaluating the constitutional implications of a government employer's decision based on an employee's exercise of her right to free speech, that is, the Pickering balancing test. n181

The Eleventh Circuit began its Pickering balancing analysis by deferring to the combative political climate in which the case arose. n182 "As both parties acknowledge, this case arises against the backdrop of an ongoing controversy in Georgia about homosexual sodomy, **[*323]** homosexual marriages, and other related issues, including a sodomy prosecution - in which the Attorney General's staff was engaged - resulting in the well-known Supreme Court decision in *Bowers v. Hardwick*." n183 The court discussed Georgia's ongoing cultural skirmishes at length, observing that "the controversy in the State of Georgia and the Attorney General's involvement at the heart of that controversy, both as the State's litigator and its legal advisor, have not let up since the Attorney General's 1991 decision to revoke the offer to Shahar." n184 The court took particular note of state appellate court opinions on visitation rights for non-custodial homosexual parents, n185 the constitutionality of enforcing the state's same-sex solicitation statute, n186 domestic partner benefits and family law, n187 and instances in which the Law Department had been called upon to opine on issues touching on homosexuality. n188

When the Attorney General viewed Shahar's decision to "wed" openly - complete with changing her name - another woman (in a large "wedding") against this background of ongoing controversy, he saw her acts as having a realistic likelihood to affect her (and, therefore, the Department's) credibility, to interfere with the Department's ability to handle certain kinds of controversial matters (such as claims to same-sex marriage licenses, homosexual parental rights, employee benefits, insurance coverage of "domestic partners"), to interfere with the Department's efforts to enforce Georgia's laws against homosexual sodomy, and to create other difficulties within the Department which would be likely to harm the public perception of the Department. n189

The Eleventh Circuit, like the district court, made short work of Shahar's arguments grounded on her right to religious freedom:

That the Attorney General did not revoke Shahar's offer because of her religious affiliation or her religious beliefs (as opposed to her conduct) is plain from the record. Assuming arguendo that the Attorney General's decision to revoke Shahar's offer did implicate her Free Exercise rights, we believe that Pickering balancing applies... and that the Attorney General prevails in that balance for the reasons discussed above. In addition, several of us also doubt that a **[*324]** facially neutral executive act which adversely impacts on the exercise of one's religion either constitutes a violation of the Free Exercise Clause or requires heightened scrutiny. n190

Like the Ninth Circuit, the Eleventh Circuit also held the Elrod v. Burns "policymaker" exception applicable:

The government employer's interest in staffing its offices with persons the employer fully trusts is given great weight when the pertinent employee helps make policy, handles confidential information or must speak or act - for others to see - on the employer's behalf.... Staff Attorneys inherently do (or must be ready to do) important things, which require the capacity to exercise good sense and discretion (as the Attorney General, using his considered judgment, defines those qualities): advise about policy; have access to confidential information (for example, litigation strategies); speak, write and act on behalf of the Attorney General and for the State. n191

For the appellate court's majority, the fact that Shahar would have functioned as legal counsel to the state's executive branch held considerable weight, since the court perceived a virtually ipso facto rule that such positions are policymaking positions. n192 The court's majority stated, "we know of no federal appellate decision in which a subordinate prosecutor, state's attorney or like lawyer has prevailed in keeping his job over the chief lawyer's objection." n193

In concluding its analysis, the Eleventh Circuit majority was considerably more deferential to Shahar's views than the Ninth Circuit was to Reverend Lumpkin's, stating somewhat apologetically:

[*325]

We do not decide today that the Attorney General did or did not do the right thing when he withdrew the pertinent employment offer. That decision is properly not ours to make. What we decide is much different and less: For the Law Department's professional staff, Georgia's Attorney General has made a personnel decision which none of the asserted federal constitutional provisions prohibited him from making. n194

Shahar sought rehearing by the full Eleventh Circuit, contending the revelation of Bowers' adulterous relationship with a woman in the Law Department required supplementation of the record. n195 The en banc court denied Shahar's request on August 1, 1997, on the ground that the parties had stipulated in the trial court to limit discovery relating to the sexual histories of both parties and employees of the Law Department. n196 Pursuant to this agreement, Bowers stated that, on the date he withdrew the employment offer, he had no specific knowledge of any sexual conduct of Shahar and that his decision to withdraw the offer was based on no act of sexual conduct on Shahar's part. n197 In turn, Shahar agreed to forego her written interrogatories requesting the names of any Law Department employees believed by the Attorney General to have engaged in sodomy or adultery. n198 Given the strategic decision by Shahar to decline to pursue information of the kind sought to be submitted on rehearing, the court did not believe the equities tipped in favor of granting Shahar an opportunity to relitigate the case. n199 Shahar filed a petition for writ of certiorari to the Supreme Court of the United States, which was denied on January 12, 1998. n200

After leaving office, Bowers ran for Governor of Georgia in the 1997-98 campaign season. n201 When the Supreme Court denied certiorari, former Attorney General Bowers was reported to be "pleased," and through his campaign spokesman, reiterated that "the prevailing interest was the right of the attorney general to determine who to hire and who not to hire.... The question about Ms. Shahar was whether her judgment was such that she should be employed at the Department of Law." n202 Although Bowers enjoyed a strong early showing in the polls, when revelations of his longstanding marital affair during his tenure as Attorney General surfaced, n203 [*326] support from the ultra-conservative wing of the Republican party evaporated, and he was soundly defeated in the primary. n204

The Supreme Court of Georgia struck down the state's anti-sodomy law on November 23, 1998 in *Powell v. State*, n205 relying upon the right of privacy provisions of the Georgia Constitution. n206 A disappointed former Attorney General Bowers predicted a legislative challenge to the court's decision, saying, "I can't imagine how they made such a ruling." n207

IV. A Detente Proposed: Rephrasing the Constitutional Standards of Pickering and Elrod to Protect Religious Profession by Public Employees

The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. n208

As the decisions in *Lumpkin v. Brown* and *Shahar v. Bowers* reflect, the federal courts are increasingly using the balancing test [*327] enunciated in *Pickering* to review governmental employment decisions based upon an employee's exercise of religion, a context for which it was not specifically developed and for which it is not suited. The *Pickering* test had its genesis in the context of free speech, assisting courts "to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs." n209 The federal courts of appeal, however, have begun to employ the test to balance the interests of government employers against the religious freedom rights of employees. The result is that religious orthodoxy - or at least the willingness to refrain from publicly stating religious unorthodoxy - has become a covert occupational qualification for public employment. *Lumpkin* and *Shahar* squarely present the question of whether such a balancing test is appropriately applied to an employee's right merely to hold and profess religious beliefs, which the Court has repeatedly termed absolute. n210

A. Belief and Profession Under the First Amendment

The right of free exercise of religion under the First Amendment contains two distinguishable components: "[a] freedom to believe and [a] freedom to act." n211 Thomas Jefferson recognized the distinction in his letter to the Danbury Baptist Association (famous for its phrase "wall of separation between church and State"), in which he wrote, "the legislative powers of the government reach actions only, and not opinions." n212 This distinction between the two components of religious freedom has been the linchpin of free exercise jurisprudence. In rejecting the proposition that the First Amendment's guarantee of religious freedom protected the practice of polygamy, the Court distinguished between religious belief and religious practices in *Reynolds v. United States*: n213 "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." n214 The Court in *Cantwell v. Connecticut* n215 offered what has become the classic articulation of this distinction: "The [First] Amendment embraces [*328] two concepts, - freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." n216 More recently, *Employment Division, Department of Human Resources v. Smith* harkened back to *Reynolds* and continued to build upon the foundation of this dichotomy, distinguishing between "belief and profession" on the one hand and "the performance of (or abstention from) physical acts" on the other. n217

The Supreme Court, in *Cantwell* and other cases, has repeatedly decreed that the right to religious belief is an "absolute" right. n218 Because the right to believe and to profess is absolute, the Court on numerous occasions has specifically warned against attempts to coerce belief. n219 Where the Court has confronted attempted governmental restrictions on the right to believe and profess, no balancing test has generally been applied, for the power to limit the profession of belief, absent an imminent danger of lawless action, is considered to be completely beyond the purview of the state. For example, in *Cantwell*, the Court struck down a content-based ordinance that purported to regulate religious solicitation, holding that while the state is free to regulate the time and manner of solicitation generally, "to condition the solicitation of aid for the perpetuation of religious views or systems upon a license... is to lay a forbidden burden upon the exercise of liberty protected by the Constitution." n220 Likewise, in *West Virginia State Board of Education v. Barnette*, n221 the Court overruled its decision in *Minersville School District v. Gobitis*, n222 [*329] which had upheld flag salutes in part because allowing religious dissent "might introduce elements of difficulty into the school discipline." n223 The *Barnette* Court categorically rejected this argument, observing that "freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." n224

The Supreme Court has recognized and affirmed that the right to believe and the right to profess (or refuse to profess) belief are indissolubly linked, and that the latter is inherent within the former. n225 Justice Murphy's concurrence in *Barnette* emphasized that constitutional liberties include the right to profess or refrain from professing belief: "The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all...." n226 In *Torcaso v. Watkins*, the Court struck down the requirement that all office holders in the State of Maryland declare a belief in the existence of God. n227 The Court's decision was grounded neither in the Free Speech Clause nor in the Constitution's prohibition against religious test oaths. Rather, the Court found that the "religious test for public office unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him." n228 Likewise, in *Wooley v. Maynard*, n229 the Court precluded New Hampshire from forcing its citizens to display the state motto "Live Free or Die" on automobile license plates over their religious objections. n230 "The State may [not] constitutionally require an individual to participate in the dissemination of an ideological

message," the Court adjured. n231 The Court began its analysis "with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." n232

The majority's opinion in *Smith*, relying upon the distinction between religious belief and religious action, clearly includes the right to profess belief within the right to believe. In both instances where the right to believe is invoked by the Court in *Smith*, it is linked with the right to profess: "The free exercise of religion means, first [*330] and foremost, the right to believe and profess whatever religious doctrine one desires." n233 However, *Smith* also made clear that religious speech is sometimes classified as profession of belief and sometimes as "advocacy" or a form of "action." The Court classified a form of religious speech, "proselytizing," as religious action: "The 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation." n234 Hence, *Smith* suggests that religious speech is afforded different levels of constitutional protection depending upon its proper classification either as mere profession of belief or as action. The distinction is helpful in discerning whether the public professions of belief by Reverend Lumpkin and the symbolic religious speech engaged in by Robin Shahr could be couched as "advocacy," i.e., concerted activity contrary to the responsibilities their government employers entrusted to them. If, however, their speech did not amount to advocating against their employers' interests, they should have retained their right to hold their public positions without hindrance. A close examination of the statements made, actions taken, and the circumstances surrounding Lumpkin's and Shahr's public professions of belief is therefore warranted.

B. The "Absolute" Right to Believe Under the Fire of Political Pressure: Is Conscience a Casualty of War?

The controversial portions of Reverend Lumpkin's newspaper and television interviews were simply professions of his religious beliefs and cannot be construed as "proselytizing" or religious advocacy of any kind. Despite the attempt by Mayor Jordan's office to "spin" Lumpkin's statements as advocating violence, Lumpkin did not at any time "cross the line from belief to behavior to advocacy." n235 The questions prompting the controversial statements dealt with Lumpkin's personal religious beliefs, not his performance as a Human Rights Commissioner. Although Lumpkin's personal religious beliefs arguably became a matter of public concern as a result of the *San Francisco Chronicle* article regarding the non-acceptance of homosexual, African-American men within the African-American community, n236 the article quoted Lumpkin, not as a San Francisco Human Rights Commissioner, but as the pastor of Ebenezer Baptist Church. n237 The questions clearly demonstrate that Lumpkin was being asked to clarify his personal religious beliefs. Lumpkin's answers [*331] to these questions merely revealed his belief that the Bible teaches that homosexuality is an immoral lifestyle.

Significantly, Mayor Jordan had previously issued a press statement supporting Lumpkin's right to hold his beliefs. n238 Further questions and responses in the interview clarified that Lumpkin believed the Old Testament book of Leviticus stated that a man who sleeps with a man should be put to death and that it was God who made that statement. n239 Lumpkin's response to the interviewer's final "Do you believe that?" indicated that he believed that God's command of capital punishment for homosexual acts needed to be understood in its specific historical setting. n240 Lumpkin never indicated that he believed that the command in Leviticus should be implemented in modern society. Lumpkin never indicated that he believed in or advocated any type of punishment for homosexuals or homosexual acts, or that he would support violence or aggression against homosexuals. Taken together, his statements could

only have left the reasonable viewer with the impression that Lumpkin was merely clarifying his religious views on homosexuality.

Mayor Jordan clearly "spun" Reverend Lumpkin's television statements into something they were not. His press release of August 20, 1993, characterized Lumpkin's statements as "direct or indirect advocacy of violence" and stated that they implied "that stoning to death was the appropriate punishment for 'God's laws' as stated in the Book of Leviticus." n241 His statement of August 23, 1993, further misrepresented Lumpkin's statements as implying "that stoning to death of homosexuals was part of [Lumpkin's] biblical beliefs," n242 despite Mayor Jordan's knowledge to the contrary imparted to him personally by Lumpkin earlier that day. n243 The Mayor's reliance on Lumpkin's statements out of their proper context is a tactic specifically condemned by the Supreme Court in Rankin v. McPherson; a public employer may not divorce a statement made by an employee from its context and use that statement standing alone as the basis for a discharge. n244 McPherson also requires [*332] that Lumpkin's comments be taken in the context of his record as a Human Rights Commissioner. n245 Mayor Jordan described Lumpkin's record as follows:

Reverend Lumpkin is and has always been a staunch defender of the principle of human and civil rights for everyone. He has a solid and unambiguous record as a member of the Human Rights Commission. As a commissioner he has protected and advanced gay and lesbian civil rights.... As a member of that Commission his record on gay and lesbian issues is unblemished. As a commissioner, he has served all segments of the San Francisco community with dignity and respect. n246

Lumpkin's performance in upholding gay and lesbian civil rights was not incongruent with his religious beliefs. Although he did believe that the Bible condemned homosexual acts as morally wrong, Lumpkin was nonetheless strongly committed to the civil rights of those who practice such acts. n247

The City of San Francisco could not cite a reasonably foreseeable threat to governmental functions as a result of Lumpkin's statements. In Connick, the Supreme Court outlined the factors to be examined in a Pickering analysis and noted that the threshold inquiry is whether the employee's speech addressed a matter of public concern. n248 Religious belief is constitutionally always a matter of public concern. n249 Furthermore, the Connick Court used the term "public concern" in contrast to a public employee's personal grievance toward his supervisor or employer. n250 Lumpkin's remarks were not grievances against the Mayor, the Human Rights Commission, or the City of San Francisco.

The Court in Connick mandated that a Pickering balance give [*333] "full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." n251 No evidence was presented in the record that Lumpkin's beliefs had interfered with his public duties. On the contrary, the record documented that Lumpkin's commitment to gay and lesbian rights was "solid and unambiguous." n252 While Mayor Jordan may have been justified in firing a Human Rights Commissioner who advocated violence against a certain group of citizens, that is not what Lumpkin did.

The Ninth Circuit found that Lumpkin's statements were "antithetical to the Commission's official charge "to eliminate prejudice and discrimination because of... sexual orientation... and to officially encourage private persons and groups to promote and provide equal opportunity for and good will toward all people." n253 In so doing, the appellate court relied upon a formulation of the government's asserted interest that is of questionable constitutionality in light of the holding in R.A.V. v. City of Saint Paul. n254 The Court in R.A.V. struck down as facially invalid a municipal ordinance that had been construed to prohibit "fighting words" that insult or provoke violence on the basis of race, color, creed, religion, or gender. n255 The

Court held that while the government may proscribe certain categories of speech, e.g., libel, it may not engage in content-based discrimination between points of view. n256 "The only interest distinctively served by [a] content limitation is that of displaying [the government's] special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids." n257 San Francisco, therefore, had no constitutionally cognizable compelling state interest in "enforcing" the language of the Commission charter.

Connick also requires analysis of whether the employee's speech interfered with working relationships. n258 Lumpkin's television statements were made on August 20, 1993. Mayor Jordan fired Lumpkin three days later on August 23, 1993. There was no meeting of the Human Rights Commission in the interim to provide evidence of how other Human Rights Commissioners would react. Mayor Jordan did not seem concerned with the Commission's [*334] working relationships after Lumpkin had been quoted in the newspaper as calling homosexuality "an abomination." n259 Furthermore, the relationship between the Mayor and a Human Rights Commissioner is not the close working relationship described in Connick. Consequently, Lumpkin's relationships with others within the Human Rights Commission and administration should not have been grounds for termination. n260

When the Eleventh Circuit's decision in *Shahar v. Bowers* is placed against the Pickering/Connick standard, a remarkably similar pattern of reasoning appears. Like the Ninth Circuit in *Lumpkin v. Brown*, the Eleventh Circuit viewed a public employee's decision to speak out publicly as itself a basis for termination, on the grounds that Shahar's judgment could reasonably be questioned on the basis of her private associations and positions:

Because of Shahar's decision to participate in such a controversial same-sex "wedding" and "marriage" and the fact that she seemingly did not appreciate the importance of appearances and the need to avoid bringing "controversy" to the Department, the Attorney General lost confidence in her ability to make good judgments for the Department. n261

In applying the Pickering analysis, the court paused to make an intriguing epistemological observation. The court noted the inherent imprecision of the constitutional balancing between an employee's free speech interests and "the disruption and other harm the [employer] believes her employment could cause." n262 Rather disingenuously, the court stated that "[a] person often knows that 'x' outweighs 'y' even without first determining exactly what either 'x' or 'y' weighs." n263 These comments are interesting for two reasons. First, the court implied - and confirmed in its ensuing discussion - that in this analysis, an employee's legitimate and demonstrable right of free speech is weighed against the employer's mere state of mind regarding the speech, specifically the disruption the employer believes the speech could cause. Second, the court acknowledged the intuitive nature of the balancing in a given set of circumstances. [*335] These two themes - the speculative nature of the proof required of the employer and the subjectivity involved in weighing the interests - are repeatedly struck in the balance of the *Shahar* decision, as they were in the Ninth Circuit's opinion in *Lumpkin*.

As to the first theme, the court dutifully noted "*Shahar* argues that we may discount the potential harm based on (what she sees as) the weakness of the Attorney General's predictions [of disruption]. *Shahar* overstates the Attorney General's "evidentiary burden." n264 That burden, the court said, depended not on a showing of actual or impending disruption, but only upon a showing that the employer's view of the facts and predictions of disruption was reasonable. n265 The court could not say "that the Attorney General's worries and view of the circumstances that led him to take the adverse personnel action against *Shahar* are beyond the broad range of reasonable assessments of the facts." n266

Having established that an employer's concerns about an employee's speech need only be "reasonable," the court further tipped the balance in Bowers' favor by refusing to accede to Shahar's position that her expressive conduct did not, and could not, amount to a legal marriage, but instead constituted only pure speech and association. n267 The Eleventh Circuit surely recognized the distinction between representing that the wedding had substantive legal effect (thereby arguably advocating illegal conduct) and engaging in symbolic speech by stating, "for clarity's sake, we use the words 'marriage' and 'wedding' (in quotation marks) to refer to Shahar's relationship with her partner; we use the word marriage (absent quotation marks) to indicate legally recognized heterosexual marriage." n268 But the court refused to admit that the impact of Shahar's conduct was mitigated by the fact that the wedding and the relationship were personal and private, not politically or ideologically driven: "Shahar asks us also to consider the 'non-employment related context' of her 'wedding' and 'marriage' and that 'she took no action to transform her intimate association into a public or political statement.'" n269

If Shahar is arguing that she does not hold herself out as **[*336]** "married," the undisputed facts are to the contrary. Department employees, among many others, were invited to a "Jewish, lesbian-feminist, out-door wedding" which included exchanging wedding rings: the wearing of a wedding ring is an outward sign of having entered into marriage. Shahar listed her "marital status" on her employment application as "engaged" and indicated that her future spouse was a woman. She and her partner have both legally changed their family name to Shahar by filing a name change petition with the Fulton County Superior Court. They sought and received the married rate on their insurance. And, they, together, own the house in which they cohabit. These things were not done secretly, but openly. n270

The Eleventh Circuit pointed to Bowers' view that the people of Georgia were "set against equating in some way a relationship between persons of the same sex with traditional marriage." n271 For the court, the potential "confusion" on the part of the citizens of Georgia engendered by Shahar's profession of a lesbian "marriage" was sufficient to justify her termination:

Even if Shahar is not married to another woman, she, for appearance purposes, might as well be. We suppose that Shahar could have done more to "transform" her intimate relationship into a public statement. But after (as she says) "sanctifying" the relationship with a large "wedding" ceremony by which she became - and remains for all to see - "married," she has done enough to warrant the Attorney General's concern. He could conclude that her acts would give rise to a likelihood of confusion in the minds of members of the public: confusion about her marital status and about his attitude on same-sex marriage and related issues. n272

In the court's view, Bowers "had a right to take steps to protect the public from confusion about his stand and the Law Department's stand on controversial matters, such as same-sex marriage." n273

Further, the court seemed to rely upon the public's use of ill-fitting stereotypes about homosexuals in equating Shahar's profession of lesbianism with conduct constituting sodomy, as Justice Scalia had in *Romer v. Evans*: n274

[*337]

About public perception, we accept that the fact the Shahars are professed lesbians and see themselves as "married" does not prove beyond reasonable doubt that either of them has engaged in sodomy within the meaning of Georgia law. But we also accept that, when two

people say of themselves that they are "married" to each other, it is reasonable for others to think those two people engage in marital relations. n275

The court referenced the view of a Ninth Circuit judge who had opined in an earlier case that "sodomy is an act basic to homosexuality," n276 and stated that it could not say that Bowers "[was] clearly wrong to worry that reasonable people - inside and outside the Law Department - in Georgia could think along these same lines." n277 In view of the fact that:

Some reasonable persons may suspect that having a Staff Attorney who is part of a same-sex "marriage" is the same thing as having a Staff Attorney who violates the State's law against homosexual sodomy... [the court] accepted that Shahar's participation in a same-sex "wedding" and "marriage" could undermine confidence about the Attorney General's commitment to enforce the State's law against homosexual sodomy (or laws limiting marriage and marriage benefits to traditional marriages). n278

The court injected one final level of ambiguity and subjectivity into the Pickering analysis by conceding that "public perception... is not knowable precisely," "is rarely monolithic," and would possibly not draw the same conclusions as Bowers had from Shahar's "marriage" or would not attribute such perceptions to the Law Department or the Attorney General. n279 However, the court concluded, "assessing what the public perceives about the Attorney General and the Law Department is a judgment for the Attorney General to make.... We must defer to [Bowers'] judgment about what Georgians might perceive unless his judgment is definitely outside of the broad range of reasonable views." n280

Finally, in assessing the impact of the Connick factor of potential disruption of the governmental function of the employer, the Eleventh Circuit took note of Connick's admonition that "a wide degree of deference to the employer's judgment is appropriate" in gauging this factor as well. n281 In the court's view, Shahar's argument [*338] that her responsibilities at the Law Department would have consisted chiefly of death penalty appeals, rather than involvement in legal issues relating to gay rights or the sodomy statute, was not relevant. n282 The court rejected her contention that the Pickering test requires evidence of potential interference with her particular duties, stating that even assuming Shahar was correct about her likely assignment within the Department:

The Department, when the job offer was withdrawn, had already engaged in and won a recent battle about homosexual sodomy - highly visible litigation in which its lawyers worked to uphold the lawful prohibition of homosexual sodomy. This history makes it particularly reasonable for the Attorney General to worry about the internal consequences for his professional staff (for example, loss of morale, loss of cohesiveness and so forth) of allowing a lawyer, who openly - for instance, on her employment application and in statements to coworkers - represents herself to be "married" to a person of the same sex, to become part of his staff. Doubt and uncertainty of purpose can undo an office; he is not unreasonable to guard against that potentiality. n283

The author submits that Bowers' reliance on the potential for disruption within his department may have been exaggerated, since the evidence suggested that it was doubtful that Shahar's presence in Bowers' employ would have "materially disrupted" the Law Department. n284 More disturbing is the Eleventh Circuit's apparent accession in Bowers' argument that a substantial justification for his actions may be found in his need to please his electorate. n285 This rationale provides a public official with carte blanche to rely upon majoritarian prejudices in enacting policies against disfavored classes for the sole reason that he or she must stand for re-election, a result the Supreme Court condemned in *Romer v. Evans*. n286

C. Religious Beliefs as "Public Policy:" Does the "Policymaking" [*339] Exception to Pickering Allow "Backdoor" Religious Tests for Public Service?

The circuit courts' reliance on the *Elrod v. Burns* "policymaker" exception n287 in *Lumpkin* and *Shahar* raises troubling questions concerning the role religion may be permitted to play in public policymaking. Confined to its factual parameters, *Elrod* stood only for the proposition that Mayor Jordan or Attorney General Bowers would have been justified in firing, for reasons of political loyalty, the high level "policymaking" staff in their offices who had been hired by their previous administrations. However, neither *Lumpkin* nor *Shahar* were fired for their political views or political affiliation, but rather for expressing personal religious beliefs. The *Elrod* "policymaker" exception has not been applied by the Supreme Court to employee religious affiliation or belief; in fact, it is questionable whether such an application may be constitutionally permitted. *Elrod* requires the employer (and the reviewing courts) to inquire "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." n288 To allow chief executives to rely upon the *Elrod* exception would be tantamount to holding that a particular religious belief or affiliation may be a bona fide occupational qualification, a view which is repulsive to the First Amendment. n289

Where, as in these cases, a government employee makes off-the-job public statements regarding his or her personal religious beliefs, and such statements do not amount to advocacy against the employer's interests, the First Amendment does not permit the supposition that the employee's religious beliefs may interfere with the discharge of his or her public office. n290 As the Supreme Court observed in *Branti v. Finkel*, "if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest [*340] in maintaining governmental effectiveness and efficiency." n291 Unlike political beliefs, religious beliefs, by virtue of the Establishment Clause, may not ordinarily provide the basis for public policymaking, although individual religious beliefs may animate otherwise neutral governmental actions. n292 Therefore, the religious beliefs of policymaking employees per se cannot be said to threaten a public employer's interests. Where the employee's religious beliefs do not result in conduct detrimental to the employer's interests, such beliefs should be deemed irrelevant to the employer's affairs by virtue of the Free Exercise Clause and afforded the highest possible degree of protection.

Similarly, in a number of analogous cases, the Supreme Court has made clear that the First Amendment will not ordinarily indulge the presumption that an individual's religious beliefs disqualify him or her from performing a public function, even where those beliefs would appear to be at odds with the governmental purpose. For example, the Court has held that jury veniremen cannot be excluded for cause from serving on a capital case on the ground of religious scruples against the death penalty. n293 Likewise, the Court in *Agostini v. Felton* n294 recently clarified that it would not indulge a presumption in its Establishment Clause jurisprudence n295 that allowing public school teachers into parochial schools would inevitably result in the inculcation of religion by the state and that pervasive monitoring of such teachers was required. n296

In *Zobrest v. Catalina Foothills School Dist.*,... [we] refused to presume that a publicly employed interpreter would be pressured by the pervasively sectarian surroundings to inculcate religion by "adding to [or] subtracting from" the lectures translated.... In the absence of evidence to the contrary, we assumed instead that the interpreter would dutifully discharge her responsibilities as a full-time public employee and comply with the ethical guidelines of her profession by accurately translating what was said.... *Zobrest* therefore expressly rejected the

notion... that, solely because of her presence on private school property, a public employee will be [*341] presumed to inculcate religion in the students. n297

A failure to apply the Pickering standard to require a showing of a compelling interest in censoring public employee speech, absent a showing of actual or impending interference with the employee's responsibilities or governmental function, indulges the presumption against religious public servants condemned in *Witherspoon*, *Agostini*, and other cases, and adopts as an element of First Amendment employment jurisprudence an unsubstantiated prejudice that receives condemnation in other First Amendment contexts.

The far better approach to conflicts between a public employer and a religious employee is to presume against interference with the employee's responsibilities, absent proof of facts giving rise to a reasonable expectation that the employee's beliefs will impede performance or undercut public confidence in the employee's department. There is certainly no necessity, as the Supreme Court stated in *Connick v. Myers*, for an employer to wait until a "mini-insurrection" is brewing in an office n298 or "to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." n299 Nonetheless, more should be required than the mere speculation given deference in *Lumpkin and Shaha*. The inordinate flexibility of the Pickering standard points to a need to revisit the instruction of *Waters v. Churchill* that a particularized showing of interference with the provision of public services is not required. n300 As the Supreme Court recognized in a similar context - the prohibition on patronage-based employment practices - "the First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate." n301

Conclusion

The cases discussed herein are examples of governmental action that the Supreme Court cautioned against in *Rankin v. MacPherson*: "vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech." n302 Undoubtedly, appeals judges may err in applying constitutional rules, and they may, however unconsciously, [*342] apply legal standards with varying degrees of rigidity depending upon political and personal persuasions. Nonetheless, the constitutional standards animating the Bill of Rights were intended by the Framers and the great jurists of the Supreme Court to provide an anchor for unpopular speech, even for the speech "that we hate," n303 against the strong currents of political orthodoxy that would sweep away their voices. The stronger those currents, the weightier and more immutable the constitutional protections must be. For instance, of what value are the Pickering/Connick protections for public employees who desire to exercise their rights of free exercise of religion and free speech in a volatile area of public policy, when two circuit courts of appeal have applied the Pickering test to hold that public employees may be summarily fired for their religious speech and conduct? These employees were fired despite the fact that their job performances were unassailable, they did not advocate illegality, and in the absence of anything but speculation that governmental functions had been hampered and public confidence called into question.

More fundamentally, when federal trial and appellate courts, called upon to address public issues as polarizing as homosexuality and religion, have found a First Amendment standard so flexible that they feel free to apply it, not to protect minority viewpoints, but to reinforce majoritarian positions, is it not time to reassess the continuing vitality of the standard itself? When a First Amendment principle as important as the right of free expression for public employees is adulterated to the point where, as it appears, a fundamentalist Baptist need not

apply to serve in the municipal government of San Francisco, and a Jewish lesbian is not welcome in the state government of Georgia, are we as a nation prepared to pay the price for elevating parochialism to a constitutional value? Robin Shahar, who is now employed as an attorney in the corporation counsel's office of the City of Atlanta, expressed the view of many who feel ostracized by political and religious orthodoxy when she said, "Is it harder for me to live in Georgia than in New York? Sure it is, but this is where I am right now, this is where I want to be right now, and I'm not going to run away... because someone has violated my constitutional rights...." n304

FOOTNOTES:

n1. 478 U.S. 186 (1986).

n2. 517 U.S. 620 (1996).

n3. *Id.* at 635-36.

n4. *Id.* at 636 (Scalia, J., dissenting) (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

n5. *Id.* (Scalia, J., dissenting).

n6. *Id.* (Scalia, J., dissenting).

n7. See *id.* (Scalia, J., dissenting).

n8. *Id.* (Scalia, J., dissenting) (citation omitted).

n9. *Id.* at 652 (Scalia, J., dissenting). Scalia's confidence that traditional attitudes favored Amendment 2 was undocumented. Actual polling data seems to call into question whether prevailing mores have remained opposed to acceptance of homosexuality, gay marriage, and employment rights for homosexuals since the mid-1980s. The Gallup Organization has been tracking American attitudes on the gay rights issue for more than 20 years, and the poll results continue to show that the public is divided on the acceptability of homosexual behavior and lifestyles. See Mark Gillespie, Gallup News Services, Americans Support Hate Crimes Legislation That Protects Gays (Apr. 7, 1999) <<http://www.gallup.com/poll/releases/pr990407.asp>>. In 1977, 43% of Americans polled stated they did not believe homosexual relations between consenting adults should be legal. See Frank Newport, Gallup News Services, Some Change over Time in American Attitudes Towards Homosexuality, but Negativity Remains (Mar. 10, 1999) <<http://www.gallup.com/poll/releases/pr990301b.asp>>. The year 1986, in which *Bowers v. Hardwick* was decided, was the 20-year nadir in tolerance for homosexual lifestyles, as the percentage of respondents opposing legalization of gay lifestyles fell to 33%. See *id.* By 1996, the year *Romer v. Evans* was decided, that figure had reached its 20 year zenith, at 44%. See *id.* The percentage has leveled off in the last several years, with 50% of respondents indicating acceptance of legalizing homosexual relations. See *id.*

Likewise, in 1989, only 19% of Americans queried stated their belief that homosexuality is an inborn trait, while 48% considered it the result of environment and upbringing. See *id.* By 1996, the percentage who considered homosexuality an inborn trait had risen to 31%, and the percentage believing it a matter of nurture and environment had fallen to 40%. See *id.* In 1999, 34% considered homosexuality inborn, while, curiously, the percentage of those who considered it a result of environment and upbringing rose once again, to 44%. See *id.*

On the other hand, Gallup notes, despite a more ambivalent attitude about homosexuality as a lifestyle, Americans strongly support ending job discrimination against gay men and lesbians. See *id.* In 1977, 56% of Americans polled responded that homosexuals should enjoy

equal rights in job opportunities. See *id.* By 1989, the figure had risen to 71%. See *id.* In 1996, the figure rose further to 84%. See *id.*

n10. *Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

n11. James Davison Hunter, *Culture Wars: The Struggle to Define America* 42-44 (1991).

n12. See Jeremy Rabkin, *The Culture War That Isn't*, *Pol'y Rev.*, Aug.-Sept. 1999, at 18.

n13. The author's belief is shared by Professor Rabkin. See *id.* at 17.

n14. See *id.*

n15. See Amicus Brief filed on behalf of *Petitioners at 6*, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039).

n16. See *id.* at 3.

n17. See *id.*

n18. *Bowers v. Hardwick*, 478 U.S. 186, 187 (1986).

n19. 109 F.3d 1498 (9th Cir. 1997).

n20. 114 F.3d 1097 (11th Cir. 1997).

n21. See *Lumpkin*, 109 F.3d at 1500; *Shahar*, 114 F.3d at 1101-02.

n22. 391 U.S. 563 (1968).

n23. See *Lumpkin*, 109 F.3d at 1500-01; *Shahar*, 114 F.3d at 1003.

n24. *Lumpkin*, 109 F.3d at 1500.

n25. *Id.*

n26. *Shahar*, 114 F.3d at 1099.

n27. *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986) (holding that sodomy is not a fundamental right protected by the Fourteenth Amendment of the United States Constitution).

n28. *Shahar*, 114 F.3d at 1101.

n29. *Id.* at 1104.

n30. See *id.*

n31. *Id.* at 1104-05.

n32. See *Connick v. Myers*, 461 U.S. 138, 152 (1983) (holding that an employer does not have to allow destructive effects to occur before taking action).

n33. 427 U.S. 347 (1976).

n34. See Felix A. Nigro, *Modern Public Administration* 289 (1973).

n35. *Id.* at 290.

n36. See *id.*

n37. *Id.* at 290-91.

n38. *Elrod*, 427 U.S. at 373.

n39. *Id.* at 367. The *Shahar* court appeared to give some consideration to the role of government employment policy when it stated:

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

Shahar v. Bowers, 114 F.3d 1097, 1104 n.15 (1997) (citations omitted).

n40. *Elrod*, 427 U.S. at 367-68.

n41. 445 U.S. 507 (1980).

n42. *Id.* at 518.

n43. 461 U.S. 138 (1983).

n44. *Id.* at 143-44 (quoting *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892)).

n45. See *id.* at 144.

n46. *Id.* at 144. "The Court cast new light on the matter in a series of cases arising from the widespread efforts in the 1950s and early 1960s to require public employees, particularly teachers, to swear oaths of loyalty to the state and reveal the groups with which they associated." *Id.*; see also *Cramp v. Board of Pub. Instruction*, 368 U.S. 278, 280 (1961) (holding that the state could not require a teacher to execute an oath that he had never supported the Communist Party); *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 897 (1961) (noting that the government may not deny employment based on previous membership in a particular party); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (holding unconstitutional a requirement that a notary declare a belief in God before receiving his commission); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (holding that it was unconstitutional for the state to require its teachers to divulge all organizations to which the teachers belonged or contributed); *Wieman v. Updegraff*, 344 U.S. 183, 190 (1952) (holding that a state could not require its employees to establish their loyalty by an oath denying past affiliations with Communists).

n47. 367 U.S. 488 (1961).

n48. *Id.* at 495-96; cf. U.S. Const. art. VI, cl. 3:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Id.

n49. 374 U.S. 398 (1963).

N50. *Id.* at 404.

n51. See *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968).

n52. *Id.*

n53. *Id. at 571-72.*

n54. *Connick v. Myers*, 461 U.S. 138, 149 (1983). *Connick* arose after an assistant district attorney circulated a survey about office practices among her co-workers and was fired as a result. *Id. at 141.*

n55. *Id. at 154-55.*

n56. See *id. at 149-54.*

n57. See *id. at 154.*

n58. *Id.*

n59. *Id. at 147-48.*

n60. See *id. at 148 n.7.*

n61. 483 U.S. 378 (1987).

n62. *Elrod v. Burns*, 427 U.S. 347, 367 (1976).

n63. *McPherson*, 483 U.S. at 390-91.

n64. *Id.*

n65. Susan Stryker & Jim Van Buskirk, *Gay by the Bay* 51-83 (1996). See generally Charles Kaiser, *The Gay Metropolis, 1940-1996* (1997) (discussing the transformation of gay political activism over five decades); Gale S. Rubin, *South of Market and Gay Male Leather 1963-1997*, in *Reclaiming San Francisco History, Politics, Culture* 247-69 (James Brook et al. eds., 1998) (explaining the history of homosexuals in the South of Market district of San Francisco).

n66. See Stryker & Van Buskirk, *supra* note 65, at 51-83.

n67. See *id. at 64.*

n68. See *id.* See generally Randy Shilts, *The Mayor of Castro Street: The Life & Times of Harvey Milk* (1982) (discussing Mayor Moscone's rise to political power).

n69. See Stryker & Van Buskirk, *supra* note 65, at 78.

n70. See *id.*

n71. See *id. at 73-78.*

n72. See *id. at 81.*

n73. See *id.*

n74. See *id. at 82.*

n75. See *id.*

n76. See *id.*

n77. See *id.*

n78. See *id.*

n79. See *id. at 89.*

n80. See *id. at 90-91.*

n81. See *id. at 95.*

n82. See *id.*

n83. See *id.* at 95, 99.

n84. See *id.* at 99. Migden was a driving force behind a new slate of pro-gay bills that were signed into law by Governor Gray Davis on October 3, 1999. See Greg Lucas, Gov. Davis Finds Middle Ground with Lawmakers: New State Laws Reflect Give-and-Take, *S.F. Chron.*, Dec. 27, 1999, at A1.

n85. Stryker & Van Buskirk, *supra* note 65, at 99.

n86. See *id.* at 112-13.

n87. See *id.* at 113.

n88. See *id.* at 115.

n89. *Id.* at 121.

n90. See *id.* at 124-25.

n91. See *id.* at 127-28.

n92. See *id.* at 140.

n93. See *id.* at 142.

n94. See *id.*

n95. *Lumpkin v. Brown*, 109 F.3d 1498, 1499 (9th Cir. 1997).

n96. *Id.* at 1500.

n97. When Jordan held the office of Chief of Police for the City in 1988, the Department was accused in a wrongful death shooting that involved Lumpkin's nephew. See Dan Levy, Lumpkin Fired from Rights Panel, *S.F. Chron.*, Aug. 24, 1993, at A1. Lumpkin gained the favor of Jordan and the public by siding with the police department over his brother, the victim's father. See *id.*

n98. See *Lumpkin v. Jordan*, No. C-93-4338 FMS, 1994 WL 669852, at *1 (N.D. Cal. Nov. 22, 1994).

n99. See *id.*

n100. See S.F., Cal., Admin. Code 12A.4 (2000).

n101. Evelyn C. White, History of Hostility: Bias from Within Against Black Gays, *S.F. Chron.*, June 26, 1993, at A1 (quoting Eugene Lumpkin). The article in pertinent part reported:

A forum on AIDS last February at Morehouse College in Atlanta was canceled after male students denounced homosexuality. Morehouse is one of the nation's most esteemed black colleges and the alma mater of slain civil rights leader Martin Luther King Jr.

....

Debate over the definition of "masculinity" was a factor in the melee at Morehouse, says Jafari Allen, an openly gay black male who was slated to speak at the February AIDS forum. He says the students who disrupted the event were outraged because he did not meet their standards of manhood. "In the very chapel where Dr. King sat as a student, black men hurled objects at me and called me a "faggot,"" Allen recalled. "It was terrifying. I still haven't recovered from it."

Black ministers, King foremost among them, have been leading forces in the liberation of oppressed people. But on the subject of homosexuality, some are openly antagonistic. Others, unwilling to speak forthrightly about AIDS, stand silent in their pulpits as their parishioners succumb to the disease.

Id. The passage quoting Lumpkin followed.

n102. *Lumpkin, 1994 WL 669852*, at *1. The Mayor and the City and County stipulated that the July 13, 1993 press release "accurately reflected the Mayor's beliefs and actions regarding Reverend Lumpkin's tenure on the [Commission] as of that date." Id. This stipulation was the only direct evidence in the district court record regarding Mayor Jordan's state of mind with respect to the reasons for Lumpkin's termination.

n103. See id. at *2.

n104. Id. The pertinent text of the resolution, which was introduced on June 19, 1993, after the publication of the San Francisco Chronicle article, but not adopted by the Board until August 16, 1993, after Lumpkin's television interview, is as follows:

Calling on Eugene Lumpkin to resign as a member of the human rights commission and further calling on Mayor Frank Jordan to remove Eugene Lumpkin from the Human Rights Commission if he fails to resign and to restore public confidence in the role and mission of the commission especially with regards to lesbian and gay San Franciscans

WHEREAS, members of the Human Rights Commission are charged with providing leadership in the struggle for equal rights, dignity and respect for all San Franciscans; and,

WHEREAS, members of the San Francisco Human Rights Commission are also charged with resolving disputes and providing a forum in which San Francisco residents may come forward without fear of bias; and,

WHEREAS, Eugene Lumpkin, a member of the Human Rights Commission, has made public statements that "the homosexual lifestyle is an abomination against God," attacked laws that protect against discrimination by stating that "I have problems with people trying to set aside and make special laws for this and that" and stated publicly before the Lesbian, Gay and Bisexual Advisory Committee of the Human Rights Commission that he will not represent the lesbian and gay community on the Commission but will "represent the rest of San Francisco"; and,

WHEREAS, Eugene Lumpkin has, by his words and demeanor undermined the role and responsibilities of the Human Rights Commission and his statements and actions have resulted in a lack of confidence in the Commission's ability to perform its duties as expressed by a wide range of San Francisco residents and organizations;

....

FURTHER RESOLVED, That the Board of Supervisors calls on Mayor Frank Jordan to remove Eugene Lumpkin from the Human Rights Commission if he fails to resign, and to restore public confidence in the role and mission of the Commission, especially with regards to the ability of the Commission to consider complaints and lead the community toward equality and respect for all lesbian and gay San Franciscans.

Resolution No. 656-93, June 19, 1993. The resolution went unsigned by Mayor Jordan. See id.

n105. See *Lumpkin, 1994 WL 669852*, at *2.

n106. *Lumpkin v. Brown*, 109 F.3d 1498, 1499 n.1 (9th Cir. 1997).

n107. *Id.*

n108. *Id.*

n109. See Dan Levy, *Jordan Asks Lumpkin to Quit - He Says No*, S.F. Chron., Aug. 21, 1993, at A1.

n110. See *Petition for Writ of Certiorari at A-48, A-49, Lumpkin v. Brown*, 522 U.S. 995 (1997) (No. 97-367).

n111. *Id.* at A-49. The substance of Lumpkin's declaration was as follows:

2. I believe, as my denomination and Church teach, that the Holy Bible is the inerrant, infallible and word of Almighty God.

3. During the course of the interview with Evelyn White, I was asked about my religious beliefs concerning homosexuality, and when I explained that the Bible says that it is an abomination, I was specifically referring to the book of Leviticus, Chapter 18, verse 22, which reads as follows: "You shall not lie with male as one lies with a female; it is an abomination."

....

5. The actual passage in Leviticus reads as follows: "there is a man who lies with a male as those who lie with a woman, both of them have committed a detestable act; they shall surely be put to death. Their bloodguiltiness is upon them." When I was asked if I "believed" this passage, I meant that I believed that is what the Bible said, and that the passage did in fact state the law that was in effect at that time; I did not state that I believed that this was now or should be the law, nor did I state that homosexuals should be killed or harmed.

6. At the August 23 breakfast meeting that I had with the Mayor, I... explained my religious beliefs concerning Leviticus. I reiterated to the Mayor that I was strongly opposed to violence against gays, lesbians and bisexuals, that I did not believe that there should be death penalties against homosexuals, and that I would continue to uphold all provisions of Charter of the Human Rights Commission - Chapter 12A of the San Francisco Administrative Code. I also offered to assist in any way I could to publicly clarifying my beliefs in this area.... The Mayor continued to insist on my resignation, but I refused to do so, so the Mayor said that he would remove me from my position as a Human Rights Commissioner.

Id. at A-47 to A-50.

n112. See *id.* at A-49.

n113. See *Lumpkin v. Jordan*, No. C-93-4338 FMS, 1994 WL 669852, at *2.

n114. See *id.*

n115. *Petition for Writ of Certiorari at A-51, Lumpkin v. Brown*, 522 U.S. 995 (1997) (No. 97-367).

n116. See *id.* at A-50.

n117. See *id.*

n118. See *Lumpkin v. Brown*, 109 F.3d 1498, 1499 (9th Cir. 1997).

n119. *Id.*

n120. See *Lumpkin v. Jordan*, No. C-93-4338 FMS, 1994 WL 669852, at *1.

n121. See *id.* "It shall be an unlawful employment practice... for an employer, because of the... religious creed... of any person... to bar or to discharge the person from employment or from a training program leading to employment...." Cal. Gov't. Code 12940(a) (Deering 1997).

n122. See *Lumpkin*, 1994 WL 669852, at *1. "Every person who... subjects... any citizen of the United States... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. 1983 (1994).

n123. See *Lumpkin*, 1994 WL 669852, at *1.

n124. See *id.* Article I, Section 4 of the California Constitution states: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion." Cal. Const. art. I, 4. Section 8 states: "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin." Cal. Const. art. I, 8.

n125. See *Lumpkin*, 1994 WL 669852, at *7.

n126. See *id.*

n127. See *id.*

n128. See *id.* The court specifically cited *Besig v. Friend*, 460 F. Supp. 134, 139-40 (N.D. Cal. 1978), in which a member of the Recreation and Park Commission was found to be a policymaker and, thus, was subject to dismissal by the Mayor for joining in a controversial legal action. See *id.* It also noted *Hall v. Ford*, 856 F.2d 255, 265 (D.C. Cir. 1988), which held an athletic director to be a "policy level employee" subject to dismissal for "expressing views on matters within the core of his responsibilities that reflected a policy disagreement with his superiors." *Id.*

n129. *Lumpkin*, 1994 WL 669852, at *4 (citing S.F., Cal., Admin. Code 3.5 (2000)).

n130. *Id.* (quoting S.F., Cal., Admin. Code 12A.2 (2000)).

n131. *Id.* (quoting *Sims v. Metropolitan Dade County*, 972 F.2d 1230, 1238 (11th Cir. 1992)).

n132. See *Lumpkin v. Brown*, 109 F.3d 1498, 1498 (9th Cir. 1997). Willie L. Brown was substituted for his predecessor, Frank Jordan, as Mayor of the City and County of San Francisco, pursuant to Federal Rule of Appellate Procedure 43(c)(1). See *id.*

n133. See *id.*

n134. *Id.* at 1500.

n135. *Id.* (quoting S.F., Cal., Admin. Code 12A.2 (2000)).

n136. *Id.*

n137. *Id.* at 1501.

n138. *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 367 (1997)). The Ninth Circuit also rejected claims under the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. 2000bb (1994), and the Establishment Clause of the First Amendment of the United States Constitution. See *Lumpkin*, 109 F.3d at 1501-02. The Supreme Court struck down RFRA as applied to the states while *Lumpkin*'s appeal was pending, thus making the claim moot. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). The Ninth Circuit's rationale regarding the Establishment Clause claim was as follows:

We turn finally to Reverend Lumpkin's claim that his removal from the Human Rights Commission violated the Establishment Clause by endorsing a particular religious faith that interprets scripture "less literally" than does Reverend Lumpkin's. Reverend Lumpkin's only argument is that the City promoted a religious faith that is antithetical to Reverend Lumpkin's. But Mayor Jordan's press releases consistently acknowledged Reverend Lumpkin's right to adhere to his religious faiths and stressed the secular reasons for Reverend Lumpkin's removal. When the Mayor announced Reverend Lumpkin's removal from the Human Rights Commission, he stated that "I have not in the past, nor will I in the future ask that a religious litmus test of beliefs be a part of the appointment process for any San Francisco Commission." The Mayor went on to say that "when [religious] beliefs are volunteered in a way that negatively influences the operation of a state function, or suggests a justification for actions which may lead to violence, I believe it crosses the line between church and state." Because these statements adhere to secular principles, they defeat Reverend Lumpkin's claim that his removal from the Human Rights Commission had the impermissible primary effect of promoting any particular religious faith.

Lumpkin, 109 F.3d at 1501-02 (citations omitted).

n139. See *Lumpkin v. Brown*, 522 U.S. 995, 995 (1997).

n140. See *id.*

n141. *Shahar v. Bowers*, 114 F.3d 1097, 1109 (11th Cir. 1997).

n142. See *id.* at 1101.

n143. See *id.*

n144. See *Shahar v. Bowers*, 836 F. Supp. 859, 861 (N.D. Ga. 1993).

n145. See *Shahar*, 114 F.3d at 1100-01.

n146. McKay Jenkins, A Law Grad's Suit Against State Becomes Gay Rights' Rallying Point, *Atlanta J. & Const.*, Oct. 4, 1991, at A12.

n147. See *id.*

n148. *Id.*; see also Mark Silk, What Exactly Is Bowers Opposing?, *Atlanta J. & Const.*, Oct. 10, 1991, at A19. In this article, Shahar stated:

"Fran and I chose to get married for the same reasons any two people do. We met, we fell in love, we wanted to spend our lives together, and we wanted to celebrate our love and commitment to each other surrounded by people we love, and in accordance with our Jewish traditions."

Id. (quoting Robin Shahar).

n149. Jenkins, *supra* note 146, at A12.

n150. *Id.*

n151. See McKay Jenkins, Gay Rights Battle Focuses on Ga.; Bowers' Office: Fight for Legal Recognition Still Steeply Uphill in Ga., *Atlanta J. & Const.*, Oct. 6, 1991, at D1; Time Will Vindicate Shahar, *Atlanta J. & Const.*, Jan. 14, 1998, at A10. The Eleventh Circuit readily acknowledged this fact. See *Shahar v. Bowers*, 114 F.3d 1097, 1100 (11th Cir. 1997).

n152. See *Shahar*, 114 F.3d at 1101.

n153. See *id.*

n154. See *id.* The offer stated:

"To carry out the functions of the Attorney General and the Department of Law," section 45-15-30 of the Code of Georgia empowers the Attorney General to hire various subordinate lawyers within the Department. Section 45-15-31(a) provides that all such subordinate attorneys "shall be appointed by the Attorney General for such periods of time as he deems advisable" and "may be removed by Attorney General."

Id. at 1100 n.5.

n155. *Shahar v. Bowers*, 836 F. Supp. 859, 864 n.4 (N.D. Ga. 1993).

n156. *Shahar*, 114 F.3d at 1101.

n157. See *Shahar*, 836 F. Supp. at 866.

n158. *Shahar*, 114 F.3d at 1100.

n159. See generally *Bowers' Anti-Gay Crusade*, Atlanta J. & Const., Oct. 15, 1993, at A10 (reporting the district court's decision upholding *Bowers'* refusal to hire *Shahar*, but recognizing a fundamental right of association in the relationship); *Rhonda Cook, Fallout From Bowers' Disclosure*; *Shahar Petitions Court to Reconsider Her Firing*, Atlanta J. & Const., June 21, 1997, at D2 (discussing *Shahar's* appeal to the court to consider her firing in light of the discovery of *Bowers'* adulterous affair); *Jay Croft, Gay Groups Decry Ruling on Lesbian Lawyer*, Atlanta J. & Const., Jan. 13, 1998, at C1 (reporting denial of certiorari to Supreme Court); *Ideas for Our Community*; *Shahar Still Fighting for Principle*, Atlanta J. & Const., Nov. 3, 1997, at A10 (commenting on *Bowers'* morality based decision-making); *Peter Mantius, Bowers' Reneging of Job Offer Goes to Appeals Court*; *Lesbian's Suit Being Called Major Gay Rights Case in Ga.*, Atlanta J. & Const., Dec. 1, 1994, at E3 (discussing the importance of the case for homosexual rights); *Bill Rankin, Appeals Court Vacates Landmark Ruling*; *Lesbian Lawyer's Case to be Reheard*, Atlanta J. & Const., Mar. 12, 1996, at C4 (reporting on the Eleventh Circuit's decision to vacate and remand); *Bill Rankin, The Federal Appeals Court's Conservative Bent*; *Blind Lady Justice Lifts Her Right Wing*, Atlanta J. & Const., Sept. 28, 1997, at H4 (discussing the Fourth Circuit's conservatism); *Silk*, supra note 148, at A19 (discussing the retraction of *Shahar's* job offer by *Bowers*); *Time Will Vindicate Shahar*, Atlanta J. & Const., Jan. 14, 1998, at A10 (editorial regarding denial of certiorari).

n160. *Jenkins*, supra note 151, at D1.

n161. *Id.*

n162. See *Shahar*, 114 F.3d at 1101 n.8.

n163. See *id.* at 1101.

n164. See *Shahar v. Bowers*, 836 F. Supp. 859, 865 (N.D. Ga. 1993).

n165. *Id.*

n166. *Id.* at 867.

n167. See *id.* at 868.

n168. See *id.* at 865.

n169. *Id.* at 866.

n170. 494 U.S. 872 (1990).

n171. *Shahar*, 836 F. Supp. at 866.

n172. *Id.*

n173. *Id.* (citing *Employment Div., Dep't. of Human Resources v. Smith*, 494 U.S. 872, 883 (1990)).

n174. *Id.*

n175. See *Shahar v. Bowers*, 70 F.3d 1218 (11th Cir. 1995).

n176. *Bowers v. Hardwick*, 760 F.2d 1202, 1212 (11th Cir. 1985), rev'd, 478 U.S. 186 (1986).

n177. See *Shahar*, 70 F.3d at 1226.

n178. See *Shahar v. Bowers*, 114 F.3d 1097, 1099 (11th Cir. 1997).

n179. *Id.* at 1104.

n180. *Id.* at 1102 (citations omitted).

n181. *Id.* at 1103 n.14.

n182. See *id.* at 1104.

n183. *Id.*

n184. *Id.*

n185. See *id.* at 1104 n.16 (citing *In re R.E.W.*, 472 S.E.2d 295 (Ga. 1996)).

n186. See *id.* (citing *Christensen v. State*, 468 S.E.2d 188, 190 (Ga. 1996)).

n187. See *id.* (citing *City of Atlanta v. McKinney*, 454 S.E.2d 517, 521 (Ga. 1995); *Van Dyck v. Van Dyck*, 425 S.E.2d 853 (Ga. 1993)).

n188. See *id.* (citing Op. Ga. Atty. Gen. 96-7, available in 1996 WL 180274; Op. Ga. Atty. Gen. 94-14, available in 1994 WL 153468; Op. Ga. Atty. Gen. 93-26, available in 1993 WL 546462).

n189. *Id.* at 1104-05.

n190. *Id.* at 1111 n.28 (citing *Lyng v. Northwest Indian Cemetery Protective Ass'n.*, 485 U.S. 439, 451 (1988) (stating that the government's ability to carry out its policies "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development")). The court of appeals relied on the Eighth Circuit's decision in *Brown v. Polk County*, 61 F.3d 650, 658 (8th Cir. 1995), for the proposition that the Pickering analysis is to be applied to claims of free exercise of religion brought by government employees. See *Shahar*, 114 F.3d at 1111.

n191. *Shahar*, 114 F.3d. at 1103-04.

n192. See *id.*

n193. *Id.* at 1104. This is a curious statement given that the Supreme Court's analysis in *Connick v. Myers* strongly suggested that the policymaking status of a public attorney is not a per se rule. *Connick v. Myers*, 461 U.S. 138, 154 (1983) (citing *Pickering v. Board of Educ.*, 391 U.S. 563, 569 (1968)). The Court considered the application of the policymaker exception in *Connick*, but did not rule solely on that basis; it went on to engage in the Pickering balancing analysis. *Id.* at 150-51. If the Elrod policymaker exception were dispositive, the Court would have ruled on that basis. See supra notes 38-40 and accompanying text. The Court has never done so, either in *Connick* or in its other cases applying *Pickering*. Further, the

Court held in *Branti v. Finkel* that a newly appointed public defender (certainly a "chief lawyer" like a district attorney or a state's attorney general) was not entitled to discharge subordinate public defenders for political reasons. *Branti v. Finkel*, 445 U.S. 507, 519-20 (1980).

n194. *Shahar*, 114 F.3d at 1110-11.

n195. See *Shahar v. Bowers*, 120 F.3d 211, 212 (11th Cir. 1997) (en banc) (ruling on Shahar's motion to supplement).

n196. See *id.* at 213.

n197. See *id.*

n198. See *id.*

n199. See *id.*

n200. See *Shahar v. Bowers*, 522 U.S. 1049, 1049 (1998).

n201. See Kathey Alexander, Bowers Makes Campaign Official, *Atlanta J. & Const.*, May 14, 1997, at C3.

n202. Jay Croft, Gay Groups Decry Ruling on Lesbian Lawyer, *Atlanta J. & Const.*, Jan. 13, 1998, at C1.

n203. See Dick Pettys, Bowers Confesses to Lengthy, Adulterous Affair; Ex-Attorney General Offers No Excuses, *Atlanta J. & Const.*, June 5, 1997, at D1.

n204. See Charmagne Helton & Kathey Pruitt, Election '98; Campaign Notebook; In Debate, Rivals Scold Bowers on Adultery, *Atlanta J. & Const.*, June 25, 1998, at C5; Kathey Pruitt, Calls for Bowers to Quit Campaign Grow Louder, *Atlanta J. & Const.*, Apr. 25, 1998, at D1; Cynthia Tucker, Mike Bowers: Candidacy at a Crossroads; Targeting Other People's Sex Lives Is a Tricky Business, *Atlanta J. & Const.*, Apr. 19, 1998, at G5.

n205. 510 S.E.2d 18, 26 (Ga. 1998).

n206. *Id.* at 24. The court extended its rationale in *Pavesich v. New England Life Insurance Co.*, 50 S.E. 68, 72 (Ga. 1905), the first holding by any court of last resort in the United States that citizens possess a "liberty of privacy" under the state constitutional provision protecting against deprivations of liberty except by due process of law. *Powell*, 510 S.E.2d at 21. *Powell*, unlike *Bowers v. Hardwick*, did not involve consensual homosexual sodomy, but the prosecution of allegedly consensual heterosexual sodomy. *Powell*, 510 S.E.2d at 20. The court struck down the defendant's conviction on constitutional grounds, reasoning:

While *Pavesich* and its progeny do not set out the full scope of the right of privacy in connection with sexual behavior, it is clear that unforced sexual behavior conducted in private between adults is covered by the principles espoused in *Pavesich* since such behavior between adults in private is recognized as a private matter by "any person whose intellect is in a normal condition.... Adults who "withdraw from the public gaze"... to engage in private, unforced sexual behavior are exercising a right "embraced within the right of personal liberty."... We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity.

Id. at 24 (citations omitted) (quoting *Pavesich*, 50 S.E. at 69-70).

n207. Bill Rankin & Kathey Pruitt, Sodomy Ruling May Stand; Reaction: Disappointed Conservatives Unsure of What They'll Do Next, but a Bigger Fight Is Likely, *Atlanta J. & Const.*, Nov. 24, 1998, at D1.

n208. *Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710 (1976).

n209. *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968).

n210. See *infra* note 218 and accompanying text.

n211. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

n212. *Reynolds v. United States*, 98 U.S. 145, 164 (1879) (quoting Thomas Jefferson's letter to the Danbury Baptist Association). See generally Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 114-15 (1982) (discussing the prior treatment of Jefferson's letter and offering a separate analysis); Daniel Dreisbach, *Real Threat and Mere Shadow* 125-27 (1987) (explaining that courts have struggled with interpreting Jefferson's letter).

n213. 98 U.S. 145 (1878).

n214. *Id.* at 166.

n215. 310 U.S. 296 (1940).

n216. *Id.* at 303-04.

n217. 494 U.S. 872, 877 (1990).

n218. *Cantwell*, 310 U.S. at 303 ("The Amendment embraces two concepts - freedom to believe and freedom to act. The first is absolute.").

n219. See, e.g., *Smith*, 494 U.S. at 877 ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."); *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) ("The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such."); *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) ("The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs, as such." (citation omitted)); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) ("We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion."); *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947) ("Neither a state nor the Federal Government... can force... a person... to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs."); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."); *Cantwell*, 310 U.S. at 303 ("Freedom to believe... is absolute."); *Reynolds v. United States*, 98 U.S. 145, 164 (1878) ("Congress was deprived of all legislative power over mere opinion...."); *Id.* at 166 ("Laws... cannot interfere with mere religious belief and opinions....").

n220. *Cantwell*, 310 U.S. at 307.

n221. 319 U.S. 624 (1943).

n222. 310 U.S. 586 (1940).

n223. *Id.* at 599-600.

n224. *Barnette*, 319 U.S. at 639.

n225. See *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 877 (1990).

n226. *Barnette*, 319 U.S. at 645 (Murphy, J., concurring).

n227. *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961).

n228. *Id.*

n229. 430 U.S. 705 (1977).

n230. *Id.* at 717.

n231. *Id.* at 713.

n232. *Id.* at 714.

n233. *Employment Div., Dep't. of Human Resources v. Smith*, 494 U.S. 872, 877 (1990) (emphasis added).

n234. *Id.* (emphasis added).

n235. *Lumpkin v. Brown*, 109 F.3d 1498, 1499 (9th Cir. 1997).

n236. See *White*, supra note 101, at A1.

n237. See *id.*

n238. See *Lumpkin*, 109 F.3d at 1502 ("Mayor Jordan's press releases consistently acknowledged Reverend Lumpkin's right to adhere to his religious faith.").

n239. See *id.* at 1499 n.1.

n240. *Id.*

n241. *Lumpkin v. Jordan*, No. C-93-4338 FMS, 1994 WL 669852, at *2 (N.D. Cal. Nov. 22, 1994).

n242. *Petition for Writ of Certiorari at A-54, Lumpkin v. Brown*, 522 U.S. 995 (1997) (No. 97-367).

n243. See supra note 111 (summarizing conversation between Lumpkin and Mayor Jordan at a breakfast meeting on August 23, 1993).

n244. *Rankin v. McPherson*, 483 U.S. 378, 388 (1987); cf. *Sims v. Metropolitan Dade County*, 972 F.2d 1230, 1234 (11th Cir. 1992) ("The law does not require omniscience of the Defendants in their investigation of employee conduct; it requires only that their investigation be thorough enough to support a reasonable person's conclusion that action based thereon would not violate clearly established law.").

n245. *McPherson*, 483 U.S. at 390.

n246. *Lumpkin*, 1994 WL 669852, at *1.

n247. See *id.* Assuming that the trial and appellate courts were correct in applying a Pickering test to Lumpkin's termination, speech constituting religious action presents a "hybrid situation" invoking both the right of free speech and the right of free exercise of religion. *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872, 882 (1990). Pursuant to *Smith*, the Mayor's conduct should have been subjected to heightened scrutiny, and the government should have been required to demonstrate a "paramount interest" of "vital importance" to overcome both Lumpkin's free speech and free exercise rights, *id.* at 881-82, such as an "incitement to imminent lawless action," *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).

n248. *Connick v. Myers*, 461 U.S. 138, 146 (1983).

n249. See U.S. Const. amend. I; see also *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819, 845-46 (1995) (holding that speech from religious viewpoint is entitled to

First Amendment protection); *Rankin v. McPherson*, 483 U.S. 378, 395 (1987) (Scalia, J., dissenting) ("In short, speech on matters of public concern is that speech which lies "at the heart of the First Amendment's protection." (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978))).

n250. *Connick*, 461 U.S. at 149.

n251. *Id.* at 150.

n252. *Lumpkin*, 1994 WL 669852, at *1.

n253. *Lumpkin v. Brown*, 109 F.3d 1498, 1500 (9th Cir. 1997) (quoting S.F., Cal., Admin. Code 12A.2 (2000)).

n254. 505 U.S. 377 (1992).

n255. *Id.* at 391.

n256. See *id.* at 384.

n257. *Id.* at 395 (footnote omitted); see also *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 581 (1995) ("Disapproval of a private speaker's statement does not legitimize use of the [State's] power to compel the speaker to alter the message by including one more acceptable to others.").

n258. *Connick v. Myers*, 461 U.S. 138, 151 (1983).

n259. White, *supra* note 101, at A1.

n260. The *Connick* Court was also concerned with whether the time, place, and manner of the speech interfered with the employee's duties. *Connick*, 461 U.S. at 152. Lumpkin's television interview clearly did not conflict with his attendance at commission meetings. Finally, *Connick* also inquired about the context in which the dispute arose to determine whether the speech arose out of an employment dispute. *Id.* at 153. However, before the television interview Mayor Jordan was pleased with Lumpkin's performance as a Human Rights Commissioner. There is no evidence that Lumpkin had a grievance with the Mayor, the Human Rights Commission, or the City.

n261. *Shahar v. Bowers*, 114 F.3d 1097, 1105-06 (11th Cir. 1997).

n262. *Id.* at 1106.

n263. *Id.*

n264. *Id.* at 1107 (quoting *Waters v. Churchill*, 511 U.S. 661, 676-77 (1994) (plurality opinion)). "Government employers should be allowed to use personnel procedures that differ from the evidentiary rules used by courts, without fear that these differences will lead to liability." *Id.*

n265. See *id.* at 1107-08 (citing *Waters*, 511 U.S. at 673-75).

n266. *Id.* at 1106. The court cited the Supreme Court's plurality opinion in *Waters v. Churchill*, which it characterized as holding that, "for [the] Pickering balance, facts to be weighed on the government's side merely need to be reasonable view of facts or reasonable predictions; manager's view of circumstances is entitled to substantial weight." *Id.* (citing *Waters*, 511 U.S. at 673-81).

n267. See *id.* at 1106-07.

n268. *Id.* at 1099 n.1.

n269. *Id.* at 1106.

n270. *Id.* at 1107 (footnote omitted).

n271. *Id.* at 1110 n.24. The court based this perception in part on the state's anti-same-sex marriage law, Ga. Code Ann. 19-3-3.1 (1999), and in part on the role played by Georgia's senators and most of its representatives in the passage of the Defense of Marriage Act, 1 U.S.C. 7 (Supp. 1997) (defining marriage as consisting of a man and a woman), and 28 U.S.C. 1738C (Supp. 1997) (granting states the power to refuse to recognize same-sex marriages entered into in other states). See *id.*

n272. *Id.* at 1107 (footnote omitted).

n273. *Id.* at 1109.

n274. *Romer v. Evans*, 517 U.S. 620, 640-42 (1996) (Scalia, J., dissenting).

n275. *Shahar*, 114 F.3d at 1105 n.17.

n276. *Id.* at 1105 (quoting *Watkins v. United States Army*, 847 F.2d 1329, 1357 (9th Cir. 1988) (Reinhardt, J., dissenting), vacated, 875 F.2d 699 (1989)).

n277. *Id.*

n278. *Id.*

n279. *Id.* at 1109.

n280. *Id.*

n281. *Id.* at 1107 (quoting *Connick v. Myers*, 461 U.S. 138, 152 (1983)). The court of appeals also cited *Waters v. Churchill*, 511 U.S. 661, 673 (1994) ("We have given substantial weight to government employers' reasonable predictions of disruption,... even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential."). See *Shahar*, 114 F.3d at 1107-08.

n282. See *Shahar*, 114 F.3d at 1108.

n283. *Id.*

n284. For example, in one media report, several Georgia public officials denied concern about Bowers' hiring of Shahar. See McKay Jenkins, Metro Officials' Views Mixed on Bowers's Action, Atlanta J. & Const., Oct. 5, 1991, at B3.

n285. See *Shahar*, 114 F.3d at 1108 ("The Attorney General, for balancing purposes, has pointed out, among other things, his concern about the public's reaction - the public that elected him and that he serves - to his having a Staff Attorney who is part of a same-sex "marriage."").

n286. *Romer v. Evans*, 517 U.S. 620, 632-36 (1996).

n287. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding unconstitutional the dismissal of non-civil-service employees of the Cook County, Illinois Sheriff's Office by a newly elected sheriff because of the employees' political beliefs and associations).

n288. *Branti v. Finkel*, 445 U.S. 507, 518 (1980) (emphasis added) (arguing that the "ultimate inquiry is not whether the label "policymaker' or "confidential' fits a particular position").

n289. See *McDaniel v. Paty*, 435 U.S. 618, 629 (1978) (holding unconstitutional a state statute banning clergy from serving as state legislators); *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961) (holding unconstitutional a religious test for public office).

n290. See *McDaniel*, 435 U.S. at 628-29 (holding that no basis exists for fearing that clergy in public office will not be faithful to the oaths of office); *Witherspoon v. Illinois*, 391 U.S. 510, 522-23 (1968) (holding that jury veniremen cannot be excluded for cause on the ground of religious scruples against the death penalty); *Torcaso*, 367 U.S. at 496 (holding that religion cannot be used as a criterion for government employment).

n291. *Branti*, 445 U.S. at 517. But see *supra* note 285 and accompanying text for the author's criticism of this rationale.

n292. See, e.g., *Harris v. McRae*, 448 U.S. 297, 318-20 (1980) (rejecting an Establishment Clause attack on the Hyde Amendment prohibiting Medicaid funding of abortion despite the parallel between the provisions of the amendment and the tenets of the Roman Catholic Church).

n293. See *Witherspoon*, 391 U.S. at 521-23.

n294. 521 U.S. 203 (1997).

n295. See *School Dist. v. Ball*, 473 U.S. 373, 386-87 (1985), overruled by *Agostini v. Felton*, 521 U.S. 203 (1997) (holding that professional religious schoolteachers were at substantial risk of infusing religious messages into the publicly-funded afterschool program classes they also taught).

n296. *Agostini*, 521 U.S. at 223.

n297. *Id.* at 223-24 (citation omitted).

n298. *Connick v. Myers*, 461 U.S. 138, 151 (1983).

n299. *Id.* at 152.

n300. *Waters v. Churchill* 511 U.S. 661, 673 (1994) ("Few of the examples [of government employers restricting protected speech] we have discussed involve tangible, present interference with the agency's operation. The danger in them is mostly speculative.").

n301. *Rutan v. Republican Party*, 497 U.S. 62, 76 (1990).

n302. *Rankin v. McPherson*, 483 U.S. 378, 384 (1987).

n303. *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

n304. *Jenkins*, *supra* note 146, at A12.