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Article

THE FREEDOM OF INTIMATE ASSOCIATION IN THE TWENTY FIRST CENTURY

Nancy Catherine Marcus[a1]

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In this first decade of the twenty-first century, the Supreme Court finds itself at historic juncture: the Rehnquist era has come to an end while the new bench is left to resolve the jurisprudential loose ends of the past century.

This article focuses on one such unresolved area of law, the constitutional doctrine of intimate association, which arguably has its roots in the historic Griswold v. Connecticut[1] decision. With Griswold having recently celebrated its fortieth birthday, the case warrants revisiting in light of its profound significance for individual rights in the twenty-first century. Famous for identifying a fundamental right to reproductive freedom and privacy as rooted in various penumbras and emanations of the Bill of Rights,[2] Griswold provided a critical bridge between various constitutional amendments with overlapping individual rights protections.

While some have since questioned the origins of the right to privacy,[3] Section I of this article engages an alternative reading of Griswold as embodying a broader constitutional doctrine with both First and Fourteenth Amendment components: the freedom of intimate ***270** association. It explores the evolution of this doctrine from its articulation in Kenneth Karst's article The Freedom of Intimate Association,[4] which first linked the doctrine to Griswold, to the parallel analyses in the Supreme Court's Roberts v. United States Jaycees[5] decision and later intimate association cases. The section continues by describing the ensuing split in the circuits in their struggles to interpret the doctrine, harmonized only by a consensus in the circuits' cries for further clarity at the end of the twentieth century. As Section II describes the critical revisiting of intimate association that came with the new century in the Court's Lawrence v. Texas[6] decision. This section explains how Lawrence may be read as the first case in which the Supreme Court actually affirmed a litigant's freedom of intimate association, providing the necessary tools for the development of a more coherent and defined intimate association doctrine. Section II additionally proposes a new presumption-based model for re-establishing the parameters of intimate association while staying true to the original intimate association doctrine as adopted by the Court in Roberts. Section III further describes the advantages of re-affirming and clarifying freedom of intimate association as a powerful unifying doctrine by exploring its various potential applications.

Should the Court actualize the potential provided by Lawrence, the hopes of those who have long awaited more clarity in the Court's intimate association jurisprudence may finally come to fruition.

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I. Background: Intimate Association in the Twentieth Century

Four decades after the Supreme Court issued its historic Griswold opinion, the decision's legacy continues in full force, often cited as the source of modern reproductive privacy rights. Less often is the casezed as the first 'freedom of intimate association' case, but this too has the potential to become part of Griswold's legacy over time. This section explores Griswold's role as the case giving birth to the d and explores the doctrine's subsequent evolution, first as a concept fleshed out through scholarly writings, then as explicitly adopted by the Supreme Court, and finally as subject to varying and confused ***271** interpretations by the lower courts. A doctrine with much promise for the future securing of individual rights, the freedom of intimate association remains, while clearly established under the Constitution, relatively undefined at the end of the century. This section sets forth the questions raised by such a profoundly promising doctrine of individual liberty with such largely undefined boundaries and dimensions.

A. Griswold Revisited: A Karstian Approach to Intimate Association

Throughout the years, the Supreme Court's Griswold decision has been recognized as a landmark decision for its role in establishing a fundamental right to privacy in intimate life decisions. Applying the reproductive freedom and privacy protections of Griswold to unmarried couples in Eisenstadt v. Baird,[7] the Court described its previous Griswold decision as establishing that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[8]

The Court in Griswold identified this privacy right as rooted in the First Amendment's "freedom to associate and privacy in one's associations,"[9] as well as in the other penumbras and emanations of the Bill of Rights, as applied to the states by the Fourteenth Amendment.[10] However, upon extending its recognition of reproductive freedom to abortion rights in Roe v. Wade,[11] the Court began consistently approaching reproductive rights cases in terms of substantive due process privacy rights, rather than in terms of other constitutional ***272** provisions, for which it was criticized by both proponents[12] and opponents[13] of a fundamental right to reproductive privacy and liberty

The landscape of privacy rights has evolved significantly in the four decades following Griswold. The constitutional protections of Griswold have expanded in scope even as the "right to privacy" itself has been less frequently invoked in the Court's more recent individual liberty decisions.[14] This expansion of Griswold's influence, paired with a new articulation of privacy rights in terms of broader liberty protections, is exemplified in the Court's Lawrence[15] decision. In Lawrence, the Court found Griswold to be the "most pertinent beginning point"[16] of its substantive due process analysis, which traced the history of privacy rights decisions emanating from Griswold and ultimately affirmed strong constitutional protections for gays and bisexuals in their intimate conduct and relationships. Rather than refer to such rights as "privacy rights," however, the Lawrence Court used broader "liberty" language, echoing the famous 'heart of liberty' language in the post-Roe abortion decision Planned Parenthood of Southeastern Pennsylvania v. Casey.[17]

While the terminology surrounding privacy rights has transitioned into a broader liberty paradigm in reproductive rights decisions, what has remained constant is the Court's focus on substantive ***273** due process coupled with a reciprocal failure to apply First Amendment and equal protection principles that were also present in Griswold. Because of this exclusive due process focus of reproductive rights focus, Griswold itself has come to be known as a substantive due process privacy rights decision.

Kenneth Karst's article, The Freedom of Intimate Association,[18] proposed a broader reading of Griswold which embraces the doctrinal significance of the case far beyond its contributions to substantive due process privacy rights. The first comprehensive articulation of a constitutional freedom of intimate association, Karst's article lauded the Griswold opinion's historic (if implicit) recognition that associational rights are confined neither to the First Amendment nor to public contexts and that, correspondingly, privacy rights are not confined to a substantive due process context.[19] Rather, Karst posited, the constitutional freedom of intimate association implicitly embraced by the Court in Griswold exists within a more general zone of privacy

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created by the First, Fourth, and Fifth Amendments (and extended as against state encroachment of individual rights by the Fourteenth).[20] Karst concluded that Griswold, viewed in conjunction with a larger line of cases, evidenced a larger trend toward recognizing intimate association as an organizing principle underlying both First and Fourteenth Amendment cases.[21]

While Karst noted that the Supreme Court had not yet given name to the freedom of intimate association nor clearly delineated the rights it protects,[22] he found Justice Douglas's description of marriage in the following passage of the Griswold opinion to indicate the Court's recognition of an underlying freedom of intimate association:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[23]

***274** By Karst's calculations, in 1980 there had been fifty cases since Griswold--cases addressing marriage rights, rights in comparable nonmarital situations, illegitimacy, parental rights, and gay rights, for example--which could rightly be categorized[24] as intimate association cases (if not explicitly named as such by the Court), demanding a higher level of judicial scrutiny.[25] Karst identified four specific values common to the types of intimate association warranting greater constitutional protection, including physical society, caring and commitment, close and enduring emotional intimacy, and self-identification.[26]

Since such values can only be fully realized when the choice to form and preserve intimate associations is protected,[27] Karst explained, Griswold's affirmation of reproductive freedom had identified that freedom as encompassing individual autonomy and associational privacy.[28] However, the emergence of the doctrine of intimate association as an organizing principle of constitutional rights was not a smooth integration. Karst aptly described the majority opinion in Griswold: "Justice Douglas chose to weave the opinion from gossamer of his own. Frowning at substantive due process, glancing in the direction of the First Amendment, and altogether ignoring equal protection, he clothed the decision in a constitutional right of privacy that has kept commentators busy ever since."[29] Since Griswold, Karst continued, intimate association guarantees have become securely rooted in modern substantive due process, while the Court has also frequently cloaked its intimate association decisions in equal protection garb.[30]

***275** So which is it? A First Amendment right? An equal protection or substantive due process right? Karst concludes that it is all three, given that acts such as marriage and sexual intimacy implicate a First Amendment freedom of expression[31] as well as equality and liberty components.[32]

Acknowledging that the Court might be reluctant to frame its analyses in terms of expressive rights (nearly every act could be considered expressive), Karst suggested using the First Amendment as a source of analogous perspectives for Fourteenth Amendment due process claims to intimate association, while relying on substantive due process as a unifying source of intimate associational rights.[33] For such purposes, the First Amendment's historically heightened protection of unpopular minority groups[34] can be instructive in intimate association cases involving public expression of intimate associations.[35] In such cases where there is a clear causal connection between expressing one's sexual orientation, for example, and being treated or deprived of a fundamental right because of that expression, First and Fourteenth Amendment rights are both at stake. As for the role of equal protection, Karst's intimate association doctrine is but a piece of his larger doctrine of equal citizenship, which reflects the Constitution's mandate that each citizen be treated "as a respected, responsible, and participating member" of society.[36] The principles of equal citizenship can serve as an instrumental guide in the Court's balancing of rights and interests in intimate association cases.[37]

Intimate association can ultimately serve as a critical organizing principle in affirming both the autonomy and moral judgment of individuals, as it did in Griswold, and in integrating the various constitutional sources of protections for one's most intimate relationships.

***276 B. Intimate Association Hits the Courts: Roberts v. United States Jaycees**

Professor Karst ended his 1980 article with a disclaimer that one should not expect courts to adopt his conclusions about intimate association any time soon.[38] Indeed, a closely divided Supreme Court rejected intimate association rights for gays and bisexuals in its infamous Bowers v. Hardwick[39] decision six years later.[40]

However, two years prior to that, the Supreme Court did in fact appear to adopt much of Karst's intimate association framework in Roberts v. United States Jaycees,[41] even while, as Bowers indicated, it was not yet ready to extend its recognition of intimate association rights to same-sex couples.

In Roberts, the Court rejected a challenge by a male-only club to a state public accommodations law prohibiting gender discrimination, holding that the law violated neither the intimate associational nor the First Amendment expressive rights of the Jaycees. The Court noted, as it had in Griswold, that since the 1958 decision NAACP v. Alabama,[42] First Amendment protections have been interpreted as including a right of association. In Justice Brennan's majority opinion, the Court then proceeded, for the first time, to explicitly recognize the freedom of intimate association as a type of associational right protected by the Constitution.[43] Noting that the right of association exists as both a First Amendment right of expression and as a fundamental component of personal liberty, Brennan concluded that in some cases, "freedom of association in both its forms may be implicated."[44] While acknowledging the Jaycees' assertion that the case involved both types of freedoms--expression and intimate association--Brennan was careful to distinguish and engage in separate analyses of the two claims, beginning with a specific examination of the freedom of intimate association claim.[45]

***277** Citing a long line of Fourteenth Amendment liberty and privacy rights cases,[46] Brennan explained that the choice to enter into some types of intimate associations, including marriage, family relationships, and other close personal relationships, is an essential liberty that is central to constitutional protections of individual freedom.[47] Brennan wrote:

> The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State . . . Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty. . .[48]

After initially introducing intimate association in both First and Fourteenth Amendment terms, the Court in Roberts framed its intimate association analysis largely in terms of the freedom of association's Fourteenth Amendment liberty component. While the Court may have felt it unnecessary to focus on the First Amendment--the link between associational rights and due process being comparatively new territory warranting more exploration--the opinion has consequently been criticized by some as being unclear about the specific constitutional sources of the intimate association rights it described.[49] An alternative reading of the Roberts opinion, however, suggests that the Court may have deliberately chosen not to limit intimate association to one particular constitutional source, but rather embraced freedom of intimate association's multifaceted nature. With the freedom of intimate association encompassing both First and Fourteenth ***278** Amendment dimensions, the Court may have decided that the specific roots of that freedom are not as important to emphasize as intimate association's broader meaning and protections in any given case.

Whether or not it should be criticized for not clearly identifying the roots of intimate association, Brennan's majority opinion did leave the precise parameters of the right to association open to interpretation, though providing broad guidelines for future intimate association cases.[50] Brennan suggested, for example, that intimate associations which might warrant increased levels of protection under the Constitution may be "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."[51] Saving a more specific description of intimate association's parameters for a later date, Brennan added that relevant factors in determining which relationships are intimate enough to warrant greater constitutional protection may include the "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent."[52]

Comparing the Roberts guidelines to Karst's description of the four common values of intimate association, it may not be a stretch to describe Roberts as the Supreme Court case "that lifted the right to intimate association from Karst's article."[53] While the core values of intimate association identified by Karst included close society, caring commitment, intimacy, and self-identification,[54] the Supreme Court's parallel description of intimate association as distinguished by smallness, selectivity (echoing Karst's emphasis on choice as critical to the realization of intimate associations) and seclusion, and its further description of intimate association's key characteristics as also including congeniality and/or intimacy in size, purpose, and policies, closely fits Karst's description of intimate association. Both the Karst article and the Roberts opinion recognize intimate association not as an absolute guarantee, but as a right that should receive varying degrees of ***279** protection depending on the extent to which such characteristics are present in a given case.[55]

Additionally, both the Karst article and the Roberts opinion recognize diversity as a driving force of intimate association. Diversity is a critical component of Karst's article as well as his broader equal citizenship doctrine, bridging equal protection and liberty.[56] In Roberts, the Supreme Court similarly acknowledged the critical importance of diversity in the protection of intimate associations:

> Without precisely identifying every consideration that may underlie this type of constitutional protection, we have noted that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State. . . . Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.[57]

Finally, the Roberts Court's description of freedom of association as both a First Amendment right and a substantive due process liberty interest appears to follow Karst's recommendation that courts treat the First Amendment as a source of analogous perspectives for Fourteenth Amendment due process claims involving personal relationships, while simultaneously treating freedom of intimate association as a separate and distinct right from the broader freedom of expressive association.

***280** While freedom of intimate association as a constitutional doctrine and source of personal liberty protection may have its roots in the Supreme Court's Griswold decision, it was only after the doctrine was given a name by Karst in his seminal article that the Court itself explicitly gave name to this new doctrine. With Roberts having explicitly named the freedom of intimate association doctrine and begun to describe its various dimensions and protections, the Court entered a new era of constitutional protections for personal relationships, opening the door for future decisions to apply the doctrine with more specificity.

C. Roberts Applied: Confusion and Divide

The application of the freedom of intimate association doctrine in future cases has been a bit of a bumpy ride, with the Supreme Court declining to add enough clarity to the doctrine for lower courts to follow Roberts with confidence and consistency. This section of the article describes the troubled path of the intimate association doctrine from its minimal application in Supreme Court cases following Roberts to the divisions that consequently occurred among lower courts and circuits struggling to interpret the obscure doctrine.

1. Supreme Court Cases Following Roberts

As described in the previous section, remarkable parallels between the Roberts opinion and Karst's intimate association article suggest that the Supreme Court was closely following Karst's proposed intimate association model when it articulated the doctrine for the first time in Roberts.

The differences between Karst's article and the Roberts opinion are as critical to understanding the evolution of the intimate association doctrine as the similarities between the twoIn particular, the parallels between Karst's article and the Roberts opinion appear[58] to end when the role of equality in each is considered. In Karst's article, equality is a necessary component of

intimate association along with liberty, since intimate association is but a part of the larger equal citizenship that should guide every individual liberties case. In Roberts, equality and liberty found themselves at odds. The Jaycees' freedom ***281** of association claim was in direct opposition to a public accommodations law designed to protect equal rights.[59] This was to be an unfortunate trend in other intimate association cases,[60] in which equality and liberty kept finding themselves at ostensibly[61] opposite corners of the ring, intimate association serving as a tentative referee struggling to enforce an as-yet unwritten set of clear rules.

The first case after Roberts to address intimate association, Bowers v. Hardwick,[62] did so with the majority opinion sidestepping the doctrine altogether, to the consternation of Justice Blackmun, who issued a forceful dissent. Before the case arrived at the Supreme Court, the Eleventh Circuit in Hardwick v. Bowers[63] had accepted the intimate association claim of litigants challenging Georgia's sodomy ban. As the Supreme Court had done two years prior in Roberts, the Eleventh Circuit in Hardwick interpreted Griswold as recognizing a freedom of intimate association, with Eisenstadt v. Baird extending that right to unmarried individuals.[64] The Eleventh Circuit concluded that "[t]he 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."[65]

Upon reviewing the Eleventh Circuit's decision, however, the Supreme Court majority opinion of Bowers v. Hardwick was pointedly silent about the intimate association (not to mention the equal protection) claims raised by Hardwick. The Bowers majority narrowly defined the constitutional issue at hand as only whether there was a "fundamental right to engage in homosexual sodomy."[66] It was only in ***282** Justice Blackmun's dissent that any significant ink was devoted to intimate association. Addressing the Bowers claim in terms of the constitutional privacy and freedom of intimate association protections that should be accorded to intimate relationships, Blackmun wrote,

I believe that Hardwick has stated a cognizable claim that [the Georgia sodomy statute] interferes with constitutionally protected interests in privacy and freedom of intimate association . . . the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy. . . .

The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others . . . .[67]

In his dissent, Blackmun emphasized the importance of diversity[68] and the intertwining nature of the privacy and intimate association rights at issue.[69] He concluded his dissent by imploring his colleagues to revisit the freedom of intimate association and its potentially valuable role in preserving traditional American principles of self-determination, diversity, and respect for privacy in intimate relationships, arguing:

> [T]he mere fact that intimate behavior may be punished when it takes place in public cannot dictate how States can regulate intimate behavior that occurs in intimate places. . . I can only hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their ***283** intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do. Because I think the Court today betrays those values, I dissent.[70]

The remaining twentieth century Supreme Court decisions that mentioned intimate association only minimally addressed intimate association in terms of what it is not, without providing meaningful guidance on what it is.

In Board of Directors of Rotary Internat'l v. Rotary Club of Duarte,[71] decided a year after Bowers, a majority of the Court explicitly recognized intimate association for the first time since Roberts. Upholding a discrimination ordinance as applied against a quasi-public business male members, the Court engaged in an intimate association analysis that described Roberts as a First Amendment case.[72] The Court did however appear to recognize the Fourteenth Amendment dimensions of intimate association as well, citing several substantive due process cases for the proposition that the freedom of intimate association is a fundamental component of the liberty protected by the Bill of Rights.[73] Applying the general standards of Roberts, the Court

concluded that rotary clubs lack the intimate and private characteristics of intimate associations warranting constitutional protection.[74] In its analysis, the Court did little to further define the parameters of intimate association as a doctrine, leaving such boundaries open for future determination.[75]

In a similar case decided the next year, New York State Club Association v. City of New York,[76] the Court upheld an anti-discrimination ordinance as applied against another large, quasi-public business networking club, affirming the appellate court's ruling which had ***284** relied on Roberts.[77] However, the Court in the New York State Club Association again did nothing to further clarify the doctrine of intimate association, not even mentioning intimate association by name. As in Duarte, the Court in New York State Club Association once again invoked the precedent of Roberts only to explain what intimate association is not (i.e., it is not applicable to large, quasi-public clubs), not to further define what it is.

The final references by the Court before the turn of the century to intimate associational rights of claimants appeared in a small group of cases in which the Court did at least begin focusing on claims of individuals, as opposed to group associations, but nonetheless added little clarity to the doctrine of intimate association.

In City of Dallas v. Stanglin,[78] the Court held that a municipal ordinance prohibiting teenagers from using a dance hall did not infringe on their freedom of intimate association, again citing Roberts without any detailed discussion of intimate association other than to say that it "is clear beyond cavil that dance-hall patrons, who may number 1,000 on any given night, are not engaged in the sort of 'intimate human relationships' referred to in Roberts."[79]

In FW/PBS v. City of Dallas,[80] the Court held that a city ordinance defining and regulating hotels that rent rooms for less than ten hours as "sexually oriented businesses" did not violate the hotel guests' freedom of intimate association. In that case, the Court finally had the opportunity to apply its intimate association doctrine to individuals engaged in intimate acts within a private context. Despite the private and sexually intimate nature of the relationships described in that case, the Court, after quoting Roberts' holding that the Bill of Rights protects certain types of highly personal relationships, still concluded that the types of relations that occur in hotel rooms for less than ten hours do not qualify.[81] Justice O'Connor, with a majority of the Court concurring, wrote that such relationships are simply "not those that have 'played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals ***285** and beliefs'"[82] and consequently are not entitled to protection as intimate associations.[83]

Finally, while not presented as a formal claim or described in doctrinal depth, freedom of intimate association made brief appearances in the Court's abortion rights decisions. In Planned Parenthood of Southeastern Pa. v. Casey,[84] a majority of the Court, in declining to overturn Roe v. Wade, concurred that to overturn Roe would be to ignore that in the two decades since that decision, "people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail," and that reproductive autonomy has furthered the ability of women to be equal participants in society[85] The Court's acknowledgement of the sanctity of intimate associations as tied to reproductive autonomy in Casey appears to have evolved significantly since Ohio v. Akron Center for Reproductive Health,[86] decided four years prior to Casey, in which the Court upheld a parental notification abortion restriction in the name of preserving the family, which it called "society's most intimate association."[87] While neither Casey nor Akron Center engaged in a full intimate association analysis, the opinions' similar references to the primacy of intimate relationships-- which served in one case to preserve reproductive freedom and in the other to uphold an abortion restriction--leaves the role of intimate association in future reproductive rights cases open.[88]

***286** With the turn of the century came no further clarity in the Court's intimate association analyses.

In Boy Scouts of America v. Dale,[89] a case in which the Boy Scouts of America invoked its right to "intimate association" to defend its expulsion of a gay scoutmaster, the Supreme Court revisited intimate association in a brief footnote, describing the precise scope of intimate association as "unclear," even while dismissing the doctrine as inapplicable to the case at hand due to the large size, broad scope, and nonselectivity of the Boy Scouts.[90] Concluding that the Boy Scouts had a right not to associate with gays, thereby justifying its expulsion of Dale, the Court did not expound further on the doctrine of intimate association.

In Troxel v. Granville,[91] a case addressing the visitation rights of grandparents, only Justice Stevens mentioned intimate association, in a fleeting footnote within his dissenting opinion. Addressing the hesitation of federal courts to second guess certain state court decisions, Stevens wrote of such deference, "[t]hat caution is never more essential than in the realm of family and intimate relations. . . [This principle] flows in equal part from the premise that people and their intimate associations are complex and particular, and imposing a rigid template upon them all risks severing bonds our society would do well to preserve."[92] While hardly a comprehensive or substantive exposition on the doctrine of intimate association, the footnote may nonetheless shed light on the reasons behind at least one member of the Court's reluctance to define strict parameters and boundaries around the doctrine.

Finally, in Overton v. Bazzetta,[93] the Court held that prison regulations prohibiting visitation from former prisoners as well as from ***287** nieces, nephews, and children where the prisoner's parental rights had been terminated did not violate substantive due process or First Amendment associational rights, explicitly rejecting the prisoners' intimate association claims while declining to define the doctrine with any detail.[94]

2. The Circuit Court Divide

Despite the Supreme Court's revisiting the doctrine of intimate association numerous times since Roberts, the freedom of intimate association still remained relatively undefined. With the Court having left the specific parameters and contours of that right open to interpretation, the result was a myriad of conflicting approaches to intimate association by lower courts.

O'Connor's FW/PBS analysis, placing a new emphasis on tradition, was the first step the Court had taken toward substantially refining its intimate association doctrine since Roberts. With intervening and subsequent Supreme Court decisions continuing to leave the parameters of intimate association relatively undefined, lower federal courts were left only with the guiding precedents of Roberts (whose broad sliding-scale framework would appear to allow for protection of even non-traditional relationships) and FW/PBS (which seems to narrow the scope of the freedom of intimate association's protections primarily to "traditional" relationships). The contrasting tones of the two decisions have contributed to a split among the federal courts in their own interpretations and inconsistent applications of the freedom of intimate association.

Some who tracked the circuit court split previous to the turn of the century focused in part on the apparent division among the circuits (and even within some circuits) in their designation of intimate association as either a First Amendment or a Fourteenth Amendment right, a hybrid of the two, or of uncertain constitutional derivation.[95] However, the courts' different applications of the First and Fourteenth Amendments in intimate association cases may not actually constitute ***288** such a troublesome split. As Karst and Roberts both explained,[96] some cases of intimate association will trigger either First Amendment or Fourteenth Amendment protections, or both.[97] Any inconsistency between or within circuits regarding their varying constitutional emphases may merely be the result of both the fact-specific and the hybrid nature of intimate association, and need not indicate a circuit's larger judicial philosophy.

Consequently, the following analysis of the circuit court split focuses not on the courts' varying designations of the freedom of intimate association's constitutional roots, but rather on the circuits' common struggles for clarity in their interpretations of the broad guidelines of Roberts and the more narrow tradition-focused FW/PBS opinion.

a. Analysis Through 1998

To date, the most comprehensive analysis of the circuit courts' varied approaches in implementing the broad intimate association framework established by Roberts has been Collin O'Connor Udell's 1998 article Intimate Association: Resurrecting a Hybrid Right.[98] Udell's analysis notes a striking lack of consistency among the intimate association tests applied by the federal circuits. As of 1998, Udell concluded, the Second Circuit was applying a "truncated" version of the Roberts test; the Third Circuit had abandoned the Roberts continuum in favor of a harsher "all or nothing" approach; the Fifth Circuit had create a separate "private association' rights category while also applying a Pickering style approach to government employee cases; and the Sixth, Ninth, Tenth and Eleventh Circuits had vacillated between various approaches, including variations of the Roberts test, a "direct or substantial interference" test, a tradition-focused test, a deferential balancing test, and intent-based

test, the Elrod-Branti test, strict scrutiny, and other tests.[99]

A review of the cases highlighted by Udell as best capturing each circuit's position on intimate association indicates that the circuits ***289** which had taken the broadest approach to intimate association as of 1998, most closely mirroring the framework of Roberts, was the Second Circuit.[100] The circuit which had departed most sharply from Roberts was the Third Circuit.[101] The remaining circuits had either failed to address intimate association with either enough depth or consistency to be considered as having clearly established an either broad (i.e., closely mirroring Roberts) or narrow (e.g., tradition-focused) intimate association doctrine.

b. Since 1998

Since Udell's 1998 analysis, the split among the circuits and their ongoing frustrations at the lack of clarity provided by the Supreme Court's intimate association precedents continued. In the Second Circuit, the majority opinion of Patel v. Searles[102] turned to the Bible for poetic guidance in confronting the ambiguity of the freedom of intimate association:
This appeal deals with the constitutional right of intimate association. Although clearly recognized in a general way by the Supreme Court and in scholarly writings, all of its boundaries have not yet been fixed. We think it unnecessary for our purposes to attempt to fully remedy that lack. Like the wind that blows where it wills and can be heard, yet no one knows "from where it cometh and whither it goeth" John 3:8, this constitutional right is real despite the lack of exact knowledge regarding its derivation and contours.[103]

***290** Citing Roberts in its description of intimate association's sliding-scale of protections, the Second Circuit found that the plaintiff's relationship in that case to his father, wife, children and siblings was entitled to the highest degree of protection.[104]

The Third Circuit has addressed the freedom of intimate association only summarily in recent years. In Pi Lambda Phi Fraternity v. University of Pittsburgh,[105] for example, the Third Circuit, following the precedents of Roberts and Duarte, ruled that a fraternity's membership requirements, size, and inclusiveness weighed against granting its intimate association claim.[106]

Intimate association was also addressed only in passing in the Third Circuit's Forum for Academic and Institutional Rights [hereinafter 'FAIR'] v. Rumsfeld decision,[107] and not at all in the subsequent Rumsfeld v. FAIR[108] Supreme Court decision reversing the Third Circuit. In FAIR v. Rumsfeld, the Third Circuit had struck down as violating law schools' right of expressive association the 'Solomon Amendment,' which required the Department of Defense to withhold federal funds from law schools that refused[109] to affirmatively accommodate military job recruiters. The majority opinion of the Third Circuit decision dismissed an intimate association analysis as irrelevant in a brief footnote,[110] and intimate association did not reappear in the Supreme Court's eventual Rumsfeld v. FAIR decision upholding the Solomon Amendment. Despite intimate association not being central to its analysis, this case is worth mention because of the compelling circular conundrum of oppositional associational rights it presented to the Supreme Court: the case implicated the right to not associate with gays and bisexuals versus the right to not associate with those who will not associate with gays and bisexuals, with the underlying intimate associational rights of those gays and bisexuals hanging in the balance of the case's resolution.Additionally, with the intimate associational rights of LGBT students neither directly asserted by the litigants in ***291** that case nor mentioned at all by the Court in its decision upholding the Solomon Amendment, Rumsfeld v. FAIR represents yet another missed opportunity for the Court to clarify its doctrine on the freedom of intimate association.

The Fifth Circuit, in a per curium (and unpublished) opinion, Walker v. Henderson,[111] engaged in a comprehensive analysis of Roberts and the intimate association Supreme Court cases following Roberts. Echoing the refrain of frustration with the broad doctrine common across the circuits at the turn of the century, the court be Roberts had clearly established the existence of an intimate association doctrine without describing the connection between familial and nonfamilial relationships establishing the relative importance of the various intimate association factors, or identifying the contours of the right.[112]

The Walker opinion was simultaneously broad and narrow. The analysis was broad in its recognition that the sliding scale established by Roberts allows for protection of various types of intimate associations:

'Between these poles . . . lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular [State] incursions . . . .' Accordingly, determining which intimate associations merit constitutional limits on State intrusion 'entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.'[113]

Despite according a broad reading of intimate association arguably as true to the original Roberts reading as any, the Fifth Circuit's conclusion itself was narrow, denying intimate association protections to a woman whose personal relationships with friends and family were interfered with by a Mississippi Highway Patrol officer, allegedly motivated by race, who persistently harassed Walker and kept her friends and family from visiting her.[114]

***292** In the Sixth Circuit, a series of intimate association cases have been decided in recent years with varying results. In Johnson v. City of Cincinnati,[115] the court held that a city ordinance excluding the plaintiffs from designated "drug exclusion zones" based on their past drug conviction record violated their associational and due process rights. To arrive at that conclusion, the court applied the framework of Roberts' intimate association doctrine, since, the court explained, "both plaintiffs' claims involved intimate relationships that 'foster diversity and act as critical buffers between the individual and the power of the State.'"[116] The court then delved into a broader discussion of fundamental familial rights and liberty interests which emphasized the role of tradition. Addressing the rights of one plaintiff, a grandmother who was denied access to her grandchild, the court emphasized the tradition of according strong protections to familial rights in childrearing,[117] and concluded that the grandmother, like other family members, had a fundamental associational right to participate in her grandchildren's upbringing.[118] As to the second plaintiff, who was prevented from visiting the neighborhood where his attorney lived under the drug exclusion zone law, the court once again cited Roberts in affirming a fundamental associational right between attorney and client.[119]

After finding that the relationships in the case implicated both the First Amendment and a fundamental Fourteenth Amendment substantive due process liberty interest,[120] the court concluded that the applicable standard of review should be strict scrutiny and consequently granted the intimate association claims of the plaintiffs.

Another Sixth Circuit decision rendered the same year, Marcum v. McWhorter,[121] is especially noteworthy for articulating the Roberts framework in all its breadth, while simultaneously adding an FW/PBS-like tradition-based component to Roberts. Citing Bowers v. Hardwick as authority, the court denied intimate association protection to the plaintiff's exclusive relationship with his live-in romantic partner, ***293** solely due to the fact that the relationship was adulterous.[122] The court conceded that many of the Roberts factors warranting the highest levels of protection for an intimate association were present in the case: the plaintiff's relationship was a highly selective, exclusive, two-person relationship.[123] Despite the presence of such factors, the court concluded that the adulterous nature of the relationship mitigated against its constitutional protection as an intimate relationship:

> Based on the historical treatment of adultery, a right to engage in an intimate sexual relationship with the spouse of another cannot be said to be either deeply rooted in this Nation's history and tradition or implicit in the concept of ordered liberty. Thus, following the Supreme Court's decision in Bowers, we decline to accord Marcum's adulterous relationship the constitutional protection afforded those intimate associations which receive protection as a fundamental element of personal liberty.[124]

Providing another example of the ambiguity created by Roberts' unclear parameters, giving lower courts perhaps too much discretion in defining the factors relevant to an intimate association inquiry, is the following passage in Marcum:
The Supreme Court has set forth factors which may be used in determining whether a particular relationship is constitutionally protected. These factors include: "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." The adulterous nature of the relationship between Marcum and Abbott is an objective characteristic that is pertinent to this case and we find that the district court correctly considered it in determining whether the relationship was constitutionally protected.[125]

Since Roberts had failed to define ‘other characteristics‘ with specificity, and did not on its face preclude courts from including adultery as such a pertinent analytical factor, the Supreme Court enabled the Sixth Circuit to come to the conclusion it did in Marcum, interpreting “other characteristics” as including adultery.[126] Consequently, ***294** the court in Marcum was able to cite Roberts in all its breadth while still coming to a narrow result, excluding even the most intimate type of relationship from constitutional protection due to a tradition of disfavoring adulterous sexual conduct, without any further inquiry into the scope of intimate association protections or explanation as to the relevant standard of review in such cases.[127]

However, two years later, in Flaskamp v. Dearborn Public Schools,[128] the Sixth Circuit did revisit the applicable level of review appropriate for intimate association cases, apparently lowering it from the strict scrutiny it applied in its earlier Johnson decision to rational basis.[129] In Flaskamp, the Sixth Circuit held that a school board’s policy of prohibiting sexual relationships between teachers and former students within a year or two of graduation did not violate the plaintiff’s intimate association rights. Citing Lawrence, the Sixth Circuit became the first federal appeals court to formally recognize the links and potential synonymity between the intimate association doctrine articulated in Roberts and the parallel protections described by the Supreme Court in its later Lawrence v. Texas decision.[130] Once again, the Sixth Circuit had managed to combine a broad articulation of intimate association with an analysis that nonetheless led to narrow results.

The Eighth Circuit Geiner v. City of Champlin[131] decision demonstrates how the problem of intimate association’s lack of clearly defined parameters may be harmful to litigants as well as frustrating to courts. In Geiner, a case in which plaintiffs raised associational along with other rights in challenging their arrest for having a loud party, the Eighth Circuit noted that due to the lack of clarity provided by Roberts, citing Roberts actually “hurts the plaintiffs more than it helps them, since it establishes an indeterminate spectrum for associational rights based on intimacy, without indicating with any precision where houseguests might fall on that spectrum.”[132] Criticizing Roberts’ lack of precision and turning to other cases for guidance, the court affirmed the district court’s conclusion that relationships between ***295** hosts and houseguests do not fall on the highly protected end of the Roberts continuum of constitutional protections.[133]

Finally, the Supreme Court missed a golden opportunity to resolve the growing circuit confusion over intimate association by denying certiorari to the appeal of the Eleventh Circuit’s Shahar v. Bowers[134] decision. In Shahar, the Eleventh Circuit’s en banc decision rejected the intimate association claim of Robin Joy Shahar, an attorney whose offer of employment was withdrawn by Georgia Attorney General Bowers[135] because he found out she was engaged to another woman.[136] The Eleventh Circuit panel originally hearing the case had applied strict scrutiny and upheld Shahar’s intimate association claim, citing Zablocki v. Redhail[137] for its decision to apply that standard of review since “[m]arriage in the conventional sense is an intimate association, significant burdens on which are subject to strict scrutiny. Though the religious-based marriage in which Shahar participated was not marriage in a civil, legal sense it was intimate and highly personal in the sense of affection, commitment, and permanency . . . .”[138]

On rehearing en banc, however, the full Eleventh Circuit disagreed, describing the rights of government employees who are fired for their intimate associations as solely a First Amendment issue subject to the Pickering[139] balancing test, not strict scrutiny, and rejecting the panel’s decision to the contrary.[140] O’Connor’s FW/PBS tradition-focused intimate association framework played an important role in the Eleventh Circuit’s analysis, the court opining that although Shahar was not seeking the right to same-sex marriage, intimate association protections were inappropriate for her lesbian relationship since “[g]iven the culture and traditions of the Nation, considerable doubt exists that Plaintiff has a constitutionally protected federal right to be ***296** ‘married’ to another woman: the question about the right of intimate association.”[141]

Also playing a strong role in the court’s decision not to grant intimate association protection to Shahar was its reliance on the then-intact precedent of Bowers v. Hardwick. First citing Bowers as advising them to be “especially cautious” in granting unenumerated rights “because some part of the population believes them to be a good idea,”[142] the court continued to cite Bowers more extensively throughout its analysis, relying on the case as allowing prohibitions of homosexual conduct. Dismissing Shahar’s invocation of Romer v. Evans,[143] the court distinguished Romer as being about condition, not conduct, and as prohibiting broad discrimination, not discrimination confined to an employment context, instead finding Bowers to be more relevant compelling precedent.[144] The court consequently rejected Shahar’s distinction between her status as engaged to a woman and the illegal conduct (sodomy) it presumed she was engaging in,[145] and, relying on Bowers concluded that Attorney

General Bowers' role as defender of Georgia's sodomy ban in the Supreme Court case was a "realistic" reason for him to view Shahar's intimate association with another woman as a potential threat warranting the termination of her employment.[146]

Now that Bowers has been overturned by Lawrence, the court's strong reliance on Bowers in the Shahar case raises serious questions about the precedential strength of its conclusions, and could justify a revisiting of the issues presented by the case.

***297** c. Summary of Current Trends and Troubles in the Circuit Court Split

From the more recent circuit court opinions on intimate association, it appears that the circuit courts remain positioned as most closely following the broad parameters of Roberts, and the Third Circuit continuing to apply a narrow interpretation of intimate association. The only identifiable shift in the circuits' various approaches to intimate association is that the Eleventh Circuit also appears to have endorsed a narrow, tradition-based intimate association, joining the Third Circuit in the split between broad and narrow interpretations of the doctrine. One thing is clear from the circuit courts' persistent cries for clarity: their dissatisfaction with having such a broad constitutional doctrine at their avail without knowing where the precise boundaries and parameters of that doctrine lie. Clear cries for clarity could be heard in the Fifth Circuit's criticism of Roberts for failing detail the contours of the right to intimate association;[147] declaration that citing Roberts' intimate association doctrine actually hurts plaintiffs more than it helps them, due to its indeterminate nature and lack of precision;[148] and the Second Circuit's turning to the Bible to describe its lack of knowledge of the unfixed boundaries of intimate association.[149]

Other circuits, while not raising similarly poignant cries for clarity, would benefit as well from a resolution of the questions left lingering after Roberts, as evidenced by their inconsistent interpretations of intimate association. In clarifying the contours of the freedom of intimate association, the Supreme Court should perhaps start by addressing the breadth of that right as intended by Roberts. While the Second Circuit has (not without complaints about the difficulty of so doing) followed the sliding scale guidelines of Roberts most faithfully in recognizing freedom of intimate association's protections for a broad array of relationships, other circuits, while still applying the guidelines of Roberts in name, have interpreted Roberts' sliding scale in such a way that only the most traditionally recognized relationships have received protection.

The open-endedness of Roberts' intimate association description, in conjunction with the narrow focus of the subsequent Bowers and ***298** FW/PBS decisions, made it possible for circuits such as the Sixth and Eleventh Circuits to deny intimate association rights to relationships they did not consider to be rooted in tradition. Now that Bowers has been overturned, such narrow tradition-based approaches to Roberts should consequently be reviewed by the Supreme Court, which could clarify the appropriate role of tradition, the connection between familial and nonfamilial relationships, and which other types of intimate associations warrant heightened protection. At the very least, the Court should shed more light on which "other characteristics"[150] are pertinent to an intimate association inquiry, and which considerations may be impermissible grounds for singling out of unpopular or untraditional relationships for disfavor now that Bowers is no longer valid precedent.[151]

Finally, as the Udell article documented, the variance in balancing tests and standards of review applied by the courts reviewing intimate association cases is so great as to be mind-boggling. Should all intimate associations be entitled to strict scrutiny? Only those at the highest level of the Roberts sliding scale? If so, which relationships would those be? Just blood relationships and marriage? All familial relationships? Same-sex civil unions too? And which other relationships receive protection, if not at the highest levels? Casual dating relationships? Smaller selective groups? Which types? What standard of review should apply to other cases?

These are some of the questions and challenges left for the Supreme Court after two decades of circuit courts dancing around the Roberts precedent, unable to agree on a rhythm or key, but dancing (somewhat blindly) nonetheless. Should the Court lift its baton and agree to play the piece once more, with a bit more precision and definition, lower courts may finally find some long-sought harmony as they dance to the clarified melody of intimate association.

The remainder of this article presents a possible new model that might reflect the Court's current leanings toward stronger and clearer protections of intimate association. Such a model could help finally bring an end to the dissonance of dissatisfaction ringing through the lower courts as they continue to dance around the doctrine of intimate association.

*299 II. Crossing the Bridge: Toward a Broader Reading of Intimate Association

Although the 2003 Supreme Court Lawrence v. Texas decision did not use the phrase 'intimate association' or address intimate associatiomay provide critical guidance for future intimate association cases and may be read as a type of intimate association case itself. By overruling Bowers and providing critical clarification about the proper roles of tradition and morality in the constitutional protections of intimate relationships, the decision may help resolve the split between narrow and broad interpretations of Roberts, and may also indicate the Court's willingness to provide further clarification of its intimate association doctrine in a future decision.

The Supreme Court is perfectly positioned to revisit the issue of freedom of intimate association and to provide more specific guidance for its application in future cases. With Lawrence shining new light on intimate association rights, the Court could soon decide, twenty years after the doctrine's initial articulation in Roberts and forty years after Griswold, that the time has finally come to clarify the parameters and protections that define the freedom of intimate association. This section proposes a new presumption-based model for intimate association cases that follows the original Roberts guidelines and the powerful precedent of Lawrence, providing suggestions consistent with those decisions in order to help define and clarify the contours of intimate association.

A. Leading up to Lawrence v. Texas: Sexual Orientation and the Supreme Court

Since Bowers v. Hardwick, the Supreme Court has had a mixed track record on gay rights. In two right to association cases heard by the Court prior to Lawrence v. Texas, the Court ruled against the egalitarian claims of the gay and bisexual litigants, and for the expressive associational rights of the groups seeking to exclude them, in essence holding that certain organizations do indeed have a right to not associate with gays and bisexuals.[152]

In Boy Scouts of America v. Dale,[153] while dismissing the Boy Scouts' intimate association claim, the Court nonetheless held that a ***300** state public accommodations law that "significantly burden[s] the organization's right to oppose or disfavor homosexual conduct" impermissibly violated the Boy Scouts' right to expressive association. Five years earlier, in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,[154] the Court had similarly upheld the dismissal of a discrimination lawsuit filed by the Irish-American Gay, Lesbian, and Bisexual Group of Boston (GLIB) after members of that group were excluded from participation in a St. Patrick's Day Parade organized by the South Boston Allied War Veterans Council under the authority of the City of Boston. As in Dale, the Court ruled that the public accommodations law at issue violated the defendant's right to expressive association.

While the Dale and Hurley decisions seemed to strike a blow at gay rights by granting a right to not associate with gays and bisexuals, the cases are more fairly read as the Court taking a strong stand in favor of associational rights, not against gay rights. In Hurley, the Court seemed to take extra care to distance itself from the apparent anti-gay stance of the defendants, noting at the end of the majority opinion that "[o]ur holding today rests not on any particular view about the Council's message but on the Nation's commitment to protect freedom of speech. Disapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others."[155]

Balancing out the seemingly negative (for gay rights) Dale and Hurley decisions are the landmark Romer v. Evans[156] and Lawrence v. Texas[157] decisions. In each of these cases, a significant majority of the Court issued forceful declarations of equal rights for gays and bisexuals - even, in Romer, as against the associational claims asserted by the defendant.[158]

In Romer, the Court struck down a broad amendment to Colorado's Constitution that denied gays and bisexuals virtually all civil rights protections, present and future, under state and local law.[159] In so doing, the Court emphasized that the asserted associational rights ***301** of those seeking to exclude gays did not justify denying gays and bisexuals equal protection under the law:[160] While Romer is relevant to associational rights cases in that it limits the scope of such rights where they conflict with the equal protection of gays and bisexuals, it serves as even more critical precedent for its recognition of equal citizenship rights, regardless of sexual orientation. Justice Kennedy, writing for the majority, pointedly chose to begin and end the opinion with

strong invocations of equal citizenship:

One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens." Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado's Constitution. . .[161]

We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws.[162]

Similarly, addressing the state's defense that the amendment only prevented gays and bisexuals from having "special" rights, Kennedy wrote,

We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civil life in a free society.[163]

While Romer does not explicitly address the intimate associational rights of gays and bisexuals, the equal citizenship precedent it ***302** sets forth provides critical guidance for future intimate association cases. Most importantly, the case reunites principles of equality and liberty and sets the stage for such Fourteenth Amendment principles to be joined as well with the First Amendment roots of intimate association protections.

B. Lawrence and Its Potential Intimate Association Progeny

The Court's next decision affirming constitutional protections for gays and bisexuals, Lawrence v. Texas, continued where Romer left off, applying the equal citizenship principles of Romer to an intimate association context, and providing critical guidance on the specific contours and parameters of the freedom of intimate association.[164]

1. Understanding Lawrence as an Intimate Association Case

In Lawrence, the Court struck down a Texas sodomy ban and overturned the controversial Bowers decision.[165] While the majority opinion of Lawrence, authored by Justice Kennedy, did not explicitly refer to the Roberts precedent or the doctrine of intimate association, it is rife with references to intimate association rights.

Kennedy began the opinion emphasizing the Constitution's protection of intimate conduct:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.[166]

Kennedy proceeded to define the central question of the case in similar terms of intimacy, beginning the first section of the opinion, "[t]he question before the Court is the validity of a Texas statute making it a crime for two persons of the same-sex to engage in certain ***303** intimate sexual conduct."[167] Later in the opinion, Kennedy again described the conduct banned by the Texas statute in terms of its intimacy.[168]

Kennedy's opinion went on to connect the intimate conduct at issue to that conduct's role as an indicator of an intimate relationship, holding that persons of all sexual orientations are protected in their choices to engage in intimate conduct by the

Constitution's guarantees of liberty:

> This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.[169]

Reflecting the theme of autonomy in one's intimate associations that was similarly central in the Court's analysis in Roberts, the Lawrence Court quoted Planned Parenthood of Southeastern Pa. v. Casey[170] in its ruling that the Constitution demands individual autonomy for intimate choices, regardless of a person's sexual orientation.[171]

Yet another signal from Kennedy that principles of intimate association underlie the Lawrence decision is his endorsement of Justice Stevens' dissent in Bowers, highlighting the following passage from Justice Stevens' dissent:

> ***304** Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.[172]

In other passages, Lawrence makes clear that narrow approaches to tradition and morality are constitutionally impermissible justifications for denying individual liberties.[173] The Court explained,

In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. '[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.'[174]

Echoing the majority's statements that the imposition of moral judgment is neither the proper role of the courts nor sufficient justification for state laws,[175] Justice O'Connor separately concurred:

> Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient ***305** rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.

Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law.' Texas' invocation of moral disapproval as a legitimate state interest proves nothing more than Texas' desire to criminalize homosexual sodomy. But the Equal Protection Clause prevents a State from creating 'a classification of persons undertaken for its own sake.' And because Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior. The Texas sodomy law 'raises the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. '[176]

In Lawrence, a solid majority of the Court consequently recognized that the broader constitutional traditions of protecting the autonomy, equal rights and liberty of its diverse citizenry supersede more narrow traditions reflected in the moral prejudices of even a majority of the populace.[177] As Kennedy reminds us, the Constitution's founders "knew times can blind us to certain truths and later generations can see the laws once thought necessary and proper in fact serve only to oppress."[178]

Striking down sodomy bans, which "locked an entire segment of the population into a subordinate status and often forced such individuals either to transform or suppress important dimensions of their identities in order to escape second-class treatment in the public realm,"[179] Kennedy alluded to a powerful affirmative "due process right to demand respect for conduct protected by the substantive guarantee of liberty" as well.[180] What this "right to demand respect" means is unclear given that there will always be segments of society that refuse to respect the relationships of same-sex couples. But at a minimum, this passage of Lawrence suggests that the government ***306** itself must accord the same degree of constitutional respect and equal rights to same-sex relationships as to any other similar type of intimate association.

As to the source of such rights, the Court in Lawrence described intertwining equal protection and due process rights.[181] This aspect of Lawrence is reminiscent of the Court's earlier affirmation in Roberts that intimate association exists as both a fundamental component of personal liberty and as a First Amendment right.[182]

At least two federal courts have noted the parallels between the Supreme Court's opinions in Roberts and Lawrence and concluded that Lawrence establishes critical precedent for intimate association cases. In Flaskamp v. Dearborn Public Schools,[183] the Sixth Circuit linked Roberts and Lawrence in its analysis:
The Supreme Court has also held that "certain kinds of personal bonds," [citing Roberts at 618] and "certain [kinds of] intimate conduct," [citing Lawrence at 562] are protected by the substantive component of the Due Process Clause. Whether called a right to intimate association, see Roberts, or a right to privacy, see Lawrence, the point is similar: "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." [quoting Roberts at 617-18 and Lawrence at 567 ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring")].[184]

In Citizens for Equal Protection v. Bruning,[185] (discussed at greater length in the next section for its historic importance as the first federal court decision striking down a state constitutional ban on same-sex marriage and for invoking intimate association to do so) a Nebraska federal district court similarly found Lawrence to provide helpful guidance in its intimate association analysis. In its description of the due process and First Amendment dimensions of intimate association, ***307** the Bruning court cited both Roberts and Lawrence for the proposition that the two freedoms may coexist, particularly as against state interference with an individual's choice in forming partnerships.[186] The court continued with a lengthier description of the striking similarities between Roberts' and Lawrence's intimate association analyses:
The intimate relationships that have been accorded full constitutional protection are marriage, the begetting and bearing of children, child-rearing and education, and cohabitation with relatives. . . Between the opposing poles of a marital relationship on one hand and a large business enterprise on the other, lie "a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State." Roberts, 468 U.S. at 620, 104 S.Ct. 3244 (noting that determination of the limits of state authority over an individual's freedom to enter into a particular association involves "a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments)." See also Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (invalidating statute criminalizing sodomy on due process grounds and holding that the fact that the governing majority in a state has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting private consensual sexual behavior).[187]

Lawrence consequently can be, and, as shown above, has been read as an intimate association case, a historic affirmation of the intimate association principles first explicitly set forth by the Court in Roberts. The similarities between the two cases are noteworthy on their face, but potentially profound in their implication.

2. The Significance of Lawrence for Future Cases

The parallels between Lawrence and Roberts identified by the Nebraska district court and the Sixth Circuit may just be the tip of the iceberg. Lawrence's significance for future intimate association cases is potentially manifold in dimension.

***308** First, in light of the abundant references in the Lawrence majority opinion to intimacy in one's relationships as triggering powerful liberty protections, and the opinion's requirement that laws such as Texas' sodomy ban be struck down, Lawrence is the first actual affirmation of a litigant's intimate associational rights by the Supreme Court since Roberts.

Second, Lawrence can help resolve the confusion created by both the Supreme and lower courts' apparent inconsistency in relying alternatively on either the First or Fourteenth Amendments as sources of intimate associational rights. While Roberts recognized intimate association as emanating from First Amendment protections but also rooted in substantive due process,[188] the opening passage of Lawrence extended due process protections to intimate relationships even in public spheres,[189] in a sense reuniting the privacy protections of due process with the public and expressive dimensions of such rights more commonly associated with the First Amendment. This reunion is critical, for not only are the complementary roles of the First s implicitly integrated by Lawrence, but the case also joins the expressive and intimate associational freedoms inherent in such personal liberty cases, going beyond even the Roberts Court's initial analysis which treated intimate association as distinct from the freedom of expression.

Third, Lawrence similarly confirms that that the equal protection and due process protections for intimate relationships are interrelated because both are included in the broader liberty protections as articulated in Casey's affirmation that autonomy in such relationships is at the heart of Fourteenth Amendment liberty. This confirmation in Lawrence creates a critical bridge between related constitutional doctrines, and may represent the limits, if not the absolute end, of the court's jurisprudence in which principles of liberty have necessarily been sacrificed to principles of equality.[190]

Fourth, the fact that Lawrence overturned Bowers is critical for intimate association cases. Most immediately, the overturning of Bowers calls into question the ongoing validity of certain circuit court decisions that relied on the precedential strength of Bowers in their ***309** denial of intimate association protections.[191] In the longer term, the Court's clear rejection of Bowers' narrow tradition-and-morality-focused due process jurisprudence may preclude future intimate association decisions that rationalize a narrow application of Roberts through similar invocations of tradition and morality. Furthermore, to the extent that some lower courts have interpreted intimate association as synonymous with privacy rights, such an equation may be supported by Lawrence, which cited a long line of privacy rights cases in affirming the associational rights of same-sex couples. However, it should be noted that Kennedy's opinion used neither the express phrase "right to privacy" nor "freedom of intimate association" to describe the right it was acknowledging, instead locating privacy and associational rights under the larger umbrella of liberty protections. Before dwelling too long on this point though, one might heed the Sixth Circuit's observations in Flaskamp that the precise terminology used in a given case is not nearly as significant as the similarity between the broader principles of respect for intimate relationships that Roberts and Lawrence both described.[192]

Fifth, while Lawrence leaves open the question of appropriate standards of review in intimate association cases (not even clearly defining the test applied within the Lawrence decision itself), it did provide critical guidelines for future analyses that weigh individual interests against state interests. Most significantly, Lawrence invoked the "harm principle"[193] as a boundary limiting a state's permissible rationales for intrusions on intimate associations, establishing that "[t]his, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects."[194]

Sixth, Lawrence clearly establishes that same-sex couples are entitled to equal protection of their liberty interests in choosing and ***310** engaging in their intimate relationships.[195] It may even be concluded that, after Lawrence, same-sex couples should be ranked as high on the Roberts sliding scale as married opposite-sex couples.[196] While the Lawrence court pointedly refused to decide whether a constitutional right to same-sex marriage might exist,[197] the majority opinion did describe the similar nature of same-sex and marital relationships and the entitlement of each type of relationship to the same constitutional protections:

> To say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in Bowers and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

. . . When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.[198]

***311** Finally, as read in conjunction with Romer, Lawrence reminds future interpreters of intimate association that the protection of intimate relationships is but part of the Constitution's larger promise of equal citizenship rights for all. O'Connor's concurrence in particular illuminates the equal citizenship principles guiding the Lawrence decision, warning against the dangers of a legal system which would single out a minority group for different treatment under the law.[199]

While the Roberts Court did not have the opportunity to more fully unite the equality and liberty components of intimate association due to the conflicting equality (anti-discrimination) and liberty (associational) claims, Lawrence was able to accomplish what Roberts could not. Serving as a bridge to reunite liberty and equality in an intimate association context, as well as the interrelated First and Fourteenth Amendment principles inherent in intimate association protections, Lawrence was able to reaffirm the critical interconnections between the Constitution's fundamental protections for individual rights.

C. Answering the Cries for Clarity: A Presumption Based Parameter Proposal

The Court's Lawrence v. Texas decision may resolve several decades' of intimate association confusion. The Lawrence precedent enables the development of a more clearly defined intimate association model, closing the gaps that have remained since the Court first explicitly identified a freedom of intimate association in Roberts, only to then add that, while providing broad guidelines for future cases, they "need not mark the potentially significant points on this terrain with any precision."[200]

To help the Court complete the picture, clarifying the contours and parameters of the freedom of intimate association, I propose the following model to supplement the intimate association doctrine established by the Court in Roberts. The proposed model begins with suggested presumptions in the evaluation of same-sex relationships and then turns to other intimate associations, describing similar presumptions ***312** and varying standards of review that should apply to different types of relationships.

First, following the precedent of Lawrence, there should be a presumption in intimate association cases that same-sex couples are entitled to the same degree of protection for their intimate associations as married opposite sex couples. Further, in order to in intimate association cases involving same-sex couples, a court's analysis in such cases should begin with a presumption that state infringements of the intimate relationships of same-sex couples, like married couples, should be subjected to strict scrutiny. While same-sex couples can not be legally married in the vast majority of states, this, as Lawrence recognized,[201] should not be held against them in evaluating their fundamental liberty interests. Until the day that same-sex couples are provided the same degree of legal recognition as opposite sex couples in being given the opportunity to marry, it is essential that such a presumption of equality exist in intimate association claims, to accommodate the Constitution's mandate of equal citizenship.

Second, since not all same-sex couples are in a marriage-like relationship, the presumption of equality should be rebuttable. If, for example, it could be shown that a same-sex couple lived in a state or locality where marriage, civil unions, or domestic partnership registries were available to them but that they had not sought such legal recognition, and if the couple were shown

to be lacking in other characteristics described in Roberts as indicating an intimate association,[202] they may not receive the highest level of protection if the defendant meets its burden of proof in rebutting the presumption of equality. Such a case might involve, for example, state-condoned discrimination against members of a same-sex couple in the initial stages of a courtship, not yet committed to each other, still dating other people, and interacting mostly in group settingsn states and localities where significant legal status recognition is not available to same-sex couples, such couples should still be entitled to the highest levels of intimate association protection provided that their relationship can be described in terms of Roberts factors--for example, evidencing a significant commitment ***313** through shared finances, children, cohabitation or other indications of the intimate nature of the relationship.

Third, if the state meets its burden of proving a couple not to be in a marriage-like relationship, if the couple is sexually or romantically intimate to a lesser degree, they would still receive at least the degree of heightened protection[203] accorded to the couple in Lawrence.[204] While not citing Roberts, the Court of Military Justice has recently noted that Lawrence does require heightened protection for casual private sexual relationships absent evidence of harm or coercion, observing that "the Supreme Court placed Lawrence within its liberty line of cases resting on the Griswold foundation. These cases treated aspects of liberty and privacy as fundamental rights, thereby, subjecting them to the compelling interest analysis . . . What Lawrence requires is searching constitutional inquiry."[205]

Fourth, unmarried opposite sex couples would also be granted the presumption of deserving the same level of heightened protection granted to the same-sex couple in Lawrence, so long as their relationship displayed similar degrees of sexual intimacy, took place in a private setting, or otherwise met some, if not most, of the Roberts intimate association criteria, and threatened no harm to a person or institution the law protects (the stated contours and boundaries of Lawrence).[206] The "or" in the previous sentence is critical; if a romantic couple is celibate out of moral, religious, or other personal conviction; if an intimate couple is persecuted in a public context; or if other Roberts factors are not met in completion, this should not exclude such intimate relationships from heightened protection. However, if some of the Roberts factors are present in a personal relationship, it may be presumed to be of the type of relationship entitled to a heightened, if not the strictest, form of protection. In this light, the Court may wish to revisit the implications of its prior holding in FW/PBS v. ***314** City of Dallas[207] that intimate relationships which can be consummated in less than ten hours do not warrant protection, and consider returning to the broader roots of its seminal Roberts decision as affirmed by Lawrence. As the Marcum decision recognized, even intimate conduct that takes place among small groups at a party may be entitled to heightened scrutiny.[208] Even casual encounters, after all, can involve the most private types of interactions and most personal choices, and can lead to the future formation of even more highly protected intimate associations.[209] The Roberts sliding scale of protections accommodates such protections for intimate relationships of lesser degrees that still warrant protection from state interference.

Fifth, infringements of familial relationships would be presumed to warrant the same level of strict scrutiny, regardless of whether they take the form of marriage or same-sex romantic partnerships. Many courts interpreting the doctrine of intimate association have recognized such familial relationships as entitled to strict scrutiny, though a split has emerged in identifying the importance of consanguinity in according levels of protections.[210] The presumption of strict scrutiny for familial relationships would recognize that any member--parent, child, sibling, aunt, grandparent, stepparent, same-sex co-parent, intended parent--of any family, traditional or not, should be presumed to receive the highest level of protection in their intimate relationships. Extending strong intimate associational rights to a broad range of family members is in accordance with the Supreme Court's ruling in Moore v. City of East Cleveland[211] that the liberty interests protected by the Fourteenth Amendment "include freedom of personal ***315** choice in matters of marriage and family life," which extends to non-traditional families.[212]

Sixth, the application of strict scrutiny is not predicated on the existence of a familial, marital, or sexually intimate partnership, but can be applied as well where other nonfamilial, platonic relationships have been recognized as entitled to special legal protections, such as attorney-client relationships (as was the case in Johnson v. City of Cincinnati[213]) and other relationships protected by confidentiality assurances or other similarly recognized zones of legal protection.

Finally, other intimate relationships which lack many, but not all, of the Roberts qualifying factors may still be protected under a more deferential rational basis review. Such protected associations could include casual friendships, temporary caretaker arrangements, small, private clubs, a couple on their first date, or other personal associations meeting enough of the Roberts

criteria to be considered intimate in nature, but not enough to be ranked at the top of the intimate association ladder. The freedom of intimate association could consequently extend to such associations, allowing both private gay rights and religious organizations to maintain "safe spaces" absent government interference, for example, or preventing state-sanctioned interference with personal relationships. This framework would prevent both overt government interference--such as through harassment by state actors--and more indirect interference--such as through state hospital restrictions on visitors contrary to a patient's wishes.

The Court should, at the very least, provide clearer guidance as to what "other characteristics"[214] may or may not be relevant factors in an intimate association case, given that this aspect of the intimate association criteria is particularly vague and open to subjective interpretation. For example, in cases involving public employers terminating employees because of their intimate associations, some courts have applied a more deferential balancing test such as the Pickering test, even where strict scrutiny might otherwise apply. The Court needs to clarify whether "other considerations" includes a defendant's ***316** status as a public employer, effectively allowing courts to the focus from the intimate relationship to the defendant. The clearest boundaries of intimate association's "other considerations" may be derived from the dictum of Lawrence. Using Lawrence dictum for guidance, the Court should specify that the "other characteristics" that a court may evaluate in determining the degree of protection an intimate association receives can include the existence of actual harm[215] caused by the relationship, but not the perceived immorality or traditional unpopularity of a certain type of relationship justifying continued disfavored treatment of the individuals within that relationship. Even if the defendant in a case is a public employer, which a circuit may view as triggering a Pickering test analysis, for example, such an analysis would still be bound by the parameters established by Lawrence.

What about traditionally disfavored relationships that remain morally repugnant to a large segment of society, such as adulterous, incestuous, polygamous or other nonmonogamous relationships? One might hesitate even to consider such cases as worthy of heightened protection, anticipating a Scalia-like opinion lambasting the slippery slope of intimate association rights as embracing the worst elements of society, which states are obliged to look down upon. That said, it would be intellectually dishonest to ignore that such relationships may indeed share the characteristics of other intimate relationships and be entitled to similar protection. This is not to say that employers may not fire adulterous employees whose relationships do pose a serious threat to the essential function of an organization, or that incest and polygamy may not be treated disfavorably if a given polygamous or incestuous arrangement is not consensual or can be shown to result in actual harm. What the state may not do, however, is justify the singling out of such relationships for the denial of rights by invoking traditional or "moral" abhorrence or disapproval of such relationships. Indeed, just as the Roberts Court relied on First Amendment doctrine as for intimate associations cases justifying heightened scrutiny in such cases, it stands to reason that as in the case of unpopular speech,[216] the unpopularity of any given relationship should increase, ***317** not decrease, the level of skepticism due to asserted justifications for imposing sanctions on the relationship.

If the Court were to adopt a presumption-based model similar to the one outlined above, it would provide a measure of clarity to the doctrine of intimate association. Even more importantly, it would do so in a way that accords stronger protections for the equal citizenship rights of all individuals, following the mandates of both Romer v. Evans and Lawrence v. Texas.

III. Potential Applications and Advantages of Intimate Association in the Twenty First Century

A. Potential Applications of Intimate Association in Future Cases

The Court is at an ideal point in history to revisit and clarify the doctrine of intimate association, as it enters a new era likely to present a growing number of cases implicating the freedom of intimate association. With the circuits still struggling to interpret the intimate association doctrine, the Court has at its disposal new tools and opportunities to strengthen and clarify it. If the Court avails itself of this opportunity, it can reduce the confusion that has attended the doctrine of intimate association during its formative era and bring the doctrine closer to maturity.

While revisiting and clarifying the doctrine of intimate association has many merits, as described in this section, there are also reservations litigants might have in raising intimate association claims. Such reservations may be indicated, for example, by the lack of any reference in the respondent's brief[217] in Rumsfeld v. FAIR to law students' intimate associational rights in that case challenging the government compelled law school accommodation of military recruiters, although the litigants did raise the general relevance of the military's discrimination.[218] FAIR's silence around intimate association in a case already involving dual (and dueling) associational rights is understandable, since the organization's claims to associational rights in that case did not include the third party claims of the gay and bisexual students being discriminated against. Such an omission of intimate associational ***318** claims may have weakened the litigants' case, however, more easily enabling the Supreme Court to eventually uphold the Solomon Amendment.

Another case that may come before the Supreme Court in the near future does (as the federal district court opinion in the case recognized) directly involve the intimate associational rights of the litigants, although the litigants to date have not asserted such rights. Citizens for Equal Protection v. Bruning,[219] the first federal court decision striking down a state constitutional ban on same-sex marriage, is on appeal and may ultimately reach the Supreme Court. Until the Bruning decision, most cases addressing same-sex marriage had been decided by state courts, which primarily limited their constitutional inquiries to the litigants' equal protection and substantive due process claims.[220]

Bruning is unique both in the nature of the claims asserted by the litigants and in the nature of the claims recognized by the court which were not even asserted by litigants, including the claim of freedom of intimate association. The litigants in Bruning were careful to emphasize that they were not asking the court to decide whether they had a right to same-sex marriage, but were rather asking the court to strike down the constitutional amendment as violating the federal constitution's equal protection and bill of attainder clauses by broadly and unconstitutionally denying them any meaningful opportunity to seek the right to same-sex marriage or other lesser protections for their relationships.[221]

Despite not having been asked to do so, the Nebraska court struck down the constitutional amendment not just on the equal protection ***319** [222] and bill of attainder grounds argued by the plaintiffs, but also on the basis of various First Amendment rights not asserted by the plaintiffs,[223] including the freedom of intimate association, which it tied to the other constitutional claims at issue.[224] The Bruning opinion contains one of the most comprehensive intimate association analyses rendered by a federal court to date. The opinion began by tracing the history of the intimate association doctrine described in Roberts, including the Lawrence decision as an essential part of that history.[225] As noted earlier, Bruning is one of very few federal court decisions to identify the parallel analyses of Roberts and Lawrence, citing both cases for the proposition that the Constitution accords strong constitutional protections to a broad range of relationships, including the types of intimate relationships identified in the two cases.[226] Bruning also emphasized Lawrence's admonition that even if a governing majority in a state has traditionally viewed a particular type of relationship as immoral, such traditional disfavor is not a sufficient reason for upholding a law that infringes upon intimate relationships.[227]

Another significant element of the Bruning analysis is its description of the interrelated roles of the First and Fourteenth Amendments in protecting intimate associational rights. Citing Roberts, the court noted that First Amendment and due process freedoms may coincide in some cases.[228] Bruning, the Nebraska court decided, was one of those cases.[229] The court consequently employed an analysis that ***320** embraced the symbiotic relationship between the First Amendment and equal protection, and incorporated the equal citizenship principles of Roberts, Lawrence and Romer.[230] By making such necessary connections between the First and Fourteenth Amendments, the court was able to explain why it based its decision in part on First Amendment principles, including the freedom of intimate association, that were never invoked by the litigants themselves.

The Bruning case may present a pending opportunity for the Supreme Court to revisit the freedom of intimate association, though such a claim has not been asserted by the plaintiffs in Bruning. It is more likely, however, that the case will come to represent, like Shahar v. Bowers[231] and Rumsfeld v. FAIR,[232] another missed opportunity for the Court to clarify its intimate association doctrine. In their appellate brief, Bruning litigants were quick to distance themselves from, rather than follow the lead of, the Nebraska district court judge's intimate association analysis, opening their brief with a statement of the case containing the adamant disclaimer that "[t]he State's statement of the case is satisfactory except that Plaintiffs have not advanced a First Amendment claim, the District Court's decision did not rest on such a claim, and, therefore, no such claim is

before this court."[233] Intimate association was consequently ignored in the appellee's brief, and it will likely to continue to be ignored as a viable claim as the case continues its appellate ascent.

Even if the litigants do not assert intimate association claims, however, courts may still consider intimate association as relevant in each case.[234] Thus, even if the freedom of intimate association does not reappear in the future arguments or decisions in Bruning, there will be many future opportunities for the doctrine to be revisited.

***321** Intimate association is particularly pertinent to future same-sex marriage cases, which by their nature implicate the equal citizenship and intimate association principles inherent the Supreme Court's affirmations of equal rights and liberties for gay and bisexual citizens in Romer and Lawrence. On this point, the historic Massachusetts Supreme Court's Goodridge v. Dep't. of Pub. Health[235] decision recognizing a right to same-sex marriage, like Lawrence, did not articulate a "freedom of intimate association" as such. However, it can be seen as an intimate association decision in the same vein as Lawrence. In Goodridge the court described Lawrence's holding in terms of the protection of intimate relationships: "[t]here, the Court affirmed that the core concept of common human dignity protected by the Fourteenth Amendment to the United States Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one's choice of an intimate partner."[236] The Goodridge court's own holding consequently reflected its understanding of the freedom of intimate association, if not specifically referring to the doctrine by name:

> Barred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same-sex is arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under law.[237]

Further indicating that the right to marry as affirmed by Goodridge is a natural extension of the freedom of intimate association is the concurring opinion of Justice Greaney, which closes with the same intimate association Griswold passage that Karst used as a starting point and opening passage in his intimate association article.[238]

***322** While other courts have not similarly recognized the right to same-sex marriage as a protected form of intimate association,[239] there are many arguments to be made for such recognition of same-sex

Although the connection between intimate association and same-sex marriage rights may seem like a novel twenty-first century twist, such a connection was first suggested twenty five years ago in Karst's intimate association article. Describing marriage rights in terms of individual autonomy, self-expression, and community recognition of such expression,[240] Karst described freedom to marry as "[t]he one most clearly established feature of the constitutional freedom of intimate association,"[241] and concluded that until same-sex couples are granted equal marriage rights, they will continue to be denied equal citizenship and intimate association rights, remaining impermissibly cloaked in the state-imposed stigma of second-class citizenship.[242] Predicting that the Court would inevitably reverse this injustice, he cautioned, however, that such recognition would take time.[243]

Karst supplemented his analysis with the observation that, in 1980, the Court's jurisprudence revealed a trend away from the regulation of marriage and toward a recognition that the law should respect, not restrict, the entering of such associations.[244] That trend has continued, with the Court continuing to affirm a fundamental right to marry even for those who traditionally and legally have been accorded second-class citizenship status: prisoners. In its 1987 Turner ***323** v Safley[245] decision, a unanimous Supreme Court strongly affirmed the rights of prisoners to get married, even given the diminished citizenship rights of prisoners. In doing so, the Court embraced principles intrinsic to both the doctrines of equal citizenship and intimate association, recognizing the fundamental a vehicle of emotional supp spiritual significance, once again reflecting attributes of relationships similarly affirmed in Roberts as warranting heightened freedom of intimate association protections.[246] Considering that prisoners are legitimately second-class citizens in many ways and that the Court has prohibited second-class treatment of gays and bisexuals, a same-sex marriage advocate would be well-advised to emphasize the precedential value of Turner and the associational and equal liberty protections it represents, demanding the strictest scrutiny of marriage bans which treat gays and bisexuals as even lesser citizens than prisoners.

While it may be years before the Court conclusively decides whether the Constitution guarantees a right to same-sex marriage, either by applying principles of intimate association and equal citizenship or not, it has at least begun paving the path, acknowledging in Romer and Lawrence that the Constitution prohibits state-imposed stigma that would demote gays and bisexuals to a second-class status.[247] With the Lawrence Court's additional admonitions against appealing to traditional or moral prejudices as justification for denying equal liberty protections to gays and bisexuals in their intimate relationships, further decisions like Shahar v. Bowers[248] should become a ghost of the past.

***324** Even if the Supreme Court's recognition of a right to same-sex marriage is still on the distant horizon, the intimate associational rights of gays and bisexuals will continue to be implicated in future cases where infringements of liberty interests involve state interference with intimate relationships. The mere status of being in same-sex relationships continues to be a basis for denials of equal rights in other contexts such as custody and adoption decisions, access to housing, health care, employment, and a myriad of other contexts. In addition, the expression of being in such relationships and even the expressive act of "coming out" as gay or bisexual continues result in substantial denials of equal rights and opportunities, most obviously in the context of gays and bisexuals receiving punitive treatment by the military. Such continued incidents of disfavored treatment triggered by the existence or expression of intimate same-sex relationships give rise to potential interrelated First and Fourteenth Amendment claims, and in such cases courts would be well guided by the doctrine of intimate association.

Although much of this section has focused on the implications of intimate association for gay and bisexual citizens, it cannot be emphasized enough that the freedom of intimate association extends to a vast array of contexts other than gay rights, some of which are discussed in the previous section's proposed presumption-based model for intimate association.[249]

In the case of adultery, for example, since Lawrence cast a new light on the role of traditional moral prejudices in evaluating intimate association claims, overturning Bowers in the process, it seems that sufficient guidance has been given to the Sixth Circuit to warrant the circuit's revisiting its approach to intimate association. As discussed earlier, the Sixth Circuit in Marcum v. McWhorter[250] relied on the Bowers precedent in allowing public employers to fire employees known to be in adulterous relationships because of the traditional moral disapproval of such relationships. Permitting such a narrow, tradition-based rationale for the infringement of intimate associational rights (as opposed to a harm-based justification) arguably does not hold up under the precedent set by Lawrence, and this aspect of ***325** Marcum should be revisited.[251] Similarly, th"all or nothing" approach to intimate association, eschewing the more flexible sliding scale of Roberts and limiting protections to blood relationships,[252] warrants revisiting after Lawrence's establishment of strong protections for intimate relationships.

A renewed focus on the freedom of intimate association would provide an essential model for stronger protections of intimate relationships in a broad array of contexts. The field of protections established by Lawrence's affirmation of strong liberty protections for personal life choices and relationships extends to the intimate associations of all citizens. If Lawrence's potential is realized, the doctrine of intimate association could herald the end of an era of state-sanctioned stigmatization of, and interference with, disfavored relationships in the name of traditional morality.

B. Advantages of a Renewed Intimate Association Focus

Some litigants may hesitate to invoke their intimate associational rights because of the past obscurity of the doctrine. There are indeed potential dangers to relying exclusively on any doctrine that may be less familiar to courts and lacking in enough relevant precedent to provide sufficient guidance to litigants in a case. such hesitation to appeal to the intimate associational rights that may clearly be implicated in any given case should be re-evaluated. With the new guidelines provided by Lawrence, there may be more advantages than ever to bringing intimate association claims forward to supplement other viable claims.

As an alternative to a "right to privacy" argument, for example, the right to association may be viewed more favorably by the Supreme Court, which has been framing privacy issues more frequently in terms of the broader liberty interest that encompasses both the public and private rights of citizens.[253] In addition, privacy rights remain highly ***326** politicized and under attack - even, some fear, by Chief Justice Roberts himself, due to his one-time reference to a "so-called right to

privacy."[254] Given a chance to explain that reference during his confirmation hearing on September 13, 2005, Roberts seemed to disown his past expressed skepticism about privacy rights, but in doing so notablescribed privacy rights once again as an extension of broad substantive due process liberty protections.[255] As such, a re-emphasis of the liberty components of privacy rights would seem to be in accordance with the majority views of the Roberts court. Finally, with Chief Justice Roberts having served as a consultant for the gay rights litigants in Romer,[256] it is likely that the equal citizenship principles articulated in that case, along with the strong liberty protections embraced by the Court in Lawrence, are compatible with the jurisprudence of the new Chief Justice.

***327** With the newly restructured Court showing apparent majority support for the equal citizenship and liberty protections established in Romer and Lawrence, future litigants may consequently benefit from appealing to equal citizenship's derivative intimate association doctrine, which arguably could accord even stronger privacy protections than the right to privacy itself.

The right to privacy has been largely confined to its articulation as a substantive due process right, limiting its application in more public associational contexts and obscuring its relationship to equal protection. Intimate association, on the other hand, has been out of the closet from the start as encompassing First Amendment as well as due process and equal protection dimensions, availing it to a broader array of constitutional claims. The strength of intimate association comes from its various and interrelated constitutional roots as first identified in Griswold and as re-affirmed in Lawrence. Articulating cases in terms of the freedom of intimate association allows such cases to be presented in a way that strengthens the interrelated claims to equality, liberty, and expressive rights that may be all be pertinent in a case rather than forcing litigants or courts to choose one constitutional amendment over another.

Furthermore, the Roberts decision's initial identification of intimate association as grounded in the First Amendment should help to reassure those confronting challenges to privacy as an "unenumerated" right. While the Ninth Amendment clearly protects unenumerated rights as well as those named in the text of the Constitution, the freedom of intimate association, as an extension of the freedom of expression named in the First Amendment, may be viewed as having more easily identifiable constitutional roots. The First Amendment also provides helpful guidance to traditionally unpopular groups, whose rights can receive heightened protection under an intimate association doctrine that prohibits a state's discriminatory treatment of unpopular expressions of one's most intimate life choices.[257]

In the end, the doctrine of intimate association creates a powerful bridge, not just between constitutional amendments and principles, but between overlapping contextual scenarios as well. As a subset of the integral equal citizenship doctrine embraced by the Court in Romer and Lawrence, intimate association allows for the privacy protections of the Fourteenth Amendment to be secured in . Such protections ***328** are mandated by the promises of Romer and Lawrence that no individual shall be denied equal respect or subjected to second class status by the state due to his or her intimate relationships, no matter how traditionally unpopular such relationships may appear in the eyes of a "moral" majority. Even as the doctrine of intimate association opens the door for the fuller equal protection of the liberty interests and associational rights of all citizens, the contours and parameters of such a right are especially ripe for re-examination after Lawrence, which simultaneously strengthens the protections for intimate relationships and paves the path for a more clearly defined articulation of that doctrine.

C. Conclusion

Since the turn of the century, the Supreme Court's treatment of the freedom of intimate association has evolved into a climate of receptivity toward the full and equal application of intimate association protections for all citizens. The Court seems poised, as never before, to accord strong equal liberty protections to intimate associations, regardless of sexual orientation, traditional norms, moral disapproval, or other hurdles that too many disenfranchised individuals have faced over the years in seeking protection for their most intimate life choices and relationships.

With the Court newly restructured, a new century bringing in a modern era of individual rights challenges, the circuits pleading for clarity, and the freedom of intimate association being ripe for re-examination, the Court has a golden opportunity to give the doctrine of intimate association a clearer definition. Should it choose, at this historic crossroads, to finally bring more clarity to

the doctrine it only began to describe in Roberts, and which has long awaited completion, the Court should be guided, as it was in Romer and Lawrence, by the Constitution's promise of equality and liberty for all citizens in their intimate private lives and public expressions of such intimate life choices. The Constitution's guarantee of equal liberty for all individuals--to be secure in their persons, their liberties, and their right to autonomy and dignity in their personal lives--demands no less.

Footnotes

a1 LL.M., University of Wisconsin Law School; J.D., Case Western Reserve University School of Law; B.A., James Madison College at Michigan State University. Current S.J.D. Dissertator, University of Wisconsin Law School. I wish to thank Professor Linda Greene, whose ongoing guidance and support have played an instrumental role in my academic scholarship. I am also grateful to Professor Kenneth Karst, whose visionary work has inspired this article, and whose input and encouragement have been invaluable.

1 381 U.S. 479 (1965).

2 Id. at 484-86.

3 Roe v. Wade, 410 U.S. 113, 171-72 (1973)(Rehnquist, J. dissenting) (disputing existence of right to privacy as applied to abortion); Robert H. Bork, the Tempting of America: The Political Seduction of the Law 99-100 (Free Press, 1990)(arguing that the right to privacy has no basis in the constitution); see e.g. John Aloysius Farrell, Sifting Roberts' Views on Women's Issues, Denver Post, Sept. 4, 2005, at E1 (describing Chief Justice Roberts' record prior to confirmation as including a memo describing the right to privacy as a 'so-called 'right to privacy,'' and an 'amorphous right' not found in the Constitution). But see c.f. infra note 255 and accompanying text (Robert's confirmation testimony affirming existence of right to privacy and clarifying previous comment).

4 Kenneth L. Karst, The Freedom of Intimate Association, 89 YALE L.J. 624 (1980).

5 468 U.S. 609 (1984).

6 539 U.S. 558 (2003) (striking down Texas sodomy ban and overturning the infamous Bowers v. Hardwick, 478 U.S. 186 (1986), reh'g denied, 478 U.S. 1039 (1986)).

7 405 U.S. 438 (1972).

8 Id. at 453 (as quoted by Lawrence v. Texas, 539 U.S. 558, 565 (2003)).

9 Griswold, 381 at 483 (quoting NAACP v. Alabama, 357 U.S. 449, 462 (1958)).

10 Id. at 484-86.

11 410 U.S. 113 (1973).

12 Proponents of a fundamental right to reproductive privacy bemoaned the lack of emphasis on women's equality in this area of

jurisprudence. See, e.g., Catharine A. Mackinnon, Toward a Feminist Theory of the State, 184-94 (Harvard 1989); Ruth Colker, An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age and Class, 1991 Duke L.J. 324, 356-57 (1991); Ruth Bader Ginsburg, Some Thoughts On Autonomy and Equality in Relation to Roe v. Wade, 63 N.C. L. Rev. 375 (1985); Kenneth L. Karst, Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1, 53-59 (1977); Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. PA. L. REV. 955 (1984); Reva B. Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261 (1992).

13 See supra note 3. See also Marybeth Herald, A Bedroom of One's Own: Morality and Sexual Privacy, 16 Yale L.J. & Feminism 1, 6 (2004)('The thirty years between the issuance of these opinions has been a time of heated political, social, and academic debate over the limits of judicial interpretation of the Constitution with privacy rights as the focal point').

14 See Nancy C. Marcus, Beyond Romer and Lawrence: The Right to Privacy Comes out of the Closet, 355 Colum. J. Gender & L. 15 (2006).

15 539 U.S. 558 (2003).

16 Id. at 564.

17 505 U.S. 833 (1992) ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment .... At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.") (cited by Lawrence, 539 U.S. at 574).

18 See Karst, supra note 4.

19 Id. at 652-66.

20 Id. at 624-25.

21 Id. at 692.

22 Id. at 625.

23 Id. at 624 (citing Griswold v. Connecticut, 381 U.S. at 486 (1965)).

24 Karst provided the following working definition of "intimate association": a "close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship." Karst, supra note 4 at 629.

25 Id. at 625-28, 667-85.

26 Id. at 630-37. Self-identification, which Karst describes as relationships that help shape individual identity and allow individuals to

express such identities, has been recognized by other scholars as intrinsic to equality and expressive rights. See, e.g., Nan D. Hunter, Expressive Identity: Recuperating Dissent for Equality, 35 Harv. C.R.-C.L. L.Rev. 1 (2000) (advocating a new approach to expressive identity which recognizes and bridges the interconnections between equality and expression as well as between oppositional identity politics and constitutional law).

27 Id. at 637. See also id. at 692 ("It is meaningless to speak of morality when there is no choice. The freedom to choose our intimates and to govern our day-to-day relations with them is more than an opportunity for the pleasures of self-expression; it is the foundation for the one responsibility among all others that most clearly defines our humanity").

28 Id. at 641.

29 Id. at 653.

30 Id.

31 Id. at 654.

32 Id. at 655-59.

33 Id. at 655.

34 See id. at 656.

35 See id. at 658.

36 See Karst, supra note 12 at 4.

37 Karst, supra note 4 at 663. See also Kenneth L. Karst, Local Discourse and the Social Issues, 12 Cardozo Stud. L. & Literature 1, 26 (2000) (describing Griswold's establishment of intimate association in terms of equal citizenship).

38 Karst, supra note 4 at 666.

39 478 U.S. 186 (1986), overruled by Lawrence v. Texas, 539 U.S. 558 (2003).

40 See infra Section C.1.

41 468 U.S. 609 (1984).

42 357 U.S. 449 (1958) (holding that state mandated disclosure of NAACP membership lists violated the organization's freedom of

association).

43 Roberts, 468 U.S. at 618.

44 Id. at 617-18.

45 Id. at 618.

46 The precedents cited in the decision, at 618-19, included, for example, Zablocki v. Redhail, 434 U.S. 374 (1978); Carey v. Population Servs. Int'l., 431 U.S. 678 (1977); Moore v. City of East Cleveland, 431 U.S. 494 (1977)(plurality opinion); Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1972); Stanley v. Georgia, 394 U.S. 557 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965); NAACP v. Alabama ex rel Patterson, 357 U.S. 449 (1958); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); and Meyer v. Nebraska, 262 U.S. 390 (1923).

47 Roberts, 468 U.S. at 617-18.

48 Roberts, 468 U.S. at 618.

49 See, e.g., Cornelia Sage Russell, Shahar v. Bowers: Intimate Association and the First Amendment, 45 Emory L.J. 1479, 1489 (Fall 1996); Gwynne L. Skinner, Intimate Association and the First Amendment, 3 Law & Sexuality 1, 10 (1993); Collin O'Connor Udell, Intimate Association: Resurrecting a Hybrid Right, 7 Tex. J. Women & Law 231, 240 (Spring, 1998).

50 See Roberts, 468 U.S. at 620 ("We need not mark the potentially significant points on this terrain with any precision.").

51 Id.

52 Id.

53 Udell, supra note 49 at 232. See also id. at 236-37 (describing Roberts as "happy evidence that Justice Brennan sat down with the Yale Law Journal and studied Karst's article at one time or another").

54 Roberts, 468 U.S. at 630-37.

55 Compare Karst, supra note 4 at 627 ("The freedom of intimate association, like other constitutional freedoms, is presumptive rather than absolute. In particular cases, it may give way to overriding governmental interests ... The freedom of intimate association is thus a principle that bears on constitutional interest balancing by helping to establish the weight to be assigned to one side of the balance") with Roberts, 468 U.S. at 620 (Describing two illustrative associational poles--family relationships which may receive the most protection, and business relationships which may receive the least--the Court concludes that [b]etween these poles, of course, lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State. Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.).

56 See Karst, supra note 4 at 664.

57 Roberts, 468 U.S. at 619-20.

58 Despite such an appearance of equality and liberty being at odds in Roberts, however, a more in-depth analysis of the opinion reveals equal citizenship principles being employed as a part of intimate association. See infra at II.B.

59 Minn Stat. Ann. §363A.01, et seq. (West 2004).

60 Which, at the Supreme Court level, included Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) and New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988), described later in this section.

61 The associational and liberty interests of the women whose rights were also at issue, if not directly claimed in such cases, however, might cast a different light on the apparent opposition posed in such cases, since both the equality and liberty interests of women were at stake in each case.

62 478 U.S. 186 (1986), overruled by Lawrence v. Texas, 539 U.S. 558 (2003).

63 760 F.2d 1202, 1212 (11th Cir. 1985), rev'd sub nom., Bowers v. Hardwick, 478 U.S. 186 (1986).

64 Id.

65 Id.

66 Bowers v. Hardwick, 478 U.S. at 191. In overruling Bowers, the Lawrence Court in 2003 sharply criticized the Bowers majority for engaging in such a narrow articulation of the liberty interests at stake:
"To say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it said marriage is simply about the right to have sexual intercourse...." Lawrence, 539 U.S. at 566. "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." Id. at 567.

67 Bowers, 478 U.S. at 202, 205 (Blackmun, J. dissenting).

68 Id. at 205(citing Karst, supra note 4 at 624) "The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many 'right' ways of conducting those relationships").

69 While Blackmun recognized the separate claims to privacy and intimate associational rights violations asserted by Hardwick, he also seemed to describe intimate association as a subset of privacy, writing, "Indeed, the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy." Id. at 208.

70 Id. at 213-14, (citing Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 n. 13 (which Blackmun describes as noting that "marital intercourse on a street corner or a theater stage" can be forbidden despite the constitutional protection identified in Griswold v. Connecticut, 381 U.S. 479 (1965))).

71 481 U.S. 537 (1987).

72 Id. at 544-45.

73 Id. (citing Zablocki v. Redhail, 434 U.S. 374, 383-86 (1978); Carey v. Population Servs. Int'l, 431 U.S. 678, 684-86 (1977); Moore v. East Cleveland, 431 U.S. 494, 503-04 (1977) (plurality opinion); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925)).

74 Id. at 546.

75 Id. at 545 ("[w]e have not attempted to mark the precise boundaries of this type of constitutional protection").

76 487 U.S. 1 (1988).

77 Id. at 8, 18.

78 490 U.S. 19 (1989).

79 Id. at 24.

80 493 U.S. 215 (1990).

81 Id. at 237.

82 Id. (quoting Roberts, 468 U.S. at 618-19, arguably out of context, since the sentence quoted in its entirety is actually a tribute to the critical importance of supporting a diverse, not narrowly traditional culture:
Without precisely identifying every consideration that may underlie this type of constitutional protection, we have noted that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State.
Roberts, 468 U.S. at 618-19 [emphasis added]).

83 FW/PBS, 493 U.S. at 237.

84 505 U.S. 833 (1992).

85 Id. at 856 (citations omitted).

86 497 U.S. 502 (1990).

87 Id. at 520 (accepting the state's conclusion "that, in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature" and that "the statute here is a rational way to further those ends ...").

88 Arguably, abortion rights litigants remain better positioned than opponents to appeal to the freedom of intimate association, since abortion restrictions can generally be described as implicating a woman's right not to be forced into an intimate association (i.e., motherhood) against her will. Despite the Akron decision, litigants could still argue that with familial relationships historically receiving the highest degree of protection from government interference under the doctrine of intimate association, parental notification or consent laws warrant strict scrutiny under the doctrine. Currently on the Court's docket is a parental notification case, Planned Parenthood v. Heed, 390 F.3d 53 (1st Cir. 2004), cert. granted, Ayotte v. Planned Parenthood, 73 U.S.L.W.3684 (U.S. May 23, 2005) (No. 04-1144) (challenging parental notification law with no health exception), but the litigants in that case have not raised intimate association claims and the doctrine will most likely not be addressed in that case.

89 530 U.S. 640 (2000).

90 Id. at 698 n.26.

91 530 U.S. 57 (2000).

92 Id. at 90 n.10 (Stevens, J., dissenting).

93 539 U.S. 126 (2003).

94 Id. at 131-32 ("We do not hold, and we do not imply, that any right to intimate association is altogether terminated by incarceration or is always irrelevant to claims made by prisoners. We need not attempt to explore or define the asserted right of association at any length ....") (citations omitted).

95 See, e.g., Cornelia Sage Russell, Comment, Shahar v. Bowers: Intimate Association and the First Amendment, 45 Emory L.J. 1479, 1495-1510 (1996). See also Udell, supra note 49 at 239-69.

96 See Udell, supra note 49 at 233-39.

97 Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984) (At times, the "intrinsic and instrumental features of constitutionally protected association may, of course, coincide. In particular, when the State interferes with individuals' selection of those with whom they wish to join in a common endeavor, freedom of association in both of its forms may be implicated").

98 Udell, supra note 49.

99 Id. at 261-62 (citations omitted).

100 See Sanitation and Recycling Indus. v. City of New York, 107 F.3d 985, 996 (2d Cir. 1999) (finding 'pure business relationships' with organized crime members to be outside the protection of intimate association after applying Roberts factors: 'Whether the right extends to other relationships depends on the extent to which those relationships share the characteristics that set family relationships apart - small, select, and secluded from others').

101 See Rode v. Dellaciprete, 845 F.2d 1195, 1204-05 (3d Cir. 1988). While quoting the various Roberts factors in detail, the court held that a relationship between in-laws, even where good friendship was involved, was not an intimate association because the relationship was not by blood, a dating relationship, or based on the creation and sustenance of a family. Although Udell's above summary also describes the Tenth Circuit as also failing to faithfully apply Roberts, the article acknowledges at 254-55 that the Tenth Circuit's jurisprudence 'was initially the most faithful to' Roberts, due to its decision in Trujillo v. Bd. of County Comm'rs, 768 F.2d 1186 (10th Cir. 1985)(affirming the broad reach of intimate association's protections in holding that a prisoner's death infringed upon his intimate associations with family members). Trujillo having since been slightly modified, it still remains good law in the Tenth Circuit, and it consequently is not so clear that the Tenth Circuit is generally failing to apply the Roberts factors.

102 305 F.3d 130 (2d Cir. 2002).

103 Id. at 133.

104 Id. at 135-36.

105 229 F.3d 435 (3d Cir. 2000).

106 Id. at 438 (citing Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984) and Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987)).

107 390 F.3d 219 (3d Cir. 2004), cert. granted, 73 USLW 3648 (U.S. May 02, 2005) (No. 04-1152).

108 126 S.Ct. 1297 (2006).

109 Because of the schools' anti-discrimination policies protecting students from employment recruiters who discriminate based on sexual orientation.

110 Id. at 235, n.17.

111 239 F.3d 366 (5th Cir. 2000)(table).

112 Id. at *3 n.1 (quoting Neal E. Devins, The Trouble With Jaycees, 34 Cath. U. L.Rev. 901, 910 (1985) (which the court described as 'noting that the highly unstructured framework of Jaycees necessitates ad hoc determination of which associations warrant constitutional protection')).

113 Id. at *3 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 620 (1984)).

114 Id. at *1.

115 310 F.3d 484 (6th Cir. 2002).

116 Id. at 499 (quoting Roberts, 468 U.S. at 618-19).

117 Id. at 499-500.

118 Id. at 501.

119 Id. (citing Roberts, 468 U.S. at 617-618).

120 Id. at 502.

121 308 F.3d 635 (6th Cir. 2002).

122 Id. at 638.

123 Id. at 640.

124 Id. at 640, 642.

125 Id. at 640-41(quoting Roberts, 468 U.S. at 620 (emphasis added)).

126 Id. at 641.

127 See 308 F.3d 635, 638-42 (6th Cir. 2002).

128 385 F.3d 935 (6th Cir. 2004).

129 Id. at 943. Compare to Johnson, 310 F.3d at 502.

130 Id. at 942; see also supra Section II.B.

131 27 F.3d 1346 (8th Cir. 1994).

132 Id. at 1352.

133 Id.

134 114 F.3d 1097 (11th Cir. 1997), reh. denied 120 F.3d 211 (11th Cir. 1997), cert. denied 522 U.S. 1049 (1998).

135 The same Bowers who was the named defendant in Bowers v. Hardwick.

136 Shahar v. Bowers, 114 F.3d at 1101.

137 434 U.S. 374 (1978).

138 Shahar v. Bowers, 70 F.3d at 1224-25.

139 Pickering v. Board of Educ., 391 US 563 (1968)(holding that in cases involving an employer's actions against an employee that implicate employee's First Amendment rights, courts should weigh the state's interest as an employer against the First Amendment interest of the employee).

140 Shahar v. Bowers, 114 F.3d at 1102.

141 Id. at 1099 (citing FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 237-39 (1990)); Roberts v. United States Jaycees, 468 U.S. 609 (1984).

142 Id at n.2, (citing Bowers v. Hardwick, 478 U.S. 186, 194 (1986)).

143 Romer v. Evans, 517 U.S. 620 (1996)(striking down state constitutional amendment banning civil rights protections for lesbians, gays and bisexuals).

144 Shahar v. Bowers, 114 F.3d at 1110.

145 Id. at 1105, n. 17 ("[W]hatever else may be doubted about Georgia's sodomy law, we know that its application to homosexual sodomy violates no fundamental liberty interest protected by the Federal Constitution because the Supreme Court has already so held.") (citing Bowers, 478 U.S. at 193-98, 188 n.2). See also Id. at 1110 n.25 (citing Bowers v. Hardwick, 478 U.S. 186 (1986))("We also note that in deciding Romer, the Court did not overrule or disapprove (or even mention) Bowers v. Hardwick, which was similarly about conduct in that it held that the State of Georgia did not violate 'substantive due process' in prosecuting homosexual sodomy as a crime.").

146 Id. at 1104-05.

147 Walker v. Henderson, 239 F.3d 366, *3 n.1 (5th Cir. 2000) (table) (quoting Neal E. Devins, The Trouble With Jaycees, 34 Cath. U. L. Rev. 901, 910 (1985)).

148 Geiner v. City of Champlin, 27 F.3d 1346, 1352 (8th Cir. 1994).

149 Patel v. Searles, 305 F.3d 130, 133 (2d Cir. 2002).

150 Marcum v. McWhorter, 308 F.3d 635, 641 (6th Cir. 2002) (quoting Roberts v. United States Jaycees, 468 U.S. 609, 620 (1984)).

151 468 U.S. 609 (1984).

152 See generally Boy Scouts of America v. Dole, 530 U.S. 640 (2000); Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995).

153 530 U.S. at 659. See also supra Section I.C.1.

154 See generally 515 U.S. 557 (1995).

155 Id. at 581.

156 517 U.S. 620 (1996).

157 539 U.S. 558 (2003).

158 517 U.S. at 635.

159 Id.

160 Id. at 634-35 ("The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality.... we find it impossible to credit [these justifications].").

161 Id. at 623 (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

162 Id. at 635.

163 Id. at 631. Karst described this passage in the following terms: '[h]ere Justice Kennedy is expressing the nation's aspiration to an

inclusive public world. In doctrinal terms, he is talking the language of equal citizenship.' Kenneth L. Karst, Justice O'Connor and the Substance of Equal Citizenship, 55 SUP. CT. REV. 357, 438 (2004).

164 539 U.S. 558 (2003).

165 Id. at 578.

166 Id. at 562.

167 Id.

168 See Kennedy's description of Bowers, id. at 566 ('The facts in Bowers had some similarities to the instant case. A police officer, whose right to enter seems not to have been in question, observed Hardwick, in his own bedroom, engaging in intimate sexual conduct with another adult male').

169 Id. at 567.

170 505 U.S. 833 (1994).

171 Lawrence v. Texas, 539 U.S. 558, 574 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1994)).

172 Id. Although the citations from Stevens' dissent were omitted in Lawrence's quotation of the opinion, those citations included Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972); and Griswold v. Connecticut, 381 U.S. 479 (1965)--part of the same line of cases cited in Roberts as establishing a freedom of intimate association.

173 See id. ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."). See also id. at 571 ("Our obligation is to define the liberty of all, not to mandate our own moral code')(quoting Casey, 505 U.S. at 850).

174 Id. at 571-72 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

175 See supra note 173.

176 Id. at 582-83 (O'Connor, J., concurring) (citing Romer v. Evans, 517 U.S. 620, 633-35 (1996); Dept. of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)).

177 See id.

178 Lawrence, 539 U.S. at 579.

179 Id. at 562.

180 Id. at 575.

181 Id. (noting that such constitutional sources of equality and liberty protections are "linked in important respects, and a decision on the latter point advances both interests").

182 Roberts v. United States Jaycees, 468 U.S. 609. 617-18.

183 385 F.3d 935 (6th Cir. 2004). See also supra, Section I.A.

184 Flaskamp, 385 F.3d at 942.

185 368 F.Supp.2d 980 (D. Neb. 2005), appeal docketed, No. 05-2604 (8th Cir., Sept. 1, 2005).

186 Id. at 990-91 ("[t]hese two constitutionally protected freedoms can coincide particularly when the state interferes with an individual's selection of those with whom they wish to join in a common endeavor") (citing Roberts, 468 U.S. at 618).

187 Id. at 992-93.

188 See Roberts, 468 U.S. 609.

189 See Lawrence v Texas, 539 U.S. 558.

190 See supra notes 177-178 and accompanying text.

191 Such as Marcum v. McWhorter, 308 F.3d 635 (6th Cir. 2002) and Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997), reh. denied 120 F.3d 211 (11th Cir. 1997), cert. denied 522 U.S. 1049 (1998). See supra Section I.C.1.

192 See supra note 184 and accompanying text.

193 See John Stuart Mill, On Liberty (H. B. Acton. London, ed., Everyman ed.)(1872):
[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others...

194 Lawrence, 539 U.S. at 567.

195 For a more substantive discussion of this issue, see Laurence H. Tribe, Lawrence v. Texas: The 'Fundamental Right that Dare not

Speak its Name,‘ 117 Harv. L.Rev. 1893 (2004) (describing liberty protections of Lawrence as embodying principles of equal dignity and respect).

196 See infra, Section II.C.

197 The majority opinion stated that “[the present case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter,” Lawrence, 539 U.S. at 578, and O’Connor’s concurrence (at 575) even more firmly stated,

That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fall under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations--the asserted state interest in this case--other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.

Lawrence, 539 U.S. at 575 (O’Connor, J., concurring).

198 Id. at 567-68.

199 Romer v. Evans, 517 U.S. 620, 585 (1996) (O’Connor, J., concurring) (“The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally”) (quoting Railway Express Agency v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J. concurring)).

200 Roberts v. United States Jaycees, 468 U.S. 609, 620 (1984).

201 See supra note 172 and accompanying text.

202 ‘[D]istinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship,‘ and by factors as the relationship’s ‘size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent.‘ Roberts, 486 U.S. at 620.

203 See Justice O’Connor’s description of the Lawrence majority opinion as applying the same type of a ‘more searching form of rational basis‘ as applied in Romer and previous cases involving illegitimate government objectives, Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring).

204 Whom the record does not describe as being in a committed, exclusive, long-term relationship, but liberty in their private, intimate sexual relationship was still granted strong

205 United States v. Marcum, 60 M.J. 198, 205 (2004) (addressing the constitutionality of the Military Sodomy provision, Article 125, while ultimately distinguishing the case from Lawrence due to evidence of possible coercion and other factors).

206 Lawrence, 539 U.S. at 567.

207 493 U.S. 215 (1990). See supra Section I.C.2.

208 Marcum, 60 M.J. at 205.

209 See Karst, supra note 4 at 633:
[W]hile commitment means an expectation of constancy over a period of time, any effective legal shelter for this value must offer some protection to casual associations as well as lasting ones ... One reason for extending constitutional protection to casual intimate associations is that they may ripen into durable intimate associations. Indeed, the value of commitment is fully realizable only in an atmosphere of freedom to choose whether a particular association will be fleeting or enduring. A doctrinal system extending the freedom of intimate association only to cases of enduring commitment would require intolerable inquiries into subjects that should be kept private, including states of mind.

210 See supra Section I.C.2.

211 431 U.S. 494 (1977).

212 Id. (citing Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-40 (1972); Meyer v. Nebraska, 262 U.S. 390, 399-401 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925)).

213 310 F.3d 484 (6th Cir. 2002).

214 Roberts v. United States Jaycees, 468 U.S. 609, 620 (1984)(identifying relevant factors as including "[s]ize, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent").

215 E.g., rape and domestic violence situations, as opposed to consensual sadomasochistic relationships where no serious harm or unwanted physical pain is inflicted.

216 See, e.g., Simon & Schuster v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991).

217 Brief for the Respondents in Opposition, Rumsfeld v. FAIR, No. 04-1152 (U.S. Feb. 28, 2005).

218 See FAIR v. Rumsfeld, 390 F.3d 219, 239 (3d Cir. 2004) ("Unsurprisingly ... the record demonstrates that openly gay persons who meet with military recruiters are told by the recruiters that they may not pursue military careers").

219 368 F.Supp.2d 980 (D. Neb. 2005), appeal docketed, No. 05-2604 (8th Cir., Sept. 1, 2005). See also supra Section II.B.1.

220 See, e.g., Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Baker v. State, 744 A.2d 864 (Vt. 1999); Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), superceded by Haw. Const. Art. I, § 23.

221 Bruning, 368 F. Supp. 2d at 985 n.1 (quoting Complaint at P 4, Citizens for Equal Protection, Inc. v. Bruning, 368 F. Supp. 2d 980 (D. Neb. 2005) (No. 03 Civ. 3155), 2003 WL 23791331:
The plaintiffs expressly disclaim an interest in recognition of same-sex marriages, civil unions or domestic partnerships as a remedy in this case. They seek only 'a level playing field, an equal opportunity to convince the people's elected representatives that same-sex relationships deserve legal protection' and 'equal access, not guaranteed success, in the political arena.' The court is not asked to decide whether a state has the right to define marriage in the context of same-sex and opposite-sex relationships.

222 In the Nebraska court's equal protection analysis, Romer v. Evans played a prominent role, the factual parallels between the two cases emphasized throughout the plaintiffs' arguments and the court's decision in both cases involving sweeping constitutional amendments that prohibited gays from receiving a large number of legal benefits or even seeking such benefits in any meaningful way through the legislative process. Bruning, 368 F. Supp. 2d at 992, 994-95, 1001-06, 1008; see also Romer, 517 U.S. at 623-25.

223 Bruning, 368 F. Supp. 2d at 989.

224 Id. at 994-96 ("Although not central to disposition of this case, the court finds Section 29 burdens rights of intimate association," since it prohibits the state from recognizing even unions 'similar to marriage,' implicating numerous relations even beyond same-sex partnerships, such as protections for foster and adoptive parents, non-married parents sharing custody, cohabitants, and same-sex couples seeking custody or adoption rights. "Without determining where on this spectrum a potential domestic partnership, civil union or other "same-sex" relationship would fall, let it suffice to say that associations or living arrangements affected by Section 29 are closer to the end of the continuum that deserve constitutional protection.").

225 Id. at 990-92.

226 See supra note 186 and accompanying text (quoting Bruning, 368F.Supp.2dat990-91.).

227 Bruning, 368 F. Supp 2d at 993.

228 Id. at 990-91 (citing Roberts, 468 U.S. at 618).

229 Id. at 990-95.

230 Id. at 993-95.

231 See supra Section I.C.2.

232 126 S.Ct. 1297 (2006).

233 Brief for Appellees at 2, Citizens for Equal Protection v. Bruning, No. 05-2604 (8th Cir., Sept. 1, 2005).

234 As Justice Blackmun has noted, it is a well-settled principle of law that "a complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." Bowers v. Hardwick, 478 U.S. 186, 201-02 (1986) (Blackmun, J., dissenting) (quoting Bramlet v. Wilson, 495 F.2d 714, 716 (8th Cir. 1974), and citing Parr v. Great Lakes Express Co., 484 F.2d 767, 773 (7th Cir. 1973)); Due v. Tallahassee Theatres, 333 F.2d 630, 631 (5th Cir.1964); United States v. Howell, 318 F.2d 162, 166 (9th Cir. 1963); 5 C. Wright & A. Miller, Federal Practice and Procedure § 1357 (1969); Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

235 798 N.E.2d 941 (Mass. 2003).

236 Id. at 948.

237 Id. at 949.

238 See supra Section I.A., quoting Griswold v. Connecticut, 381 U.S. 479, 486 (1965) and compare to Goodridge at 973-74 (Greaney, J., concurring), quoting the same Griswold passage:
"Simple principles of decency dictate that we extend to the plaintiffs, and to their new status, full acceptance, tolerance, and respect. We should do so because it is the right thing to do. The union of two people contemplated by G. L. c. 207 'is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.' Griswold v. Connecticut, 381 U.S. 479, 486 (1965). Because of the terms of art. 1, the plaintiffs will no longer be excluded from that association."

239 See, e.g., Smelt v. County of Orange, 374 F.Supp.2d 861, 867-68, at n.10 (C.Dist. Cal. 2005) (rejecting a Fifth Amendment challenge to the federal Defense of Marriage Act, the court held that denying marriage to same-sex couples does not necessarily violate a First Amendment associational right, distinguishing Bruning and abstaining from a more detailed discussion of intimate associational rights).

240 Karst, supra note 4 at 651. See also David B. Cruz, 'Just Don't Call it Marriage': The First Amendment and Marriage as an Expressive Resource, 74 S. Cal. L.Rev. 925 (2001); Gwynne L. Skinner, Intimate Association and the First Amendment, 3 Law & Sexuality 1 (1993).

241 Karst, supra note 4 at 652.

242 Id. at 683-86.

243 Id. at 686 ("Because stigma is ... clearly forbidden by the Fourteenth Amendment's principle of equal citizenship, the results of serious constitutional inquiry in these cases are easy to predict. That serious inquiry and those results may take a while to arrive, but arrive they surely will").

244 Id. at 650-52.

245 482 U.S. 78 (1987).

246 Id. at 95-96.

247 See Lawrence v. Texas, 539 U.S. 558, 562, stating that bans on the intimate conduct of same-sex couples impermissibly "locked an entire segment of the population into a subordinate status and often forced such individuals either to transform or suppress important dimensions of their identities in order to escape second-class treatment in the public realm" and at 584, that:
[T]he State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law. The Texas sodomy statute subjects homosexuals to 'a lifelong penalty and

stigma.' A legislative classification that threatens the creation of an underclass ... cannot be reconciled with the Equal Protection Clause ... (citations omitted);
Romer v. Evans, 517 U.S. 620, 634-35 (stating ("[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense ....A state cannot so deem a class of persons a stranger to its laws").

248 114 F.3d 1097 (11th Cir. 1997), reh'g. denied 120 F.3d 211 (11th Cir. 1997), cert. denied 522 U.S. 1049 (1998) allowing employers to fire their employees who have 'come out' as being in same-sex relationships).

249 See supra Section I.C.

250 308 F.3d 635 (6th Cir. 2002). See also supra text accompanying notes 121-27.

251 For discussion of Lawrence's potential to help establish more viable intimate association claims for same-sex couples, while less clearly resolving more complex cases involving adultery, see Nan D. Hunter, Sexual Orientation and the Paradox of Heightened Scrutiny, 102 Mich. L. Rev. 1528, 1539-40 (2004).

252 See Rode v. Dellaciprete, 845 F.2d 1195 (3d Cir. 1988). See generally supra Section I.C.2.

253 As evidenced by the Lawrence opinion and as noted by Chief Justice Roberts during his confirmation hearing testimony:
I agree with the Griswold court's conclusion that marital privacy extends to contraception and availability of that. The court, since Griswold, has grounded the privacy right discussed in that case in the liberty interest protected under the due process clause. That is the approach that the court has taken in subsequent cases, rather than in the penumbras and emanations that were discussed in Justice Douglas's opinion. And that view of the result is, I think, consistent with the subsequent development of the law which has focused on the due process clause and liberty, rather than Justice Douglas's approach.
Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary, 109th Cong. 207 (2005) [hereinafter Hearings] (answer of John G. Roberts) available at http://www.nytimes.com/2005/09/13/politics/politicsspecial1/13text-roberts.html (follow "53" hyperlink).

254 See supra note 3.

255 Hearings, supra note 253, at 146-47, available at http:// www.nytimes.com/2005/09/13/politics/politicsspecial1/13text-roberts.html (follow "4" and "5" hyperlink):
ROBERTS: The right to privacy is protected under the Constitution in various ways....It's protected by the Fourth Amendment ... under the First Amendment ... the Third Amendment... [and the Court] has recognized that personal privacy is a component of the liberty protected by the due process clause. The court has explained that the liberty protected is not limited to freedom from physical restraint and that it's protected not simply procedurally, but as a substantive matter as well. And those decisions have sketched out, over a period of 80 years, certain aspects of privacy that are protected as part of the liberty in the due process clause under the Constitution.
Roberts provided even stronger articulation of the right to privacy as a type of protected liberty interest in his answers to questioning by Senator Feinstein:
FEINSTEIN: In response to the chairman's question this morning about the right to privacy, you answered that you believed that there is an implied right to privacy in the Constitution, that it's been there for some 80 years, and that a number of provisions in the Constitution support this right. And you enumerated them this morning. Do you then believe that this implied right of privacy applies to the beginning of life and the end of life?
ROBERTS: Well, Senator, first of all, I don't necessarily regard it as an implied right. It is the part of the liberty that is protected under the due process clause. That liberty is enumerated...
Id. at 223.

[256] See Sheryl Gay Stolberg and David D. Kirkpatrick, Court Nominee Advised Group on Gay Rights, N.Y. Times, Aug. 5, 2005, at A1.

[257] See supra Section I.A. (citing Karst, supra note 4 at 656).

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