JUDICIAL RHETORIC AND RADICAL POLITICS: SEXUALITY, RACE, AND THE FOURTEENTH AMENDMENT

BY

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DISSERTATION

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ABSTRACT:

"Judicial Rhetoric and Radical Politics: Sexuality, Race, and the Fourteenth Amendment" takes up U.S. judicial opinions as performances of sovereignty over the boundaries of legitimate subjectivity. The argumentative choices jurists make in producing judicial opinion delimit the grounds upon which persons and groups can claim existence as legal subjects in the United States. I combine doctrinal, rhetorical, and queer methods of legal analysis to examine how judicial arguments about due process and equal protection produce different possibilities for the articulation of queer of color identity in, through, and in response to judicial speech.

The dissertation includes three case studies of opinions in state, federal and Supreme Court cases (including *Lawrence v. Texas*, *Parents Involved in Community Schools vs. Seattle School District No. 1*, & *Perry v. Brown*) that implicate U.S. Supreme Court Justice Anthony Kennedy's development and application of a particular form of Fourteenth Amendment rhetoric that I argue has liberatory potential from the perspective of radical (anti-establishmentarian and statist) queer politics. I read this queer potential in Kennedy's substantive due process and equal protection arguments about gay and lesbian civil rights as a component part of his broader rhetorical constitution of a newly legitimated and politically regressive post-racial queer subject position within the U.S. constitutional state. My queer rhetorical analysis of judicial speech contributes to the project of bridging post-structural philosophy with everyday material relations. By theorizing queer politics in terms of institutional legal rhetoric, I offer a method for evaluating judicial argumentative choice in terms of radical queer of color political goals.

For Derek, Robert, Catherine, Dick, and Cory,

and for Elvin Odell & Grandpa Moose

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Jon Stewart: "We were talking about the Supreme Court, and they seem very protective over their process,"

Justice Sandra Day O'Connor: "yes"

Stewart: "and you were saying one of the reasons you thought that might be."

O'Connor: "Well, the Supreme Court is the one branch of government that has written explanations for everything it decides and does. That's pretty impressive. No other branch of government, no member of Congress, has to write some written explanation of everything."

[Laughter]

Stewart: "But that is such a good point."

O'Connor: "Yes. Not bad."

Stewart: "But it is [such a good point]…things happen that seem inexplicable on the legislative side..."

O'Connor: "That's right."

Stewart: "...or on the executive side, and you ask, and no one seems to know how it happened or went down...they just show up and they vote on it, and you don't know why."

O'Connor: "But every member of the Court has to have a written explanation...every Justice has signed on to some explanation. That's pretty impressive, I think."[1]

—Excerpt from comedian Jon Stewart's interview with Retired Supreme Court Justice Sandra Day O'Connor on *The Daily Show With Jon Stewart*, March 5, 2013

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A judicial speech act is a sovereign event.[2] In the United States, the Justices of the Supreme Court can exercise sovereign power through rhetorical utterance by at once: determining who is a person and who is not; and making a claim for the right and power of their judicial speech to make that determination. Other U.S. judges and (as Barack Obama has recently insisted) legitimate representatives of the sovereign authority of the U.S. state can exercise this power, but the Supreme Court is unique as the putative and in many cases still the actual final arbiter of any such decision. Of course it is true that human existence does not flow from the Supreme Court, and so by "determining who is a person and who is not," I mean that the Court has the authority to decide whether a person is legible as a subject of the sovereign power of the law, and if so, in what way will that power characterize the nature of that subject.

This is the power not to decide existence itself, but rather the nature of existence as a legal entity in and in relation to the United States of America. In other words, the Supreme Court is the final arbiter in most decisions about the range of possible subjectivities a person can perform or inhabit in those situations when they choose or are forced to engage the law as subjects of legal sovereignty. Such a decision, of course, can have the effect of life and death, as well as any number of other consequences for the nature of both. This dissertation combines queer, argumentative, and queer of color[3] approaches to law to examine how public arguments constitute legitimate forms of lesbian, gay, bisexual, trans*, and queer (LGBTQ), and LGBTQ of color life in relation to U.S. national culture.[4] It is about certain U.S. state, federal, but especially Supreme Court jurists' rhetorical production of certain possible forms of queered and racialized ways of being subject to the U.S. Constitution, and the concomitant production of future possibilities for these subjectivities. In this introduction, I offer a preliminary theorization of the power politics of judicial rhetorical criticism, before discussing the details of my current project. I hope that my work in these pages can contribute a rhetorical perspective to a project others have started—the construction of a radical politics of practical legal recourse.

I. The Rhetorical Performance of Judicial Sovereignty

The philosopher and logician Chaïm Perleman says that the judge, "in giving his decision," "performs an act of sovereignty...by declaring what is in conformity with the law."[5] Judicial declaration is therefore a form of argument as Perelman understands it, wherein the goal of making an argument is to bring a desired conclusion in line with what is already accepted as a given among argumentative interlocutors.[6] The role of the judge in a democratic society is not only to arbitrate what is legal and what is not, but also to use argument as a means of bringing competing visions of law into accord: the judge "shows that the decisions which he is led to take

are not only legal, but are acceptable because they are reasonable."[7] Marouf Hasian, Jr., Celeste Michelle Condit, and John Louis Lucaites call for a rhetorical study of U.S.[8] law that situates jurists as participants in a "rhetorical culture," where judicial rhetoric should be understood in terms of the judiciary's struggle to not only make sound legal decisions, but also to legitimate those decisions in public.[9] Judicial speech is sovereign speech in the sense that its primary function in a democracy is to legitimize the exercise of legal power by the representatives of the state.[10] The arguments judges make in support of their decisions are significant independent from the conclusion itself. They are the technique by which the jurist establishes her own legitimacy as a sovereign entity; in so doing, she enacts an argument for the sovereignty of law.[11]

A juxtaposition of Perelman's study of the rhetorical evolution of the judiciary with his earlier writing on judicial argument and "juridical proof"[12] suggests an interesting distinction between the public and courtroom functions of judicial speech. In this distinction, a judge's argumentative justification for her decision, or conclusion of law, is a public rhetorical act, but in the courtroom, it is the "conclusions that matter to the parties."[13] For those who stand before the bench, all other components of the speech of judicial decision are "little more than a basis from which legal consequences flow."[14] This distinction parses the power of judicial speech into a thing of immediate, material power directed at parties (and especially at the "defendant or accused") to a legal dispute, and a rhetorical act directed at the public whose consent is required for democratic governance, for the purpose of legitimizing and retaining the judicial power to determine "legal consequences."

I propose a modification of Perelman's distinction through a conceptual expansion of the space of the courtroom and of the law.[15] Not only a judge's decisions, but also the particular argumentative choices she makes in support of those decisions, are at once legitimations and

exercises of sovereign power. This power may be felt most immediately by the "parties" to whom the judge directs her ruling, but it also affects any person who may be similarly situated in a similar dispute. The arguments in support of a ruling form rhetorical frameworks of possibility for future conclusions of law that might affect parties to disputes, where neither the party nor the dispute has yet to be conceived. The argumentative framework of judicial decisions matters to the life of each person within the reach of the various manifestations of U.S. law—its "long arm"—whether every such person perceives the effect or not.

In a series of lectures in 1955, J.L. Austin answers the ancient question "can saying make it so?" with the figure of the "performative"—found where the issue "of an utterance is the performing of an action."[16] Austin's systematic discussion of performative utterance has become influential in the cultural study of legal rhetoric, including Judith Butler's examination of the relationships between legal performatives and political subjectivity in *Excitable Speech*. Butler grounds a critique of Mari J. Matsuda and Catherine McKinnon's arguments for the regulation of speech—specifically of "hate speech" and "pornography"[17]—in the proposal that "*the state produces hate speech*," a "formulation"[18] that amounts to a reframing of Perelman's notion of the relationship between law and rhetoric. Perelman—writing in Cold War Europe—assumes a democratic state of sovereign law that requires argumentative legitimation of legal sovereignty as an alternative to the anti-democratic and unethical modes of legitimation through force and coercion.[19] Butler instead posits the decentering of dominant power from the person of the state, replaced in a democratic state of laws with a fantasy of legal sovereignty that is at once grounded in and produced by the notion that the law may be petitioned as protection from dominance.[20]

For Butler, appeals to sovereign law—in other words, the act of petitioning the law as a subject of legal sovereignty—are actually appeals to the law *as* sovereign. Such petitions both

create and legitimize the sovereign power of (in this case) national law; they also continually provide conditions of possibility for judicial representatives of the law, to, as Perelman says they are bound, re-argue for that sovereignty themselves:[21] "the one who waits for the law, sits before the door of the law, attributes a certain force to the law for which one waits...the anticipation conjures its object."[22] Political projects—including projects of rhetorical criticism—that focus on either the legal sovereign or the "subjects" of law do not respond to the way in which power exists and operates.[23] Rather, they shore up the *idea* of sovereign power as a bulwark against a more radical and potentially liberatory understanding of the (following Michel Foucault) "'constitution [and domination] of subjects'"[24] through the multiple, distributed and almost entirely extra-sovereign processes of power that move through our present society.[25] Butler argues that this Foucaultian understanding of power can be the basis for more effective opposition to "domination"[26] than that found through politics that assume the necessity of "recourse to the law."[27]

The fantasy of legal sovereignty produced through appeals to judicial protection has the particular effect of obscuring both the rhetoricity and power of judicial speech (or simply, the power of legal rhetoric), wherein "we set ourselves free...to seek recourse to the law—now set against power and imagined as neutral," in order to "control" the "onslaught" of the effects of legal sovereignty itself, effects produced in part by the very action of seeking recourse.[28] This process can be collapsed into the figure of the "sovereign performative"[29] that at once calls to, argues for, and produces the sovereignty of law. In her demand for rejecting the fantasy of law-as-sovereign as the basis of progressive politics, Butler is one of many publicly inspirational figures for politics of resistance to the present popular cultural domination of the (anti-rhetorical) idea that the legal sovereign has a monopoly on the constitution of subjects, a monopolgy

(re)produced perversely through legal institutional control over political projects designed to protect those legal subjects most vulnerable to the law itself. I will use the word "radical" frequently in this dissertation, and by "radical" I will most often mean such politics of resistance[30]—politics that I admire, often support, and occasionally participate in.

But—following Matsuda—I think that Butler seems to miss an important point. Given the material force of the fantasy of legal sovereignty in the margins, "'at the point[s]'" where power is "'completely invested in its real and effective practices,'"[31] I argue that resistance to the idea of legal sovereignty must not preclude what Cathy Cohen might call a "practical"[32] understanding of the presently inevitable reality of the sovereign rhetorical operations of the law. The political project of resistance to the performative sovereignty of judicial rhetoric in the United States must not deny (as Matsuda and Richard Delgado said in 1987 to the "crits" of Critical Legal Studies) the need to construct strategically informed and tactically sound responses to those "formal" structures of law that already act as and with the material power of sovereign authority—authority over the constraints that legal forms of subjectivity already impose on personhood.[33] As Butler herself acknowledges in 2004,[34] the absolute critique of legal sovereign performatives does not adequately consider how the effects of the fantasy of legal sovereignty are most often (and most often most terribly) felt by "those who have" actually "seen and felt the falsity of the liberal promise"[35] of the U.S. judiciary as a shield against domination.

My experience of the law has occurred through my own participation in and observation of judicial sovereignty—both from a majoritarian perspective. I teach argumentation in a prison, a setting that emphasizes the paradoxical and simultaneous vitality and uselessness of rhetorical and argumentative interaction with those persons charged with enforcing the reasoned

justification of judicial decision through coercive violence. In our present democratic state of laws, the production of legitimacy for judicial sovereignty through argument, and the production of legitimacy through force, work together in explicit and mutually supportive fashion.

More happily, I was recently invited by two friends to officiate their wedding, at a ceremony in Rehoboth, Massachusetts. I agreed, and asked whether I should purchase an ordination online, so that I could legally perform the ceremony. There was no need—Massachusetts is unusual among U.S. states in maintaining a category of officiant called a "solemnizer." Any person, with little qualification, can apply to be a solemnizer. The dichotomy between the "republican style"[36] of the application process, and the quotidian ease with which I was granted the certificate made me think about the "sovereign performative"[37] that I would stage in Rehoboth. The "I do" statement in a marriage ceremony is one of Austin's core examples[38] of an "illocutionary" performative, an utterance which "has a certain *force*" in the "saying" of it,[39] but this example itself performs an interesting elision of the role of a state representative in a civil marriage ceremony. In Rehoboth, my friends would not *be married* until I pronounced them so publicly. That pronouncement would of course require other performative statements ("I do") from my friends as a pre-requisite to its validity.[40] But on the date and in the location specified by the solemnization certificate, I had, as a feature of the designation "solemnizer" bestowed on me by the Commonwealth of Massachusetts, absolute power over whether they would be married or not—on that date and in that location. In the narrow context of the two possible realities of my friends becoming married or not on that day and in that location, my role was to exercise the sovereign performative power of the Commonwealth as its judge-like representative.

But in that exercise, I would also be performing two arguments: one for the sovereign legitimacy (and successful performativity)[41] of my utterances and the illegitimacy of any others; and one for the value and significance of "married" as a position of legal subjectivity in Massachusetts and the United States. I bring up this example to emphasize the specifically illocutionary power of the judicial rhetorical constitution of subjects before law. Austin describes illocution as "'in saying *x* I was doing *y*' or 'I did y,'"[42] but judicial illocution might more accurately be described as "in saying *x* I did *x*." When I said that these people were married, I made them married. The statement and the doing were one and the same. If a judge sentences a person to death, she does not depress the needle; the pronouncement of sentence is an illocutionary act in the first sense (x and y). But in pronouncing the sentence, the judge does redefine the convicted (of a death-eligible crime) person's subjectivity before law from "convicted" and/or "criminal" and/or "felon" and/or "murderer" and/or "traitor" to, more primarily, "condemned." This is an illocutionary act in the second sense (x and x).

If a judge rules that it is unconstitutional to require a trans* person's passport to list their gender contrary to that person's "self-understanding,"[43] this is a "perlocutionary" act (where the utterance effectively causes something to happen)[44] in that the ruling enables the person who is trans* to change the official designation of their gender. But it is *also* an *x* and *x* illocutionary act in the context of the petitioner's subjectivity before law—the utterance of the ruling has changed their self-understanding of their own identity from "not real" to "real" in the eyes of the law. This would be even more evident if the ruling did not merely realize the truth of a trans* person's self-understanding as male or female, but went so far as to create, in the moment of the utterance itself, a legally recognized trans* identity category.

All of these examples are performatives enabled by the fantasy of the sovereign location of power in law. When asked, I considered (given my own views on marriage as an institution) declining to perform the ceremony—even in Massachusetts, whose marriage laws mean that the sexual orientation identity of the two people I married cannot be discerned from this story. I understood that my performative and the discourse of the ceremony surrounding it would contribute in a small way to the sovereign power of the state over human relational and sexual legitimacy. But this refusal would not have made the present sovereignty of the state over the determination of legally legitimate and illegitimate forms of relation any less inevitable.

Petitions to the law are inevitable; they will be made, often by people with no other recourse to save their life, or to preserve their life's basic quality. As Butler demonstrates, any such petition will have performative effect. I do not offer this brief critique of Butler's theory of "sovereign performatives" to dispute the facticity of her arguments. I begin this project with the stipulation that politics of resistance to the "sovereign performative" must include actions of resistance to statist law itself—that is, the specific articulation of opposition, within progressive social movements, to strategies that privilege appeals for help from judges. But these politics must also acknowledge that those who undertake such strategies do not always do so without knowledge of the sovereign performative function of their actions—"recourse to the law" does not always or even usually "imagine" the law "as neutral."[45] These radical politics must also be undertaken *with knowledge of* the effects of the petitions to law-as-sovereign that will inevitably be made—and particularly with knowledge of the effects that flow from the (also performative and also inevitable) judicial rhetorical responses to these inevitable petitions.

Austin teaches us that it is in the nature of performatives to not always work, and to produce effects in excess of their explicit ones. The judicial rhetorical constitution of subject and

abject forms of being-in-relation to law operates through legal performatives that contain the possibilities for their own future "infelicity."[46] My project is an attempt to explore some future possibilities for the counter-sovereign articulation of subjectivity before U.S. law—possibilities that are both foreclosed and engendered in the argumentative justifications for judicial decisions. Specifically, I examine some key Supreme Court cases relating to sexual practice, race in education policy, and marriage. I perform a legal rhetorical criticism of critic-constructed "meta"-texts[47] that form argumentative frameworks through which judges apply various legal doctrines to questions of sexual, racial, educational, and relational freedom.

Following Perelman, I understand judicial argument to be the explanatory justifications offered for judges' authoritative interpretive application of legal doctrine to problems of public concern—problems that have been framed as legal, either by jurists themselves, petitioners to the courts, or both. In the United States, judicial arguments about constitutional interpretation have the privileged function of delimiting the grounds on which the authority of all other statist legal argument is based. Given the overwhelming salience of constitutional legal discourse in U.S. everyday life,[48] this means that the judicial rhetoric of constitutional law plays a significant role in delimiting the grounds on which a person can base their claim—literally[49]—to existence and legitimacy in the U.S. polity.[50] Jurists' arguments from and about the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution in particular perform a final arbitration function in the ongoing and generally contentious process of the statist determination of what forms of racialized queer identity and relation will be eligible for recognized and legitimated status in U.S. public life.

In this dissertation, I focus on the Fourteenth Amendment—due process and equal protection—rhetoric of U.S. Supreme Court Justice Anthony M. Kennedy. I read this rhetoric in

terms of "genealogies of precedent," or the argumentative possibilities for queer subjectivity before law that are brought into being by the doctrinal frameworks Kennedy and other judicial rhetors use in a given opinion. Each chapter offers a case study of opinions in several Federal and Supreme Court cases that are foundational to Kennedy's development of a new constitutional jurisprudence of substantive due process and equality. I demonstrate that this jurisprudence is both productive of and violent to possibilities for practical and strategic sexually "progressive"[51] interactions with U.S. constitutional law. These interactions, despite their practical or strategic formulation, can be undertaken and/or framed in terms of anti-statist and institutional radical queer political goals. Possibilities for the success of such radical framing of practical interaction are partially delimited in the argumentative choice of U.S. judicial opinions.

II. A Short History of Due Process

The language of "due process" in particular has been salient in English legal discourse from at least the ratification of the *Magna Carta* in the fourteenth century,[52] and while the specific legal language used to describe the concept has remained remarkably consistent, its meaning and application have undergone significant change. One example of this evolution is the distinction between "substantive" and "procedural" due process of law, a distinction that plays a central role for the Court's Justices in determining the processes they should undertake for adjudicating particular cases, as well as for more generally determining whether or not all people can be treated equally under the law. I pay particular attention to due process as the Court has recently commented on it, because due process plays a crucial role in determining how marginalized subjects will be treated within U.S. society. Before entering the U.S. judicial system, due process rhetoric was fundamental to negotiations of power and resistance in English polities. The role of due process in these negotiations has been and continues to be to legitimize

political structures predicated on the normalization of identity-based "hierarchies of value"[53] in cultural life, even as due process simultaneously serves as a primary rhetorical and conceptual resource for those who seek to challenge or dismantle those hierarchies.

"Procedural" due process concerns the means by which a person can be punished under the law. It is a procedural check against a sovereign's attempts to violate the fundamental rights of its subjects, deriving from the *Magna Carta* requirement that "judgment must precede execution." A person cannot be subject to punishment or other deprivation of "life, liberty, or property," except through the application of the appropriate legal procedures a person facing punishment is due (such as trial by combat or a properly carried out arrest that includes a Miranda warning).[54] In antebellum U.S. constitutional jurisprudence, due process began[55] to be applied in a "substantive" as well as "procedural" manner. Contrary to the 1856 ruling in *Murray's Lessee v. Hoboken Land & Improvement Company*, where "the Court emphasized that due process is met so long as the government's *procedures* are in accordance with the law,"[56] "substantive" due process means that persons protected by the Constitution may not be deprived of life, liberty, or property except by force of law that at minimum[57] is "fair and reasonable" and in furtherance of a "legitimate governmental objective."[58]

Substantive due process recognizes that there are times when the "government's procedures" for the deprivation of liberty are unjust *even though* they may be wholly "in accordance with the law."[59] One of the more important early articulations[60] of substantive due process in U.S. judicial rhetoric is the *Dred Scott v. Sandford* decision, in which Chief Justice Taney, in addition to his more famous holding that Scott as a black man and slave was not a constitutional subject,[61] also held that the procedure of depriving the respondent Sandford of his "property" (Scott) was unjust even though it was in accordance with the law at the time.[62] Just

prior to his ultimate judgment in *Scott*, Taney notes at the end of an extended aside that if the Missouri Compromise means that a person like Sandford will face loss of property (slaves) merely because "he…brought his property into a particular Territory of the United States," and even though he "had committed no offence against the laws," then *a law such as that* "could hardly be dignified with the name of due process of law."[63] This is the essence of the difference between procedural and substantive due process. Substantive due process insists that a sovereign authority may deprive a person of life, liberty, or property through what is universally agreed to be right legal procedure—a trial before the King's Council, or compliance with the dictates of a legitimately enacted federal statute such as the Missouri Compromise—and still treat that person wrongly because what has been done justly is not always just.[64]

III. Case Studies of Judicial Opinion and the Queer Study of Judicial Argument

In the United States, judicial arguments about substantive due process and the legitimacy of governmental intrusions on freedom participate in what the *Scott* decision demonstrates is a parallel construction of the possible conditions of freedom from oppressive power, and the delimitation of the range of subjectivities that are granted access to those possible freedoms. In the status quo, this parallel constitution of freedom from and legitimation of oppressive power through due process rhetoric continues to be implicated in questions of identity and personhood. As I will demonstrate, the recent relationship between due process, equality, and sexuality in judicial rhetoric is fundamental to the status and future of LGBTQ and person of color dis/enfranchisement in the United States. The Fourteenth Amendment is simultaneously a great (and often necessary) resource and a great impediment to social movements attempting to use U.S. law as a means for achieving racial and LGBTQ progressive political goals. Successful attempts at petitioning federal courts to use the Fourteenth Amendment as the justification for the

judicial proscription of racist and heterosexist laws, or judicial demands for municipal actions to correct structures of racist and heterosexist inequality, have also helped to create frameworks of argumentative possibility for subsequent court decisions that have had the opposite effect.

The political relevance of the statements produced by the United States Supreme Court should not be taken as a given. The utility of political projects that focus on U.S. judicial rhetoric, constitutional rhetoric, and/or the judicial rhetoric of constitutional law are frequently called into question by scholars of U.S. political discourse and contemporary social movements.[65] Such questions are underscored by recent actions of the Obama administration, which has been working to undermine not the significance of constitutional law, but rather the significance of judicial rhetoric *per se* (the primary role of the judiciary in deciding questions of constitutional interpretation).[66] The President's project of undermining the judiciary's review power (a phrase synonymous with 'the power of U.S. judicial rhetoric') has occurred specifically in terms of the question of what branch-manifestations of the federal government should be empowered to determine questions of how to determine if agents of the U.S. state are acting in accordance with the Fifth and Fourteenth Amendment requirements of procedural and substantive due process when they deprive a person of life, liberty, or property.[67]

But the Justice Department's recent efforts to undermine judicial review only highlight the fact that in the U.S., the terms on which any legal negotiation takes place are heavily implicated in the contemporary status of the U.S. Constitution. A lawyer may only very rarely directly discuss questions of constitutional interpretation, but the authority of their legal arguments in any context rests ultimately on both the Constitution, and on the English tradition of judicial rights and procedures on which much of the Constitution is based. Drone assassinations aside, the Court, as the ultimate authority not only on the constitutional legitimacy

of given laws or policies, but on the question of the status of a person, is still the primary entity that decides whether or not persons are eligible for protection under U.S. law. If a person or group eschews the courts and pursues legislative or even extra-legal avenues for social or cultural enfranchisement, the Supreme Court, however ploddingly, will have some ultimate authority as to the effectiveness of that pursuit. Constitutional rhetoric is thus constitutive of subjectivities before the law—possibilities for identification in, through, and under the primary rhetorical instrument of U.S. sovereignty. The particular subset of constitutional rhetoric I am interested in is the set of arguments made by jurists about the manner in which constitutional doctrine should be applied to particular petitions to the state for justice—that is, the rhetoric of judicial opinion.

The performative arguments of U.S. constitutional law are a form of "constitutive" rhetoric. As with performatives, a key feature of "constitutive" rhetoric is the success of the project of constitution. Successful constitutive rhetorics, as Maurice Charland argues in his study of the rhetorical constitution of the "*peuple québécois*"[68] in and through the *Parti Québécois'* 1979 "White Paper,"[69] have often been physically generated from a document functioning literally as *a* constitution.[70] Legal processes function productively in the rhetorical constitution of culture, and every United States legal process is explicitly or implicitly grounded in the United States Constitution. The rhetoric of U.S. constitutional judicial opinion is disseminated in two primary ways: first, as written legal documents ostensibly authored by judges (but often in fact by clerks, working with judges) that are copied, scanned and disseminated electronically, through proprietary databases, free websites designed to promote access to judicial opinion, and some court websites that publish all of their decisions; and second, through journalistic summaries of these opinions. Each judicial opinion becomes part of the

constantly evolving set of revisions to the Constitution as a living, constitutive text, as do as judges' attempts at editorial control over those revisions (amendments, statements of constitutional interpretation from outside the judiciary, etc.) to the Constitution produced by legislators, the President, and other extra-judicial figures.

If the United States is a society constituted in a piece of paper, that paper is not only the literal document of the United States Constitution, but also the total set of published judicial arguments about how the original text should be interpreted in any number of different situations. It is not what the Constitution says, but rather judicial arguments about what the Constitution says, about legitimate forms of being and relating in the United States that matters most to the rhetorical production of legitimate and illegitimate forms of U.S. legal subjectivity.

The significance of the procedural and philosophical statements that judges make about constitutional doctrine, sexuality, and race is therefore not only in those statements' immediate and often limited effect on what actions political and cultural agents take in response to judicial pronouncement. It is rather in a judge's rhetorical power to do two things. First, a judge has the power to participate in delimiting the range of subjectivities that are recognized as legitimate to stand before the law of the Constitution, and thus to participate as actors in U.S. public life, and/or to petition for redress of wrong in U.S. state and federal courts. I say "range of subjectivities," because these subjectivities include categories of persons that are not eligible to stand before U.S. law *at all* (except to be killed or imprisoned as subjects to the literal violence of the state's sovereign force), categories of persons who may petition U.S. courts for redress of certain wrongs, but who are banned from legitimate participation in U.S. public life, and categories of persons who may petition the law *more or less* as full members of the U.S. polity. Second, a judge has the power to participate in delimiting what future laws will and will not be

able to proscribe and enable certain actions by individuals and groups, thus helping to determine ranges of rhetorical possibility for (following Lauren Berlant, Michael Warner, and Charles E. Morris III) efforts those individuals and groups might take to effect projects of anti-establishmentarian and statist queer/of color "'world making'"[71] in and against the U.S. polity.

In the following case studies, I examine the relationship among arguments that Kennedy and other federal and state judges make about the Fifth and Fourteenth Amendments (and their state equivalents), as they apply to laws and policies implicated in current sites of contestation over racial and sexual identity in the United States. The primary cases I examine include: *Brown v. Board of Education* (347 U.S. 483, 1954), the 1950s public secondary school racial integration case; *Bowers v. Hardwick,* (468 U.S. 186, 1986), a case in which the Court upheld a Georgia law criminalizing sodomy as any form of non-heterosexual vaginal sex; *Romer v. Evans* (517 U.S. 620, 1996), Kennedy's determination that Colorado's popularly enacted Amendment II to the state constitution violated the Fourteenth Amendment Equal Protection Clause; *Lawrence v. Texas* (539 U.S. 558, 2003), in which the Court reversed its ruling in *Bowers* to hold both a Texas and the previous Georgia anti-sodomy law unconstitutional under the Fourteenth Amendment's guarantee of substantive due process; *Parents Involved in Community Schools v. Seattle School District No. 1*, (551 U.S. 701, Nos. 05-908, 05-915, 2007), a twin case taking up equal protection challenges to voluntary school integration policies in Seattle, Washington and Jefferson County, Kentucky; and finally *In re Marriage Cases* (43 Cal.4th 757, California Supreme Court S147999, 2008), *Perry v. Schwarzenegger* (704 F. Supp. 2d 921, 2010), and *Perry v. Brown* (9th Cir., Case No. 16696, 2012), the California Supreme Court and U.S. district and appellate court decisions that (in the former) led to and (in the latter two) address the state and federal constitutionality of California's Proposition 8.

There are at least hundreds of examples of U.S. judicial rhetoric that would provide for a fascinating examination of the relationship between substantive and procedural justice, and the rhetorical constitution of racialized queer subjectivities before the law. The particular cases I have selected for examination in this project have received little attention in rhetorical criticism of law,[72] but they are especially salient to the argument of my thesis, in part because of their publicly recognized role in U.S. public debates concerning sexuality, race, equality, and process. Indeed, each is precedent setting, in addition to being salient within public discourse.

I also examine these cases because of their common doctrinal and rhetorical connection to the jurisprudence of the enigmatic U.S. Supreme Court Justice Anthony M. Kennedy. Kennedy's longstanding position as a "moderate" conservative on the Court has given him the opportunity[73] to write majority or significant concurring and dissenting opinions in several controversial cases concerning sexuality and race.[74] The recent history of judicial rhetorics of process and equality is defined by significant shifts in how jurisprudence involving the Due Process and Equal Protection Clauses has operated—in particular, judicial rhetorics of due process and equal protection have been central in responding to and thus framing and delimiting the ongoing debate over demands for full enfranchisement of lesbian and gay subjects in the major institutions of U.S. public life. Kennedy's arguments about due process and equal protection in particular have had significant impact on the nature of those LGBT, queer, racialized, and queerly racialized identities recently granted legibility before the law; these arguments are thus of specifically rhetorical interest to my work. Kennedy's opinions are notable as well for their primary role in determining how the Court interprets and applies due process in relationship to a new and peculiarly *substantive* framing of equal protection. Kennedy's judicial arguments—and those from other doctrinally related opinions—are thus an

ideal location to study the role of constitutional rhetoric in the production of newly legitimate and racialized LGBT and queer ways of being, living, and relating in U.S. public life.

In each of my case studies, I take up judicial arguments about due process in juxtaposition to arguments from equal protection. The Due Process Clauses are generally applied to limit the scope and power both of specific laws challenged in particular cases, and of the power of law, generally, to interfere restrictively in the lives of autonomous subjects. If a person in the United States is denied a right codified in law (whether constitutional or statutory), their petition for redress would be procedural. If a person lacks a right that is either absent from or specifically denied in law—for example, the right to publicly define and live their identity as they see fit, or to gain access to an institution, such as marriage and the military, from which they are legally excluded—their primary legal recourse as an individual is a petition to law involving substantive due process. If a person seeks redress for being treated differently under an existing state law or policy, they may seek redress through the Equal Protection Clause of the Fourteenth Amendment, which reads "nor shall any state…deny to any person within its jurisdiction the equal protection of the laws."[75] The Equal Protection Clause is on its face procedural—it is ostensibly designed to ensure that the law in any given situation applies equally to all legitimate persons, without necessarily demanding a finding of whether the law, while equitable, is otherwise just. The dual history of equal protection and due process jurisprudence is thus key to understand the contemporary nature of the tension and contradiction over the relationship between substantive and procedural justice.

Judicial rhetorics of substantive due process have some queer potential[76] as a corrective to what I and others (including Reva Siegell, Russel K. Robinson, and Derrick A. Bell) argue[77] are the problematically essentialist tendencies of equal protection jurisprudence. By examining

examples of judicial rhetoric that differentially take up questions of both equality and process—in terms of the substantive and procedural versions of both legal principles—I provide a rhetorical avenue for the exploration of radical[78] queer potentials and limitations in constitutional law. This exploration is particularly important for the present moment of constitutional rhetoric, which features a dual renaissance in both substantive due process and equal protection jurisprudence, a renaissance exemplified in Kennedy's recent Fourteenth Amendment arguments. Three of the more visible cases before the Court at the time of this writing—*Hollingsworth v. Perry*, *United States v. Windsor*, and *Fisher v. University of Texas at Austin*—have the potential to be decided based on Fourteenth Amendment precedent established in recent Kennedy opinions.

The first two (*Hollingsworth* and *Windsor*) are the current iterations of the "marriage cases" discussed in Chapter Three. In these, equal protection and due process doctrines merge in the articulation of a racialized (where "racialized" in this case means the abjection of racial difference toward the normativity of racial Whiteness[79]) "right to marry" that has been differentially denied to same-sex couples. In *Fisher*, the Court has the opportunity to continue its nearly thirty-year tradition of using the Fourteenth Amendment to strike *down* anti-racist municipal and public university educational policies as unconstitutional.[80] As I argue in Chapter Two, the relationships between equal protection and due process on the one hand, and sexuality and race on the other, are most often considered separately or analogically in both popular and academic discussions of these cases. My juxtaposition of due process and equal protection doctrines instead approaches the antecedent opinions of these cases now before the Court as judicial arguments that are about the legal constitution of concomitantly raced and sexualized—"queer of color"[81]—constitutional subjects. This analysis is important for a consideration of how a case like *Fisher* might not only be related to a case like *Windsor* (in that both, for example, are

about equal protection), but might actually form part of the same, implicit judicial "meta"[82]-argument about possibilities for queer of color legal subjectivities.

For example, the constitutional law scholar and queer legal theorist Janet E. Halley argues that Kennedy's opinion for the Court in *Romer v. Evans* (a case in which, "for reasons known only to themselves, a majority of the Supreme Court...issued a favorable gay rights decision") "adopts an extreme form" of queer "nominalist" politics.[83] The "nominalist view" of "sexual orientation identities"[84] accords with "queer theory's" "strong constructi[vist]" approach to identity politics,[85] in that identity categories are constructions rather than descriptions of identities as they exist in the world. The nominalism of Kennedy's *Romer* opinion stems from his particular and rather surprising application of the Equal Protection Clause, in which the Justice "refused to base" his "decision on any social description of the group harmed by the challenged law."[86] In other words, Kennedy found a way to declare an anti-gay policy unconstitutional without any need to define and delimit the *nature* of the legally legitimate and constitutionally protected gay legal subject, effectively creating a doctrinal basis for possible future subject*less* petitions to U.S. law.

A major part of Chapter One is devoted to the manner in which Kennedy enables a similarly nominalist politics of legal identity in his argumentative framing of "loose construction"[87] due process jurisprudence in *Lawrence v. Texas*. But, when Kennedy's framing of substantive due process in *Lawrence* (a case concerned explicitly with sexuality, but not race) is read in Chapter Two alongside his similarly substantive framing of equal protection in both *Romer v. Evans* and *Parents Involved* (a case concerned explicitly with race, but not sexuality), the problematic racial implications of the queer nominalist potential of Kennedy's Fourteenth Amendment arguments are made more clear. Rather than creating a future potential for radical

queer social movements to craft strategic relationships with U.S. legal institutions, the "meta"[88]-text of Kennedy's Fourteenth Amendment doctrine instead demands that radically nominalist subject positions be articulated in the context of "post-racial" demands to leave behind difference as a significant site of political organization in the United States—demands that promote a resuscitated politics of white supremacy under the guise of a benevolent multiculturalism.

This is not an optimistic conclusion, but my goal is not to seek optimism in the law. I do see—particularly in *Lawrence*, as well as in some of the opinions I take up in Chapter Three—some *potential* in recent judicial rhetoric for a radical queer praxis of institutional legal relation, but it is a highly conceptual, vague, and futurist potential set against a powerfully repressive status quo. Judicial rhetoric in the United States has little to offer radical politics.

IV. Radical Queer Methods of the Rhetorical Critique of Judicial Argument

I began my discussion with Butler's dual challenge to critical race and radical feminist theories of legal praxis, because I take the politics that ground this work from both positions simultaneously. They are not so incommensurate as Butler (in 1997) seems to think. As Halley says, "critical race theorists" who call for petitions to the law-as-sovereign do not do so because they wish to invest in the sovereign's claim to legitimacy, but rather because of a position of "rhetorically alert pragmatism" that seeks to recognize those situations in which oppressive legal sovereignty is inescapable and so must be dealt with as best it can.[89]

I want to animate the utility of rhetoric for this alertness. I share the great anxiety in the question of, what does rhetorical criticism do?[90] I am fond of the tautology (a version of which is offered by Aristotle to open the *Rhetoric*)[91] that rhetorical criticism helps show how we already do things, rhetorically. To practice criticism of argument as rhetoric's corollary[92] is thus to study how we already argue, argumentatively.[93] Marianne Constable—an important

American champion of rhetorical legal study—argues that the "rhetoric of law" particularly "turns to the way that law answers questions and claims to solve problems...but not in order to solve the problems itself or to stand for better answers. Rather, rhetoric looks at how law makes its claims."[94] I do not do much in this dissertation to offer solutions or alternatives. Rather, I explore a method of critique that may be useful as one, primarily conceptual, component of a radical queer of color rhetorical *praxis*. Rather than argue for a queer valuation of certain examples of judicial public address, I call for and attempt to demonstrate a radical queer *perspective on* U.S. judicial rhetoric. I hope this perspective can make a small contribution to an "alertness" of *how certain judicial opinions work* to constitute forms of intersectionally raced and queered LBGT subjectivities before law. These forms of subjectivity provide almost entirely negative, but nonetheless substantively and importantly different, possibilities for petitions to the U.S. constitutional state.[95]

More specifically, I call for a radical perspective on judicial *argument*—a perspective on the differential value of judicial arguments to certain anti-statist and establishmentarian queer of color political goals. In Perelman's terms, much of the recent queer of color and queer legal theory commentary on Anthony Kennedy's judicial rhetoric is more interested in legal conclusions, than in the processes through which those conclusions were drawn. Here I need to distinguish "conclusions" from "decisions" (terms Perelman-in-translation conflates) in that the recent work of, in particular, Jasbir K. Puar, David L. Eng, and Lynne Huffer looks beyond the ostensibly progressive decisions of Kennedy's opinions (*Lawrence v. Texas* might be described simply as the welcome statement that laws forbidding two men from having sex are not welcome in our Republic) to examine the political implications of the Justice's doctrinal logic—such as his reliance on the right to privacy, or on an oddly depoliticized deployment of the Equal

Protection Clause which obscures that document's particular racialized history. This form of analysis looks beyond Kennedy's judicial *decision* to the political content of his *opinions*. But it still does not often amount to a consideration of Kennedy's judicial arguments.

A study of judicial argument considers the "techniques"[96] through which jurists not only defend the validity of their conclusions of law, but also explicitly and implicitly construct and defend as valid structures of decision-making—what I call "frameworks"—through which other decisions might be made. Judicial decisions are performatives in that their utterance effects an immediate change in the status of the petitioners before the Court. Judicial conclusions are performatives, because they establish a temporary reality about what a given portion of the living meta-text of the U.S. Constitution *means* in a given situation. Judicial argumentative choices about what "techniques" to employ in using "language to persuade and convince" (for example to include broad statements of constitutional theory, or to choose instead to limit an opinion's arguments to what is strictly necessary to support a given decision) are *also* performatives, because their significance is not in whether a person hears them, or is actually persuaded or actually convinced.[97] They are performatives because of their simultaneously illocutionary and perlocutionary effects on future conditions of possibility for political constructions of different forms of being and relating, in accordance with or opposition to (or both) the sovereign Constitution of the United States.

A given example of judicial rhetoric is therefore at once "text" and "context." My study in Chapter Two of a given set of judicial arguments as simultaneously queered and racialized constitutions of possibility for legal subjectivity (following Siobhan B. Somerville's analysis of *Loving v. Virginia*) is, I think, one possible example of the type of rhetorical criticism John Angus Campbell and Celeste Michelle Condit called for in their attempts to resolve the Michael

Leff/Michael Calvin McGee debates over "icon" and "fragment," "text" and "context."[98] Judicial rhetoric is conveyed primarily through ostensibly individual rhetor-produced "specific discursive products"—judicial opinions—wherein jurists attempt to instantiate constitutional legal realities in response to the "rhetorical situation"[99] of a legal dispute, and within the (contested) relations of constitutional text and prior judicial precedent from which the ability to pass judgment arises (and to which the opinion will add).[100] On the Supreme Court, judicial opinions are never discrete texts. They are always constructions of an argumentative interplay between the Justices, the advocates, the petitioners, the recognized "friends of the Court," the opinions that came before, and the possibilities for opinions and legislation that might come after—and it is this argumentative exchange that actually forms what is typically received and disseminated as a quickly explainable, single-text judicial *decision*.

The rhetorical criticism of judicial opinion in the service of a queerly intersectional, radical politics of identity and relation therefore demands an approach to judicial opinions as simultaneously discretely effective performative utterances, and also as a set of arguments that form the contributory fragments of *critic* constituted "meta"[101]-texts.[102] The internal justification for these texts' critical composition can be located both in the "tissue of connectives that the [single] text constructs,"[103] and also through shared constitutional and political implication "sideways"[104] across various articulations of judicial argument that may or may not be self-evidently connected.[105] In the queer of color rhetorical critical practice I attempt in this dissertation, the ties binding these arguments together into coherent and performative "meta"-texts of judicial rhetoric are those that bind arguments about due process and equal protection in multiple judicial opinions—some explicitly considerate only of race, some only of sexuality, some of both in analogic relation to one another—into single examples of judicial opinion (now

"opinion" in the sense of critically-revealed position) that are at once and always already racially queer. If the "aim of argumentation is not to deduce consequences from given premises," but "rather to elicit or increase the adherence of the members of an audience to theses that are presented for their consent,"[106] my rhetorical criticism of judicial argument will attempt to explore how sets of disparate judicial arguments delimit possibilities for subjective adherence to those forms of being human that are constructed as legible and valid under the Constitution.

This dissertation's articulation of a radical queer political perspective on U.S. judicial rhetoric is a particularly nominalist mode of what I call queer rhetorical legal criticism. My invocation of "nominalist" here is not meant as a position per se on the strong constructivist approach to identity politics—it is again a method of perspective on, rather than a political endorsement of, judicial argumentative frameworks that invite petitioners to self-constitute the nature of the subject position through which they speak to the law.[107] Following Cathy Cohen, I invoke "queer" much more in terms of anti-heterosexist and racist political goals than in terms of boundaries of identity.[108] I believe—and argue here—that forms of subjectivity before law are constituted in judicial arguments about the constitutional text, but as I note above, forms of legal subjectivity are not often the same thing as identity itself—particularly in the case of persons whose "self-understandings"[109] are conceptually impossible or explicitly or implicitly repudiated within the space of U.S. constitutional rhetoric.[110] A major limitation of my project is therefore that it is less concerned with actual persons than with ranges of possibility for legal subjectivity. In her defense of the utility of a rhetorical perspective on law, Constable goes on to say that "what count as both questions and answers at law today presume a particular background of activity—of utterances, of actions, of events—and of institutions—of education, of lawyering, of judging—that constitute law."[111] In these terms, one assumption of this thesis is that what count

as legal subjects presumes a particular background of judicial argument, and this is a background that should be known and understood. The rhetorical resources through which a subject may speak a legal "I,"[112] and be legible as that which she spoke to the judicial interlocutors at whom she directs her appeal, are not exhaustive of possibilities for subjectivity, identification, self-understanding, or being. But they do function to delimit the practical ways in which a person can exist within the powerful fantasy of U.S. legal sovereignty.

A critical understanding of these limits is helpful to radical queer of color political goals, even if the latter are foundationally opposed to any form of legitimation of U.S. legal institution's claims to sovereign power. I hope to participate in the queer rhetorical and historical critic Charles E. Morris III's rhetorical practice of "queering" as a form of exercising[113] "queer politics,"[114] which "expose and present alternatives to institutionalized heteronormativity, embrace difference, resist assimilation and institutionalization, and combat 'disciplining, normalizing social forces' in whatever form these might be encountered"[115] (although the major focus of my participation here is the part that "exposes"). As a project of queer rhetorical legal criticism, "queering" is in part futurist, wherein part of the function of queer rhetorical criticism is to locate and evaluate future queer potentials latent[116] in the formulation of judicial argument in recent decisions. Given the status quo of U.S. judicial rhetorical culture, these potentials are latent in legal argument that in its contemporary context is not only "straight" from a "heterocentrist"[117] perspective, but also directly contrary to queer politics. Thus in Chapter Three, I suggest counterfactually that there are more productive subjective resources for radical queer politics in a dissenting opinion *against* same-sex marriage, than in the majority opinion that defends at length the California Supreme Court's order that employees of the state issue marriage licenses to same-sex couples.

In the first two chapters, I argue that the queer potentials latent in the formulation of Kennedy's Fourteenth Amendment via a nominalist argumentative framing of due process are enabled and delimited by the (post)-racialization[118] inherent to Kennedy's meta-argumentative judicial rhetorical constitution of legitimate queer legal subjectivity before U.S. law. This idea of the post-racial queer legal subject that I argue is carried through Kennedy's Fourteenth Amendment rhetoric parallels the process of "racialization" (or occlusion/evacuation of race[119]) common to a range of queer academic and political rhetorics, whose refusal of exclusive terms of identification can obfuscate (in terms of race, class, sexuality, gender, and sex) differences and diversity among those persons and politics understood as "queer."[120] In an attempt at queer of color scholarly resistance, I participate in "queering" also as the "radical"[121] or "critical"[122] exploration of the ways that choices between different heterocentrist judicial arguments matter to anti-structuralist and -positivist "queer of color" politics.[123]

An approach to rhetorical queering through analysis of elite judicial texts runs counter to methods currently dominant, as I discuss below, in both critical legal rhetorical and queer legal criticism. It is problematic to describe even a limited sense of radical queer potential in judicial argument, when those arguments (as an inherent feature of their primary function to (re)legitimize the sovereignty of U.S. judicial institutions) are vital to the rhetorical construction and maintenance of institutional regimes of violent disciplinary and biopolitical control (including marriage and other regimes of distinction between illegitimate and legitimate forms of sexual intercourse and relation).[124] An over-valuation of the differences between the various argumentative choices of a group of federal judges obscures the ways in which contrasting legal arguments in judicial uptakes of racial and sexual politics represent "shifts"[125] in, rather than

affirmations or repudiations of, the oppressive organization of public life through the state and institutional articulation and maintenance of racial, (hetero)sexual, and other normativities.[126]

This dissertation is a defense of the productive value and normative significance of these "shifts." "Mainstream legal" culture is constrained by the foundationally racist assumptions and goals of the U.S. Constitution, and activists appear to have the choice of divestment or participation at the expense of accepting the basic constraint of participation in the rhetorical process of legitimizing the judiciary's sovereign authority to determine who can be and who cannot.[127] I offer a third way: a practical exploration of possibilities for the rhetorical/political exploitation of queer potentials in "mainstream legal" argument in the service of radical queer of color political agendas. Chapter Four (the conclusion) is accordingly devoted to an exploration of how canonical rhetorical method and theory as the *value* and practice of contingent identification can be a significant component of anti-establishmentarian and poststructuralist queer of color politics.

V. Some More About Argument as Method in Queer Rhetorical Criticism

My call for a "perspective" on judicial rhetoric is indebted to the lawyer and rhetorical critic Francis J. Mootz III's notion of the law as a practice of "rhetorical knowledge." Mootz argues that the law's constitutive nature derives from and is defined by the phronetic (as I discuss at length in Chapter Four)[128] processes of rhetorical engagement at play in a given case.[129] The procedural arguments of jurists are significant not only for the literal implications of a court's ultimate judgment (Perelman's "decision"), but for the way in which a jurist's legal procedural argumentative choices set the frame through which ultimate judgment will be made on the statute or practice in question.[130] Mootz is particularly enamored of judicial rhetors who "openly construct their arguments as arguments,"[131] because this practice is a rare jurisprudential

recognition of the fact that "legal practice is grounded in rhetorical knowledge and is not a matter of providing a dialectical[132] elaboration of fixed principles."[133]

While Mootz dissociates argument from dialectic, placing argument in the accordingly anti-dialectical realm of rhetoric, the argument scholar Joseph W. Wenzel proposes that it is better to think of arguments as having a variety of different (and often simultaneous) modes and functions, which can be parsed depending on the "perspective" through which arguments are made and interpreted.[134] In Wenzel's perspective typology of argument,[135] "dialectic" can be distinguished from "rhetorical" arguments partly through the situations in which they are articulated; "dialectical situations are often institutionalized by the creation of specific forums, e.g., courtrooms."[136] In this "dialectic" perspective, "good argumentation consists in the systematic organization of interaction...so as to produce the best possible outcomes"[137]—certainly a description of the manner in which a courtroom is supposed to operate. Judicial opinion is not argument literally within the systematized "interaction" of the courtroom (picture lawyers or debaters arguing with each other not directly, but rather through the procedures of the law and the intermediary of the judge). But it is still the case, as Mootz points out, that Supreme Court Justices do not publish interactive argumentative dialogues, but rather 'speak' to each other in disputes over the outcome of a case through the systematized interaction of their published opinions. In Wenzel's typology, arguments in judicial opinions might therefore be more properly dialectic, and not rhetorical, arguments.

In this study, however, I am less interested in what does or should distinguish "rhetorical" vs. "dialectical" modes of reasoning,[138] and more in the question of how argument functions as a rhetorical mode of communication even within the formally dialectic space of the Court. Wenzel's typology describes dialectic as "a method, a system, or a procedure for regulating

discussions among people"; this certainly does not preclude those discussions from being articulated primarily through rhetorical argument.[139] Here, I follow Perelman and Wayne C. Booth in holding that it is more useful to understand Aristotle's opening statement that "rhetoric is an *antistrophos* to dialectic," and therefore that the practice of argument is *antistrophos* to the practice of rhetoric, in terms of argumentative reasoning as a difficult-to-distinguish corollary, rather than "converse" or "counterpart," to rhetorical persuasion.[140]

Rather than distinguish between rhetoric and dialectic, Perelman's "new rhetoric" defines argument as a rhetorical practice through a juxtaposition of Aristotle's theories of "analytic" and dialectical modes of reasoning."[141] In an analytic syllogism, "truth is a property of the proposition and is independent of personal opinion," rendering "analytical reasoning...demonstrative and impersonal," free from interference from "personal opinion," and therefore from the necessity of persuasion.[142] "Dialectical" as opposed to analytical reasoning works through "persuasive argument" instead of logical inference. What Wenzel calls the "logical" perspective on argument, Perelman argues, derives from the European Enlightenment conflation[143] of Aristotle's theories of dialectical and analytical "judgments," a move that consigned any form of argument that is not logical inference to the mere "'garnishing of speech,'" and so sought the "death of rhetoric" itself as a form of legitimate philosophical study.[144] Against this trend, Perelman calls for a rhetorical study of argumentation as the attempt to achieve an audience's—"*any sort of audience*"—"acceptance or rejection of a debatable thesis": "the object of the new rhetoric, which amplifies as well as extends Aristotle's work, is thus to study these arguments and the conditions of their presentation."[145]

As I read it, Wenzel's distinction between the rhetorical perspective on argument "as a natural process of persuasive communication," and the dialectical as arguments made within a

communication situation organized systematically in order to achieve a common truth, functions to conceptually underwrite what Mootz identifies as the tendency of both judges and critics of legal discourse to present judicial argument in *analytic* terms. It is as if judges debate about the correct result of proceeding through a series of "valid...inferences,"[146] as if to frame their disagreements as over points of logic in their colleagues' "demonstration."[147] In other words, judicial arguments are: delivered through a dialectical form; framed as logical (analytic) inferences; but in fact work rhetorically as "persuasive communication."

As rhetors, judges attempt to achieve consensus over the desirability of their conclusions of constitutional and statutory interpretation through "arguments [that] are more or less strong, more or less convincing," that are "never purely formal," and that "derive [their] value from...action upon the mind of some person."[148] "Arguments as arguments" do not show, they tell (they do not demonstrate, but seek to persuade) through the strategic and error-prone rather than logical selection of warrants so as to "increase the adherence of the members of an audience to theses that are presented for their consent."[149] Mootz takes delight in those rare examples of judicial opinion that present "arguments as arguments" (in these examples, some of which I take up throughout this project, judges are open about their persuasive intent, as well as the frustration they feel from their colleagues' lack of adherence to the conclusions they urge as the most doctrinally accurate, and most desirable from a prudential[150] standpoint). But it is also therefore the responsibility of the rhetorical critic of judicial opinion to *consider* arguments as arguments, even when they are not initially presented or typically treated as such. I go one step beyond Mootz to read judicial argumentative framing as a form of public policy-making.[151] Judges are not legislators, but they are state-policymakers in a limited sense. The argumentative framework through which a judicial rhetor frames her opinion has material effect beyond the decision itself.

The argumentative frames that influence and constrain a conclusion of law—the obvious statement of policy in an opinion—both influence future policy, and, in the context of particular legal situations, are extant policies themselves. Judicial argumentative frames function as performative utterances.

The analytically framed production of legal argument depends on an understanding of the linear development of precedent through the application of the doctrine of *stare decisis* ("things decided"), or adhering to past precedent.[152] This is how judicial argument *works*; it is, again, almost never presented *as argument*. As the late James Arnt Aune—a pioneering practitioner of rhetorical legal criticism in U.S. communication studies—argues, it should be possible to perform rhetorical legal criticism that is cognizant of the analytic epistemology of doctrinal law, while simultaneously approaching judicial claims rhetorically, as arguments produced by individual rhetors who are elite participants in a complex and varied rhetorical culture.[153] The fact that judges frame their arguments from precedent in analytic terms does not make them "arbiters of a kind of machine logic."[154] Rather, judicial rhetors "are in the business of definition and argumentation, crafting meaning within…culturally determined realms."[155] I ground my close reading of judicial opinion in an understanding of how precedent and other key legal doctrines function in judicial argumentation, but I also draw on the argumentative frames set forth in the opinions I examine to critically reveal meta-arguments about the nature of those identities and political possibilities that are constituted as real and legitimate in the Constitution.

I call these frames "genealogies of precedent."[156] An effective judicial rhetor must ground[157] her conclusions of law in a credible *genealogy* of "things decided"—where the genealogy is the warrant for the conclusions of law. While both popular and academic legal critics and jurists frame doctrinal disputes as historical examinations of truth (although they will

explicitly disagree as to the appropriate methods through which to arrive at the truth of doctrinal history),[158] doctrinal argument can be more accurately described as a process of "veridiction," or the judicial argumentative construction *and normative defense* of a "regime of [doctrinal] historical truth" within which certain doctrinal conclusions are true and others false.[159] Judges often frame the data for their doctrinal claims in terms of objective and linear histories of precedent, when in fact doctrinal argument involves the contingent articulation of particular precedential histories that are appropriate to a given context.[160] Judges cite putatively objective histories of precedent. These citations are in fact constructions of precedential genealogies as argumentative technique in support of judicial conclusions.

A judge writing an opinion—particularly a Justice on the Court—is free to make almost any argument she wants, but this is because the total set of "things decided" in Anglo-American legal history is so large. The doctrinal history appropriate to a given case is a set of available argumentative resources, and a judicial rhetor's decisions about how to use those resources in response to a given judicial rhetorical situation has normative implications.[161] If judicial argument can be understood in terms of the rhetorical and historiographical construction of competing precedential genealogies, then the rhetorical criticism of judicial argument should also be genealogical, allowing the critic to respond to the jurist constructed precedential history underlying a given opinion as the rhetorical frame through which a judge is able to articulate normative claims about how the Constitution should be applied in a particular case.

Such an approach is necessary for any intersectional consideration of racialized subjectivities before the law: that is, for the effective practice of queer of color legal rhetorical criticism. Legal discourse generally, and judicial rhetorics of equality and anti-discrimination particularly, frame identity insistently in terms of what Kimberlé Crenshaw calls a "single-axis"

framework (one axis—race, gender, etc.—per case).[162] The queer legal theorist Siobhan B. Somerville offers a methodological corrective to the "single-axis" frame for queer of color legal scholarship: as an alternative to examining relations of precedent between cases taken up in linear comparative histories of *stare decisis*, Somerville looks "'sideways' to consider how" ostensibly separate legal "categories" of race and sexuality "were produced simultaneously."[163] In Somerville's example, *Loving v. Virginia* (388 U.S. 1, 1967) should not be read only as a case about miscegenation that is precedentially related to future cases about same-sex marriage. The opinion in *Loving* is also part of a meta-judicial text that takes up questions of racial and sexual relation and identity as not similar, but part and parcel of the same—fundamentally intersecting and mutually implicated issues of racialized queer identity and legal subjectivity.[164]

I take up Somerville's corrective rhetorically, by positing what G. Thomas Goodnight might call a "meta"[165]-argumentative analysis of judicial opinion. Another way of putting this might be in terms of paratexts of judicial opinion, texts that circulate around and among actual, discrete judicial opinion. These texts have "real" existence only as the theoretical construction of a legal critic. But, given a consideration of any judicial opinion as *at once* text and context—as both a discrete entity and a collection of argumentative fragments that disparately form the pieces of implicit meta-arguments of judicial interpretation—they have independent performative force. I therefore consider legal "rhetorical action" in two ways: first, as it operates in specific judicial opinions as discrete rhetor-produced texts;[166] and second, in terms of these critic-constituted texts composed of "meta"-arguments brought together by shared constitutional and political implication across relations of precedent and doctrine that may or may not be self-evidently connected.[167] For example, rather than ask "what are the radical queer political potentials in Kennedy's Fourteenth Amendment arguments" in various important opinions, I ask

"how does Kennedy's meta-argument about the Fourteenth Amendment that I have reconstructed from and across multiple opinions frame possibilities for racialized queer legal subjectivity?" How do these judicial arguments frame and delimit possibilities for radical, contra-sovereign, anti-establishmentarian queer of color politics in the United States?

VI. Radical Praxis Through Queer Rhetoric, Queer Legal Theory, and Queer of Color Politics

In this dissertation, I address questions more often addressed in queer legal studies and cultural studies through rhetorical methods, following in part the example of "critical legal rhetorical studies."[168] In keeping with critical legal rhetorical studies,[169] I am interested less in an appraisal of the forensic rhetoric of Kennedy's opinion in terms of argumentative skill, and more in the relationship between judicial argumentative choices and the constitutive legitimation and abjection of LGBT/Q and person of color subjectivities in U.S. public life. I propose a synthesis of the critical legal rhetorical practice of studying judicial arguments as arguments, and a more radical (contra-establishmentarian) mode of juridical critique. In the "End of Innocence," the postmodern feminist theorist Jane Flax calls for a theory of argument as a power-seeking exercise that rejects "a belief in the connections between truth and knowledge."[170] Instead, the *telos* of justice requires recognition of the "desire" for achieving "power in the world" as a means of resisting domination. Flax argues that where argument is a form of resistance to domination, argument as appeal to truth (what Perelman calls analytic demonstration): risks ineffectiveness, because "arguments can lack [political] force...no matter how well grounded in some epistemological scheme";[171] and precludes what Cohen might call a "queer" politics grounded in contingent understandings of privilege across the gender, sexual, racial, and class identifications that form parts of movements for radical change.[172] A radical queer of color understanding of judicial "argument as argument" is a proposal for a certain rhetorical praxis of

the critique of judicial opinion, a praxis grounded in an empathetic ethic of selfishness that seeks to find resources in the power-seeking arguments of judges for the often mutually exclusive power-seeking goals of queer of color politics.

My contribution to queer and queer of color legal theory is both simple and important—I see this dissertation as a modest addition to, rather than a significant departure from, existing work. Chandan Reddy argues that a truly "critical" queer of color legal scholarship should attend to the abjected social and cultural "forces and relations" that constitute the law and the legal "archive," and that "bourgeois law cites...but cannot comprehend."[173] Kennedy's opinion in *Lawrence v. Texas* is an excellent example of Reddy's point about citation—in *Lawrence*, the Justice situates his legal arguments within an historical, social, and cultural context about which he claims but in fact has no apparent knowledge.[174] Reddy calls for critics to contend "with the law as an active archive," enabling a fuller understanding of legal discourse as an ideological force of subjugation and erasure. This critical practice requires that we "not simply accept [the legal archive's] narrative and framework," asking "instead" how "regulation marks [the law's] interest in difference."[175] I insist that a necessary component of not accepting the law's "narrative and framework" is precisely the development of a practical knowledge of how that narrative and framework operate through the specific construction of judicial argument. Such a development requires a close reading of judicial arguments themselves, within the context of their construction within the rhetorical constraints of judicial rhetorical culture. The legal archive is the "technique by which the modern US state promotes the citizen as a universal agent," thereby "demanding that we take up its framework for difference as a prerequisite for a validated agency."[176] I contend that one component of what Reddy calls "critical" and I call "radical" queer of color praxis should be an insistent close reading of (as Constable says) "how" specific

judicial argumentative techniques form the components of that broader technique that performatively forces the constitution of a universalized subject-before-law.

There is accordingly a significant difference of methodological emphasis between the work of my dissertation, and much of critical legal rhetorical studies and queer rhetorical studies. My insistent focus is on the judicial text itself; the claims I make derive from readings of arguments authored by judges, and the contexts in which I locate these readings are primarily other arguments authored by other judges.[177] This approach runs contrary to calls from both critical legal rhetoricians and queer legal theorists[178] to de-emphasize legal scholarship's hegemonic focus on written texts authored by judicial elites. For Marouf Hasian, Jr. and Isaac West,[179] critical legal rhetorical criticism—and for West, *queer* rhetorical legal criticism in particular—should be separate and in some ways opposed to traditional rhetorical analyses of law.[180] This mode of critical legal rhetoric argues that we must at least assign the same importance that I give to jurisprudence[181] to quotidian and other speech that implicates but is not explicitly concerned with judicial instituions.[182] I agree, but argue that the distinction between jurisprudence and quotidian law is useful more as a means of insisting that radical legal scholarship continue to focus on both, rather than as a project of delineating "where the most important site of legal change may" or may not be.[183] I take it as a given starting point of this project that the "most important site of legal change" for radical politics is not only external, but opposed, to the fantastic sovereign space of the Court. My position is that the Court should be attended to as a productive discursive site of significant and primarily negative effectiveness on these external "most important" sites of productive radical politics.

Hasian and West's position is echoed in much of "queer legal theory." The queer legal scholar Leslie J. Moran argues that while the self-referential methods of "black letter lawyers"

and law professors have excluded queer perspectives,[184] the goal of queer legal studies cannot simply be inclusion. The "'queer' in legal scholarship" is opposed to consigning meaning to the law through reference only to legal texts, thus obscuring the heteronormative and other oppressive processes that provide the conditions of possibility for the production of institutional legal discourse. "The law," as the queer legal feminist Lynne Huffer concludes in her analysis of *Lawrence v. Texas*, is "severely limited in its capacity to address wrongs and carry out justice,"[185] and it should be treated as such. There are few studies in the field of communication and/or rhetoric that are explicitly critical, legal, rhetorical, and queer; Isaac West's work constitutes an early alignment of a *queer* critical legal rhetoric with the particular form of queer legal theory represented by Moran and Huffer, suggesting that part of what might make a queer critical legal rhetoric "queer" is a repudiation of the forensic (more accurately, judicial)[186] matters that pervade so much of both "traditional" and critical legal rhetorical studies. Nonetheless, it is my contention that queer legal theory's wholly justified antipathy (or animus) toward "black letter" law should not preclude the development of a critical queer of color legal rhetorical praxis that includes a specific concern with the jurisprudential arguments in "great cases."[187]

Franz Kafka's man "before the law" arrived at the gate thinking that "the Law...should surely be accessible at all times and to everyone," but the gate at the entrance, which he comes to find has been "made" only for him, remains barred by the gatekeeper for his entire life, and shut at the apparent moment of his death.[188] In his study of rhetoric, style, and power, Robert Hariman takes up Kafka's related story in the *Trial* of "an individual...failing to comprehend and influence" the "bureaucratic apparatus" of the law such that it eventually "destroys him." Hariman argues that as bureaucracy is not only a space of "alienation," but also inevitably a

collection of commonly shared "everyday experiences" of our inescapably bureaucratic social order, we might, "by identifying the elements of a *bureaucratic style* of political action...learn what forever eluded Kafka's K.: the knowledge of how to live well within a bureaucratic world."[189] I make a similar claim, that while there is a need for radical queer legal praxis to include both rejection of the value and sovereign force of the U.S. judicial apparatus, there is also a need for interrogation of judicial speech that might effect, as Butler suggests vis-à-vis the "social order" of gendered life, an "opening [of] possibilities" for the "field" of legal subjectivity even to those whose identifications are constituted as "unrealizable" within that same field.[190]

The difference between my position toward judicial rhetoric and Hariman's toward bureaucratic style is that if K. is read as the "man from the country" "before the law," it is not accurate to say that K. (unlike the other people in Hariman's opening example who pay bills and inhabit corporate offices) lived within a bureaucratic legal world, and simply did not know how to live it well. K.'s destruction in the *Trial* was perhaps an exemplary condition of necessity for his life. Standing before the gate of the law, Kafka's "man from the country" is at once wholly defined and wholly de-realized by the "radiance that streams inextinguishably from" the law's gateway; there is no indication that a critical practice which succeeded in describing to the man the composition and nature and origin of that radiance will help him to get past the gatekeeper. Writing as a white, bourgeois, heterosexual person who does *not* "understand what it is to live in the social world as what is 'impossible,'"[191] I am inspired by but do not presume to wholly cross-apply Butler's necessary optimism about the critical praxis of "opening up possibilities." I hope that some of the criticism in the following chapters can suggest some such openings, but I intend these chapters less as contributions to the "knowledge of how to live well within" the fantasy of U.S. constitutional legal sovereignty, and more as contributions to the practical "knowledge of"

the implications of some of the judicial argumentative self-constructions of that fantasy to those who feel its effects most violently.

Here I note Morris' study of the "Trial of Leopold and Loeb" as an important basis for my work on these case studies. Morris takes up the whole *mis-en-scène* of a major court trial—including the arguments of the lawyers and judge—as his critical object because of he recognizes the "muscle and materiality" that "jurisprudence" provides toward heteronormativity.[192] While "the most important site of legal change may not be in the courtroom," courts, and arguably *the* Court in particular, retain centrally important roles in determining the particular manner in which discursive and material relations of domination will be reinforced *against* those attempts at change.

Radical queer politics' general rejection of liberal desires for inclusion into mainstream institutions does not preclude the value of institutionality to those same politics. Lauren Berlant and Michael Warner lament the fact that while heteronormativity enjoys near total institutional support, "queer culture . . . has almost no institutional matrix for its counterintimacies."[193] Similarly, Matsuda argues that, given the racism of the law, it is necessary to combine an "outsider jurisprudence"[194] (the focus of much of queer legal theory) with specific "calls for doctrinal change" against racist laws that function as a "psychic tax imposed on those least able to pay."[195] The mechanism of legal resistance to radical change is judicial argument. Conversely, it is in the range of possible arguments that can be made within the space of legal institutional culture that possibilities for queer of color rhetorical/political exploitation of legal discourse in the service of anti- or contra- or alternative to- judicial institutional politics exist.[196] This dissertation temporarily brackets analysis of such "outsider jurisprudence" as one means of considering the import of "black letter" legal argument to queer of color world-making goals.

VII. Summary of Chapters

In Chapter One, I focus on the due process and equal protection arguments in the majority, minority, and concurring opinions in *Bowers v. Hardwick* and *Lawrence v. Texas*. I argue, as I do in *QJS*, that Kennedy's choice to foreground the Due Process rather than the Equal Protection Clause of the Fourteenth Amendment as the basis for his majority opinion in *Lawrence* speaks to the potential in substantive due process rhetoric for a constitutional legal doctrine that is more consistent with radical queer politics than equal protection. It is not Kennedy's doctrinal arguments with respect to his findings in the case, however, that are the most interesting to me. Rather, I locate a latent radical queer possibility in Kennedy's meta-arguments about how the Due Process Clauses should be broadly interpreted.

Kennedy's due process rhetoric allows for a partial constitutional recognition of the mutable and political nature of identity—a recognition productive of the potential for a constitutionally recognized queer "nominalist" legal subjectivity.[197] But this same Fourteenth Amendment rhetoric, which is also present in Kennedy's framing of equal protection in *Romer v. Evans*,[198] also underwrites the perniciously racist rhetoric of a "color-blind"[199] and "post-racial"[200] Constitution present throughout recent US Federal and Supreme Court cases concerning higher education admissions and K-12 school integration policies. Chapter Two undertakes a close analysis of equal protection arguments in some of these cases, in particular Chief Justice John Roberts' plurality and Kennedy's concurring opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*. I argue that Kennedy's "gratis dicta" framing arguments about due process and equal protection in *Romer*, *Lawrence*, and *Parents Involved* should be read together, as a meta-argument about the possibility for a nominalist legal subjectivity that is dependent on the idea of what I call the post-racial queer subject-before-law.

Chapter Three offers a reading of recent state and federal judicial opinions concerning same-sex marriage, in particular the majority and dissenting opinions for the Supreme Court of California in *In re Marriage Cases*, and the federal judicial opinions that are doctrinally descended from these cases in *Perry v. Schwarzenegger* and *Perry v. Brown*. In *Schwarzenegger*, U.S. District Chief Judge Vaughn R. Walker's equal protection arguments frame gay and lesbian identity itself through desire for entrance into the institution of marriage—and do so in a manner that reflects a broader rhetorical constitution in constitutional law of queer relational being in terms of normative relationships. In the Ninth Circuit's affirmation of Walker's opinion in *Perry v. Brown*, Circuit Judge Stephen Reinhardt does not issue a due process finding. Reinhardt also does not issue a finding with respect to the "rights of same-sex couples to marry" under any constitutional principle. Rather, he confines his ruling to the narrow conclusion that a removal of a right previously granted a class of persons—as the right to marry had been granted same-sex couples in California prior to Proposition 8 in *In re Marriage Cases*—is a violation of the Equal Protection Clause as defined by the precedent of Kennedy's opinion in *Romer v. Evans*. Reinhardt's opinion can be read as doing less than Walker to affect a substantive increase in gay and lesbian civil rights. I suggest instead that the Ninth Circuit's more narrow equal protection ruling actually re-opens some possibilities for a radical queer subject of the Fourteenth Amendment *without* marriage.

My arguments in the first three chapters highlight the theoretical and conceptual dilemma of a project that a radical queer political perspective on foundationally anti-radical judicial speech. To hold radical queer politics together with institutional legal rhetoric is to hold together establishment and disestablishment, subject and abject. Chapter Four, my conclusion, addresses this question through rhetorical theory, specifically through a radical queer of color reading of

the Gadamerian concept of the Aristotelian rhetorical virtue of *phronēsis* as *Vernünftigkeit*, or "the practical *knowledge of* practical reason" that "teaches us the conditions under which reason becomes practical."[201] I propose that a queer of color "knowledge of practical reason" may not "teach us" such "conditions" as they are currently taken to be extant in heteronormative ideology, but rather will seek to destabilize the assumptive nature of such conditions productively as it provides the basis for asking the question "those conditions under which reason becomes practical" *to whom*. In other words, I articulate a practical/radical queer epistemology[202] of legal rhetoric that can provide a means of provisional queer identification with jurisprudential rhetorics that matter differently to, even as they abjectify, queer of color subjects before law. Radical queer politics should not surrender to the inevitable power of heteronormative institutions like the Supreme Court, but they should allow room for practically radical queer considerations of the relative value of the different actions that will, inevitably, be taken by those institutions.

Notes to Introduction:

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[1] *The Daily Show With Jon Stewart*, "March 5, 2013: Sandra Day O'Connor Pt. 2" (March 5, 2013), http://www.thedailyshow.com/watch/tue-march-5-2013/sandra-day-o-connor-pt—2.

[2] Chaïm Perelman, *The Idea of Justice and the Problem of Argument*, trans. John Petrie (London: Routledge and Kegan Paul, 1963), 103.

[3] Chandan Reddy, *Freedom with Violence: Race, Sexuality, and the U.S. State* (Durham: Duke University Press, 2011), 17-18.

[4] As I note elsewhere, "the non-pejorative 'queer' of everyday U.S. speech has come to denote an identity category grounded in sexual difference, dissidence, and 'dishomogeneity' that may be inclusive of, but also different from, the more specifically defined 'lesbian,' 'gay,' 'bisexual,' and 'transgender' (LGBT). In a similar but not identical move, 'queer' can also be used as an umbrella term to broadly and efficiently describe multiple specific categories of sexual minority identity at the same time." In order to consider the judicial rhetorical production not of subjects themselves, but rather conceptual forms of legally possible queer subjectivity, I use "queer" also in a non-identarian sense, following "the feminist and queer of color theorist Cathy J. Cohen's 1997 call for a queer politics that moves beyond identity to define queer and queerness in terms of a fluid and contextual oppositional stance to 'dominant norms' of sexuality, gender, race, and class." Peter Odell Campbell, "Intersectionality Bites: Metaphors of Race and Sexuality in HBO's *True Blood*," in *Monster Culture in the 20th Century: A Reader*, ed. Marina Levina and Diem-My T. Bui (New York: Bloomsbury, 2013), 99-100.

[5] Perelman, "Law and Rhetoric," in *Justice, Law, and Argument: Essays on Moral and Legal Reasoning*, trans. William Kluback (Dordrecht, Boston, and London: D. Reidel Publishing Company, 1980), 121.

[6] Perelman, *The Realm of Rhetoric*, trans. William Kluback (Notre Dame, IN and London: University of Notre Dame Press, 1982), 21.

[7] Perelman, "Law and Rhetoric," 121.
[8] Perelman comments on "Western European" law, suggesting that this argumentative function of judicial speech is already prevalent in the "Anglo-Saxon" legal tradition. Perelman, "Law and Rhetoric," 123-124.
[9] Marouf Hasian, Jr., Celeste Michelle Condit, and John Louis Lucaites, "The Rhetorical Boundaries of 'The Law': A Consideration of the Rhetorical Culture of Legal Practice and the Case of the 'Separate But Equal Doctrine,'" *Quarterly Journal of Speech* 82 (November 1996): 328.
[10] Perelman, "Law and Rhetoric," 121.
[11] Judith Butler, *Excitable Speech: A Politics of the Performative* (New York and London: Routledge, 1997), 74, 77-80.
[12] Perelman, *The Idea of Justice*, 98.
[13] Perelman, *The Idea of Justice*, 103.
[14] Perelman, *The Idea of Justice*, 103.
[15] Leti Volpp, "Imaginings of Space in Immigration Law," *Law, Culture, and the Humanities* (March 7, 2012): 1.
[16] J.L. Austin, *How to Do Things With Words*, 2nd Edition, ed. J.O. Urmson and Marina Sbisà (Cambridge: Harvard University Press, 1975), 6-7.
[17] Butler, *Excitable Speech*, 73-74.
[18] Butler, *Excitable Speech*, 77.
[19] Perelman, "Law and Rhetoric," 121: "there is abuse of power when the decisions taken by the existing power seem unreasonable, contrary to the common good and if they are not accepted, but imposed by constraint. Power in this situation risks the loss of its authority; it can make itself feared, but it will not make itself respected." See also Perelman, *The Idea of Justice*, 103-104.
[20] Butler, *Excitable Speech*, 78-79.
[21] Butler, *Excitable Speech*, 77-82.
[22] Butler, "Preface 1999," in *Gender Trouble: Feminism and the Subversion of Identity* (New York and London: Routledge, 1990, 1999), xiv.
[23] Butler, *Excitable Speech*, 77.
[24] Michel Foucault, "Two Lectures," in *Power/Knowledge: Selected Interviews and Other Writings*, ed. Colin Gordon (New York: Pantheon Books, 1980), 96-7, in Butler, *Excitable Speech*, 79.
[25] Butler, *Excitable Speech*, 78-79.
[26] Butler, *Excitable Speech*, 79.
[27] Butler, *Excitable Speech*, 80.
[28] Butler, *Excitable Speech*, 79-81.
[29] Butler, *Excitable Speech*, 74.
[30] See also, for example, Shane Phelan, *Sexual Strangers: Gays Lesbians, and Dilemmas of Citizenship* (Philadelphia: Temple University Press, 2001), 3, 9, 108-09; and Barbara Smith, "Where's the Revolution?" *The Nation* (January 1, 1998), http://www.thenation.com/print/article/wheres-revolution.
[31] Foucault, "Two Lectures," 97, in Butler, *Excitable Speech*, 79.
[32] Cathy J. Cohen, "Keynote Address," *Queertopia!*: An Academic Celebration, Northwestern University Queer Pride Graduate Student Association (Chicago: Northwestern University, May 22, 2010).
[33] Richard Delgado, "The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?" *Harvard Civil Rights-Civil Liberties Law Review* 22 (1987): 306.
[34] Butler, *Undoing Gender* (New York and London: Routledge, 2004), 3-5.
[35] Mari J. Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations," *Harvard Civil Rights-Civil Liberties Law Review* 22 (1987): 323.
[36] Robert Hariman, *Political Style: The Artistry of Power* (Chicago: The University of Chicago Press, 1995), 139-140.
[37] Butler, *Excitable Speech*, 74.
[38] Austin, *How to Do Things With Words*, 5.
[39] Austin, *How to Do Things With Words*, 121.
[40] See for example Austin's initial discussion of "infelicities," in Austin, *How to Do Things With Words,* 14.
[41] Austin, *How to Do Things With Words,* 14.
[42] Austin, *How to Do Things With Words*, 122.
[43] Janet E. Halley, "Like Race Arguments," *What's Left of Theory?: New Work on the Politics of Literary Theory*, ed. Judith Butler, John Guillory, and Kendall Thomas (New York and London: Routledge, 2000), 49.
[44] Austin, *How To Do Things With Words*, 118-119.

[45] Butler, *Excitable Speech*, 80.
[46] Austin, *How to Do Things With Words*, 5, 18, 116.
[47] G. Thomas Goodnight, "The Metapolitics of the 2002 Iraq Debate: Public Policy and the Network Imaginary," *Rhetoric and Public Affairs* 13 (2010): 69.
[48] See for example James Arnt Aune, "Tales of the Text: Originalism, Theism, and the History of the U.S. Constitution," *Rhetoric and Public Affairs* 1 (1998): 258: "matters of constitutional interpretation have come to dominate our public life…political questions in the United States have a way of turning themselves into judicial questions."
[49] Eyder Peralta, "Attorney General Holder Defends Targeted Killing of Americans," *The Two-Way: NPR's News Blog* (March 5, 2012), http://www.npr.org/blogs/thetwo-way/2012/03/05/147992097/attorney-general-holder-defends-targeted-killings-of-americans.
[50] Peter Odell Campbell, "The Procedural Queer: Substantive Due Process, *Lawrence v. Texas*, and Queer Rhetorical Futures," *Quarterly Journal of Speech* 98, 2 (May 2012): 204-205.
[51] Reddy, *Freedom with Violence*, 217.
[52] William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John, With an Historical Introduction*, 2nd edition (Glasgow: James Maclehose and Sons, Publishers to the University, 1914), 375; A.E. Dick Howard, *Magna Carta: Text and Commentary*, Revised Edition (Charlottesville: University of Virginia Press, 1998), 23; Opinion of Holmes, J., *Jackman v. Rosenbaum Co.*, 260 U.S. 22 (1922): 31.
[53] Nikhil Pal Singh, *Black Is A Country: Race and the Unfinished Struggle For Democracy* (Cambridge: Harvard University Press, 2004), 24.
[54] McKechnie, *Magna Carta*, 379-382; *Black's Law Dictionary*, 7th ed., ed. Bryan A. Garner (St. Paul, MN: West Group, 1999), s.v. "due process;" and Erwin Chemerinsky, *Constitutional Law*, Third Edition (New York: Aspen Publishers, 2009), 604.
[55] Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* (Charlottesville: University of Virginia Press, 1968), 363.
[56] *Murray's Lessee v. Hoboken Land & Improvement Company*, 59 U.S. (18 How.) 272 (1856): 276. The Court in *Murray's Lessee* cited the *Magna Carta* in its interpretation of the Fifth Amendment, declaring that "the words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta*." As I read the opinion, the Court relied heavily on this point to conclude, as the constitutional law scholar Erwin Chemerinsky puts it, "that due process is met so long as the government's procedures are in accordance with the law." Chemerinsky, *Constitutional Law*, 604.
[57] *Black's Law Dictionary*, s.v. "strict scrutiny," s.v. "rational basis test;" *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (2010): 117-118.
[58] *Black's Law Dictionary*, s.v. "due process," "substantive due process."
[59] *Black's Law Dictionary*, s.v. "due process."
[60] David Bernstein, "*Dred Scott* and 'Substantive Due Process,'" *The Volokh Conspiracy* (July 19, 2007), http://www.volokh.com/posts/1184879544.shtml.
[61] Opinion of Taney, C.J., *Dred Scott v. Sandford* 60 U.S. (19 How.) 393 (1857): 403; Chemerinsky, *Constitutional Law*, 750, 753.
[62] Taney, *Dred Scott*, 450.
[63] Taney, *Dred Scott*, 450.
[64] Similarly, the substantive application of equal protection that accompanies the due process arguments in one of the cases analyzed here does not question whether or how a specific kind of person is treated unequally under the law, but rather how a given law presumes as a feature of its construction the unequal treatment of persons.
[65] See for example Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change*?, 2nd Edition (Chicago: University of Chicago Press, 2008), 326-368 and 420-429; Alexis Krell and Jordan Schrader, "Gingrich Touches on Gay Marriage, Gas in Visit to South Sound," *The Bellingham Herald* (February 24, 2012), http://www.bellinghamherald.com/2012/02/24/2408696/gingrich-touches-on-gay-marriage.html; and Daniel Malloy, "Gingrich Says State Gay Marriage Laws Better than Court Rulings," *The Atlanta Journal-Constitution* (February 24, 2012), http://www.ajc.com/news/georgia-politics-elections/gingrich-says-state-gay-1361435.html.
[66] Eric Holder, "Statement of the Attorney General on Litigation Involving the Defense of Marriage Act," *Justice News*, United States Department of Justice: Office of Public Affairs (February 23, 2011), http://www.justice.gov/opa/pr/2011/February/11-ag-222.html.
[67] Peralta, "Attorney General Holder."

[68] Maurice Charland, "Constitutive Rhetoric: The Case of the *Peuple Québécois*," *Quarterly Journal of Speech* 73, 2 (May 1987): 134.
[69] Charland, "Constitutive Rhetoric," 135.
[70] Charland, "Constitutive Rhetoric," 135, 138, 140-144.
[71] Lauren Berlant and Michael Warner, "Sex in Public," *Critical Inquiry* 24 (1998): 561, in Charles E. Morris III, "Introduction: Portrait of a Queer Rhetorical/Historical Critic," in *Queering Public Address: Sexualities in American Historical Discourse*, ed. Charles E. Morris III (Columbia: The University of South Carolina Press, 2007), 5.
[72] Most of these cases have not been given much—if any—attention in rhetorical criticism, although Charles E. Morris III briefly references the "historians' Amicus Brief" in *Lawrence* as evidence for the importance of queer rhetorical/historical engagement with judicial rhetoric.[72] Charles E. Morris III, "Archival Queer," *Rhetoric & Public Affairs* 9.1 (2006): 149. A significant exception is *Brown*, which in contrast to the almost total absence of the other cases in this dissertation, is mentioned in over forty articles and book reviews in *Quarterly Journal of Speech* and *Rhetoric & Public Affairs* since 2000 alone. I am primarily interested in *Brown* not so much in itself, as I am in terms of its relationship to Kennedy's Fourteenth Amendment arguments in *Parents Involved*. *Brown*—and to a lesser extent *Bowers*—is also a central case study in the early development of "critical legal rhetorical studies," a legal rhetorical sub-field that I discuss in the introduction to the dissertation. Marouf Hasian, Jr. "Critical Legal Rhetorics: The Theory and Practice of Law in a Postmodern World," *Southern Communication Journal* 60 (December 1994): 44-56; Hasian, Condit, and Lucaites, "Rhetorical Boundaries," 323.
[73] See for example Jeffrey Toobin, "After Stevens: What will the Supreme Court be like without its liberal leader?," *The New Yorker* (March 22, 2010): 45.
[74] A phenomenon numerous commentators have referred to as "the Kennedy Court," a play on the standard practice of naming a particular instantiation of the Court after the current Chief Justice (a position Kennedy has never held). See for example Charles Lane, "Kennedy Reigns Supreme on Court," *The Washington Post* (July 2, 2006), A06, web, and Linda Greenhouse, "Is the 'Kennedy Court' Over?" *New York Times "Opinionator"Blog* (July 15, 2010), web; Lyle Denniston, "The 'Kennedy Court,' Only More So," *SCOTUSblog* (April 9, 2010), http://www.scotusblog.com/2010/04/the-kennedy-court-only-more-so/.
[75] U.S. Const. amend XIV, §1.
[76] Campbell, "The Procedural Queer," 204.
[77] Campbell, "The Procedural Queer," 217-218; Reva Siegel, "Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action," *Stanford Law Review* 49 (1997): 1114; Derrick A. Bell, *Silent Covenants:* Brown v. Board of Education *and the Unfulfilled Hopes for Racial Reform* (Oxford and New York: Oxford University Press, 2004), 196-97; Russell K. Robinson, "Proposition 8, 'Hate' & 'Like Race' Arguments" (paper presented at the Northwestern University Queertopia! An Academic Festival conference, Chicago, Illinois, May 21-22, 2010); Robinson, "Perceptual Segregation," *Columbia Law Review* 108 (2008): 1101-02.
[78] Phelan, *Sexual Strangers*, 3, 9, 108-09; and Smith, "Where's the Revolution?"
[79] David L. Eng, *The Feeling of Kinship: Queer Liberalism and the Racialization of Intimacy* (Durham: Duke University Press, 2010), 47.
[80] Opinion of Sparks, District Judge, *Fisher v. University of Texas at Austin (Fisher I)*, 645 F. Supp. 2d 587 (W.D. Tex. 2009): 593-599. See also Bell, *Silent Covenants*, 146-149, 158-159.
[81] Reddy, *Freedom With Violence*, 17-18.
[82] Goodnight, "The Metapolitics of the 2002 Iraq Debate," 69.
[83] Halley, "Like Race Arguments," 68.
[84] Halley, "Like Race Arguments," 48.
[85] Halley, "Like Race Arguments," 42.
[86] Halley, "Like Race Arguments," 67.
[87] *Black's Law Dictionary*, s.v. "loose construction," "liberal construction."
[88] Goodnight, "The Metapolitics of the 2002 Iraq Debate," 69.
[89] Halley, "Like Race Arguments," 56.
[90] Wayne C. Booth, *The Rhetoric of Rhetoric: The Quest for Effective Communication* (Malden, MA: Blackwell Publishing, 2004), ix-xii, 1, 3.
[91] Aristotle, *On Rhetoric: A Theory of Civic Discourse*, 2nd ed., trans. George A. Kennedy (Cambridge: Oxford University Press, 2007), 30-31, 1.1.1-1.1.2. See also Booth, *The Rhetoric of Rhetoric*, 3.
[92] Kennedy in Aristotle, *On Rhetoric*, 30, 1.1.1, 30n4. "Rhetoric is an *antistrophos* to dialectic...a result is that all people, in some way, share in both; for all, up to a point, try both to test and uphold an argument [as in dialectic] and to defend themselves and attack [others, as in rhetoric]." George Kennedy explains that "*antistrophos*" can be

translated as "counterpart," but also "correlative" and "coordinate." I follow what I understand to be Perelman's position, as I explain below, that the most useful translation for the rhetorical study of argument would be "correlative."

[93] See also Perelman, *The Idea of Justice*, 140: "the same techniques of argumentation are found on every level, whether it is discussion around the family table or debate in a very specialized circle."

[94] Marianne Constable, "On Not Leaving Law to the Lawyers," in *Law in the Liberal Arts*, ed. Austin Sarat (Ithaca: Cornell University Press, 2004), 78.

[95] See for example Sara L. McKinnon, "Citizenship and the Performance of Credibility: Audiencing Gender-based Asylum Seekers in U.S. Immigration Courts," *Text and Performance Quarterly* 29, 3 (July 2009): 205-212, 218.

[96] Perelman, *The Idea of Justice*, 140. See also Chaïm Perelman and Lucie Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, trans. J. Wilkinson and P. Weaver (Notre Dame, IN: University of Notre Dame Press, 1969), 4, in James Jasinski, *Sourcebook on Rhetoric: Key Concepts in Contemporary Rhetorical Studies* (Thousand Oaks, CA: Sage Publications, 2001), 38, s.v. "argument."

[97] Perelman, *The Idea of Justice*, 140.

[98] John Angus Campbell, "Between the Fragment and the Icon: Prospect for a Rhetorical House of the Middle Way," *Western Journal of Communication* 54 (Summer 1990): 352-353, 360, 363; Celeste Michelle Condit, "The Rhetorical Criticism of Audiences: The Extremes of McGee and Leff," *Western Journal of Communication* 54 (Summer 1990): 331-332; Michael Calvin McGee, "Text, Context, and the Fragmentation of Contemporary Culture," *Western Journal of Communication* 54 (Summer 1990): 279; and Michael Leff and Andrew Sachs, "Words the Most Like Things: Iconicity and the Rhetorical Text," *Western Journal of Communication* 54 (Summer 1990): 256-257, 268-269.

[99] Lloyd F. Bitzer, "The Rhetorical Situation," *Contemporary Rhetorical Theory: A Reader*, ed. John Louis Lucaites, Celeste Michelle Condit, and Sally Caudill (New York: The Guilford Press, 1999), 219

[100] Leff and Sachs, "Iconicity and the Rhetorical Text," 256: "rhetorical action is a complex business that occurs at several levels simultaneously. If it surfaces most clearly in specific discursive products, it also operates more broadly within the cultural and ideological formations that embed these products," and 268-269: "form and meaning are imbricated at every level—the sentence, the paragraph, and the discourse as a whole, and all the elements of Burke's rhetoric interact cooperatively to produce a structure of meaning…while [this] ideology of the speech participates in the context of larger discursive formations and material conditions, it is also something represented within the tissue of connectives that the text constructs. In this speech, a political ideology evolves within the meaning of the text, and hence an ideological reading would require careful attention to the modes of articulation indigenous to the text."

[101] Goodnight, "The Metapolitics of the 2002 Iraq Debate," 69.

[102] McGee, "Text, Context," 279, and Campbell, "Between the Fragment and the Icon," 352-353.

[103] Leff and Sachs, "Iconicity and the Rhetorical Text," 256.

[104] Siobhan B. Somerville, "Queer *Loving*," *GLQ: A Journal of Lesbian and Gay Studies* 11 (2005), 337 (see also 357-358).

[105] McGee, "Text, Context," 279-282, and Campbell, "Between the Fragment and the Icon," 352-353.

[106] Perelman, *The Realm of Rhetoric*, 9.

[107] Halley, "Like Race Arguments," 67.

[108] Cathy J. Cohen, "Punks, Bulldaggers and Welfare Queens: The Radical Potential of Queer Politics?" *GLQ* 3 (1997): 438, in Peter Odell Campbell, "Intersectionality Bites: Metaphors of Race and Sexuality in HBO's True Blood," in *Monster Culture in the 21st Century: A Reader*, ed. Marina Levina and Diem-My T. Bui (New York: Bloomsbury, 2013), 100.

[109] Halley, "Like Race Arguments," 49.

[110] See also Butler, "Preface 1999," viii, and Kimberlé W. Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics," *The University of Chicago Legal Forum* (1989): 139.

[111] Constable, "On Not Leaving Law," 78.

[112] Butler, *Bodies that Matter: On the Discursive Limits of Sex* (New York and London: Routledge, 1993), 3; and Butler, *Undoing Gender*, 19.

[113] Alexander Doty, *Making Things Perfectly Queer: Interpreting Mass Culture* (Minneapolis: The University of Minnesota Press, 1997), xiv.

[114] Michael Warner, *Publics and Counterpublics* (Brooklyn: Zone Books, 2002), 210.

[115] Campbell, "Intersectionality Bites," 99-100, citing Steven Seidman, "Identity and Politics in a 'Postmodern' Gay Culture: Some Historical and Conceptual Notes," in *Fear of a Queer Planet: Queer Politics and Social Theory*, ed. Michael Warner (Minneapolis: University of Minnesota Press, 1993), 133; and Warner, *Publics and Counterpublics*, 209-211. See also Charles E. Morris III, "ACT UP 25: HIV/AIDS, Archival Queers, and Mnemonic World Making," *Quarterly Journal of Speech* 98, 1 (February 2012): 49-50; Lauren Berlant and Elizabeth Freeman, "Queer Nationality," *Fear of a Queer Planet: Queer Politics and Social Theory*, ed. Michael Warner (Minneapolis: University of Minnesota Press, 1993), 195.
[116] For a discussion of a similar method in feminist legal theory, see Robin West, "Jurisprudence and Gender," *University of Chicago Law Review* 55 (Winter 1998): 71-72.
[117] Doty, *Making Things Perfectly Queer*, xi-xii.
[118] Eng, *The Feeling of Kinship*, 10-11.
[119] Eng, *The Feeling of Kinship*, 10. By "racialization," I mean the re-inscription of normative white-centrism through the occlusion of the racial significance of queer identity.
[120] Seidman, "Identity and Politics," 133.
[121] Cohen, "Keynote Address," in Campbell, "The Procedural Queer," 210n56, 216n115.
[122] Reddy, *Freedom With Violence*, 148-149.
[123] Reddy, *Freedom With Violence*, 149.
[124] Craig Willse and Dean Spade, "Freedom in a Regulatory State?: *Lawrence,* Marriage, and Biopolitics," *Widener Law Review* 11 (2004-2005): 316; Joseph J. Fischel, "Transcendent Homosexuals and Dangerous Sex Offenders: Sexual Harm and Freedom in the Judicial Imaginary," *Duke Journal of Gender Law and Policy* 17 (2010): 306-311.
[125] Willse and Spade, "Freedom in a Regulatory State," 311 & 316.
[126] Eng, *The Feeling of Kinship*, 5-6.
[127] Eng, *The Feeling of Kinship*, 9-10.
[128] Francis J. Mootz III, *Rhetorical Knowledge in Legal Practice and Critical Legal Theory* (Tuscaloosa: The University of Alabama Press, 2006), 8-9. See also Jasinski, *Sourcebook on Rhetoric*, 463.
[129] Mootz, *Rhetorical Knowledge*, 107.
[130] Mootz, *Rhetorical Knowledge*, 109.
[131] Mootz, *Rhetorical Knowledge*, 74.
[132] Mootz deploys "dialectic" in the way that Chaïm Perleman uses "analytic"/"logic." Perelman, *The Realm of Rhetoric*, 2-5. See also Joseph W. Wenzel, "Three Perspectives on Argument: Rhetoric, Dialectic, Logic," *Contemporary Perspectives on Rhetoric: Second Edition*, ed. Sonja K. Foss, Karen A. Foss, and Robert Trapp (Long Grove, IL: Waveland Press, 1990), 9: "dialectic helps us to understand and evaluation argumentation as a cooperative method for making critical decisions"; 12: "the dialectician might say, 'Good argumentation consists in the systematic organization of interaction...so as to produce the best possible outcome"; 14: "dialectic [is] a method, a system, or a procedure for regulating discussions among people"; 18: "dialectical situations are often institutionalized by the creation of specific forums, e.g., courtrooms, legislatures, and the regular meetings of learned societies."
[133] Mootz, *Rhetorical Knowledge*, 62.
[134] Wenzel, "Three Perspectives on Argument," 10-11.
[135] Wenzel, "Three Perspectives on Argument," 10.
[136] Wenzel, "Three Perspectives on Argument," 18.
[137] Wenzel, "Three Perspectives on Argument," 14.
[138] Perelman, *The Realm of Rhetoric,* 1.
[139] Wenzel, "Three Perspectives on Argument," 18.
[140] Booth, *The Rhetoric of Rhetoric*, 7. See also note 92.
[141] Perelman, *The Realm of Rhetoric*, 1.
[142] Perelman, *The Realm of Rhetoric*, 2-4.
[143] Booth, *The Rhetoric of Rhetoric*, 6-7.
[144] Perelman, *The Realm of Rhetoric*, 4.
[145] Perelman, *The Realm of Rhetoric*, 4.
[146] Perelman, *The Realm of Rhetoric*, 2.
[147] Perelman, *The Realm of Rhetoric*, 4.
[148] Perelman, *The Realm of Rhetoric*, 2-3.
[149] Perelman, *The Realm of Rhetoric,* 9.
[150] Philip C. Bobbitt, *Constitutional Interpretation* (Oxford: Blackwell Publishing, 1991), 12-13, 18, 20-22.

[151] Robert Asen, "Reflections on the Role of Rhetoric in Public Policy," *Rhetoric and Public Affairs* 13 (2010): 127-130.
[152] *Black's Law Dictionary*, s.v. "stare decisis."
[153] James Arnt Aune, "On the Rhetorical Criticism of Judge Posner," *Hastings Constitutional Law Quarterly* 23 (Spring 1996): 663-669. See also Aune, "Justice and Argument in Judaism: A D'var Torah on Shofetim," *Rhetoric and Public Affairs* 7, 4 (2004): 454-455; Martín Carcasson and Aune, "Klansman on the Court: Justice Hugo Black's 1937 Radio Address to the Nation," *Quarterly Journal of Speech* 89, 2 (May 2003): 154-155; and Aune, "Three Justices in Search of Historical Truth: Romance and Tragedy in the Rhetoric of Establishment Clause Jurisprudence," *Rhetoric and Public Affairs* 2, 4 (1999): 575.
[154] Roger Stahl, "Carving Up Free Exercise: Dissociation and 'Religion' in Supreme Court Jurisprudence," *Rhetoric & Public Affairs* 5 (2002): 441.
[155] Stahl, "Carving Up Free Exercise," 441.
[156] The phrase "precedential genealogy" or "genealogy of precedent" has been used by at least four legal scholars to describe a concept similar to what I elucidate here; that is, particular and often competing historical narratives of the evolution of U.S. constitutional doctrine at once enable and are brought into being by the argumentative choices of judicial rhetors: Sumi Cho and Gil Gott, "The Racial Sovereign," *Sovereignty, Emergency, Legality*, ed. Austin Sarat (New York: Cambridge University Press, 2010), 219; Elizabeth Mertz, *The Language of Law School: Learning to 'Think Like a Lawyer'"* (Oxford: Oxford University Press,): 221n56; and Christos Mantziaris, "The Federal Division of Public Interest Suits by an Attorney General," *Adelaide Law Review* 25, 2 (2004): 255.
[157] Bobbitt, *Constitutional Interpretation*, 12-13, 18, 20-22.
[158] Clark Rountree, *Judging the Supreme Court: Constructions of Motives in* Bush v. Gore (East Lansing: Michigan State University Press, 2007), 171-172. See also for example Jeffrey D. Clements, *Corporations Are Not People: Why They Have More Rights Than You Do, And What You Can Do About It (The Definitive Guide To Overturning* Citizens United*)* (San Francisco: Berrett-Koehler Publishers, 2012), 12; Jeffrey D. Toobin, "Comment: Holding Court," *The New Yorker* (March 26, 2012): 41; and Opinion of Kavanaugh, Circuit Judge, dissenting as to jurisdiction and not deciding the merits, *Seven Sky v. Holder* (USCA Case No. 11-5047, November 8, 2011): 58, 58-59n43.
[159] Michel Foucault, "17 January 1979," *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979,* ed. Michel Senellart, trans. Graham Burchell (New York: Palgrave Macmillan, 2008), 35.
[160] Bobbitt, *Constitutional Interpretation*, 18.
[161] Mantziaris, "The Federal Division of Public Interest Suits by an Attorney General," 255.
[162] Crenshaw, "Demarginalizing the Intersection of Race and Sex," 139.
[163] Somerville, "Queer *Loving*," 337 (see also 357-358).
[164] Somerville, "Queer *Loving*," 335-337, 357-358.
[165] Goodnight, "Metapolitics," 69.
[166] Leff and Sachs, "Words the Most Like Things," 256: "rhetorical action is a complex business that occurs at several levels simultaneously. If it surfaces most clearly in specific discursive products, it also operates more broadly within the cultural and ideological formations that embed these products," and 268-269: "form and meaning are imbricated at every level—the sentence, the paragraph, and the discourse as a whole, and all the elements of Burke's rhetoric interact cooperatively to produce a structure of meaning…while [this] ideology of the speech participates in the context of larger discursive formations and material conditions, it is also something represented within the tissue of connectives that the text constructs. In this speech, a political ideology evolves within the meaning of the text, and hence an ideological reading would require careful attention to the modes of articulation indigenous to the text."
[167] Michael Calvin McGee, "Text, Context," 279-282; and Campbell, "Between the Fragment and the Icon," 352-353.
[168] Marouf Hasian, Jr., *Legal Memories and Amnesias in America's Rhetorical Culture* (Boulder, CO: Westview Press, 2000), 197.
[169] Hasian, Condit, and Lucaites, "The Rhetorical Boundaries of 'the Law,'" 323.
[170] Jane Flax, "The End of Innocence," in *Feminists Theorize the Political*, ed. Judith Butler and Joan W. Scott (New York and London: Routledge, 1992), 458.
[171] Flax, "The End of Innocence," 458.
[172] Flax, "The End of Innocence," 459-460.
[173] Reddy, *Freedom With Violence*, 166.

[174] Dale Carpenter, *Flagrant Conduct: The Story of* Lawrence v. Texas (New York and London: W.W. Norton & Company, 2012), 61, 72-74; Richard D. Mohr, "The Shag-A-Delic Supreme Court: 'Anal Sex,' 'Mystery,' 'Destiny,' and the 'Transcendent' in Lawrence v. Texas," *Cardozo Women's Law Journal* 10 (2004): 391; Kirk Davis Swinehart, "The Real Story of *Lawrence v. Texas* Revealed in 'Flagrant Conduct,'" *The Daily Beast* Book Beast (March 28, 2012), http://www.thedailybeast.com/articles/2012/03/28/the-real-story-of-lawrence-v-texas-revealed-in-flagrant-conduct.html.
[175] Reddy, *Freedom With Violence*, 166.
[176] Reddy, *Freedom With Violence*, 166.
[177] Or perhaps, more accurately, their clerks.
[178] Leslie J. Moran, "A Queer Case of Judicial Diversity: Sexuality, Law, and Judicial Studies," in *The Ashgate Research Companion to Queer Theory*, ed. Noreen Giffney and Michael O'Rourke (Burlington, VT: Ashgate Publishing Company, 2009), 295-96. See also Francisco Valdes, "Coming Out and Stepping Up: Queer Legal Theory and Connectivity," *The National Journal of Sexual Orientation Law* 1,1 (1995): 1, http://www.ibiblio.org/gaylaw/issue1/valdes.html; and Lynne Huffer, "Queer Victory, Feminist Defeat? Sodomy and Rape in *Lawrence v. Texas*," *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations*, ed. Martha Albertson Fineman, Jack E. Jackson, and Adam P. Romero (Burlington, VT: Ashgate Publishing, 2009), 430-31.
[179] John Louis Lucaites, "Book Review: Between Rhetoric and 'The Law': Power, Legitimacy, and Social Change," *Quarterly Journal of Speech* 76 (November 1990): 445; in Isaac West, "Debbie Mayne's Trans/scripts: Performative Repretoires in Law and Everyday Life," *Communication and Critical/Cultural Studies* 5 (2008): 246: "confining our attention to state-based discourses" "'seldom seriously engage[s] the political and ideological implications of the relationship between rhetoric and law for *life-in-society*.'"
[180] See also West, "Debbie Mayne's Trans/scripts," 246-247.
[181] Aune, "Tales of the Text," 258.
[182] Hasian, *Legal Memories and Amnesias*, 3. Everyday discourse about the law, Hasian argues, is as much as any expert or judicial rhetoric part of the "substantive materials that go into the fabric of our jurisprudential norms."
[183] West, "Debbie Mayne's Trans/scripts," 248.
[184] Moran, "A Queer Case of Judicial Diversity," 295.
[185] Huffer, "Queer Victory," 430.
[186] "Forensic" is "the traditional term" for the Aristotelian genre of "legal discourse," or "the presentation of a case to a jury." In his *Sourcebook on Rhetoric*, James A. Jasinski posits "judicial" and "forensic" oratory as equivalent terms, while George A. Kennedy argues in his second edition of Aristotle's *On Rhetoric* that "judicial" should always be the preferred usage over "forensic," as "forensic" derives from "forum," the scene of "all three species of [Aristotelian] oratory." Kennedy in Aristotle, *On Rhetoric*, 47, 47n73; Jasinski, *Sourcebook on Rhetoric*, 261. Aristotle classifies rhetoric according to "three genera:" "*symbouleutikon* ['deliberative'], *dikanikon* ['judicial,'], *epideiktikon* ['demonstrative']." Aristotle, *On Rhetoric*, 48, 3.3.
[187] Cass R. Sunstein, "Lochner's Legacy," *Columbia Law Review* 87, 5 (1987), 873.
[188] Franz Kafka, "Before the Law," in *The Penal Colony: Stories and Short Pieces*, trans. Willa and Edwin Muir (New York: Schocken Books, 1948), 148-150.
[189] Hariman, *Political Style*, 141-142.
[190] Butler, "Preface 1999," viii.
[191] Butler, "Preface 1999," viii.
[192] Morris, "Passing by Proxy: Collusive and Convulsive Silence in the Trial of Leopold and Loeb," *Quarterly Journal of Speech* 91, 3 (August 2005), 267.
[193] Berlant and Warner, "Sex in Public," 562.
[194] Mari J. Matsuda, "Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story," *Michigan Law Review* 87 (1989): 2322.
[195] Matsuda, "Legal Storytelling," 2323.
[196] McKinnon, "Citizenship and the Performance of Credibility," 205-212, 218.
[197] Campbell, "The Procedural Queer," 220.
[198] Opinion of Kennedy, J., *Romer v. Evans*, 517 U.S. 620 (1996).
[199] Bell, *Silent Covenants*, 107; and James D. Anderson, "Race-Conscious Educational Policies vs. a 'Color-Blind Constitution': A Historical Perspective," *Educational Researcher* 36 (June/July 2007): 249.
[200] See for example Marissa Jackson, "Neo-Colonialism, Same Old Racism: A Critical Analysis of the United States' Shift toward Colorblindness as a Tool for the Protection of the American Colonial Empire and White Supremacy,"

Berkeley Journal of African-American Law & Policy 11 (2009): 156; Mario L. Barnes, Erwin Chemerinsky, and Trina Jones, "A Post-Race Equal Protection?" *The Georgetown Law Journal* 98 (2010): 974: "the impulse to declare society post-race has surfaced repeatedly in U.S. constitutional jurisprudence. Most recently, it is found in judicial assertions [as in *Parents Involved*] that the Equal Protection Clause requires colorblindness and bars any effort at race-based remedies for discrimination and segregation."

[201] Hans-Georg Gadamer, "The Power of Reason," *Praise of Theory: Speeches and Essays*, trans. Chris Dawson (New Haven and London: Yale University Press, 1998), 40 (my emphasis).

[202] Isocrates, (*Antidosis*, in *On Rhetoric: A Theory of Civic Discourse*, Appendix I:E, 2nd ed., trans George A. Kennedy (Cambridge: Oxford University Press, 2007), 269, 270 & 271), offers an explanation for how phronesis might contribute to radical/contingent epistemology: "As for wisdom (sophia) and philosophy (philosophia)…my view, as it happens, is very simple. For since it is not within the nature of mankind to acquire certain knowledge (epistēmē) by which we might know what one should do or say [in every case], from what remains possible I think those are wise (sophoi) who can come upon opinions that are best for the most part, and those are philosophers who occupy themselves with studies from which they will most quickly gain practical understanding (phronēsis) of that sort."

CHAPTER ONE: DUE PROCESS ARGUMENTS IN *BOWERS V. HARDWICK* AND *LAWRENCE V. TEXAS*[1]

"*As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.*"[1]

—Anthony M. Kennedy, *Lawrence v. Texas*

U.S. Supreme Court Justice Anthony M. Kennedy's 2003 opinion for the Court in *Lawrence v. Texas* declared the criminalization of sodomy unconstitutional under the Due Process Clause of the Fourteenth Amendment.[2] Taken together, Kennedy's majority and the concurring and dissenting opinions in *Lawrence* offer an example of how U.S. judicial pronouncements on sexuality can be framed and understood in ways that matter for radical queer politics, even as such pronouncements originate within, are circumscribed by, and reproduce the logic of heteronormative institutions. The procedural arguments about the relationship between sexuality and constitutional law in Kennedy's *Lawrence* opinion have the consequence of shifting the boundaries of acceptable sexual life and relation in the United States.[3] The argumentative choices of judicial rhetors are both enabled by, and represent rhetorical conditions of possibility for, "genealogies of precedent," or ostensibly analytical rhetorically constructed histories of precedent that form the warrants for conclusions of law.

Kennedy's choice to foreground the Due Process rather than the Equal Protection Clause of the Fourteenth Amendment as the basis for the Court's decision in *Lawrence*[4] is both enabled by and productive of a particular precedential genealogy of substantive due process, one that is more consistent with a "nominalist"[5] queer politics—wherein subjects are free to engage in self-definition—than the foregrounding of the Equal Protection Clause in other recent decisions in gay and lesbian civil rights cases. Much of the arguments in Kennedy's opinion interpellate an

[1] This chapter is partially composed of material previously published in Peter Odell Campbell, "The Procedural Queer: Substantive Due Process, *Lawrence v. Texas*, and Queer Rhetorical Futures," *Quarterly Journal of Speech* 98, 2 (May 2012): 203-229. The copyright owner has provided permission to reprint.

anti-radical form of sexual subjectivity, whose legibility before the law is primarily dependent on its analogic relationship to heterosexual marital intimacy. In this chapter, I offer an analysis of what I argue is Kennedy's separately relevant "meta"-argumentative framing of the Fourteenth and Fifth Amendments' guarantees of substantive due process. This argumentative frame, in contradiction to the regressive politics of much of the decision, is inclusive of a latent future possibility for a radical queer subject of U.S. constitutional law.

Kennedy's doctrinal arguments in *Lawrence* are celebrated and maligned: a contradiction born in part from Kennedy's simultaneous challenge to[6] and "heterocentrist"[7] legitimation of[8] the controlling ideology of the heterosexual family in U.S. political and vernacular discourse.[9] Kennedy takes up queer sex as analogic to marital intimacy, and thus a component of the right to privacy implicit in and protected by the constitutional guarantee of due process. *Lawrence* is accordingly an important basis for the recent "consolidation" of "queer," "marriage," and "rights" in what David L. Eng calls "queer liberal discourse,"[10] a set of political arguments that works in part to re-consolidate dominant state power over queer life through the valuation of some and the denigration of other forms of queer life and relation under the sign of constitutionally and political acceptable "intimacy."

It is nonetheless the case that there is a significant difference—from the perspective of radical queer political goals—between Kennedy's *Lawrence* and other recent examples of judicial rhetoric on sexuality. As the litigator and constitutional law professor Laurence H. Tribe argues, *Lawrence* is a juxtaposition of the interest of the state in regulating sexual intercourse, with the interest of persons who are the targets of state-regulation to decide for themselves how and with whom they engage in intimate relationships.[11] In his decision, Kennedy chooses to compare these competing interests through an argumentative framework of freedom and due

process. This is a substantively different doctrinal approach than the one taken in most of the marriage cases working their way through state and federal courts. When these cases are decided in favor of gay and lesbian petitioners or respondents, the majority opinions tend to eschew any concern with sex itself[12] in favor of focusing on the question of equal rights of access to the marriage institution.

The difference between due process and equal protection rhetoric in constitutional arguments about sex and sexual identity is vital to the question of what conditions of possibility remain and can yet be realized for future forms of U.S. constitutional recognition of queer forms of identification, life, and relation. The inevitable reach of judicial pronouncements on sexuality to the everyday life of persons subject to the effective sovereignty of the U.S. Constitution demands the question of what are, if any, the various future radical queer potentials latent in the formulation of anti-radical queer judicial arguments from due process and equality, and what are the normative differences among these potentials? Given the limited vocabulary of constitutional argument, the procedural queer[13] on the United States Supreme Court will be understood either through equal protection[14] or substantive due process[15] doctrine.[16] This chapter offers a radical queer perspective on some of the possible implications of this binary.

I. *Lawrence v. Texas*: A Brief Sodomitic History

On June 26th, 2003, the Court decided *Lawrence v. Texas* (539 U.S. 558, 2003) 5-3[17] in favor of the petitioners, John Geddes Lawrence and Tyron Garner, who were arrested and prosecuted after "Texas police," "responding to a false report of a 'weapons disturbance' at a private residence," claimed to find[18] "Lawrence and . . . Garner engaged in anal sexual intercourse in Lawrence's apartment."[19] The *Lawrence* decision reversed and remanded a lower court ruling upholding the so-called "Texas 'Homosexual Conduct' law"[20] criminalizing sodomy,

defined as "'deviate[21] sexual intercourse'" between two persons of the same sex.[22] In doing so, the Court also overruled its 1986 decision in *Bowers v. Hardwick* that refused to find Georgia statute § 16-6-2 (1984, defining and criminalizing "sodomy" and "aggravated sodomy") unconstitutional.[23] Writing for the *Lawrence* majority, Kennedy argued that the "Texas statute," along with the Court's previous decision in *Bowers*, "violated" the "petitioner's rights under the Due Process Clause of the Fourteenth Amendment."[24] Kennedy was joined by Justices Stevens, Souter, Ginsberg, and Breyer, and opposed by Justice Antonin Scalia (who wrote the dissenting opinion), Chief Justice Rehnquist, and Justice Thomas.[25]

Justice Sandra Day O'Connor agreed with the judgment of the majority in rendering the "Homosexual Conduct" law unconstitutional but not in overturning *Bowers*; she rejected the majority's application of substantive due process[26] and filed a concurring opinion holding the "Texas statute" invalid under the Equal Protection Clause of the Fourteenth Amendment.[27] *Lawrence* should not be considered apart from *Bowers*; indeed, Kennedy's opinion appears more concerned with the Court's previous decision in *Bowers* than it is with the Texas statute at hand—and thus with the particular and significant history of sodomy in Georgia law.[28] The juxtaposition between Kennedy and O'Connor's positions on *Bowers* makes *Lawrence* a doctrinal laboratory for comparing an ostensibly pro-gay and lesbian example of judicial rhetoric that repudiates the statutory tradition upheld in *Bowers,* and an ostensibly pro-gay and lesbian example of judicial rhetoric that accepts this tradition as constitutionally valid. Both the Texas and Georgia sodomy statutes are still on the books in 2012.[29] Both Kennedy's majority opinion and O'Connor's concurrence have had a significant and varied influence on future case law, and on the manner in which extant sodomy laws are interpreted and enforced as a question both of law, and law enforcement policy. The material implications of *Lawrence* and *Bowers* for queer

life in the United States are constituted in the relationship between—on the one hand—the doctrinal arguments in each opinion and dissent, and—on the other—the manner in which queer existence may or may not be criminalized in a post-*Lawrence* world.

Whatever else Kennedy's *Lawrence* opinion might be, it is a specific chastisement[30] to the doctrinal history of § 16-6-2—that is, a chastisement of those who would use the state's inevitable (as the Court continues to see it) interest in regulating certain kinds of sexual interaction as a justification for the legal harassment of gay and lesbian residents of the United States. Kennedy's opinion is a legal argumentative response to Justice Byron White's majority opinion in *Bowers*; it is also a statement about the doctrinal history of the *Bowers* decision, and a legal historiographical argument about how that history should be interpreted. *Bowers*' doctrinal history thus functions as a useful primer for how the state's interest in regulating and criminalizing sex and intimacy is protected *and kept up to date* through adaptive judicial rhetoric. The particular history of state and federal judicial rhetorical responses to § 16-6-2 is rarely discussed in analyses of Kennedy's opinion in *Lawrence*. I find, however, that this history of competing argumentative framings of the Georgia law in both the Georgia courts, and by the Supreme Court in *Bowers*, provides an introduction to the delimited possibilities for queer subjectivity before law constituted in Kennedy's precedential genealogy of sodomy and due process in *Lawrence.* I will therefore begin with a short discussion of this history before turning to the *Lawrence* decision specifically.

II. From § 16-6-2 to *Lawrence v. Texas*

The ostensible purpose of sodomy laws is to "classify non-procreative sexual activity as inferior."[31] These laws are actually deployed most often not (as Scalia points out in his *Lawrence* dissent[32]) as a regulatory device directed at gays and lesbians, but rather as cover for

U.S. federal and state governments' unwillingness and inability to punish white male heterosexual perpetrators of sexual violence.[33] Georgia Statute § 16-6-2 (the statutory focus of *Bowers v. Hardwick* and the latest iteration of a venerable Georgia tradition of sex criminalization) is representative of how the genre of sodomy law accomplishes this broader purpose through the demonizing[34] exemplification of gay and lesbian sex as the exemplary form of non-procreative sexual deviance. As such, § 16-6-2 demonstrates the importance of judicial rhetoric to the manner in which a given piece of legislation can affect the social and material politics of everyday life. § 16-6-2 (1984) is a reformulation of a previous law (Ga. Code § 26-5901, 1933), which defined and criminalized sodomy as "the carnal knowledge and connection against the order of nature by man with man, or in the same unnatural manner with woman."[35] This wording could of course allow the criminalization of any sexual act framed in a criminal indictment as nonnormative, a flaw in the statute that led to legislative rewriting with the intention of more specifically criminalizing sex between two men or two women. This update to the 1933 statute was spurred specifically by a series of contradictory judicial reviews of its meaning and scope that threatened to leave Georgia unprotected from a variety of apparently unanticipated forms of deviant sexuality.

In 1939 (six years after the nearly identical 1845 version of § 26-5901 had been updated to reflect the modern spelling of "connection"[36]), the Georgia Supreme Court offered a potential answer to a then-extant doctrinal debate[37] as to whether the 1845/1933 law (§ 26-5901) defines sodomy in such a way as to require "the participation of a man."[38] When two women charged with sodomy for consensual oral sex challenged § 26-5901 on the grounds that the statute could not be violated with no male participation, the Georgia Court reluctantly held in *Thompson v. Aldredge* that while "the act here alleged to have been committed is just as loathsome when

participated in by two women [as by two men]," the court did not have the authority to interpret the statute as criminalizing something the legislature did not include: that is, carnal "connection" not limited to "the same unnatural manner" as "man by man;" or sex involving a penis.[39]

Before *Thompson*, Georgia state precedent had held, following Presiding Judge Nash Rose Broyles' 1917 opinion for the Georgia Court of Appeals in *Comer v. State*, that sodomy *could* (and should) be construed "'broadly to include cunnilingus.'"[40] But following the 1939 decision in *Thompson*, Georgia state precedent *also* held that § 26-5901 could *not* be construed to include oral sex between two women—because, as Judge Oliver Hazzard Bartow Bloodworth declared in the dissent to Broyles' opinion in *Comer*, "sodomy" cannot "be committed under our statute without the use of the virile organ of the man."[41] The warrant to *Thompson* Court's conclusion of law (that the phallic focus of the sodomy statute is the best representation of the 1933 legislator's intent, regardless of Georgia's broader need to regulate sodomy) is thus opposed to the warrant in Broyles' conclusion in the *Comer* majority. For Broyles, because the statute concerns sodomy (fundamentally a phenomenon of sex against nature) it would be contrary to precedent and statutory intent to exclude *certain forms* of sex against nature, regardless of the phallospecific examples suggested in the language of the statute.[42]

The *Comer* dissent and *Thompson* majority, both of which argue for a limited judicial construal of § 26-5901's scope, share near-identical declarations of disgust at the conduct of the plaintiffs as a preamble to those same plaintiff's lack of criminal liability under the wording of the statute. Bloodworth (dissenting in *Comer*) and the Georgia Court in *Thompson* agree with Presiding Judge Broyles and the *Comer* majority that unnatural sex *should* be regulated, but conclude that not all forms of unnatural sex *can* be regulated as sodomy *per se* under the law as written. The statutory precedent laid down in *Comer* and *Thompson* is thus contradictory, but

not mutually exclusive. The strident qualifications in Bloodworth's dissent and the *Thompson* majority are dicta[43]—language in the opinion not necessary to decide the case. But as I will argue in more detail in my analysis of *Lawrence*, dicta-claims can help form a judge's argumentative framework for her opinions' conclusions of law; and so these argumentative qualifications nonetheless participate in constructing a genealogy of sodomy law that supports as broad a construal of definition of sodomy as possible. This argumentative framework—through which Bloodworth and the *Thompson* court urge a limited and deferential interpretation of the specific language of § 26-5901—is significant independently from Bloodworth's and the *Thompson* court's more limited legal conclusions. From a rhetorical, meta-argumentative perspective, the *Comer* and *Thompson* Courts can thus be read together as arguing that Georgia has a legal imperative and a constitutional basis for the broad regulation of sodomy for the public good—even as they differ in their specific legal conclusions about the scope of § 26-5901.

Bloodworth's opening statement in his *Comer* dissent that "especially on account of the loathsomeness of the charge in this indictment...do I regret that I can not agree with my brethren in the conclusion reached by them"[44] establishes a legal argumentative framework in which future judicial limitations of § 26-5901's scope on the one hand, and future judicial support for an amended law that construes sodomy more broadly on the other, would not be at odds but rather be part and parcel of Bloodworth's desired judicial political future. Bloodworth's conclusions of law are framed—bookended—by this opening qualification, and by his closing statement that "whether [I am] right or wrong [in his construal of § 26-5901], the members of our legislature could easily make the matter clear by a short statute making unlawful such practices as are alleged in the indictment of this case."[45] In the argumentative framework of Bloodworth's opinion, both judicial restrictions on what § 26-5901 may be construed to proscribe, *and* judicial

support of the constitutionality of legislative expansion of those proscriptions, are mutually derivative and productive of the same precedential genealogy of sex criminalization.

For both the *Comer* and *Thompson* courts, because Anglo-American historical-legal precedent generally demands the proscription of non-procreative sex, the doctrinally appropriate guiding question in reviewing challenges to statutes like § 26-5901 is not, "should this law apply," but rather "does this law apply in this case, and if not, what might be done about that?" Within this judicial argumentative framework, judicial actors should, in the context of appropriate deference to the wording of statutes, maintain a constant vigilance against the various permutations of perversion citizens will employ in attempts to circumvent the statutory defense of (in the words of Mary Jane Comer's indictment for sodomy) "the good order, peace, and dignity" of the State.[46] Nearly one hundred years later, Kennedy would qualify his decision in *Lawrence* with assurance that the Court's determination that sex between men was legal did not extend to sex acts that should still be criminalized—acts about which the Justice was, of course, rather vague.[47] *Comer* and *Thompson* form part of the precedential history of *Lawrence v. Texas*, even though they are not cited as such (as state decisions, they are not *controlling* precedents the Supreme Court would be concerned with). A juxtaposition of *Comer* and *Thompson* with *Lawrence* suggests that it might be more accurate to talk about the shifting boundaries of sex criminalization from *Comer* to *Lawrence*, rather than *Lawrence's* sex de-criminalization as an implicit repudiation of *Comer.*

The statutory future suggested in Bloodworth's precedential framework for Georgia judicial sodomy rhetoric came precisely to pass. In 1963, the Georgia Supreme Court held in *Riley v. Garrett* that "§ 26-5901 did not prohibit heterosexual cunnilingus,"[48] reconciling *Thompson* and *Comer* by elevating Bloodworth's *Comer* dissent as the controlling doctrine

regarding the reach of § 26-5901's proscription.[49] Five years later, the Georgia legislature (as if finally heeding[50] Bloodworth's call for a simple legislative fix to Georgia's sodomy definition) enacted statute § 16-6-2 (1968).[51] § 16-6-2 (1968/1984) solves the "virile organ of a man" problem by providing that "a person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another," an offense that—to this day—carries the penalty of one to twenty years in prison.[52] This is the law under which Michael Hardwick was charged in Fulton County, Georgia, in 1982.

Michael Hardwick's story is superficially similar to Lawrence and Garner's—he was arrested for having sex in his house by a police officer with a dubious claim to legitimate entry.[53] The chances that a police officer—who is not herself engaging in sodomy—would *legitimately* witness a sodomitic act in a private residence are quite small. The dual assumption of sodomy laws like those in Georgia and Texas is thus that they will be primarily directed at "sex in public,"[54] and that in situations where they are directed at sex in "private," the excuse a police officer provides for the home entry that allowed their witnessing will be presumed to be valid—even though the unlikeliness of such a coincidence would simultaneously suggest that the reason for entry is *not* valid and thus a violation of privacy. Like Lawrence and Garner's, Hardwick's arrest is the effect of the law's need for an identifiable, describable material act in order to establish the necessary grounds for judicial interference.

Hardwick was charged with "consensual sodomy" under § 16-6-2, and decided to take on the substantial risk of acting as a test case for the American Civil Liberties Union (ACLU), which had been seeking an opportunity to bring suit against the Georgia statute in federal courts.[55] Hardwick and John and Mary Doe ("a married [heterosexual] couple acquainted with Hardwick" who were recruited by the ACLU lawyer Kathleen Wilde[56]) filed suit against Georgia

Attorney General Michael Bowers[57] in district court, contending that § 16-6-2 as "applied to private sexual conduct between consenting adults"[58] represented an unconstitutional abrogation of their "fundamental right of privacy" protected through the Due Process Clause of the Fourteenth Amendment, and violated their right of "freedom of expression and association" under the First and Fourteenth Amendments.[59] The Supreme Court rejected Hardwick's contention. Four years later, Halley would refer to Justice White's particular treatment of Bowers' due process claims as not only a "disastrous...defeat" for "pro-gay legalism," but also an "ominous" signal for the future of "women's rights to reproductive freedom," because the "privacy theory...depended on cases that women's rights lawyers had won in their decades-long effort to establish rights to reproductive autonomy."[60] Nonetheless, Hardwick and his legal team's (led in later stages of the case by Laurence Tribe)[61] doctrinal argumentative framing of his case specifically in terms of privacy and the Due Process Clause would give Kennedy the opportunity to use the same framing as the means of overturning White's decision in *Lawrence.* Whether or not it would have been feasible[62] for Wilde, Tribe and Hardwick to articulate a non-privacy based due process appeal (based on, perhaps, the argument that there could simply be no legitimate governmental purpose at all in the regulation of consensual sexual activity, under any circumstances), their decision to do so gave Kennedy a wider variety of argumentative possibilities to turn to in his choice to write a due process opinion instead of joining O'Connor's equal protection arguments as the *Lawrence* majority.

On appeal, the United States Court of Appeals for the Eleventh Circuit in *Hardwick v. Bowers* (*Bowers I*) reversed the Northern District of Georgia's summary dismissal of Hardwick's claim (while affirming the Northern District's "dismissal of the Does' complaint for lack of standing"[63]) and remanded the case for trial.[64] In his opinion for the Court of Appeals, Circuit

Judge Frank Minis Johnson agreed with Hardwick's contention that certain of the actions proscribed by § 16-6-2 are protected by a fundamental right to privacy. Accordingly, Johnson argued, enforcement of the sodomy statute would violate the Fourteenth Amendment's guarantee of *substantive* due process unless Georgia could prove at trial that "the State...has a compelling interest" in proscribing private and consensual sodomy, and that the sodomy statute "is the most narrowly drawn means of safeguarding that interest"[65] (on the one hand, this was a remarkable victory for Hardwick; on the other, there is a sense here in the Eleventh Circuit's willing application of the "privacy theory" set in the "women's rights" cases of what Jasbir K. Puar would later call, describing *Lawrence v. Texas*, "a sanitizing of image" by ensuring that gay sexuality remain "out of view" of both the public and the law[66]).

The U.S. Supreme Court granted Bowers' petition for certiorari (judicial review).[67] In the hierarchical procedure of judicial review, this made Bowers—the man responsible for enforcing § 16-6-2 on queer lives and bodies—the aggrieved party, and made the question before the Court not the constitutionality of the Georgia sodomy statute *per se*, but rather the constitutional validity of Circuit Judge Johnson's claim on behalf of the Eleventh Circuit that "the Georgia Sodomy Statute implicates a fundamental right of Michael Hardwick."[68] On June 30, 1986, the Court decided *Bowers v. Hardwick* (*Bowers II*) 5-4 in favor of the petitioners. Justice Byron White wrote the opinion for the majority, with Justices Harry Blackmun and John Paul Stevens filing separate dissents.[69] Johnson's 1985 opinion for the Eleventh Circuit in *Bowers I* is the first definitive statement in favor of an individual's right—regardless of their sexual identity—to non-interference in cases of "private consensual sexual behavior among adults" in the history of U.S. federal judicial rhetoric. The Supreme Court took exception to Johnson's views, and White's

opinion to that effect would remain the law of the land for just over seventeen years, until *Lawrence v. Texas*.

III. Two Stories About *Lawrence v. Texas*

There are two common stories about *Lawrence* in the popular and gay and lesbian press, legal scholarship, and queer theory. I call them the "unlikely watershed"[70] and "critical queer" *Lawrence* narratives. In the "unlikely watershed" narrative, Kennedy's opinion offers the country an (in the minds of some) awkwardly written but nonetheless long overdue and welcome repudiation of White's opinion in *Bowers*:[71] "to be sure, the criminalization of consensual sodomy was unjust; overturning *Bowers* in *Lawrence* can therefore be read, from a certain liberal perspective, as the just outcome of a long struggle for sexual freedom."[72] The catholic[73] Justice's declaration of the unconstitutionality of sodomy is a marker, in the words of the popular historian and critic Kirk Davis Swinehart, of the gay and lesbian civil right's movements newly "acquired...powerful aura of inevitability." This new aura of inevitability was "inconceivable as few as 10 years ago, when sodomy laws remained in effect in thirteen states,"[74] a time when it was easier to "imagine" that "gay men could be arrested for having sex behind closed doors, in the privacy of their own bedrooms."[75]

The unlikely watershed narrative (echoed in the subtitle "How a Bedroom Arrest Decriminalized Gay Americans" to Dale Carpenter's excellent new book *Flagrant Conduct: The Story of* Lawrence v. Texas) obscures the complex rhetorical relationship between, on the one hand, a performative judicial declaration that a statute is unconstitutional, and, on the other hand, the actual effect of that declaration on the statute itself. That is, the Court's declaration that a law is unconstitutional is an illocutionary change in the constitutional legitimacy of that statute within the U.S. republic, but that change may or may not lead to the perlocutionary effect of the

statute being taken off the books. Lawrence and Garner's arrest did *not* foment the decriminalization of gay Americans—sodomy laws remain on the books in eighteen states (Figure 1) and in the Uniform Code of Military Justice.[76]

Rather, the arrest and ultimate Court decision led to a reduction in state and federal governments' available *practical* means of persecuting gay Americans via those sodomy statutes, because—as Atlanta police had tried unsuccessfully prior to Hardwick's arrest—police and prosecutors have to be careful with how they apply these statutes, lest they create the opportunity for a test case that will establish the law unconstitutional under the *Lawrence* precedent. This means that the question of whether and in what ways these laws are *in effect* in U.S. queer lives has more to do with how, if at all, the argumentative framework of Kennedy's opinion delimits the range of possibilities for governmental, organizational, and local policies with respect to these laws, than it does with the basic fact of the opinion's conclusion that consensual sodomy laws are unconstitutional. While the decision itself failed to change the law, the argumentative framework through which the decision is articulated will be influential, in the doctrinal modality of constitutional argument,[77] on future cases that take up challenges to § 16-6-2, the Texas "Homosexual Conduct Law," and the laws on the books in UCMJ and the other sixteen states.

In the critical queer narrative, Kennedy's opinion should be acknowledged for what it is—a judicial decriminalization of consensual sodomy[78]—but not celebrated as removing a barrier to queer freedom. The opinion is certainly not, in the Berlantian sense, an example of "queer world making."[79] Rather, Kennedy effects a narrow expansion of the boundaries of acceptable intimacy on the basis of the continued political, social, and cultural abjection of most forms of queer relational practice and being.[80] For David Eng, Kennedy's decision is exemplary of a queer-liberalist politics—one that operates in conjunction with what Cathy J. Cohen calls a

politics of "secondary marginalization"[81]—that updates and re-centers the U.S. national project of intimacy regulation through the heteronormative tactic of identification through negation.[82] Those queer subjects granted legitimacy before the law in performative legal rhetoric like Kennedy's in *Lawrence* are defined in terms of the abject "constitutive outside"[83] that they are not. Legitimate queer subjects are *not* not-married, not-citizen, not-productive, not-white.

The *Lawrence* decision is rightly impugned in critical queer legal scholarship for its particular invocation of the precedential genealogy articulated in *Bowers I* and the dissents to the majority in *Bowers II*—one within which privacy, marriage, and procreation are the core issues in terms of which constitutional questions regarding intimacy and relationship should be decided. This critical queer narrative reflects the need to look beyond a jurist's ultimate judgment on the question of law in a given case, and examine as well the framework for decision-making implicit in the arguments a judicial rhetor makes in support of their decision.[84] But it does not fully consider how the argumentative evolution of constitutional doctrine (while a political and externally influenced process) is delimited by the phronetic[85] constraints of precedent that are at play in a given case.[86] The *Lawrence* majority was written by a rhetor, a human actor in a particular (judicial legal) culture[87] responding to a particular and highly constrained rhetorical situation. There should be a distinction between critical queer responses to the fact and effect of Kennedy's arguments, and the articulation of a critical queer response to the normative and doctrinal implications of the argumentative choices Kennedy and his clerks made when they wrote the opinion. I offer the latter.

I do not claim that decisions such as *Lawrence* and *Bowers* are devoid of effect beyond that created through popularly accessible discourses about them. Nor do I dispute the major conclusions of the critical queer legal critiques of the hetero-, white-, homo-, and

"domestinormative"[88] politics of *Lawrence v. Texas*. These critiques are most interested in taking up Kennedy's opinion as exemplary of the liberal and racialized heteronormativity of U.S. judicial rhetoric, and this is vital work in the project of producing radical queer legal praxis in scholarly, activist, and everyday contexts. But the critical queer story of *Lawrence* mostly omits a consideration of how Kennedy's specific procedural framing of a queer liberal "legal genealogy" of sex and relation[89] in constitutional law might yet differ from other, similar examples of queer judicial liberalism in ways that matter substantively to radical queer politics. In other words, the critical queer story of *Lawrence* originates from outside the law. My attempt to articulate a radical queer perspective on Kennedy's argumentative choice follows Aune's call[90] to begin rhetorical criticism of judicial rhetoric from within the terms of judicial opinion, in an attempt to find the best location and grounded interpretation for developing (as I explain in depth in Chapter Four) a queer epistemology of law for radical queer purposes.

I argue that Kennedy's opinion in *Lawrence*—read in the dual context of the doctrinal history of *Bowers I* and *II*, and of post-*Lawrence* judicial rhetoric on same sex relation and the Constitution—offers an interesting and *slightly different* precedential genealogy of due process and sodomy in constitutional law than what is currently being developed on the road to arguing same sex marriage before the Supreme Court. My reading of Kennedy's decision renders the opinion less remarkable than the "unlikely watershed" narrative would have it, and at the same time more valuable to radical queer politics. In the following sections, I turn first to a close reading of the first paragraph of Kennedy's opinion as "dicta," a reading that introduces my analysis in the subsequent sections of some of the different implications of due process and equal protection arguments for radical queer politics.

IV. "Active Liberty," Dicta, and Sex in Public

The "specific procedural framing" I am interested in is first evident in the first paragraph of *Lawrence*, which along with the penultimate paragraph literally frames the rest of the content in Kennedy's opinion:

> 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 more transcendent dimensions.[91]

In her criticism of Kennedy's opinion, Jasbir K. Puar argues that "the language of *Lawrence-Garner* prescribes the privatization of queer sex, rendering it hidden and submissive to the terrain of the domestic…an affront to queer public sex cultures that sought to bring the private into the public."[92] Puar's critique of *Lawrence's* reliance on "'the broader privacy argument' over the 'narrower equal-protection argument'"[93] is well taken, but her doctrinal argument here references secondary sources rather than the text of the decision itself (Puar also does not, as I will argue, fully consider the stakes involved in a switch from due process to equal protection).[94] The manner in which Kennedy frames the "'broader privacy argument'" is not entirely consistent with Puar's claim regarding the decision's "language." Kennedy does speak of preventing "unwarranted government intrusions into a dwelling or other private places," but complicating *in part* Puar's contention that the language of the case is specifically an "affront to queer public sex

cultures," Kennedy goes on to say that persons should be protected from state intrusion into the operation of their lives outside the home as well.

Two things are important here: first, Kennedy did not need to articulate a right to liberty as defined by freedom from government intrusion that extended beyond the private space of the home, as Lawrence and Garner, the petitioners in the case, were arrested for sodomy within a private dwelling. Second, Kennedy does not place any physical limitation on where the "freedom" he talks about might apply. Puar's critique of Kennedy's privacy arguments is doctrinally accurate; it is grounded in her reading of what the Justice's more expansion definitions of privacy functionally mean given how they are modified by the precedential arguments he makes later in the opinion. But in this opening paragraph, Kennedy gestures toward an interpretation of constitutional privacy protection that is not limited to traditional and privileged private spaces. Grammatically, privacy is rendered as the freedom to *be as you are* not only in the home but also in any given place and at any given time—absent, of course, a more compelling state interest.[95]

Kennedy frames his discussion of liberty and freedom in the context of "our [the United States'] tradition." If "the instant case involves liberty of the person both in its spatial and more transcendent dimensions," then the freedom to engage in "certain intimate conduct" both within and outside the private physical space of the home is framed as a fundamental element of the United States' democratic and legal traditions. Tribe argues that a major innovation in *Lawrence* was precisely to articulate, as Kennedy declares, "'a due process *right to demand respect* for conduct protected by the substantive guarantee of liberty.'"[96] Here is a possible framing of the right to privacy that might be detrimental to heteronormative restrictions on citizenship—the United States itself, through the Constitution, is defined not just through the liberty of the private

and autonomous individual, but also through the general principle that for the government to legislate against any method of living a life is an affront to American democracy.

In *Active Liberty: Interpreting our Democratic Constitution*, Justice Stephen J. Breyer argues that in United States constitutional philosophy and jurisprudence, "liberty" is understood in two ways: first, as individual freedom from "improper government interference," and second, as "active liberty," or the "collective" right of the populace to fully participate in the operations of government.[97] Kennedy's opening definition of liberty as "that which protects the person from unwarranted government intrusions into a dwelling or other private places" is the converse of Breyer's notion of "active" liberty, and Kennedy's sentence further suggests that the purpose of privacy protection has little to do with protecting an individual's right to do things that are part and parcel of their full participation in a democratic society. The enigma of the opening paragraph thus lies in the contrast between liberty understood as freedom from "unwarranted government intrusions into . . . private places" and Kennedy's subsequent association of "freedom of . . . certain intimate conduct" with freedom of "thought," "belief," and "expression." As Breyer argues, freedom of expression in particular is a necessary component of "active liberty";[98] in Breyer's ideal Supreme Court, judicial interpretation of the Constitution should be a means[99] to preserve the necessary conditions by which all citizens are encouraged, and have the full ability, to participate actively in United States civic life.[100]

Kennedy does not—and could not be expected to—come close to approaching Shane Phelan's demand that queer politics seek to queer the very status of citizenship as an institution, rather than engaging in an exclusionary[101] liberal expansion of citizenship protections to previously excluded persons and practices.[102] However, this first paragraph at least suggests that the constitutionally protected freedom from governmental intrusion into private intimate conduct

is not only a protection from governmental interference with private conduct in the home. I can also be related to those freedoms and resources that are necessary to preserve the ability of individual subjects to participate meaningfully and publicly in United States citizenship.

A close reading of the ways Kennedy describes and frames privacy, freedom, liberty, and queer actions reveals the possibility—again, limited to the opinion's opening paragraph—of a more radical interpretation of what Puar, Eng, and Lynne Huffer[103] argue is an anti-radical text. It is possible, using a rhetorical analysis of Kennedy's language, to conceive of a world in which future judges *choose to read* this opening passage in *Lawrence*, against much of the rest of the decision, as not a proscription of public queer cultures, but rather an argument that sex in public could be constitutionally protected conduct. Here is a distinction between the material political and cultural reality of *Lawrence v. Texas* and the latent rhetorical possibility of a future reading of the decision's first paragraph that might be consistent with some radical queer politics. Certainly, the relevance of this radical future possibility pales in comparison to two less optimistic material realities. First, while *Lawrence* has had some positive impact, no judge has cited Kennedy's opinion—nor is one likely to any time soon—as precedent for overturning zoning and other laws[104] restricting and outlawing queer public sex culture. The effects of the case have perhaps been most ambiguous in Texas, where as I note above the ruling has had some positive impact but has not forced Texas to repeal the law or entirely stopped Texas police from arresting people for sodomy.[105] Second, the ways in which Kennedy frames concepts of liberty and freedom in the first paragraph of a Supreme Court opinion are not likely to have (and for the most part have not had) an effect on the ways in which state governments and municipalities make laws concerning sexual conduct that are not explicit provisions outlawing sodomy.[106]

These barriers to the relevance of a radical queer reading of this passage in *Lawrence* might then point to the limited rhetorical significance[107] of specific judicial arguments in general. The statements that Kennedy makes about liberty, privacy and sexual conduct cannot themselves be examples or not of "queer world making." The primary rhetorical significance of the argumentative choices that judges make in their statements about constitutional doctrine and is not then in those statements' immediate effect on life outside the Court. It is rather in a judge's rhetorical power to participate in delimiting what future laws will and will not be able to proscribe and enable actions by individuals and cultural groups, as well as in the delimitation of the set of rhetorical resources available for how a future subject might identify themselves as a petitioner to the law. Specific judicial arguments have political effect independent from an opinions' binding conclusions of law, but some judicial arguments—like those in Kennedy's first paragraph—matter only through a particular reading of the significance of *dicta* arguments as legal performatives. That is, the potentials of some of Kennedy's opening statements can only be realistically juxtaposed against the far more regressive arguments I am about to discuss if they can be read, from the perspective of the rhetorical criticism of judicial argument I outline in the introduction, as having some tangible effect on future possibilities for the articulation of radical queer politics before law. I will argue that they can.

As a rhetorical critic, I want to find Kennedy's opening paragraph significant in that (in contrast to more conservative and limiting statements made later in his opinion) this passage suggests a "nominalist" politics wherein constitutional privacy doctrine should defer to the "self-understandings"[108] of parties before the bench, perhaps enabling a more free, open, and contingent vision for the ways in which the freedom to be a fully queer occupant of United States citizenship should be addressed by future courts. But from a certain, more analytic legal

perspective (one that I think Puar shares), the relevance of these initial statements about liberty is more questionable. Kennedy's opening statements are arguably an example of "dicta," portions (as I note in the above discussion of *Comer* and *Thompson*) of a judicial opinion that, while accorded some authority because of the inherent credibility of the judge, are either unnecessary or irrelevant to the doctrinal findings in the ruling.[109] What counts or not as dicta is often a matter of some dispute. Lawyers or judges who disagree with a set of arguments in a decision will often dismiss them as "dicta" and thus deserving of no further refutation[110]—a tactic derisively employed by Scalia in his dissent to the *Lawrence* majority.[111]

The first paragraph of *Lawrence* is arguably dicta not because it is totally irrelevant to the final holding of the Court, but because it discusses legal principles in terms "more broadly than is necessary" to the findings of the opinion,[112] and because it is redundant to the third to last paragraph in the decision. This third to last paragraph consists of (as even Scalia seems to agree)[113] doctrinally relevant and binding language, as it occurs immediately before and is directly connected to Kennedy's legal holding that "the Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[114]

It is only in this third to last paragraph, which occurs immediately after Kennedy officially declares the Court's earlier decision in *Bowers* to be officially reversed, that Kennedy appears to turn explicitly and singularly to the Texas law being challenged in *Lawrence*. The very first reference to the "Texas statute," however, actually occurs in the opinion's first paragraph (the one on which we are presently focused)—while Kennedy's discussion of liberty, freedom, and privacy in constitutional philosophy is stated in—even radically[115]—general terms, he closes the opening paragraph by contextualizing his discussion in terms of the "instant case," where "the instant case involves liberty of the person both in its spatial and more transcendent

dimensions." The "instant case," of course, is *Lawrence*, and more specifically, the conviction of Lawrence and Garner under the "'Homosexual Conduct' statute." While the opinion begins with a statement of how constitutional protections of liberty and privacy interact generally with proposed state interference, Kennedy immediately constrains his initially expansive, spatially free conceptualization of liberty and privacy to situations parallel to that of the state's interference with Lawrence and Garner—that is, to instances where the state attempts to interfere in private sexual acts occurring in private residences. This qualification at the end of the first paragraph, in combination with the next two passages that I discuss, illustrates why Puar does not accept Kennedy's initial framing of privacy as having any potential for a radical politics.

The first several sentences of the third to last paragraph of the decision appear to put this limitation in terms that are more binding on future courts:

> The present case *does not* involve minors. It *does not* involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It *does not* involve public conduct or prostitution. It *does not* involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case *does involve* two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.[116]

Kennedy's qualifying arguments in this passage—again arguably more legally binding than in the first paragraph of the opinion—epitomize the "homonormative"[117] politics of "queer liberal" tolerance rejected by Eng and Puar. Kennedy appears dismissive of the relevance of all but the "sexual practices common to a homosexual lifestyle," which are tolerated. This is certainly consistent with Puar's contention—here evidenced with specific reference to the ruling's text—that "*Lawrence-Garner* looks a tad like cleaning up the homeless and moving them out of view,

a sanitizing of image and physical as well as psychic space,"[118] especially as Kennedy's framing of how such practices should be tolerated explicitly precludes such tolerance having any effect on the legal maintenance of political and cultural heterosexual mores outside of certain private interactions between two consenting adults.

Puar further argues that the decision performs "a conversion from the vilified and repulsive 'sodomitic outlaws' to the . . . 'domestinormative' . . . further ostracizing nonnormative sexual and kinship praxis of not only homosexuals, but heterosexuals as well."[119] Indeed, the "domestinormative," heterosexually defined doctrine of marriage underscores Kennedy's final doctrinal argument before his finding in *Lawrence*. This argument (the next several sentences in the third to last paragraph of the decision) centers the dicta of the opening paragraph even more concretely within an anti-radical politics of marital intimacy:[120]

> The case does involve two adults who . . . engaged in *sexual practices common to a homosexual lifestyle.* The petitioners are entitled to respect for their *private* lives. The State cannot demean their existence or control their destiny by making their *private* sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey, supra,* at 847.[121]

Here, in juxtaposition to the opinion's first paragraph, Kennedy articulates privacy less generally, and more specifically as a right accessed by privileged individuals who are already deemed potentially worthy for the presumptive protection of United States citizenship.[122] The "realm of personal liberty" cited from *Planned Parenthood v. Casey* and applied to the "instant case" in *Lawrence* represents a kind of expansion of freedom in juxtaposition to the Texas and

Georgia anti-sodomy regimes. But that expansion comes at the expense of the "nationalist, classist, and racist" "secondary marginalization"[123] of those subjects furthest from dominant cultural norms.[124] The "realm of personal liberty" invoked through an argument reliant on the precedent of *Casey* is limited in part to individuals whose sexual identities and relationship practices (heterosexuality, monogamy, dyadic relationship pairs, etc.) accord them privileged access to the institution of marriage, and entirely to those who enjoy the economic and racial privileges necessary for access to private space. As Berlant and Warner argue, policies promoting anything less than an institutional protection of public sexual practice and being inevitably privilege those sexual subjects that are closest to heteronormative political and cultural norms. Limiting constitutional protection to queers and queer practices that occur within the "realm of personal liberty" understood through *Casey* will do little effective work in combating institutionalized heteronormativity.[125]

If, because of the distinction between dicta and doctrinally specific and binding arguments in a judicial opinion, it is this third-to-last "present case does not...*Casey*" paragraph that is most important for how *Lawrence* will shape future law, then there is little to read a radical queer potential into Kennedy's introductory statements. However, the rhetorical framing[126] of the decision itself—and I mean framing both rhetorically[127] and in the literal sense of how the first and (as I discuss in the next section) penultimate paragraphs bookend the written decision—suggests, from an argumentative perspective, that aspects of Kennedy's dicta-claims may have some use for future queer advocates attempting to combat heteronormativity in one of its most important symbolic locations.

Consider a hypothetical scenario in which an arrest for public sex is challenged under the Due Process Clause, based on a more expansive theory of the "substantive guarantee of liberty"

than that found in *Lawrence.* Read as either a decision, or a set of doctrinal conclusions, Kennedy's opinion would not help the petitioners in this future case—both in light of the Justice's careful explanation that the "present case...does not involve public conduct," and because of Kennedy's definition-through-precedent of his early expansive theory of due process liberty in terms of marriage-like intimacy. But what of a judge who (somewhat like Kennedy with *Bowers*), dissatisfied with the limits of *Lawrence*, wishes to rule for the petitioners, and so also try to protect some additional persons from stigma, persecution and incarceration? In such a situation, this hypothetical future jurist could conceivably say that while the conclusions of law in *Lawrence* do not apply, the dicta-frames with which Kennedy begins and closes his opinion provide a productive starting point for the new doctrine of substantive freedom that she would need to articulate.

Judicial arguments, even when they are not directly related to an opinion's conclusions of law, can act performatively to both expand and contract the conceptual realm of possibility for future legal petitions. Even when these possibilities seem conceptual and remote, the material importance to marginal life of the argumentative choices made by judges in constructing dicta-frameworks for their opinions should not be understated. To posit (carefully and from an assumption of radical queer political goals) that it matters what the appointed arbiters of the law-of-the-land say and think about the relationship between constitutionally protected freedoms and marginalized identities does not require a valuation of legal sovereignty, but rather a recognition of the import of statements by those who can wield the law with sovereign effect.[128]

A juxtaposition of some of the dicta in Kennedy's opening paragraph works as an initial demonstration of this point, but these statements are only one result of the doctrinal argumentative choice between due process and equal protection that Kennedy faced in writing

the *Lawrence* decision. In the next two sections I will explore the implications of this choice by: first, offering some thoughts on the relationship between Kennedy's doctrinal due process arguments and the particular way that "like race" and "miscegenation analogy"[129] arguments function in *Lawrence v. Texas*; and second, articulating a radical queer perspective on Kennedy's meta-argumentative dicta-framing of due process jurisprudence. I then turn to an analysis of due process arguments in various *Bowers v. Hardwick* opinions, before returning finally to an explicit juxtaposition of Kennedy's majority and O'Connor's concurring opinions in *Lawrence.*

V. *Lawrence v. Texas*, Due Process, and the "Like Race" Analogy

According to the Supreme Court journalist Jeffrey Toobin, the Court, in deciding a case, first holds a vote; if a clear majority and minority exist, the senior justices on either side of the vote can choose to write the majority or minority opinion themselves, or to assign it to another justice. In the case of *Lawrence*, Chief Justice Rehnquist assigned the minority opinion to Scalia, while Justice Stevens was faced with the choice of assigning the majority to either Kennedy or O'Connor. Toobin claims that there were two issues at stake in Stevens' decision: first, assigning the decision to Kennedy was probably a political move designed to connect the traditionally conservative Kennedy explicitly to the liberal justices on the Court. Second, assigning the decision to O'Connor would have more likely[130] meant a majority opinion grounded in equal protection rather than due process analysis. O'Connor's opinion would not, as Stevens wanted, have overturned *Bowers v. Hardwick.*[131] Regardless of the other arguments in the majority opinion, Kennedy's choice not only to posit due process instead of equal protection as the controlling legal doctrine in the case,[132] but also to frame the meaning of due process jurisprudence in particular ways, is significant for how future courts might address similar cases. Kennedy's primary reliance on the Due Process Clause, in contrast to O'Connor's reliance on the

Equal Protection Clause, signifies an importance difference between the doctrinal genealogies of precedent invoked by each Justice.

I want to make an argument about the importance, from a radical queer perspective, of Kennedy's particular choice of due process over equal protection jurisprudence, but this assumes a relevant distinction—from that perspective—between arguments from different parts of the Fourteenth Amendment. The problem with this assumption is that Kennedy's Fourteenth Amendment (due process) arguments, articulated through a precedential genealogy of privacy in terms of intimate, marriage-like relations, work similarly to O'Connor's Fourteenth Amendment (equal protection) arguments in their reliance on analogies not only between queer and heterosexual relationships, but also between race and sexuality.

"Particularly when they argue to judges," Halley declared three years before *Lawrence*, "[gay and lesbian] advocates are opportunists looking for a simile: 'your honor, this is just like a race discrimination case; this is just like a sex discrimination case.'"[133] Kennedy's opinion in *Lawrence* is no exception to the resulting trend of "like race"[134] arguments in U.S. judicial rhetoric about sexuality. A major portion of Eng's critique of *Lawrence* focuses on the important participatory role that all three of Kennedy's opinion, O'Connor's separate concurrence, and Scalia's dissent play in the regressive propagation of the "racialization" (abjection of race) through U.S. legal and other public rhetorics of ostensibly sexually "progressive"[135] politics of "intimacy."[136] The queer legal theorist Siobhan B. Somerville argues that these "like race" arguments produce race and sexuality as permanently separate categories, through the production and reproduction of "analogies between race and sexuality and between racialized and sexualized bodies."[137] This effective[138] and popular[139] argumentative technique of "gay and lesbian" advocacy[140] works in part through "naturalizing a progressive teleology of rights," wherein first

there was the civil rights movement to achieve racial justice, and now there is the civil rights movement to achieve gay and lesbian equality.

This naturalized "like race" teleology saturates popular accounts of recent struggles for gay and lesbian civil rights. A comment in response to New York's legalization of same-sex marriage by David Remnick in the *New Yorker* provides a perfect example: "the gay-rights movement has, in many respects, mirrored the black freedom movement, but in hyper-speed."[141] Remnick does not consider the possibility that this "mirroring" is the result in part of specific argumentative choices made by social movement representatives.[142] Understanding race and sexuality through the analogy form clearly undermines attempts to conceive of politics that are deployed against racism and heterosexism as inseparable manifestations of sovereign oppression. The idea that such a politics would even be needed is an anti-warrant to Remnick's argumentative history of gay liberation, where the implicit warrant is that "white homosexuality is like heterosexual blackness."[143] Queer is naturalized as white (thus also contributing to the simply racist re-naturalizing of whiteness itself) and racialized identity as heterosexual.[144]

Remnick's comment is a salient example of the especially popular "'miscegenation analogy,'"[145] which, in "legal argumentation," often takes the form[146] of gay couples:same-sex marriage::interracial couples:interracial marriage.[147] The notion of same-sex marriage as a protected constitutional right is foreign to many judges, but it can become much more palatable through the miscegenation analogy-invocation of *Loving v. Virginia* (388 U.S., 1967), "the landmark U.S. Supreme Court decision that unanimously struck down state laws prohibiting interracial marriage."[148] Given the prevalence of the miscegenation analogy in judicial arguments about same-sex marriage, it is particularly striking that, as Somerville points out,[149] Kennedy did not use a similar analogic argument through reference to *McLaughlin v. Florida*

(379 U.S. 184, 1964), a decision that "unanimously overturned laws against nonmarital interracial sex"[150] and so "could be considered the closest analogy to laws against same-sex sodomy."[151]

Analogies work as the comparison of a familiar relationship (the "*phoros*") with a less familiar relationship (the "*theme*"), for the purpose of "clarif[ying], structuring, and evaluat[ing]...the *theme* in terms of the *phoros*."[152] (Halley's caution-to-critics that analogies are so "deeply ingrained in the logics of American adjudication" as to be inevitable[153] is therefore a position that reflects the hyper-prevalence in judicial rhetoric of the "doctrinal" mode of argument,[154] wherein the judge must explain her positions always in terms of what has come before.[155]) Surely—especially given the specific exigence of vacating the Court's previous statement on the question in *Bowers—Lawrence* was a case where a judicial rhetor could have found a familiar, and strongly precedential (as *McLaughlin* was a unanimous decision) *phoros* particularly helpful, and even comforting. But the choice in *Lawrence* to focus on due process made the relationship to *McLaughlin*, an equal protection decision, less clear.[156] The precedential analogy Kennedy invokes *instead*—in an opinion that he declares "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter"[157]—is *Loving v. Virginia*,[158] which Scalia also cites in his dissent.[159]

Eng argues that while Scalia and Kennedy obviously come to different conclusions as to how the *Loving* precedent is controlling (or not) on the questions of law in *Lawrence*, the warrant both sets of arguments rely on and thus perpetuate is "'like race'" analogy.[160] This anti-intersectional judicial rhetoric of race and sexuality underwrites what Eng calls the "coming together of colorblind and queer politics" in service of the queer liberal project of inclusion, an inclusion that foments abandonment of the imperative for continued discussion of "racial

liberation" in the judicial rhetoric of constitutional law.[161] As a response, Eng juxtaposes the "legal genealogy of the *Lawrence* ruling traced out by both the majority and dissenting opinions"—one that "concerns issues of privacy, not race"—with his own "alternate legal genealogy, through the specter of race, through the ghost of miscegenation,"[162] following Halley to trace the "historical role of race in Constitutional jurisprudence" in particular through the "distinct history of the 14th Amendment's due process and equal protection clauses."[163] The equal protection argument "accepted in Justice O'Connor's concurrence though ultimately dismissed by the majority opinion" explicitly "connects queer liberalism to histories of race, slavery, and segregation" as a particularly regressive form of the "like race" analogy. But Eng argues that O'Connor's equal protection arguments do not promote these regressively analogic politics any more than Kennedy's reference to *Loving,* which occurs in the Justice's citation of a passage from Stevens' *Bowers* dissent.

This citation, which occurs immediately before Kennedy's official statement overturning *Bowers*, is no mere supporting quotation. It is Kennedy's elevation of what was a dicta-introductory paragraph in Stevens' dissent to a declaration of binding legal precedent. Stevens' arguments in this passage, Kennedy declares, "should have been controlling in *Bowers* and should control [in *Lawrence*]."

> Our prior cases [Stevens says in *Bowers*] 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.[164]

In his analysis of this passage in *Lawrence* in juxtaposition with O'Connor's equal protection-based "like race" arguments, Eng does not appear to consider the difference between due process and equal protection arguments to be significant. But—from a radical queer of color political perspective—the difference is significant. Equal protection jurisprudence is inherently referential to the peculiar racial history of the United States; invocations of the Equal Protection Clause in cases about sex that don't explicitly consider race (and many of those that do) will inevitably be productive of race-analogic discourses of sexuality in constitutional law. Due process jurisprudence—which traces back not to the racial politics of the Fourteenth Amendment, but rather to the question of the circumstances in which an English monarch may deprive his titular subjects of life and freedom—is not.[165] Unlike the right to equal protection of law, an invocation of the U.S. constitutional guarantee of due process is not *automatically* citational[166] of the United States' judicial racial history.

It may be the case that Kennedy's choice to foreground due process over equal protection analysis in *Lawrence* led him to use the *Loving* miscegenation analogy instead of the more legitimately apropos *McLaughlin*. *McLaughlin* would have been a more direct comparison—and it would have been very interesting to see a *Lawrence* decision based primarily on *McLaughlin* and so avoid the privacy rights for non-marital homosexual intimacy::privacy protections for marital intimacy:privacy protections for non-marital heterosexual intimacy analogy. That said, the specific way in which Kennedy deployed *Loving* as evidence for his doctrinal arguments actually does more to disarticulate the "like race" analogy from the underlying logic of his

arguments in *Lawrence* than any citation of *McLaughlin* would have—a citation that would have been enabled by a hypothetical counterfactual Kennedy choice to make equal protection arguments. I think that Eng's critique actually demonstrates that for radical queer politics, the *Lawrence* majority's due process arguments are less detrimentally productive of the "like race" analogy than O'Connor's arguments from equal protection. This does not mean that Kennedy does not abject race in his analogies of marital intimacy.[167] As is evident from my arguments in Chapter Two, "the racialization of intimacy" works very well as a description of the meta-text of Kennedy's Fourteenth Amendment arguments, writ across multiple opinions. But, unlike O'Connor's use of *Loving* to support the equal protection arguments in her concurrence, and unlike Scalia's use of *Loving* to refute O'Connor's arguments, Kennedy's reference to *Loving* is not an intrinsic component of his invocation of the Due Process Clause as the controlling constitutional text in *Lawrence*. That is, unlike O'Connor's arguments from equal protection, Kennedy's opinion is constructed such that his due process argument works with or without the analogy to *Loving*, a distinction that Eng obscures in his conflation of due process and equal protection arguments under the broader aegis of the Fourteenth Amendment.

Kennedy's use of this portion of Stevens' dissent certainly has the effect of positing an analogy between *Lawrence* and *Loving*. Nonetheless, Kennedy eschewed more explicit articulations of a *Loving*-*Bowers* analogy in Justice Blackmun's *Bowers II* dissent[168] and Circuit Judge Johnson's Eleventh Circuit *Bowers I* opinion[169] in favor of a Stevens quotation that references *Loving* in a footnote—a footnote which is not included in the *Lawrence* majority opinion. Kennedy's argumentative choice here underwrites the fact that the particulars of the *Loving* case are less important to Kennedy's doctrinal arguments than they are to O'Connor's or Scalia's. Miscegenation is the *example* Stevens gives for his contention 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 the practice." In *Lawrence*, Kennedy introduces the Stevens passage by declaring "the rationale of *Bowers* does not withstand careful analysis:" this is a reference to the question of whether Georgia's interest in prosecuting § 16-6-2 outweighs the resultant deprivation of liberty.[170] Given this context of the surrounding arguments in *Lawrence*, Kennedy does not include Stevens' *Loving* example in support of *Lawrence's* broader substantive due process argument (Kennedy's conclusion that the conduct for which Hardwick, Lawrence, and Garner were charged is protected as a right of privacy, and so cannot be a reason for depriving the plaintiffs of liberty in violation of the Fifth and Fourteenth Amendment guarantee of substantive due process).

Rather, Kennedy's citation of Stevens' implicit reference to *Loving* serves as a response to the narrower question of whether the state has a rational basis for or compelling interest in criminalizing gay sex (the first part of the two-part test, discussed in the next section, that the Court uses to determine whether the state has met the standard necessary to legitimately deprive an individual of her freedom). Miscegenation is one example (among many provided by both Stevens and Blackmun in *Bowers I*) of a legal proscription that has enjoyed long historical support but that is nevertheless unconstitutional, and that could not be justified by the proscription's long support in U.S. history alone. While it is certainly telling that Kennedy picked a passage referencing *Loving* over the other available examples, the dominant Fourteenth Amendment analogy in this section of Kennedy's opinion is not between race and sexuality, but between gay sex and heterosexual marital intimacy. "Like race" analogies are an inevitable feature of U.S. judicial arguments about sexuality; it is therefore a productive exercise to distinguish between more or less "unjustifiably coercive" examples of the genre.[171] A queer

rhetorical reading of Kennedy's arguments from the Due Process Clauses (a "citation of the law...to produce it differently"[172]) can function cooperatively with Eng and Halley's demand for "effort to move beyond the persistence and intractability of 'like race' arguments"[173] in contemporary Fourteenth Amendment law.

The present choice in federal judicial rhetoric about sexuality is not between racialized-heteronormative or intersectional-queer discourses of racial and sexual identity. The former will continue to dominate the ways that most judges talk about LGBT and people of color as U.S. constitutional subjects for the foreseeable future. Rather, the choice is between judicial rhetoric about LGBT sex and relation dominated by arguments from either equal protection or due process, and within that choice, as I argue in the next section and the following chapters, the choice between Kennedy's particularly "nominalist" framing of the Fourteenth Amendment and legal subjectivity, and more typically essentialist applications of equal protection.[174]

Equal protection is about classes of persons who may be treated differently from others; in contrast, the guarantee of both procedural and substantive due process assumes no particular victim other than the (legal, cultural, and temporal) context dependent subject-before-law. Within Fourteenth Amendment jurisprudence, arguments from due process are more potentially useful to an intersectional, "multiple-axis"[175] theory of constitutional protection than arguments from equal protection. A radical queer epistemology of due process jurisprudence is one road to "the possibility of moving beyond liberal identity-based frameworks in order to emphasize not 'who we are but how we are thought.'"[176]

VI. Due Process, Nominalism, and Subjectivity Before Law

Kennedy's specific applications of due process to the questions of law before the *Lawrence* Court (in the terms of the introduction, his legal conclusions) reference the Fourteenth

Amendment. But Kennedy ends his opinion with dicta arguments articulates a general framework for future due process jurisprudence that is grounded in both the Due Process *Clauses* of the Fourteenth (intrinsically connected to the post-slavery constitutional jurisprudence of emancipation, reconstruction, Jim Crow, and civil rights) and Fifth (not so intrinsically connected) Amendments. An analysis of Kennedy's closing dicta arguments about due process on their own terms, within temporary analytical brackets,[177] allows for a comparison of Kennedy's book-ending framing arguments for how the Due Process Clauses should be generally interpreted in constitutional jurisprudence, against the precedential genealogy of privacy and racialized intimacy that forms the basis for his conclusions of law. Kennedy's dicta meta-argument about how due process should function generally in response to different forms of subjects who come before the Court as petitioners for constitutional protection—an argument that might be imagined as floating above the specific doctrinal arguments of the opinion—is arguably more important than his specific legal conclusions to future possibilities for the articulation of radical queer legal subjectivities.

As I argue above, both the first and penultimate paragraphs of *Lawrence* appear to be textbook examples of non-legally binding dicta, but if the intervening legal discussion were removed, the penultimate paragraph would read as the conclusion to Kennedy's procedural declaration (begun with the *Lawrence*'s first paragraph) of how the Constitution generally and the Due Process Clauses specifically should be interpreted:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once

> thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[178]

If this passage, immediately before the specific order from the Court that the "Texas statute" be "reversed" and "remanded,"[179] is an example of dicta, it is the more specific type known as *gratis dictum*, or "a court's statement of a legal principle more broadly than is necessary to decide the specific case."[180] Kennedy's more legally binding arguments about the "instant case" of *Lawrence* are examples of constitutional rhetoric that are contrary and damaging to a radical queer future, but the two paragraphs providing the decision's literal frame are so general as to not be strictly necessary to the legal findings of the opinion. As I argue above with respect to the first paragraph of the decision, this allows both paragraphs together to function as a separate and independently relevant example of a "*meta*"-argument[181] concerning the way in which the Constitution generally and substantive due process specifically should be considered and argued in future cases. While the non-dicta passages in *Lawrence* may be the more specifically powerful in terms of their immediate ability to shape future law, I believe that it is useful to juxtapose the resources for a radical queer "nominalism" and futurism in Kennedy's book-ending meta-argument, against the queer-liberalist and heteronormative specific legal findings of the decision.

In this penultimate paragraph, "Liberty" again appears as the dominant trope, not primarily through repetition as in the first paragraph of the decision, but through Kennedy's use of the term vis-à-vis his discussion of the authorial intent of those responsible for the "Due Process Clauses." Liberty is framed as the ontological category for which the Constitution was primarily and most importantly designed to protect; while the whole Constitution "endures,"

liberty/freedom is the only truth about the Constitution that remains unchanged throughout history. "Freedom" (and its correlative antonym "to oppress") is again the quality through which liberty is defined. Liberty and freedom are defined here in a manner consistent with Breyer's "active liberty," in that the one immutable truth of constitutional jurisprudence is the need to protect liberty as the process of petitioning the state for redress against its own wrongs. The right to substantive due process is thus the right of "persons in every generation" to *fully exercise "active liberty."* Kennedy's arguments suggest an interest in what he views as the true meaning of the Due Process Clauses, but this true meaning is not a fixed concept, but rather the ability of the constitutional text to be re-interpreted in the service of whomever might find themselves the victim of state oppression. Kennedy's rhetoric here calls into being a Constitution solidly within the "loose construction" tradition of constitutional interpretation.[182] Such a Constitution, rather than being merely an instrument for legal positivism, has the potential to be an important vehicle for society's periodic engagement in, as James Darsey puts it, "serious acts of redefinition based on radical principles."[183]

The gay and lesbian civil rights activist and philosopher Richard Mohr is highly critical of Kennedy's opinion, focusing—like Eng and Puar—in particular on Kennedy's refusal to talk about sodomy except as the referent of a marital intimacy metaphor.[184] But it is in Mohr's reading of this passage that he is the most generous to Kennedy. Citing Kennedy's historically anti-gay record in numerous cases before *Lawrence*, Mohr posits that the "'we' in Kennedy's 'us'" is "Kennedy . . . thinking of himself"—on other words, *Lawrence* might be a means for Kennedy to atone for his largely anti-gay judicial record.[185] However, reading Kennedy here as talking primarily about himself, while interesting, does a disservice to the rhetorical potential of this passage. Mohr leaves off the last line of the paragraph, that "as the Constitution endures,

persons in every generation can invoke its principles in their own search for greater freedom." The "we" in "us" ("blind us…") might be Kennedy as much as it is the Court or the United States in general, but the "persons" in the last line is unqualified by any limiting modifier. Kennedy's vision of change via the Constitution in a democratic society is decidedly collective in nature; for Kennedy in this passage, the right to substantive due process means that the Constitution should serve as the site at and the vehicle through which a continual process of radical political and cultural change can be enacted.

Due process does not have an excellent reputation among liberal scholars of constitutional law and civil rights. The story of due process has featured the protection of corporate autonomy and the undermining of civil rights legislation, stemming from the Court's landmark 1905 decision in *Lochner v. New York*,[186] in which the Court struck down a New York State law restricting the number of hours a baker could be compelled or allowed to work.[187] Equal protection, on the other hand, is synonymous with decisions such as *Brown v. Board of Education*[188] that are viewed overwhelmingly in liberal circles as significant victories for racial justice.[189] The Equal Protection Clause is also posited by some legal scholars as the greatest hope for gay and lesbian civil rights.[190] Critical Race Theorists, however, have called the efficacy of the "equality model" of jurisprudence into serious question, suggesting that rather than ending "the state's role in enforcing race and gender stratification," equal protection jurisprudence may instead have insidiously "caused such regulation to assume new form."[191] The UCLA law professor Russel K. Robinson draws on these criticisms to suggest that the problems posed for racial justice by the "equality model" should also give gay and lesbian judicial activists serious pause,[192] a position that I argue is supported by the relationship between Kennedy's due process arguments in *Lawrence* and radical queer futurist theory.

Kennedy's insistent futurity in the decision's first and penultimate bookending paragraphs makes his procedural arguments about how the Due Process Clauses should be interpreted deeply relevant to radical queer politics in the United States. Part of the Foucauldian dilemma of queer politics generally is starkly reflected in *Lawrence v. Texas* specifically—that no matter what queer reforms or revolutions or challenges to the state occur, there will always be a shift in racist and heterosexist boundaries of inclusion and abjection[193] in the liberal statist production of "new normativities and exceptionalisms through the cataloguing of unknowables."[194] This is a bleak prognosis of culture, but "queer futurity"[195] (as Puar argues) is a potential antidote; in "queer futurity," "queerness is expanded as" a deliberately unpredictable and unforecloseable "field, a vector, a terrain."[196] While there will probably never be a politics that fully achieves Judith Butler's dream of an effective promotion of life-giving without any life effacing cultural and legal norms,[197] it is this very difficulty that makes "opening up to the fantastical wonders of futurity" "the most powerful of political and critical strategies."[198] Such a politics is so "powerful" precisely because of its mutability; if "queerness" were limited to a discussion of specific political strategies, then the realization of any particular strategy would always be vulnerable to the remarkable adaptive abilities of the heteronormative nation-state.

Conceiving of queer politics as "futurity" defined as a "field, a vector, a terrain" does not *preclude* a discussion of specific political goals, but adds to that discussion an articulation as to what the method of queer politics should be, regardless of the specific actions being taken to advance various queer agendas. The basic criteria that Kennedy outlines for interpreting the "Due Process Clauses of the Fifth and Fourteenth Amendments" read as echoes (constitutional, constrained by liberalism, but echoes nonetheless) of Puar's discussion of queer futurity. Kennedy recognizes that specific legal solutions that at one time and place seemed to be

expressions of liberty and freedom are in fact often oppressive, and his solution to this dilemma is to insist that the Constitution must never be limited to any fixed historical interpretation. Rather, it must remain always already open to the future possibility of change in what laws serve to liberate and what to oppress.

In fact, Kennedy goes a step further—implicit in his meta-argument about due process is the recognition that the Constitution has always contained elements that were never liberatory, and that the only way to make a once and future regressive document available to progressive politics is to insist on judicial interpretation being more open to the necessity of interpretive change than it is beholden to historical precedent. Kennedy insists that Supreme Court justices must not only be concerned with doctrine and historical convention, but also with the future political possibilities that their decisions will impact. This prudential[199] and loose constructivist mode of constitutional interpretation alone is not a radical position for a liberal decision from the Court, especially not in an opinion guided from behind the scenes by the "liberal leader" John Paul Stevens.[200] Rather, the way that Kennedy frames the decision through his procedural interpretation of substantive due process attempts to not only establish the doctrinal value of prudential jurisprudence, but the mutable and theoretical availability of the Constitution as a lever, available to all persons, that can be used against the oppressions of the nation-state that gave the Constitution life and that the Constitution serves to protect. Kennedy's invocation of loose constructivist interpretation in the context of gay and lesbian civil rights has the potential to render the Constitution a valuable resource for radical queer politics.

In fact, I see a strong parallel between the loose constructivist mode of Kennedy's due process arguments, and Halley's interest in "nominalist" articulations of Fourteenth Amendment doctrine. While the nominalist queer theory of identity[201] posits a subject that speaks itself into

existence on its own terms, Kennedy's legal nominalism instead allows for the possibility of a subject*less* position before the law, one in which constitutional protection not only allows petitioners to the law to describe their own identify positions on their own terms, but more importantly does not require any *knowledge* of the identity or nature of a petitioning subject as a pre-requisite for offering sovereign protection.

Nonetheless, "queer futurity" is not only a dream for times to come but an expression of the confluence of queer identity and politics in a radical queer orientation against liberalism and homonormativity. For Puar and Butler, *to be queer* is at least in part to struggle against—in the context of marriage[202] and other flashpoints of dispute over the exclusion of gays and lesbians from full United States citizenship[203]—the refusal by the "mainstream lesbian and gay movement" to "[recognize] as a problem" the possibility that assimilationist political drives "might result in the intensification of [racist and heterosexual] normalization" in the United States.[204] Queer futurity is not only a political orientation. It is a particular and radical articulation of liberatory possibilities for subjectivity that may be mutually exclusive not only with "assimilationist political drives," but with what Roderick A. Ferguson identifies as the "will to institutionality" that is part and parcel of recent racialized and subjectifying politics of mainstream struggles for gay and lesbian recognition.[205]

How, then, can there be any potential resources for a future radical queer politics on the present United States Supreme Court? The critique and radical hope inherent in queer futurist politics necessitates less a wholesale rejection of institutional action than an insistence on the need to, as Butler argues, "[distinguish between] the norms and conventions that permit people to breathe, to desire, to love, and to live, and those norms and conventions that restrict or eviscerate the conditions of life itself."[206] Radical queer politics should not surrender to the inevitable

power of heteronormative institutions like the Supreme Court, but they should allow room for practical and procedural queer considerations of the relative value of the different actions that will, inevitably, be taken up by those institutions.[207] In this way, Kennedy's particular argumentative choices construct some space for optimism with respect to openings of "possibility" for a radical queer politics at the United States Supreme Court. To make this argument does not require endorsing the desirability of the "will to institutionality," but rather the practical awareness for radical politics that the manner in which future judges reject or endorse laws and practices concerning sexual identity (and the lifegiving or eviscerative norms those laws and practices endorse) will be determined in part by the range of possible arguments about constitutional law those jurists can look to as controlling in future cases concerning queer freedom.

VII. Privacy, Intimacy, and the "Right to Sodomy"

When Richard Mohr read Kennedy's statement that *Lawrence* "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter...[but] the case does involve two adults who...engaged in sexual practices common to a homosexual lifestyle," his reaction was to comment that even given Kennedy's evident discomfort[208] with publicly asserting constitutional protections for anal sex, the rhetoric of the decision makes it clear that for Kennedy, "having to think about gay love is more frightening than having to think about guys buttfucking."[209] For Mohr, Kennedy's analogies between homosexual sex and heterosexual marital intimacy metonymically stand in for and thus marginalize the potential for committed, homosexual partner intimacy. Mohr might wish that Kennedy had more explicitly developed the miscegenation analogy.

The radical queer critique of Eng and Puar offers a precisely converse objection: that Kennedy's argumentative construction of a privacy violation intrinsic to Lawrence and Garner's arrest constitutes a "shift" (what Puar calls the "conversion" from "'sodomitic outlaws'" to participants in "'domestinormative'" kinship) "from sodomy to intimacy," resulting in an opinion that only makes it unconstitutional to criminalize gay sex if that sex takes place within the heavily circumscribed physical and conceptual spaces of intimacy that are conceivable within dominant heterocentrist family politics.[210] Eng's "shift from sodomy to intimacy" and Puar's "conversion" from the "sodomitic" to the "domestinormative" are both clear references to a shift from the focus on the former in *Bowers II,* to the latter in *Lawrence*. But, Mohr objects to *Lawrence* in part because he doesn't think Kennedy has actually made such a shift at all—Kennedy talks too much about sex, and not enough about relationships. So, is Kennedy's *Lawrence* opinion about the constitutionality of proscriptions on queer sex, or is it about the constitutionality of proscribing for homosexuals the benefits stemming from participating in intimate relationships that heterosexuals enjoy as a constitutional right?[211] My answer—'all of the above'—requires a turn back to *Bowers*.

In his opinion for the majority in *Bowers v. Hardwick* (*Bowers II*), Justice Byron White famously[212] declares that the "issue presented [to the Court] is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[213] Chief Justice Burger was so moved as to write a concurring opinion solely to "underscore" this position, arguing that, "in constitutional terms, there is no such thing as a fundamental right to commit homosexual sodomy."[214] Justice Harry Blackmun begins his dissent with the response that "[*Bowers*] is no more about a 'fundamental right to engage in homosexual sodomy'...than...*Katz v. United States*, 389 U.S. 347 (1967), was about a fundamental right to place interstate bets from a telephone

booth."[215] Instead, Blackmun argues, "Hardwick's claim" should be analyzed in terms of the "constitutional right to privacy."[216] But Stevens, in his separate dissent, refers to the "right to engage in nonreproductive sexual conduct that others may consider offensive or immoral."[217] Stevens' point here is that by definition of the statute at issue in *Bowers II*, a "right to engage in nonreproductive sexual conduct" is inclusive of precisely a "right to engage in sodomy"—and (while this may go beyond what Stevens meant) could also be taken up as a way of reading nonprocreative sex as definitionally queer.[218]

The *Bowers II* Court appears to be at odds as to not only the correct decision-making framework for deciding the case, but the nature of the very legal question the Court is asked to decide. The Justices explicitly argue with each other, but these are not "arguments as arguments"—rather, the majorities and accuse the dissents (and vice-versa) of misapplications of of precedent. On closer examination, however, these differences are less a matter of fundamental doctrinal opposition than of strategic argumentative framing. Justice Powell's concurring opinion offers a helpful explanation: "I join the opinion of the Court. I agree with the Court that there is no fundamental right—i.e., no *substantive right under the Due Process Clause*—such as that claimed by respondent Hardwick, and found to exist by the Court of Appeals."[219] Powell says "substantive right under the Due Process Clause" instead of "right to substantive due process" to underscore his position that substantive due process is not, itself, a right. Rather, it is the requirement—construed from the procedural guarantee of due process in the Fifth and Fourteenth Amendments—that the state have a good enough reason[220] to interfere with or deprive a person's "life, liberty, or property."[221] If called by a judge to justify such an action, the state must *at minimum* pass what the U.S. courts term "rational basis" review, wherein the state must show that its deprivatory action is "rationally related to some legitimate

government interest."[222] This is a lenient standard; legislation and other government decrees usually pass the rational basis test. It is only when the state seeks to deprive a person of a fundamental right—by killing them, for example—that its actions are typically subject to the more difficult "strict scrutiny" review, wherein the deciding judge(s) determine whether the statute or application of statute in question is "narrowly tailored to a compelling government interest" that outweighs the negative consequences of depriving a person of their fundamental rights.[223]

From the perspective of the *Bowers II* and *Lawrence* Courts, there is no dispute that what Hardwick, Lawrence, and Garner seek to challenge is the constitutionality of the application of the Texas and Georgia statutes to consensual sex between two men in a private residence. Because Hardwick, Lawrence, and Garner claim that Georgia and Texas acted in contravention of their guarantee of substantive due process, each Court must ask three questions: first, did the state actions in question interfere with Hardwick, Lawrence, and Garner's fundamental rights; second, if so, is the statute in question narrowly tailored to a government interest compelling enough to justify interference with those fundamental rights; and third, if not, is the statute in question at least rationally related to some legitimate government interest.

The distinction between a right to engage in homosexual sodomy, and a right to self-determination in the context of heterosexual marriage-like intimate relationships only matters to the first of these questions; so initially, it appears that White and Blackmun simply have different notions of what fundamental right might possibly be violated. If this is the case, then Kennedy's opinion in *Lawrence* most certainly represents a marked shift away from not only the effective conclusion, but also the argumentative framework of White's opinion in *Bowers II*. White asks the question of whether the Court can construe a constitutional right to engage in homosexual

sodomy (or more broadly, the right to have sex in the manner that one desires). Kennedy, instead of answering White's question about a right to engage in sodomy in the affirmative, instead follows Blackmun in asking the question of whether the Court should construe the particular actions of Hardwick, Lawrence, and Garner as equivalent to personal decisions concerning an individual's intimate life and relation that the Court has already determined are protected under the constitutionally construed "right to privacy."[224]

Doctrinally, however, White, Kennedy, and Blackmun ask the same question. Of course there is no explicit "right to sodomy" in the Constitution—any more than there is a "right to privacy." Thus the framing question White proposes in the *Bowers II* majority is not "is there a constitutional right to sodomize," but "does the Federal Constitution" *confer* a "fundamental right upon homosexuals to engage in sodomy." White spends some time enumerating two ways the Court's precedent allows for something not explicitly indicated in "life," "liberty," and "property" to be construed as a fundamental right "qualifying for heightened judicial protection" under substantive due process. These are: "liberties...'implicit in the concept of ordered liberty'" (such that liberty itself would be meaningless absent their protection); and liberties "'deeply rooted in this Nation's history and tradition'"[225] (here is what Halley means when she says *Bowers* sounded an ominous note for constitutional advocates of women's rights). "Neither of these formulations," White declares, "extend a fundamental right to homosexuals to engage in acts of consensual sodomy." He further argues that such a conclusion would over-extend the authority of the Court to "discover" rights not textually indicated in the Fourteenth Amendment.

White frames these "textual"[226] claims as conclusions of law—but I read them as dicta arguments. The language necessary to White's ultimate finding is a different set of "doctrinal"[227] arguments in in the opinion. White does not actually determine whether there is a

"fundamental right...to engage in acts of consensual sodomy" *itself*, but rather whether the Eleventh Circuit was accurate in applying the precedent of various "right to privacy" decisions to construe the "Constitution to confer *a* right of privacy that extends to homosexual sodomy."[228] The Justice compares, in turn, the putative "right to sodomize" with the "rights announced" in the cases cited by the Eleventh Circuit, but this comparison belies the fact that each of these rights is a *component of the right to privacy*.[229] The respondents (Hardwick and John and Mary Doe) do not, as White claims, urge the Court cast "aside" precedent and "announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy."[230] Here White uses what I call framing dicta to obfuscate detailed doctrinal arguments in the respondent's brief and dissenting opinions that the majority does not directly respond to.

What White refers to as a demand to recognize an aprecedential right to sodomize is actually the respondent's (Hardwick's) claim that Hardwick's actions are protected as a fundamental right under the already recognized "constitutional protection for the associational intimacies of private life in the sanctuary of the home,"[231] or in other words, the "decisional and spatial aspects of the right to privacy" taken up in Blackmun's dissent and parts of Kennedy's opinion in *Lawrence*.[232] The respondents' arguments about the relationship between Hardwick's actions and "liberties 'implicit in the concept of ordered liberty'" do not say that engaging in homosexual sodomy is, as a thing in itself, an inherent component of liberty *per se*. It is so, but only in the context of relational intimacy. As Stevens argues, the decision about whether or not to have sex with someone is one of the decisions about life that can be construed as fundamental to the zone of "intimate relationships" and personal decisions protected under the right to privacy.[233] Sex alone might necessarily indicate a relationship (Stevens and Kennedy both seem

to think to does), but if there can be sex without a relationship it does not fall under privacy, and is not a right.

What I call White's framing dicta works a technique to discredit the precedential arguments of the respondent and the *Bowers II* dissents. The dicta-frame becomes the warrant for White's argumentative construction of an alternative genealogy of the same precedents that both the majority and the dissent agree are most likely controlling on the question of whether the case implicates Hardwick's fundamental rights. White and Burger's insistence that recognition of a right to sodomy runs contrary to the will of the people and the long history and tradition of U.S. and English constitutional and common law[234] does not initially make sense, given that, as Blackmun says, the case is *not* about a right to engage in sodomy. But when read as framing dicta, White and Burger's characterization of the question of the case in this way allows their historical arguments to become the warrant for White's alternate genealogy of the precedent in the Court's previous privacy rights cases.

In White's precedential genealogy, the privacy rights cases do not speak to and cannot be construed broadly in terms of a "certain private sphere of individual liberty."[235] Rather, they speak to a right to privacy in the zone of "family, marriage, and procreation." White offers no evidence for his claim that "no connection between these" and "homosexual activity...has been demonstrated" by the Eleventh Circuit or the respondents.[236] The evidence is rather in White's rhetorical framing of queer sex as the historically demonstrably immoral act of sodomy, which, tautologically, is the warrant to White's argumentative construction of his heterosexist precedential genealogy of the right to privacy (a genealogy that is implicitly inclusive of the entire precedential history of § 16-6-2). Through a mix of historical and doctrinal arguments, White finds that the construal of activities as rights of privacy must *in deference to precedent* be

exclusive of activities that are demonstrably immoral and unnatural in the history of law. White's dicta frame may as well be a citation of Bloodworth's logic in *Comer v. State*: Gay sex is immoral and unnatural in the history of law, and so it cannot be a component of any privacy right. Accordingly, I read the opening statement in Blackmun's dissent not as a doctrinal correction to White's decision-making framework, but rather as a winking acknowledgment that White knows very well what the case is about, and Blackmun knows very well why White chooses to frame it in the way that he does.

The doctrinal argument central to White's conclusion of law thus relies on a converse (gay sex is mutually exclusive to the protected private zone of "family, marriage, and procreation") of the warrants to the doctrinal argument of Blackmun's and Stevens' dissents, and later Kennedy's opinion in *Lawrence* (gay sex is a species of the relational intimacy protected as analogous to the private zone of "family, marriage, and procreation"). Echoing Puar's critique of Kennedy's decision to take "'the broader privacy argument' over the 'narrower equal-protection argument,'" Eng argues that "Kennedy's majority opinion underscores the right to privacy as the *sine qua non* of gay and lesbian self-determination."[237] I agree, but would append "in U.S. due process jurisprudence." The issue, as Puar identifies, is between equal protection and due process, rather than privacy or not privacy. Eng implies that White's framing of *Bowers II* in terms of a right to sodomize is something that Kennedy could have directly taken up without the need to define sodomy in terms of heterosexual intimacy, thereby "desexualizing homosexuality...in the political-legal realm."[238] Why not simply accept White's decisional framework, and reverse it to recognize a right to sodomy? But if Kennedy had taken up White's question of the "fundamental right to engage in sodomy," this counterfactual *Lawrence* majority would likely have looked very similar to the real one.

Before Hardwick ever brought suit, the "shift from sodomy to intimacy" was *already indicated* in the Court's prior decisions to articulate a fundamental right to make certain decisions in terms of a right to privacy, and also to find such a right of privacy only in those situations where the decision's central importance to a person's life and/or relationship could be demonstrated. Kennedy could have taken up the "right to sodomy"—or the right to make a decision to have sex—dissociatively, severing its relationship from privacy as two separate rights construed from the guarantee of substantive due process. Eng's counterfactual exploration of what *Lawrence* would look like in this scenario is a valuable tool in a broader radical critique of privacy in judicial rhetoric about sexuality—and one that I make use of at the end of Chapter Three. My point here is simply that Kennedy's argumentative choice to articulate a right to sodomy separate from privacy would be in addition to his choice to accept White's decisional framework in *Bowers*—the most reasonable and predictable way for Kennedy to talk about a "right to sodomy" would still be in the context of a right to privacy.

While much of Kennedy's opinion certainly focuses on the "spatial" aspect of privacy in the case of Lawrence and Garner (focusing on the assumed act's occurrence in a private dwelling), this focus also demonstrates the importance of (following Blackmun and Stevens in *Bowers II*), Kennedy's *separate* affirmations of Lawrence and Garner's protected status in terms of the "decisional" right to privacy. Kennedy speaks of the decisional component of privacy in heteronormatively grandiloquent terms. But doctrinally, the precedential genealogy he invokes hearkens back to the Blackmun and Stevens *Bowers II* dissents, as well as Laurence Tribe's brief for Hardwick and John and Mary Doe, in which the protection of the spatial right to privacy—thus requiring that a protected sex act take place in a private home—is useful but not *per se necessary* for the finding that the "decisional" component applies as well.

In all of the cases I take up here, the example of judicial opinion that contains the most useful discussion of privacy and intimacy from a radical queer perspective is Blackmun's *Bowers II* dissent. Stevens would strongly limit the decisional right of privacy in cases of sex to the space of the private home.[239] Blackmun instead argues that while the Court *tends* to think of the "decisional" component of privacy in terms of marriage, family, procreation, etc., decisional privacy does not *need* to implicate these things. For Blackmun, the reason the Court has recognized the decisional component of privacy as a fundamental right only when it can be located in these particular spatial realms is not because the Court sees decisional privacy as necessarily a subordinated component of spatial. Rather, it is because the Court has sought to protect the public benefit inherent in allowing individuals to make unregulated decisions when "they form so central a part of an individual's life."[240]—that the Court has, in the past, understood the importance of such decisions in primarily spatial terms does not mean that they must always do so.

Here, Blackmun's doctrinal argumentative frame suggests a latent radical "opening" for radical queer politics in his repudiation of White's specifically heteronormative precedential genealogy of privacy. I quote the Justice's dissent at length to illustrate my point:

> We protect those rights [associated with heterosexual inter-family decision-making] because they form so central a part of an individual's life. "[T]he concept of privacy embodies the 'moral fact that a person belongs to himself, and not others nor to society as a whole'"...only the most willful blindness could obscure the fact that sexual intimacy is 'a sensitive, key relationship of human existence'...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, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds...in a variety of circumstances, we have recognized that a necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices.[241]

Blackmun still seems to need, ideologically, to connect the decision to have sex with a person of the same sex with the notion of an intimate *relationship*—his rhetorical framing here certainly participates in a heterocentrist politics of desexualization, and the sanitizing of non-normative queer sexuality. But Blackmun, like Kennedy after him, still offers a *latent* constitutional rhetorical resource for future decisions that might seek to articulate a less ideologically constrained version of the decision to have sex—regardless of the act's spatial location—as a right of privacy.

If a petitioner seeks to force recognition of a queer political subject before U.S. constitutional law, and so force the state to pass a more rigorous test to justify regulation and criminalization of queer persons and lives *per se*, the most evident and likely to succeed argumentative resources to do so in the context of due process jurisprudence are in the "decisional and spatial aspects of the right to privacy." The practical result of the critical queer narrative about *Lawrence* is to suggest, as Puar does, that Kennedy, like O'Connor, should have eschewed due process in favor of equal protection as the basis for the *Lawrence* majority. Again, the choice is between equal protection or due process. Given due process analysis, the precedential history of *Lawrence* demonstrates that in the judicial rhetoric of substantive due process, there are few argumentative resources for a judicial articulation of "gay and lesbian self-determination" through an avenue other than decisional privacy.[242] The question then becomes,

again: what are the comparative implications of due process and equal protection arguments from the perspective of radical queer politics?

VIII. A Queer Comparison of Due Process and Equal Protection, via Strict Scrutiny

The primary importance that Kennedy attaches to the Due Process Clauses is largely absent in recent court decisions in favor of the legalization of same-sex marriage. I take up some examples here prior to a more detailed analysis in Chapter Three. Partly in response to The Supreme Court of California's May 15, 2008 ruling in *In re Marriage Cases*,[243] California voters passed the "Proposition 8" initiative banning same-sex marriage in November 2008.[244] On August 4th, 2010, Judge Vaughn R. Walker of the United States District Court for the Northern District of California ruled in *Perry v. Schwarzenegger* that "Proposition 8 is unconstitutional under both the Due Process [245] and Equal Protection [246] Clauses" of the Fourteenth Amendment.[247] Chapter Three will explore some more queerly positive invocations of equal protection. But for now, the juxtaposition between on the one hand, Kennedy's invocation of due process in the context of his marriage-analogies in *Lawrence*, and on the other the equal protection arguments in O'Connor's separate concurring opinion in *Lawrence*, and Walker's opinion in *Perry* demonstrate that even given the critical queer narrative about *Lawrence*, Kennedy's reliance on due process is still far more hopeful to the future articulation of a radically nominalist queer subjectivity before the law.

For O'Connor, the key difference between the Texas and Georgia statutes is that while Texas explicitly forbade sex between two men, the Georgia law in question in *Bowers* outlawed the practice of sodomy under any circumstance.[248] O'Connor implicitly rejects Kennedy's arguments that the issue in question in both cases is a fundamental right to liberty in "individual decisions . . . concerning the intimacies of their physical relationships" (regardless of the

identity of the adults participating in those relationships), and that these decisions are thus "a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."[249] By refusing to recognize the "petitioner's right to liberty under the Due Process Clause" and relying instead on equal protection, O'Connor, in the context of gay and lesbian civil rights, echoes the famous argumentative logic of the Court's 1896 decision in *Plessy v. Ferguson*, which held that as a Louisiana law requiring blacks and whites to travel in separate train cars applied equally to both races, it was not unconstitutional under the Equal Protection Clause.[250]

Equal protection analysis that is not at least accompanied by due process arguments allows for decisions that not only uphold but valorize oppressive and discriminatory policies, so long as the Court can argue that the deprivation of liberty in the case at hand is not specifically targeted against a particular group. This is how O'Connor can simultaneously find that "the [Texas] sodomy law" is unconstitutional because it "is targeted at more than conduct. It is instead targeted at gay persons as a class,"[251] and argue that because the Georgia statute outlaws *all* sodomy, it discriminates against no particular class of people.[252] Here I succumb to my own "like race" analogy to say that just as the *Plessy* Court was able to use equal protection to ignore differentials in racial power and privilege in Louisiana,[253] O'Connor uses equal protection to argue that a law outlawing all forms of sex that are not penis in vagina intercourse is not discriminatory. O'Connor's analysis ignores, of course, the fact that while the Georgia statute at issue in *Bowers* prevented heterosexuals from having certain kinds of intercourse, it by definition outlawed any form of gay and lesbian sex—a definitional reality constructed through several decades of legal rhetorical debate about and negotiation of the meaning of § 16-6-2 by the Georgia legislature and judiciary.

Both O'Connor's application of equal protection and Kennedy's application of due process rely on liberal valuations of privacy and individual liberty that are problematic to radical queer politics, but given the inevitability of Supreme Court decisions on these questions, due process is far less detrimental, and not only because O'Connor's concurring opinion has been specifically damaging to the ability of *Lawrence* to effect legislative change toward "mainstream" gay and lesbian civil rights.[254] Kennedy's insistence on the controlling nature of substantive due process in both *Bowers* and *Lawrence*[255] rhetorically enacts a future vision of a Constitution that is far more able to be a resource for future judges who would respond in nuanced fashion to the various ways in which U.S. state governments might think to deprive lesbian, gay, and queer subjects of liberty—including via the sodomy laws that are still on the books, in defiance of both Kennedy and O'Connor's opinions.

Just as importantly, Kennedy's application of due process in the *Lawrence* decision, unlike the application of equal protection in the marriage cases and O'Connor's concurrence in *Lawrence*, does not rely on the definition and explanation of certain sexual minorities as "suspect" classes. Instead, Kennedy locates the liberty in question in terms of a right that is not only fundamental to all, but open to continual future redefinition against statist and institutional efforts to redefine the bounds of legal heteronormative oppression.

In both state and federal constitutional law, the "guarantee of equal protection coexists . . .with the reality that most legislation must classify for some purpose or another."[256] Legal classification and differential treatment cannot per se be unconstitutional, or few laws would survive judicial review. As I note above, due process jurisprudence requires state interference in a "fundamental right" in order to activate higher levels of judicial scrutiny than the rational basis test. The Court's focus is thus more likely to be on the nature of the activity in

question, rather than on the nature of the identity of the person the state deprives of liberty. This is perhaps why White was compelled to employ the framing dicta that he did, even though the tenor of his arguments suggests that what White really wanted to do was deny Hardwick protection of law because he was queer. Due process jurisprudence is an anti-essentialist process. Equal protection jurisprudence is (often) the opposite.

If a court finds that a law targets a "suspect class"[257] (a group designated for unequal treatment under the law because of a suspect classification), "strict scrutiny" review is typically applied, meaning, again, that the law must be "narrowly tailored to a compelling government interest"[258] that outweighs the negative consequences of the suspect classification. In the context of assessing the scope of equal protection, this functionally means that courts engage in a limiting function, reproducing processes of liberal definition that often[259] result more in a shifting of the boundaries of exclusion and inclusion than they do in a lessening of the normative power of the state.[260] To advance an equal rights claim in the courts, petitions to the state for justice must be made on behalf of a particular kind of essentialist identity that can at best be an incomplete stand-in for the "radical undecidability"[261] of radical queer political being.[262]

This limiting function is evident in Walker's arguments about marriage in *Perry v. Schwarzenegger*. Arguing that restrictive marriage laws are not a simple example of sex discrimination, but a disenfranchisement of a definable class of people, Walker first stipulates that sex and sexual orientation are necessarily interrelated, as "an individual's choice of romantic or intimate partner based on sex is a large part of what defines an individual's sexual orientation."[263] In the next paragraph, Walker argues that

> Those who choose to marry someone of the opposite sex—heterosexuals—do not have their choice of marital partner restricted by Proposition 8. Those who would choose to

> marry someone of the same sex—homosexuals—have had their right to marry eliminated by an amendment to the state constitution.[264]

For Walker, it is not only that gays and lesbians are "similarly situated" to heterosexuals vis-à-vis marriage, rendering legal classifications targeting them for discrimination suspect, but that gay and lesbian identity itself should be defined in part through the desire for entrance into the institution of marriage.

Walker, however, does not choose (in his equal protection analysis) to apply strict scrutiny review to Proposition 8, arguing that, following Kennedy's 1996 opinion for the Court in *Romer v. Evans*,[265] a law based on "moral disapproval alone" cannot survive even rational basis review.[266] Establishing that Proposition 8 targets gays and lesbians as a suspect class was thus unnecessary even for Walker's ultimate legal finding with respect to equal protection[267]—a point further evidenced, as I discuss in the Chapter Three, by the narrow grounds on which the Ninth Circuit chose to uphold Walker's ruling in what had become *Perry v. Brown*.[268] In this light, Walker's entire discussion of the relationship between sexual orientation, marriage, and identity is arguably dicta—Walker's provision of a justification for the application of higher levels of review in possible future decisions. What is interesting about Walker's equal protection arguments is the implicit suggestion that in the context of judicial decisions about marriage and sexuality, making a compelling argument from equal protection almost necessitates (if not an explicit conflation of queer identity with the marriage institution) at least the valuation of queer lives and relationship practices only and restrictively within heterosexual marriage norms, *even if this valuation is doctrinally unnecessary to the finding of the case.*

Due process argumentation does not so necessitate, even when the entire subject of the case is about access to marriage. In contrast to the "suspect classification" requirement for an

equal protection finding, a judicial application of strict scrutiny in substantive due process analysis requires only the presence of "fundamental rights."[269] The "parties" in *Perry* "do not dispute that the right to marry is fundamental"[270] and it is for Walker a doctrinal given that "the freedom to marry is recognized as a fundamental right protected by the Due Process Clause."[271] That "freedom to marry is a fundamental right" was decided in case law long before a major public debate about same-sex marriage.

Consequently, Walker frames the due process question of *Perry* as simply if "plaintiffs seek to exercise the fundamental right to marry"; if the answer is yes, and not "recognition of a new right" because of their identity as "couples of the same sex," then Proposition 8 is unconstitutional regardless of the equal protection findings of the case.[272] As Walker argues in the due process section of *Perry,*

> To characterize plaintiffs' objective as "the right to same-sex marriage" would suggest that plaintiffs seek something different from what opposite-sex couples across the state enjoy—namely, marriage. Rather, plaintiffs ask California to recognize their relationships for what they are: marriages.[273]

From a radical queer standpoint, any judicial decision on marriage equality will almost certainly represent a problematic reification of Puar's "homonormativity."[274] What is evident in the contrast between Walker's arguments from due process and his arguments from equal protection is that even in jurisprudential rhetoric about marriage, due process analysis is simply less inconsistent with radical queer theory's nominalist critique of normative identity politics.

IX. Conclusion: A Radical Queer Epistemology of Rational Basis

Puar is correct that much of *Lawrence* seeks to define and classify queer identity in "domestinormative" terms. Kennedy's ultimate legal finding that in the context of his due

process analysis that "the Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual"[275] establishes no doctrinal precedent for the constitutional protection of queer public life. But as in Blackmun's dissent, Kennedy's definition and classification earlier in the decision of queer identity in terms of heterosexual relationship norms is not strictly necessary to the ultimate legal finding of the case. White's, Blackmun's, and Stevens' opinions in *Bowers* did not stop at the question of whether Hardwick's actions were construable under his fundamental right to privacy. Each opinion *also* took up Laurence Tribe's request in the Brief for Respondents that (while the only question the Supreme Court needed to decide was the presence of a fundamental right, thus necessitating the trial ordered by the Eleventh Circuit) the Court also take up the question of whether there was any rational basis for the enforcement of § 16-6-2 on Hardwick, and if not, to rule the statute unconstitutional.

Given this precedential context, it is likely that the statement "the Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual" is actually Kennedy's concise application of the rational basis test. If so, this sentence is Kennedy's argument that even if there was no violation of Lawrence and Garner's fundamental rights, their arrest was *still* a violation of the constitutional guarantee of substantive due process. If this is the case, then almost all of Kennedy's opinion *with respect to* the Texas statute—including his arguments that appear to constrain constitutionally recognized queer sex to the constrained realm of heterosexual-like intimacy—is actually *gratis dictum*, and Kennedy's meta-arguments about the future application of the Due Process Clauses accordingly take on greater importance. This rational basis argument in *Lawrence* does not occur in a vacuum—it is

a component part of what I argue is a latent radical queer "opening" not just in Kennedy's due process, but his overall Fourteenth Amendment jurisprudence.

The opinions of Kennedy and Blackmun are representative of the radical queer potential of due process jurisprudence, read against the heteronormative frame through which due process arguments about sexuality will for the present moment inevitably be articulated. Due process jurisprudence, while constrained by the deep limitations of the Constitution for any kind of radical politics, at least allows for a partial constitutional recognition of the mutable and political nature of identity. Here is a future vision of constitutional law that can be aligned in favor of a Constitution that stands as a "perhaps even forever unknowable"[276] legal resource for the struggle against violently heteronormative oppression. Even significant (from a constitutional perspective) doctrinal change will not adequately address "informal" hetero and other normative citizenship structures that pervade and constrain the conditions of meaningful life in the United States.[277] Precisely because of this, radical queer rhetorical legal scholarship needs to include *procedural* queer considerations of the relative positive and negative impact different forms of constitutional judicial argument and doctrinal interpretation might have to the *substantive* goal of radical resistance to the dominant sovereignty of U.S. constitutional law.

Notes to Chapter One:

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[1] Opinion of Kennedy, J., *Lawrence v. Texas,* 539 U.S. 558, 539 U.S. ___ (2003): 18, available at http://www.law.cornell.edu/supct/pdf/02-102P.ZO. All page number citations of Kennedy's opinion in *Lawrence* are from the draft edition.

[2] Kennedy, *Lawrence v. Texas*.

[3] Craig Willse and Dean Spade, "Freedom in a Regulatory State?: *Lawrence,* Marriage, and Biopolitics," *Widener Law Review* 11 (2004-2005): 314-316; David A. J. Richards, *Identity and the Case for Gay Rights: Race, Gender, Religion as Analogies* (Chicago: University of Chicago Press, 1999), 171-72; Richards, *Women, Gays, and the Constitution* (Chicago: University of Chicago Press, 1998), 348-49; Jasbir K. Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham and London: Duke University Press, 2007), 128; and Judith Butler, *Undoing Gender*, (New York: Routledge, 2004), 8.

[4] Kennedy, *Lawrence v. Texas,* 14.

[5] Janet E. Halley, "Like Race Arguments," *What's Left of Theory?: New Work on the Politics of Literary Theory*, ed. Judith Butler, John Guillory, and Kendall Thomas (New York and London: Routledge, 2000), 68.

[6] Diane E. Elze, "Oppression, Prejudice and Discrimination," in *Sexual Orientation & Gender Expression in Social Work Practice: Working with Gay, Lesbian, Bisexual and Transgender People,* ed. Deana F. Morrow and Lori Messinger (New York: Columbia University Press, 2006), 56.
[7] Alexander Doty, *Making Things Perfectly Queer: Interpreting Mass Culture* (Minneapolis: The University of Minnesota Press, 1997), xi-xii.
[8] David L. Eng, *The Feeling of Kinship: Queer Liberalism and the Racialization of Intimacy* (Durham: Duke University Press, 2010), xi, 23-24.
[9] Cathy J. Cohen, ''Keynote Address" (talk presented at Queertopia!: An Academic Festival Conference, Northwestern University Queer Pride Graduate Student Association, Chicago, Illinois, May 22, 2010); Bonnie J. Dow, "Michelle Obama, the First Family, and Postfeminist, Postracial, Familialism" (invited lecture presented in the University of Illinois Department of Communication Colloquium Series, April 2010); and Puar, *Terrorist Assemblages*, 123.
[10] Eng, *The Feeling of Kinship*, xi, 24-25.
[11] Laurence H. Tribe, "*Lawrence v. Texas*: The 'Fundamental Right' That Dare Not Speak Its Name," *Harvard Law Review* 117, 6 (April 2004): 1934-1935.
[12] See for example Opinion of George, C.J., *In re Marriage Cases*, 43 Cal.4th 757, California Supreme Court S147999 (May 15, 2008): 9-10, 71, 84-93, available at http://www.courts.ca.gov/documents/S147999.pdf.
[13] By "procedural queer," I mean the practical legibility of queerness within established forms of constitutional argument. Generally, I mean ''procedural'' in two ways; first, as in legal ''procedure,'' which is simply ''a specific method or course of action'' in a legal ''proceeding,'' or ''the business conducted by a court,'' and second, as in ''procedural law,'' or ''the rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves.'' *Black's Law Dictionary*, 7th ed., ed. Bryan A. Garner (St. Paul, MN: West Group, 1999), s.v. ''procedure,'' ''procedural law.'' In other words, the procedural means by which Kennedy arrives at his conclusions regarding ''substantive'' due process matter to queer politics. See also Campbell, "The Procedural Queer," 203, 204n12, 205, 210, 210n66, 216.
[14] "The constitutional guarantee under the [Equal Protection Clause of the] 14th Amendment that the government must treat a person or class of persons the same as it treats other persons or classes in like circumstances." *Black's Law Dictionary*, s.v. "equal protection."
[15] See explanation of substantive due process at note 27.
[16] According to David D. Meyer's (then Associate Dean for Academic Affairs and Professor of Law, University of Illinois College of Law) closing statements to his Spring 2010 Constitutional Law I class, two of the most significant issues facing the Court in the next decade will be first, whether equal protection or due process analysis will be more controlling in civil liberties cases, and second, the way in which substantive due process doctrine is applied in civil liberties cases.
[17] The decision is also referenced as "6-3," but while all nine justices voted, Justice Sandra Day O'Connor filed a separate, concurring opinion that did not accept the entire decision of the majority. In such situations "5-3" is appropriate. See for example James W. Stoutenborough, Donald P. Haider-Markel and Mahalley D. Allen, "Reassessing the Impact of Supreme Court Decisions on Public Opinion: Gay Civil Rights Cases," *Political Research Quarterly* 59 (2006): 421; and Mark Smith, "*Lawrence v. Texas* Plaintiff Dies: Tyrone Garner Co-Defendant in Case that Overturned Nation's Sodomy Laws," Qnotes, http://www.q-notes.com/top2006/top02_092306.html. I choose "5-3" because it highlights the important difference to my argument in this paper between the majority and concurring opinions in *Lawrence.*
[18] See for example Dale Carpenter, *Flagrant Conduct: The Story of* Lawrence v. Texas (New York and London: W.W. Norton & Company, 2012), 61, 72-74.
[19] Puar, *Terrorist Assemblages*, 121.
[20] Kennedy, *Lawrence v. Texas,* 3.
[21] This is the term used in the Texas statute Kennedy quotes in the introduction to his opinion.
[22] Kennedy, *Lawrence v. Texas*, 1-2.
[23] Kennedy, *Lawrence v. Texas*, 17.
[24] Bonnie Miluso, "Family 'De-Unification' in the United States: International Law Encourages Immigration Reform for Same-Gender Binational Partners," *Georgetown International Law Review* 36 (2004): 924; Kennedy, *Lawrence v. Texas*, 3, 14, 17-18. Kennedy says the Court accepted the case in order to "consider three questions:" whether the "Texas statute" violated the Equal Protection Clause, whether it violated the Due Process Clause, and "whether *Bowers v. Hardwick*…should be overruled?" These are the questions the Court considered; in the next section, Kennedy specifies that the decision will hinge on substantive due process. "We conclude the case should be

resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of the liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution." Kennedy, *Lawrence v. Texas*, 3. See the explanation of "due process" and the "Due Process Clauses" at note 27.

[25] Scalia, J., dissenting, *Lawrence v. Texas*, 539 US 558, 539 U.S. ___ (2003), available at http://www.law.cornell.edu/supct/pdf/02-102P.ZD. Justice Thomas wrote a short opinion clarifying his reasons for joining Scalia's dissent.

[26] Under the Due Process Clauses of the Constitution (the one in the 5th Amendment is controlling on the federal government, the one in the 14th Amendment on the states), the "government" is prohibited "from unfairly or arbitrarily depriving a person of life, liberty, or property. *Black's Law Dictionary*, s.v. "Due Process Clause." In constitutional jurisprudence, two doctrinal applications of the Due Process Clauses have been developed: "procedural" due process, meaning the minimal requirement that the deprivation of a person's "life, liberty, or property" be carried out according to appropriate and just legal procedure, and "substantive" due process, which requires "legislation to be fair and reasonable in content and to further a legitimate governmental objective." *Black's Law Dictionary*, s.v. "due process." In civil rights cases such as *Lawrence* that are concerned with the deprivation of freedom, "substantive" due process is the relevant doctrine, as while the plaintiffs were likely deprived of "significant life, liberty, or property interests" through their due legal procedure, the question remains as to whether the deprivation of liberty itself is a warranted exercise of governmental power. See also the discussion of levels of scrutiny in equal protection and due process analysis, at note 224. Where Kennedy refers to the singular "Due Process Clause" as the basis for the Court's decision, he references the 14th Amendment, as *Lawrence* concerns a state law. Vaughn R. Walker's reference to the "Due Process Clause" is also to the 14th Amendment. The text of this essay follows Kennedy's usage; "Due Process Clause," singular, refers to Kennedy and Walker's invocation of the 14th Amendment, while "Due Process Clauses" refer to the 5th and Fourteenth Amendments, or the overall constitutional guarantee of due process in both federal and state legal procedure.

[27] O'Connor, J., concurring in judgment, *Lawrence v. Texas,* 539 U.S. 558, 539 U.S. ___ (2003): 1, available at http://www.law.cornell.edu/supct/pdf/02-102P.ZC.

[28] Brian Hawkins, "The Glucksberg Renaissance: Substantive Due Process since *Lawrence v. Texas*," *Michigan Law Review* 105 (2006): 410.

[29] Tim Murphy, "The Unconstitutional Anti-Gay Law That Just Won't Die," *Mother Jones* (April 12, 2011), http://motherjones.com/politics/2011/04/lawrence-texas-homosexual-conduct-statute; O.C.G.A. § 16-6-2 (2012).

[30] Hawkins, "The Glucksberg Renaissance," 410.

[31] Paula A. Brantner, "Removing Bricks from a Wall of Discrimination: State Constitutional Challenges to Sodomy Laws," *Hastings Constitutional Law Quarterly* 19 (Winter 1992): 500.

[32] Scalia, *Lawrence v. Texas*, 13; Eng, *The Feeling of Kinship*, 36.

[33] Lynne Huffer, "Queer Victory, Feminist Defeat? Sodomy and Rape in *Lawrence v. Texas*," *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations*, ed. Martha Albertson Fineman, Jack E. Jackson, and Adam P. Romero (Burlington, VT: Ashgate Publishing, 2009), 425.

[34] Richards, *Women, Gays, and the Constitution*, 348-49.

[35] Gregory K. Smith, "Casenote: *Powell v. State*: The Demise of Georgia's Consensual Sodomy Statute," *Mercer Law Review* 51 (Spring 2000): 988.

[36] Smith, "Casenote," 988; Ga. Code § 26-5901 (1933).

[37] Smith, "Casenote," 989.

[38] Smith, "Casenote," 990.

[39] Smith, "Casenote," 989-990; *Thompson v. Aldredge*, 187 Ga. 467, 200 S.E. 799: "the language of the code...seems to us to deliberately exclude the idea that this particular crime may be accomplished by two women, although it may be committed by two men, or a man and a woman. That the at [*sic*] here alleged to have been committed is just as loathsome when participated in by two women does not justify us in reading into the definition of the crime something what the lawmakers omitted." Text of decision found at Susan Thompson, "Women in American History since the Civil War" (Spring 2012), http://classes.maxwell.syr.edu/wmstory/ThompsonVAldredge.pdf.

[40] Smith, "Casenote," 989.

[41] Bloodworth, J., dissenting, *Comer v. State*, 21 Ga. App. 306 (November 14, 1917): 309; Smith, "Casenote," 989-991.

[42] Opinion of Broyles, P.J., *Comer v. State*, 21 Ga. App. 306 (November 14, 1917): 306-307.

[43] *Black's Law Dictionary,* s.v. "dictum."

[44] Bloodworth, *Comer*, 307.

[45] Bloodworth, *Comer*, 309: "whether the writer [Bloodworth] is right or wrong, the members of our legislature could easily make the matter clear by a short statute making unlawful such practices as are alleged in the indictment of this case."
[46] Broyles, *Comer v. State*, 307.
[47] Kennedy, *Lawrence v. Texas*, 17-18.
[48] Blackmun, J., dissenting, *Bowers v. Hardwick* 478 U.S. 186 (June 30, 1986): 200n1.
[49] Smith, "Casenote," 990-991.
[50] Smith, "Casenote," 989.
[51] Blackmun, *Bowers v. Hardwick*, 200n1: "Georgia passed the act-specific statute currently in force 'perhaps in response to the restrictive court decisions such as Riley.'"
[52] Opinion of Johnson, Circuit Judge, *Hardwick v. Bowers (Bowers I)*, 760 F.2d 1202 (11th Cir. 1985): 1204n1; O.C.G.A. § 16-6-2 (2012).
[53] Elizabeth R. Sheyn, "The Shot Heard Around the LGBT World: *Bowers v. Hardwick* as a Mobilizing Force for the National Gay and Lesbian Task Force," *Journal of Race, Gender and Ethnicity* 4, 1 (May 2009): 3.
[54] Lauren Berlant and Michael Warner, "Sex in Public," *Critical Inquiry* 24 (1998): 561.
[55] Brantner, "Removing Bricks," 503-504; and Peter Irons, *The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court*, Reprint Edition (New York: Penguin Books, 1990), 383, 396, 400-401.
[56] Irons, "*The Courage of Their Convictions*," 383.
[57] Joint Appendix, 1985 U.S. Briefs 140, 1986 U.S. S. Ct. Briefs Lexis 477 (December 17, 1985): 3.
[58] Brief for Respondent, 1985 U.S. Briefs 140, 1986 U.S. S. Ct. Briefs Lexis 204 (January 31, 1986): 6.
[59] Joint Appendix, 1985 U.S. Briefs 140, 5-6.
[60] Halley, "Like Race Arguments," 57.
[61] Brief for Respondent, 1985 U.S. Briefs 140, 1.
[62] Halley, "Like Race Arguments," 58.
[63] Johnson, *Bowers I*, 1207.
[64] Johnson, *Bowers I*, 1212-1213; Opinion of White, J., *Bowers v. Hardwick (Bowers II)*, 478 U.S. 186 (1986): 189.
[65] Johnson, *Bowers I*, 1212-123: "The Georgia Statute implicates a fundamental right of Michael Hardwick...such a right is protected by the Ninth Amendment...and the notion of fundamental fairness [i.e., substantive due process] embodied in the due process clause of the Fourteenth Amendment. We therefore remand this case for trial."
[66] Puar, *Terrorist Assemblages*, 123.
[67] *Black's Law Dictionary*, s.v. "certiorari."
[68] Johnson, *Bowers I*, 1212.
[69] White was joined by Chief Justice Warren Burger, Justice Lewis F. Powell (both wrote concurring opinions), and Justices Rehnquist and O'Connor. Blackmun's dissent was joined by Justices Brennan, Marshall, and Stevens; Stevens' by Brennan and Marshall. Syllabus, *Bowers v. Hardwick*, 478 U.S. 186 (1986): 187.
[70] Eng calls *Lawrence* a "watershed"; Huffer ("Queer Victory," 412) refers to the "official, celebratory political story that claims *Lawrence* as a victory for individual freedom." I use the term "unlikely watershed" to account for what is (complicating the juxtaposition Eng, Huffer, and others want to make) a deep ambiguity about Kennedy's decision among many of those Eng would call queer and queer legal liberalists.
[71] Elze, "Oppression, Prejudice and Discrimination," 56; Franke, "Domesticated Liberty," in Puar, *Terrorist Assemblages*, 118; Richard D. Mohr, "The Shag-A-Delic Supreme Court: 'Anal Sex,' 'Mystery,' 'Destiny,' and the 'Transcendent' in *Lawrence v. Texas*," *Cardozo Women's Law Journal* 10 (2004): 391; Murphy, the "Unconstitutional Anti-Gay Law"; Hawkins, "The Glucksberg Renaissance," 410; Huffer, "Queer Victory," 412.
[72] Huffer, "Queer Victory," 421.
[73] Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* (New York: Random House, 2007), 189.
[74] Kirk Davis Swinehart, "The Real Story of *Lawrence v. Texas* Revealed in 'Flagrant Conduct,'" *The Daily Beast* Book Beast (March 28, 2012), http://www.thedailybeast.com/articles/2012/03/28/the-real-story-of-lawrence-v-texas-revealed-in-flagrant-conduct.html.
[75] Swinehart, "The Real Story of *Lawrence v. Texas*."
[76] Uniform Code of Military Justice, art. 125, 10 U.S.C. § 925 (2013).
[77] Philip Bobbitt, *Constitutional Interpretation* (Oxford: Blackwell Publishing, 1991), 12-13, 18, 20-22.
[78] Huffer, "Queer Victory," 421: "to be sure, the criminalization of consensual sodomy was unjust; overturning *Bowers* in *Lawrence* can therefore be read, from a certain liberal perspective, as the just outcome of a long struggle for sexual freedom."

[79] Lauren Berlant and Michael Warner, "Sex in Public," *Critical Inquiry* 24 (1998): 561, in Charles E. Morris III, "Introduction: Portrait of a Queer Rhetorical/Historical Critic," in *Queering Public Address: Sexualities in American Historical Discourse*, ed. Charles E. Morris III (Columbia: The University of South Carolina Press, 2007), 5.
[80] Huffer, "Queer Victory," 419-420.
[81] Cathy J. Cohen, "Punks, Bulldaggers and Welfare Queens: The Radical Potential of Queer Politics?" *GLQ* 3 (1997): 437-465, in Shane Phelan, *Sexual Strangers: Gays, Lesbians, and Dilemmas of Citizenship* (Philadelphia: Temple University Press, 2001), 8.
[82] Eng, *The Feeling of Kinship*, 23-24.
[83] Judith Butler, *Bodies that Matter: On the Discursive Limits of 'Sex'* (New York: Routledge, 1993), xii-xiii.
[84] Huffer, "Queer Victory," 421: "*Lawrence* papers over other stories about sex...legal decisions are the consequence of particular narrative decisions, choices about which parts of stories should be retained and which parts should be discarded."
[85] Francis J. Mootz III, *Rhetorical Knowledge in Legal Practice and Critical Legal Theory* (Tuscaloosa: The University of Alabama Press, 2006), 8-9. See also James Jasinski, *Sourcebook on Rhetoric: Key Concepts in Contemporary Rhetorical Studies* (Thousand Oaks, CA: Sage Publications, 2001), 463.
[86] Mootz, *Rhetorical Knowledge*, 107.
[87] Marouf Hasian, Jr., Celeste Michelle Condit, and John Louis Lucaites, "The Rhetorical Boundaries of 'The Law': A Consideration of the Rhetorical Culture of Legal Practice and the Case of the 'Separate But Equal Doctrine,'" *Quarterly Journal of Speech* 82 (November 1996), 328; and Fred Rodell, *Nine Men* (New York: Vintage Books, 1955), 4, 31, in G. Edward White, *The Constitution and the New Deal* (Cambridge: Harvard University Press, 2000), 296, 296n121-122: "None of the Supreme Court's constitutional decisions...can be explained or analyzed or understood...except in terms of the justices, the *men*, who made them." *Nine Men*, 31.
[88] Puar, *Terrorist Assemblages*, 123.
[89] Eng, *The Feeling of Kinship*, 36-37.
[90] James Arnt Aune, "On the Rhetorical Criticism of Judge Posner," *Hastings Constitutional Law Quarterly* 23 (Spring 1996): 663-669. See also Aune, "Justice and Argument in Judaism: A D'var Torah on Shofetim," *Rhetoric and Public Affairs* 7, 4 (2004): 454-455; Martín Carcasson and Aune, "Klansman on the Court: Justice Hugo Black's 1937 Radio Address to the Nation," *Quarterly Journal of Speech* 89, 2 (May 2003): 154-155, and Aune, "Three Justices in Search of Historical Truth: Romance and Tragedy in the Rhetoric of Establishment Clause Jurisprudence," *Rhetoric and Public Affairs* 2, 4 (1999): 575.
[91] Kennedy, *Lawrence v. Texas,* 1.
[92] Puar, *Terrorist Assemblages*, 118.
[93] Puar, *Terrorist Assemblages*, 121.
[94] Puar, *Terrorist Assemblages*, 121.
[95] See the discussion regarding levels scrutiny at note 224.
[96] Kennedy, *Lawrence v. Texas*, 14, in Tribe, "*Lawrence v. Texas*," 1934.
[97] Stephen G. Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (New York: Vintage, 2006), 5.
[98] Breyer, *Active Liberty*, 39.
[99] Breyer, *Active Liberty*, 12, 118-20.
[100] Breyer, *Active Liberty*, 15-16.
[101] Butler, *Bodies that Matter*, 3.
[102] Phelan, *Sexual Strangers*, 3, 9, 108-09.
[103] Huffer, "Queer Victory," 430-31.
[104] Berlant and Warner, "Sex in Public," 551.
[105] Hawkins, "The Glucksberg Renaissance," 410; Murphy, "The Unconstitutional Anti-Gay."
[106] Hawkins, "The Glucksberg Renaissance," 410.
[107] See Robert Asen, "Reflections on the Role of Rhetoric in Public Policy," *Rhetoric and Public Affairs* 13 (2010): 127-29.
[108] Halley, "Like Race Arguments," 49.
[109] *Black's Law Dictionary*, s.v. "dictum."
[110] *Black's Law Dictionary*, s.v. "dictum."
[111] Scalia, *Lawrence v. Texas,* 14: "the Court's discussion of these foreign views . . . is therefore meaningless dicta."
[112] *Black's Law Dictionary,* s.v. "dictum," "*gratis dictum*."
[113] Scalia, *Lawrence v. Texas*, 14-15.
[114] Kennedy, *Lawrence v. Texas*, 18.

[115] Tribe, "*Lawrence v. Texas*," 1934-1935.
[116] Kennedy, *Lawrence v. Texas*, 17-18, my emphasis.
[117] Puar, *Terrorist Assemblages*, 2, 17-19, 48, 127.
[118] Puar, *Terrorist Assemblages*, 123.
[119] Puar, *Terrorist Assemblages*, 123.
[120] Mohr, "The Shag-A-Delic Supreme Court," 374.
[121] Kennedy, *Lawrence v. Texas*, 18, my emphasis.
[122] See Puar, *Terrorist Assemblages*, 126-27.
[123] Cohen, "Punks, Bulldaggers and Welfare Queens," in Phelan, *Sexual Strangers*, 8.
[124] As Puar argues, "the conservatization [in *Lawrence*] of sexual, gender, and kinship norms cannot be disaggregated from its nationalist, classist, and racist impulses, or from the liberal underpinnings of subject formation." Puar, *Terrorist Assemblages*, 128.
[125] Berlant and Warner, "Sex in Public," 562.
[126] Asen, "Reflections," 130.
[127] Asen, "Reflections," 127-29.
[128] Richards, *Identity and the Case for Gay Rights*, 171-72; and Richards, *Women, Gays, and the Constitution*, 348-49.
[129] Siobhan B. Somerville, "Queer *Loving*," *GLQ: A Journal of Lesbian and Gay Studies* 11, 3 (2005): 335-336.
[130] While the assignment of the majority opinion does not guarantee the rest of the justices will join the assigned judge's opinion as the majority, it does give the assigned opinion greater weight in the eyes of other justices on the Court. Toobin also argues that in this particular case, Stevens' assignment of the opinion to Kennedy assured that Kennedy's opinion would represent the majority. Jeffrey Toobin, "After Stevens: What Will the Supreme Court be Like Without its Liberal Leader?" *The New Yorker* (March 22, 2010): 45.
[131] Toobin, "After Stevens," 45. See also Kennedy, *Lawrence v. Texas*, 14.
[132] Kennedy, *Lawrence v. Texas*, 14: "As an alternative argument in this case, counsel…contend that *Romer* provides the basis for declaring the Texas statute invalid under the Equal Protection Clause…were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants. Equality of treatment and the due process right to demand for respect for conduct provided by the substantive guarantee of liberty are linked…a decision on the latter point [due process] advances both interests."
[133] Halley, "Like Race Arguments," 40.
[134] Halley, "Like Race Arguments," 40.
[135] Chandan Reddy, *Freedom with Violence: Race, Sexuality, and the U.S. State* (Durham: Duke University Press, 2011), 217.
[136] Eng, *The Feeling of Kinship*, 10-11.
[137] Siobhan B. Somerville, *Queering the Color Line: Race and the Invention of Homosexuality in American Culture* (Durham and London: Duke University Press, 2000), 4.
[138] Chaïm Perelman, *The Realm of Rhetoric*, trans. William Kluback (Notre Dame, IN and London: University of Notre Dame Press, 1982), 119.
[139] Somerville, "Queer *Loving*," 336.
[140] Halley, "Like Race Arguments," 40.
[141] David Remnick, "Comment: It Gets Better," *The New Yorker* (July 11 & 18, 2011), 31.
[142] Halley, "Like Race Arguments," 46.
[143] Somerville, *Queering the Color Line*, 7-8.
[144] Puar, *Terrorist Assemblages*, 131.
[145] Somerville, "Queer *Loving*," 335.
[146] Arguments from analogy are constructed through a relationship "between the pairs *a-b* (the *theme* of the analogy) and *c-d* (the *phoros* of the analogy)," asserting "a comparison that has as its purpose the clarification, structuring, and evaluation of the *theme* in terms of what one knows of the *phoros*. This implies that the *phoros* comes from a region that is different from that of the theme and better known than it." Perelman, *The Realm of Rhetoric*, 115.
[147] Somerville, "Queer *Loving*," 336.
[148] Somerville, "Queer *Loving*," 336.
[149] Somerville, "Queer *Loving*," 339.
[150] Somerville, "Queer *Loving*," 338.
[151] Somerville, "Queer *Loving*," 339.

[152] Perelman, *The Realm of Rhetoric*, 115.
[153] Halley, "Like Race Arguments," 46.
[154] Bobbitt, *Constitutional Interpretation*, 12-13, 18, 20-22.
[155] *Black's Law Dictionary*, s.v. "stare decisis."
[156] Somerville, "Queer *Loving*," 339.
[157] Kennedy, *Lawrence v. Texas*, 18.
[158] Kennedy, *Lawrence v. Texas*, 17.
[159] Scalia, *Lawrence v. Texas*, 16.
[160] Eng, *The Feeling of Kinship*, Kindle Edition, ch. 1.
[161] Eng, *The Feeling of Kinship*, Kindle Edition, ch. 1.
[162] Eng, *The Feeling of Kinship*, 37, 36-38.
[163] Eng, *The Feeling of Kinship*, Kindle Edition, ch. 1.
[164] Stevens, J., dissenting, *Bowers v. Hardwick*, 478 U.S. 186 (June 30, 1986): 216, in Kennedy, *Lawrence v. Texas*, 17.
[165] William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John, With an Historical Introduction*, 2nd edition (Glasgow: James Maclehose and Sons, Publishers to the University, 1914), 375; A.E. Dick Howard, *Magna Carta: Text and Commentary*, Revised Edition (Charlottesville: University of Virginia Press, 1998), 23; Opinion of Holmes, J., *Jackman v. Rosenbaum Co.*, 260 U.S. 22 (1922): 31; *Black's Law Dictionary*, s.v. "due process;" and Erwin Chemerinsky, *Constitutional Law*, Third Edition (New York: Aspen Publishers, 2009), 604.
[166] I mean citational in the sense of a textual performative—as Eng and Halley argue, invocations of the Equal Protection Clause may not always discuss race, but the invocation itself functions as a citation of racial histories and politics in the United States. See for example Judith Butler, *Bodies that Matter*, 13; Butler, "Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory," in *Performing Feminisms: Feminist Critical Theory and Theatre,* ed. Sue-Ellen Case (Baltimore: Johns Hopkins University Press, 1990), 279; Geoff Boucher, "The Politics of Performativity: A Critique of Judith Butler," *Parrhesia* 1 (2006): 113, 126-127, 131.
[167] Eng, *The Feeling of Kinship*, 10-11.
[168] Blackmun, *Bowers v. Hardwick*, 210, 210n5. Blackmun also references *Loving* as one of many cases that invalidate long-held majoritarian convictions as a justification for avoiding "this Court's scrutiny." But Blackmun begins the lengthy footnote to his citation of *Loving* with the declaration that "the parallel between *Loving* and this case is almost uncanny."
[169] Johnson, *Hardwick v. Bowers*, 1211. Unlike Kennedy, Stevens, and Blackmun, Johnson cites *Loving* as part of the precedent for reading "certain individual decisions," including those "affecting certain intimate relationships such as marriage," as protected by a constitutional right to privacy.
[170] Kennedy, *Lawrence v. Texas*, 17.
[171] Halley, "Like Race Arguments," 46.
[172] Butler, *Bodies that Matter*, xxiii.
[173] Eng, *The Feeling of Kinship*, Kindle Edition, ch. 1.
[174] Halley, "Like Race Arguments," 67.
[175] Kimberlé W. Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," *The University of Chicago Legal Forum* (1989): 139.
[176] Halley, "Like Race Arguments," 67, in Eng, *The Feeling of Kinship*, Kindle Edition, ch. 1.
[177] Mari J. Matsuda, "Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story," *Michigan Law Review* 87 (1989): 2323.
[178] Kennedy, *Lawrence v. Texas*, 18.
[179] Kennedy, *Lawrence v. Texas*, 18.
[180] *Black's Law Dictionary*, s.v. "dictum," "*gratis dictum*."
[181] G. Thomas Goodnight, "The Metapolitics of the 2002 Iraq Debate: Public Policy and the Network Imaginary," *Rhetoric and Public Affairs* 13 (2010): 69.
[182] *Black's Law Dictionary*, s.v. "loose construction," "liberal construction."
[183] James Darsey, *The Prophetic Tradition and Radical Rhetoric in America* (New York: New York University Press, 1997), 197.
[184] Mohr, "The Shag-A-Delic Supreme Court," 391.
[185] Mohr, "The Shag-A-Delic Supreme Court," 391.
[186] *Lochner v. New York*, 198 U.S. 45 (1905).

[187] Chemerinsky, *Constitutional Law*, 608.
[188] *Brown v. Board of Education* 347 U.S. 483 (1954).
[189] Derrick A. Bell, *Silent Covenants:* Brown v. Board of Education *and the Unfulfilled Hopes for Racial Reform* (Oxford and New York: Oxford University Press, 2004), 1-2.
[190] Cass R. Sunstein, "Sexual Orientation and the Constitution: A Note on the Relationship between Due Process and Equal Protection," *University of Chicago Law Review* 55 (1988): 1161 and 1163.
[191] Reva Siegel, "Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action," *Stanford Law Review* 49 (1997): 1114. See also Bell, *Silent Covenants*, 196-97.
[192] Russell K. Robinson, "Proposition 8, 'Hate' & 'Like Race' Arguments" (paper presented at the Northwestern University Queertopia! An Academic Festival conference, Chicago, Illinois, May 21-22, 2010). See also Robinson, "Perceptual Segregation," *Columbia Law Review* 108 (2008): 1101-02.
[193] Butler, *Bodies that Matter*, 3.
[194] Puar, *Terrorist Assemblages*, 222.
[195] Puar, *Terrorist Assemblages*, 221.
[196] Puar, *Terrorist Assemblages*, 221.
[197] Butler, *Undoing Gender*, 8.
[198] Puar, *Terrorist Assemblages*, 222.
[199] Philip C. Bobbitt in Sanford V. Levinson, "The Embarrassing Second Amendment," *Yale Law Journal* 99 (1989): 643.
[200] Toobin, "After Stevens," 45.
[201] Halley, "Like Race Arguments," 48.
[202] Butler, *Undoing Gender*, 104-106.
[203] See Phelan, *Sexual Strangers*, 5.
[204] Butler, *Undoing Gender*, 104.
[205] Roderick A. Ferguson, "Administering Sexuality; or, The Will to Institutionality," *Radical History Review* 100 (Winter 2008): 163.
[206] Butler, *Undoing Gender*, 8.
[207] Cohen, "Keynote Address."
[208] Toobin, *The Nine*, 191-193.
[209] Mohr, "The Shag-A-Delic Supreme Court," 391.
[210] Eng, *The Feeling of Kinship*, Kindle Edition, ch. 1.
[211] Willse and Spade, "Freedom in a Regulatory State," 314.
[212] See for example Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (New York: Random House, 2007), 62-65.
[213] White, *Bowers v. Harwick*, 189.
[214] Burger, C.J., concurring, *Bowers v. Hardwick,* 478 U.S. 186 (June 30, 1986): 196.
[215] Blackmun, *Bowers v. Hardwick*, 199.
[216] Blackmun, *Bowers v. Hardwick*, 199. See also Brandeis, J., dissenting, *Olmstead v. United States* 277 U.S. 438 (1928): 478, in Blackmun, *Bowers v. Hardwick*, 199: "rather, this case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'"
[217] Stevens, *Bowers v. Hardwick*, 218.
[218] Stevens, *Bowers v. Hardwick*, 218: "the essential 'liberty' that animated the development of the law in cases like Griswold, Eisenstadt, and Carey surely embraces the right to engage in nonreproductive sexual conduct that others may consider offensive or immoral. Paradoxical as it may seem, our prior cases thus establish that a State may not prohibit sodomy within 'the sacred precincts of marital bedrooms'...or, indeed, between unmarried heterosexual adults."
[219] Powell, J., concurring, *Bowers v. Hardwick,* 478 U.S. 186 (June 30, 1986): 198, my emphasis.
[220] Erwin Chemerinsky, "Substantive Due Process," *Touro Law Review* 15 (1999): 1501-1502.
[221] U.S. Const. amend. V, & amend. XIV § 1.
[222] *Perry v. Schwarzenegger*, 2010 U.S. Dist. LEXIS 78817 (N.D. Cal., Aug. 4, 2010): 118.
[223] *Perry v. Schwarzenegger*, 117. See also *Black's Law Dictionary*, s.v. "strict scrutiny."
[224] Blackmun, *Bowers v. Hardwick*, 201-206.
[225] White, *Bowers v. Hardwick*, 191-192.
[226] Bobbitt, *Constitutional Interpretation*, 12-13, 18, 20-22.
[227] Bobbitt, *Constitutional Interpretation*, 12-13, 18, 20-22.

[228] White, *Bowers v. Hardwick*, 190.
[229] White, *Bowers v. Hardwick*, 190-191; Blackmun, *Bowers v. Hardwick*, 201, 204-206.
[230] White, *Bowers v. Hardwick*, 191.
[231] Brief for Respondent, 1985 U.S. Briefs 140, 13.
[232] Blackmun, *Bowers v. Hardwick*, 204; Kennedy, *Lawrence v. Texas*, 17-18.
[233] Stevens, *Bowers v. Hardwick*, 216-218.
[234] White, *Bowers v. Hardwick,* 193-194; Burger, *Bowers v. Hardwick*, 196-197.
[235] *Thornburgh v. American College of Obstetricians & Gynecologists,* 476 U.S. 747, (1986): 772, in Blackmun, *Bowers v. Hardwick*, 203.
[236] White, *Bowers v. Hardwick*, 191.
[237] Eng, *The Feeling of Kinship*, Kindle Edition, ch. 1.
[238] Eng, *The Feeling of Kinship*, Kindle Edition, ch. 1.
[239] Stevens, *Bowers v. Hardwick*, 218.
[240] Blackmun, *Bowers v. Hardwick*, 204.
[241] Blackmun, *Bowers v. Hardwick*, 204-206.
[242] Tribe, "*Lawrence v. Texas*," 1934-1935.
[243] *In re Marriage Cases,* 43 Cal. 4th 757, 183 P.3d 384; 76 Cal. Rptr. 3d 683 (California 2008), LEXIS 5247.
[244] Meredith L. Patterson, "Prop 8 Postmortem, Part 1: Dissecting History," California National Organization for Women, http://www.canow.org/canoworg/2008/11/prop-8-postmortem-part-1-dissecting-history.html.
[245] *Perry v. Schwarzenegger*, 117.
[246] *Perry v. Schwarzenegger*, 135.
[247] *Perry v. Schwarzenegger*, 136.
[248] O'Connor, *Lawrence v. Texas*, 4-6.
[249] Kennedy, *Lawrence v. Texas*, 17; O'Connor, *Lawrence v. Texas*, 7; Scalia, *Lawrence v. Texas*, 15: "Finally, I turn to petitioners' equal-protection challenge, which no Member of the Court save Justice O'Connor...embraces."
[250] *Plessy v. Ferguson*, 163 U.S. 537 (1896).
[251] O'Connor in *Varnum v. Brien,* 763 N.W.2d 862 (Iowa 2009), No. 07-1499 (April 3, 2009): available at http://www.iowacourts.gov/wfData/files/Varnum/07-1499(1).pdf.
[252] See also Kennedy, *Lawrence v. Texas*, 14.
[253] The similarity between the *Plessy* decision and O'Connor's concurrence in *Lawrence* highlights the need for future queer rhetorical analysis of jurisprudential rhetoric about due process, equal protection, and gay and lesbian civil liberties litigation to consider the intersectional relationships between race and sexuality in jurisprudential civil rights rhetoric.
[254] Mohr, "The Shag-A-Delic Supreme Court," 393.
[255] Kennedy, *Lawrence v. Texas*, 14.
[256] *Perry v. Schwarzenegger*, 117-18.
[257] *Perry v. Schwarzenegger*, 118, also *Varnum v. Brien*, 49.
[258] *Perry v. Schwarzenegger*, 117. See also *Black's Law Dictionary*, s.v. "strict scrutiny."
[259] Puar, *Terrorist Assemblages*, 222.
[260] See for example Justice Cady's explanation of why the Iowa Court chose to apply "heightened" rather than "strict scrutiny" or the "rational basis test." *Varnum v. Brien*, 22-49.
[261] Gayatri Chakravorty Spivak, "French Feminism Revisited: Ethics and Politics," *Feminists Theorize the Political*, ed. Judith Butler and Joan W. Scott (New York and London: Routledge, 1992), 70.
[262] Judith Butler, "Contingent Foundations: Feminism and the Question of 'Postmodern,'" *Feminists Theorize the Political*, ed. Judith Butler and Joan W. Scott (New York and London: Routledge, 1992), 16, and Butler, *Undoing Gender*, 4-10.
[263] *Perry v. Schwarzenegger*, 120.
[264] *Perry v. Schwarzenegger*, 120.
[265] *Romer v. Evans*, 517 U.S. 620 (1996).
[266] *Perry v. Schwarzenegger*, 135—see Chapter Two for a detailed uptake of the implications of Walker's argument with respect to *Romer*. On February 7, 2012, the Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court in what is now *Perry v. Brown*. As in Walker's opinion, the Ninth Circuit issued a narrow equal protection ruling grounded in an application of *Romer v. Evans*. But unlike Walker, Circuit Judge Stephen Reinhardt does not also issue a due process finding, and he does not provide a clear justification for applying a higher level of scrutiny than rational basis in hypothetical future cases. Reinhardt does not issue a finding with

respect to the ‘‘rights of same-sex couples to marry,’’ but rather holds that, following *Romer*, the Equal Protection Clause requires at least a rational basis for the statutory removal of a right previously granted a class of persons—as the right to marry had been granted same-sex couples in California before Proposition 8. As Reinhardt himself suggests, his more narrow ruling may heighten the significance of substantive due process analysis if the Supreme Court chooses to grant review of *Perry v. Brown*. Reinhardt's opinion can be read as doing less work than Walker's to effect a substantive increase in gay and lesbian civil rights. I suggest, however, that the Ninth Circuit's more narrow ruling actually re-opens some possibilities for radical queer interpretation of the Fourteenth Amendment—possibilities that at least the equal protection analysis in Walker's District Court ruling curtailed. Opinion of Reinhardt, Circuit Judge, *Perry v. Brown* (9th Cir., Case No. 16696, February 7, 2012): 79-80; Mike Sacks, ‘‘Gay Marriage Ruling, Written To Appeal To Justice Kennedy, Could Backfire,’’ Huffington Post Politics (February 10, 2012), http://www.huffingtonpost.com/2012/02/10/gay-marriage-ruling-justice-kennedy-appeal-9th-circuit_n_1268676.html.

[267] *Perry v. Scwarzenegger*, 135.

[268] Reinhardt, *Perry v. Brown*, 79-80.

[269] *Black's Law Dictionary*, s.v. "strict scrutiny."

[270] *Perry v. Schwarzenegger*, 110.

[271] *Perry v. Schwarzenegger*, 110.

[272] *Perry v. Schwarzenegger*, 114, 117.

[273] *Perry v. Schwarzenegger*, 114.

[274] Butler, *Undoing Gender*, 104-06. See also Richard Kim and Lisa Duggan, "Beyond Gay Marriage," *The Nation* (July 18, 2005): http://www.thenation.com/article/beyond-gay-marriage.

[275] Kennedy, *Lawrence v. Texas*, 18.

[276] Puar, *Terrorist Assemblages*, 222.

[277] Kent A. Ono, "From Nationalism to Migrancy: The Politics of Asian American Transnationalism," *Communication Law Review* 5 (2005): 7.

CHAPTER TWO: THE "CORROSIVE CATEGORY OF RACE": KENNEDY'S FOURTEENTH AMENDMENT RHETORIC AND THE IDEA OF THE POST-RACIAL QUEER

"At least in Seattle, racial balancing is a compelling goddam state interest."[1]

- Jen Graves, *The Stranger*

In this Chapter, I respond to what I see as the optimistic turn of Chapter One with a more explicitly queer of color political corrective. When read through an assembled "collocation"[2] of Kennedy's Fourteenth Amendment rhetoric, the possibility of a radical legal queer subject latent in Kennedy's meta-argumentative framing of substantive due process in *Lawrence v. Texas* is dependent on the unspoken idea of what I call a post-racial queer subject of U.S. constitutional law. I demonstrate this argument through a detailed examination of Kennedy's role in the recent parallel development of "colorblind" and "post-racial" theories of equal protection jurisprudence, before turning at the end of the chapter to a specific analysis of what I argue should be read as Kennedy's "meta-argument" about the relationship between the Fourteenth Amendment and possibilities for subjectivity before the law of the U.S. constitutional state.

I. A Pessimistic Turn

In Chapter One, I argue that Justice Kennedy's particular argumentative framing of substantive due process in *Lawrence v. Texas* is more useful to radical queer politics than the arguments from equal protection foregrounded by Justice O'Connor in her concurring opinion. While arguments from equal protection are often reliant on essentialist processes of liberal identification, substantive due process analysis in cases concerning gay and lesbian civil rights is simply less inconsistent with radical queer theories of identity.[3] When a judicial rhetor applies the "strict scrutiny" test via arguments from due process, she is unlikely to find a need to articulate the subjective nature of the petitioners to whom the Court extends the protection of the

Constitution, because substantive due process is a negative check against state interference with fundamental rights of liberty. Most equal protection arguments, on the other hand, necessitate the judicial rhetorical definition and thus delimitation of a "suspect class" of persons who are treated differentially under the law. I therefore identify parts of Kennedy's substantive due process analysis in his *Lawrence* opinion, and Justice Blackmun's substantive due process analysis in his *Bowers v. Hardwick* dissent, that suggest future possibilities for subject*less* appeals for the protection of sovereign law.

Kennedy's due process arguments in *Lawrence* also participate in what David L. Eng calls the "racialization of intimacy"[4] through an anti-radical, "queer liberal" valuation of privacy rights. "Kennedy's majority opinion," Eng argues, "underscores the right to privacy as the *sine qua non* of gay and lesbian self-determination."[5] In response, I suggest that because the "right to privacy" is the most likely way in which due process protection for queer sex can be articulated, there is a critical need to develop a radical perspective on what possibilities might yet exist for queer of color politics even within the current privacy focus of substantive due process rhetoric. This need derives in part from my argument that when contrasted with O'Connor's equal protection arguments, Kennedy's particular argumentative framing of substantive due process in *Lawrence* is still less problematic from the perspective of radical queer politics.

In 1989, the Critical Race Feminist Kimberlé Williams Crenshaw argued for a centering of the "multidimensionality of Black women's experience" against the "single-axis framework"[6] through which Black women are forced to approach the bench as petitioners for judicial protection—that is, as either Black persons or female persons before the law.[7] The possibility for a subjectless substantive due process jurisprudence that I suggest in Chapter One would be an interesting corrective to single-axis judicial institutions, in the context of "multidimensional"

queer of color subjectivity. While judicial protections for non-marital but potentially marriage-like (dyadic, monogamous, long-term, religious, etc.) queer kinship relations are articulated through the doctrine of the "right to privacy," they may also in the future constitute a possible space of legal approachability wherein subjects may be free to articulate their own subjective "self-understandings"—and demand the Court respond accordingly—or else alternatively be free to engage in no such articulation at all. This may be a component of what Eng seeks in a legal doctrine that could realize, citing Janet E. Halley, "the possibility of moving beyond liberal identity-based frameworks in order to emphasize not 'who we are but how we are thought.'"[8]

I make an argument for this possibility in Kennedy's argumentative framing of substantive due process jurisprudence, and I juxtapose this possibility in the context of due process against what I see as a corollary anti-possibility in judicial rhetorics of equal protection. But my comparison in Chapter One, grounded in Kennedy's judicial rhetoric, elides an important part of the Justice's jurisprudential archive, one that seems almost as if it had been (although of course it was not) deliberately "crafted to make room for...particularly queer...understandings of sexual orientation in civil rights discourse."[9] In her reading of Kennedy's 1996 opinion for the Court in *Romer v. Evans*, Janet E. Halley argues that the Justice "adopts an extreme form" of queer "nominalist" politics,[10] given that Kennedy was able to find a way to declare an anti-gay policy unconstitutional without any need to define the nature of the legally legitimate and constitutionally protected gay legal subject. Writing three years before *Lawrence*, Halley is "uncertain whether *Romer's* nominalism will appear in other equal protection decisions."[11] In Chapter One, I argue that it does, but in a due process decision that is juxtaposed to an anti-nominalist version of equal protection that stands in stark contrast to *Romer*. From this confluence—of Kennedy's arguments in *Romer*, and his arguments in *Lawrence*—it would be

tempting to argue for the existence of a (critic-realized) Kennedy meta-text of a *queer* Fourteenth Amendment jurisprudence, a text composed of rhetorical fragments of *Romer* and *Lawrence* that consist of the total set of (mostly dicta) arguments Kennedy makes about the relationship between the Fourteenth Amendment (both due process and equal protection), and the manner in which the Supreme Court's Justices should execute their sovereign responsibility to extend constitutional protection to legally de-realized subjects before the law.

Arguing for the existence of such a (meta) text would be an optimistic move—an attempt at the Butlerian praxis of, as I note in the introduction, "opening [of] possibilities" for the "field" of legal subjectivity even to those whose identifications are constituted as "unrealizable" within that same field.[12] The present Chapter will be less optimistic. The "queer understanding of sexual orientation" enabled by the nominalist subject-politics of Kennedy's *Romer* arguments is an anti-queer of color form, one that depends on, as Reddy argues, a "refus[al] to engage [the] racial conditions" of that understanding. I argue that these racial conditions are enacted in part by Kennedy's similarly constructed equal protection framing arguments in his concurring opinion for the Court in *Parents Involved In Community Schools v. Seattle School District no. 1* (551 U.S. 701, 2007). Kennedy's opinions in *Romer* and *Lawrence* are ostensibly about sexuality, analogically related to race; his opinion in *Parents Involved* is explicitly about race with no connection to sexuality. Following the example of Siobhan B. Somerville's analysis of *Loving v. Virginia*, I take up all three here as concomitantly about both forms of legal identification. In the following sections, I read Kennedy's Fourteenth Amendment framing arguments in *Romer*, *Lawrence*, and *Parents Involved* "sideways"[13] (as Somerville advocates) as component parts of a critic-constructed meta-text of Fourteenth Amendment jurisprudence. Read through this constructed meta-text, the conditions of queer subjective freedom before law suggested in *Romer*

and *Lawrence* are inseparably linked and enabled by a "color-blind" constitutionalist politics of racial minority subjectivity before law that is constituted through the rhetoric of Kennedy's and Chief Justice John Roberts separate and majority opinions in *Parents Involved*.

Kennedy's *Parents Involved* opinion is a component part of the Justice's broader rhetorical framing of the Supreme Court's response to anti-racist policies in terms of a particular and peculiar version of what is called "color-bind constitutionalism." This peculiar project began to be fully realized in Kennedy's dissent to Justice Sandra Day O'Connor's opinion in *Grutter v. Bollinger*. Before I turn specifically to *Parents Involved*, and then my reading of Kennedy's concurring opinion in that case together with *Romer* and *Lawrence*, I therefore begin with a substantial introductory aside about the Supreme Court's explicitly argumentative debate about the relationship between equal protection and race in *Grutter* and *Gratz v. Bollinger*.

II. The Michigan Cases: An Introduction

In 2003 (the term of the *Lawrence v. Texas* decision) the Supreme Court decided two challenges to the University of Michigan's use of race in its undergraduate and law school admissions policies, with Justice Sandra Day O'Connor and Chief Justice William H. Rehnquist filing the Court's responses to each challenge on June 23. The "Michigan cases"[14] (and their direct ancestor in *Regents of the University of California v. Bakke*)[15] are among the best recent demonstrations of judicial rhetoric's potential for material-political effectivity. Just as there was following Justice Lewis F. Powell's 1978 opinion for a divided Court in *Bakke*,[16] there is a clear causal relationship between Rehnquist and O'Connor's "confusing"[17] but nonetheless definitive demarcation of constitutionally acceptable and unacceptable ways to write public university admissions policies;[18] and a recent series of rapid policy shifts by the nation's leading public universities.[19] The Michigan cases are also significant to the related but once-removed struggle

over K-12 school integration policy at the municipal level of public school districts. I therefore begin with substantial attention to these cases, because the rhetorical frameworks through which O'Connor, Rehnquist, Kennedy, and the other dissenting and concurring Justices articulate their arguments in both *Gratz* and *Grutter* function as limiting and enabling constraints in the judicial rhetorical situation in which Kennedy delivers his 2007 concurring opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*.

In *Gratz v. Bollinger*, the Court found that Michigan's use of race in undergraduate admissions failed to meet the strict scrutiny standard for a constitutional use of "racial classifications" under the Equal Protection Clause. Passing on an opportunity to explicitly rule on the legitimacy of the "[University of Michigan's] asserted compelling interest in diversity,"[20] Chief Justice William H. Rehnquist was content in his majority opinion to find that the undergraduate admissions policy failed the first half of the strict scrutiny test's requirement for the policy to be "narrowly tailored to achieve" the "asserted compelling interest"[21] in "educational diversity that [Michigan] claims justifies their program."[22] Simultaneously, in *Grutter v. Bollinger*, the Court determined that Michigan's law school admissions policy did meet the strict scrutiny standard on both sides of the test[23] (Rehnquist also declined to directly address the compelling interest question in his dissent to O'Connor's opinion in *Grutter*).[24]

Unlike Rehnquist, O'Connor in *Grutter* did see fit to rule on the question of diversity as a "compelling interest"; in fact, while Rehnquist describes the Court's grant of certiorari in *Gratz* as the simple decision to rule on a disputed question of Fourteenth Amendment law[25] (eschewing the Petitioners' repeated invitations to the Court to rule that an "interest in diversity" is *per se* not a "compelling state interest"[26]), O'Connor explicitly frames the Court's decision to take up the case in *Grutter* in terms of the political exigence[27] of addressing a "question of national

importance:" "whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities."[28] The process by which the Court actually decides to review one case and not many others is highly influenced by U.S. partisan and other political-cultural concerns beyond the most immediate purview of constitutional law. The role of politics in Supreme Court decisionmaking, however, should not be taken as a replacement for, but rather a component of, the legal reasoning that remains at the heart of Court decisions regarding review.[29] While a combination of political and doctrinal imperatives to grant review was undoubtedly at play in *Gratz* as well as *Grutter*, it is O'Connor in *Grutter* and not Rehnquist in *Gratz* who decides to frame the the legal exigence of the Court's decision to grant judicial review in explicitly broad political terms.

"Whether diversity is a compelling interest that can justify the narrowly tailored use of race" is a question of constitutional interpretation that inspired significant "disagreement among the Courts of Appeals;"[30] as such, there are explicit jurisprudential[31] reasons for the Court to take up the case. But O'Connor made the doctrinally unnecessary (because disagreement among lower courts would be enough) decision to argue that the compelling interest question in *Grutter* is particularly ripe for final review (in implicit comparison to the many other cases in the 539 term in which the Court did not grant cert) *because* of its status as a "question of national importance." O'Connor's argumentative choice functions as the suggestion—weighty in its origin at the powerfully constitutive pulpit of the United States Bench—that the relationship between the Equal Protection Clause and the use of race in University admissions policies is partially determinative of the nature of the U.S. polity itself.

Francis J. Mootz finds the judicial rhetoric of the Michigan opinions to be wonderful examples of, as I discuss in the introduction, rhetorically rather than analytically framed

"arguments as arguments."[32] The contrast between Rehnquist and O'Connor's stated exigencies of judicial review in *Gratz* and *Grutter* is not one of the examples Mootz offers in support of this claim. But I think this particular O'Connor/Rehnquist contrast plays an important role in Mootz' observation as to the Michigan cases' rhetorical effect, wherein "the discourse of affirmative action changed after *Grutter* and *Gratz*," a change that both "reflects and constitutes a changed reality"[33] in the realpolitik of U.S. public education policy. This change is two-fold: first, the Michigan Cases functioned as a spark for additional challenges affirmative action admissions policies; and second, these cases—basically on their own—completed a shift in University policy concerning race away from working against racism, and toward working for diversity.[34]

O'Connor's statement about the decision to grant review is arguably dicta—in the senses that: it was not (as I note above) a necessary justification for the Court's issue of cert in the case; and because the reason the Court decided to grant review in *Gratz* and *Grutter* does not change the immediate effect of O'Connor's or Rehnquist's conclusions of law with respect to whether Michigan's admissions policies are constitutional under the Equal Protection Clause. What is not dicta is O'Connor's decision to rule on the "compelling interest" half of the test at all, given that: first, the *Grutter* Court is highly deferential to the Law School's own statements of its interests in maintaining the program,[35] rendering (as Justice Thomas astutely notes in his separate *Grutter* opinion)[36] the evaluation of those interests possibly moot to the Court's decision; and second, that none of the concurring opinions in *Gratz* or dissenting opinions in *Grutter* explicitly refutes the University's claim to a compelling interest in enacting both of its admissions policies.[37]

In a judge's rhetorical construction of an argumentative framework for her decision, "framing the question at issue is not a matter of demarcating the perspicacious features of the

world-in-itself that can later be investigated, but rather is the activity of rhetorical engagement that provides us with a world in the first instance."[38] Because the *Grutter* majority could have upheld the admissions policy based on narrow tailoring arguments alone, O'Connor's doctrinal choice to explicitly rule on the compelling interest half of the test—regardless of the language she uses to frame the imperative of that choice—thus functions on its own as the argumentative framework determinative of the overall *Grutter* ruling's future social, political, and cultural effects. That is, O'Connor's choice to wade into the "compelling interest" debate at all locates the decision in *Grutter* (and implicitly, in *Gratz* as well) within a rhetorically constructed precedential genealogy—the specific nature of which, *O'Connor argues* through her earlier decision to frame the Court's imperative to rule at all in political terms, should be determinative of the relationship between racial identity, diversity, and the public good in the United States. Kennedy's repudiation of this precedential genealogy, as I will argue, would become central to his implicit construction, through *Parents Involved*, of a post-racial queer subject before the law.

O'Connor's adjectival phrase "of national importance" is, accordingly, quite significant. The debate in *Grutter* between O'Connor, and Kennedy and Rehnquist (her direct dissenters) is a textbook example of a disputed frame of the "question at issue."[39] Neither Kennedy nor Rehnquist dispute[40] O'Connor's conclusion that "student body diversity is a compelling state interest that can justify the use of race in University admissions."[41] While an implied objection can be read into the close of Rehnquist's dissent,[42] Kennedy goes so far as to applaud the *Grutter* Court's decision to affirm the theoretical constitutionality of the narrowly tailored use of race in efforts to increase "racial [minority]"'s access to "educational opportunities."[43] Kennedy and Rehnquist's position is that O'Connor fails in her application of strict scrutiny, because a truly rigorous judicial review of the policy would not simply accept (as they say O'Connor does), but

rather rigorously test (as they say they do)[44] the accuracy of the Michigan Law School's assertion[45] that its interest in a race-inclusive admissions policy is solely in "'obtaining'"[46] "'the educational benefits that flow from a diverse student body.'"[47]

In other words, Kennedy and Rehnquist argue that O'Connor's application of strict scrutiny is "nothing short of perfunctory,"[48] because the Justice literally allows the Law School to *deceive her*[49] into asking and answering the wrong question of law. The Law School's real interest, the Chief Justice and Kennedy argue, is not at all in a "diverse student body" narrowly conceived (the interest that O'Connor and Kennedy agree can in theory be achieved through a narrowly tailored race inclusive admissions policy) but rather in "'racial balancing,'" which O'Connor, Kennedy, and Rehnquist all agree is established in strong precedent as "patently unconstitutional" under the Equal Protection Clause.[50]

I find it difficult at this point to overlook the apparent gendered dynamics of this exchange, wherein two rightist male Justices take their conservative colleague Sandra Day O'Connor to task for what they allege is an inexcusable error in her constitutional judgment. It is one thing for a dissenting Justice to express anger at the majority's decision over a perceived threat to the basic integrity of the Court's mission of judicial review. It is quite another, as evidenced in the telling presence of the phrase "respectfully dissent" *only* in Thomas' separate (mostly dissenting) *Grutter* opinion, to use this righteous legal ethical anger as an occasion to publicly insult the basic legal intelligence of a colleague. Justice Scalia, as we know from *Lawrence v. Texas,* is of course no stranger either to hyperbolic sarcasm or the collegial insult, but in his separate (also mostly dissenting) *Grutter* opinion, it is difficult to so generously read his opening dicta-"framing [of] the question at issue"[51]:

> As [the Chief Justice] demonstrates, the University of Michigan Law School's mystical "critical mass" justification for its discrimination by race challenges even the most gullible mind. The admissions statistics show it to be a sham to cover a scheme of racially proportionate admissions.[52]

In the apparent estimation of her male colleagues, O'Connor is either lazy ("perfunctory"), or childishly naïve. These insults have both legal rhetorical and doctrinal implications.

The *Grutter* dissent narrative of deceit—the story of a pernicious, race-baiting institution of public education attempting to hoodwink the High Court guardians of the constitutional dream of racial harmony[53]—would be repeated four years later in Chief Justice John Roberts' characterization of the respondent Seattle School District's arguments in *Parents Involved*. The *Grutter* dissenting opinions, and Scalia's separate opinion, could have held to the argument that the "'critical mass' justification" is simply not commensurate with the effective reality of the admissions policy. But the "sham" component functions as an important warrant to Kennedy and Scalia's hybrid doctrinal-prudential[54] argument that the *Grutter* decision will undermine the future efficacy of the Court's Fourteenth Amendment mission to use the Equal Protection Clause as a tool to check policies productive of racial antagonism. Even isolated from the more evidently "legal work"[55] of their decisions, Scalia, Rehnquist, and Kennedy's insults are not mere dicta. They are at once enabled by and constitutive of the majoritarian supremacist framework through which the Rehnquist, Roberts, and (for some analysts) "Kennedy Courts"[56] will continue to apply the Equal Protection Clause to public policies that seek not to destroy racial harmony, but rather to alleviate racial *oppression*[57]—a form of application that would continue in *Parents Involved*.

O'Connor does not accept the Law School's description of their intent and interest in using race-conscious admissions sight unseen. She constructs a detailed and well-evidenced argument for "giving a degree of deference to a university's academic decisions" under the First Amendment to the Constitution.[58] Her conferral of argumentative presumption on the Respondent for the purposes of the compelling interest question is not based in naïveté, but rather specific precedent[59]—precedent that Kennedy, Rehnquist, and Scalia largely ignore. In O'Connor's precedential genealogy, the judicial presumption of the Law School's "good faith" (presumption accorded public educational institutions by the First Amendment) in its stated interest in "attaining a diverse student body"[60] is inclusive of the Law School's claim that the intent of their race-inclusive admissions policy is to achieve a "'critical mass' of minority students'...defined by reference to the educational benefits that diversity is designed to produce."[61] This claim, however, is the crux of the Kennedy, Rehnquist, and Scalia's mockery.

The three dissenting Justices claim that it is obvious "critical mass," in practice, means the same thing as "quota." The greatest insult to O'Connor here is that Kennedy, Rehnquist, and Scalia fail to presume that O'Connor even has an argumentative response to this position. O'Connor *argues that* critical mass is not the same as "quotas," because the content of the critical mass is always to be determined in reference to the Law School's compelling interest in diversity, which O'Connor spends considerable time explaining, and which Kennedy even agrees with in the abstract. An actual, considered *refutation* of O'Connor's conclusion of law would thus require a detailed response, supported by evidence, in order to challenge O'Connor's application of precedent in support of granting a degree of presumption to the Law School's claims of intent. Focused as they are on the numbers of different minorities admitted or not

under the Law School's policy, Kennedy, Scalia, and Rehnquist do not really mount any response to the presumption argument itself.

In other words, the *Grutter* dissenters claim that the Law School admissions policy cannot be tailored narrowly using the strict scrutiny test, because there is evidence that admissions decisions with respect to particular applicants were made primarily based on those applicants' race—meaning that race became a "predominant factor in the admissions decisionmaking [*sic*]."[62] But this line of argument suggests an almost willful ignorance of the *doctrinally grounded warrant*[63] to O'Connor's argument that the policy is not a quota system. To put it in terms of a Toulmin diagram: claim—"critical mass" is not a synonym for "quota system," and is narrowly tailored to a compelling interest in diversity; data—the critical mass sought is that which will achieve educationally beneficial diversity, which is a fluid goal not dependent on specific racial ratios; warrant—as the Court is instructed through the Court's precedent in *Regents of the University of California v. Bakke*, the Law School (and the numerous educational experts submitting *amicus* briefs) is in the best position to determine the necessary content to achieve that critical mass, in which case "minimum *goals* for minority recruitment" certainly are not synonymous with racial "balancing" or "quotas."[64]

In his separate opinion from *Grutter* (which dissents from most of O'Connor's conclusions of law), Thomas is not just "respectful" in comparison to Kennedy, Rehnquist, and Scalia because he says the word. He is *argumentatively* respectful, in that rather than resorting to mockery and deliberate ignorance, he acknowledges O'Connor's arguments, and the evidence she provides in support of those arguments, and then he refutes them. The most important exchange in either *Gratz* or *Grutter* (as Mootz also argues[65]) is that between O'Connor and Thomas. For O'Connor, the Court grants presumption to the Law School's stated intent to

achieve a critical mass of minority students for the purpose of educational diversity. This means that the specific (sometimes predominantly racial) decisions the Law School makes with respect to admitting certain students *cannot* be for the purpose of filling a "certain fixed number or proportion of [admissions] opportunities...'exclusively [with] certain minority groups,"[66] because the numeric racial content of the admitted class will be measured always against the diversity goal. Again, the crux of much of *Grutter* itself is this question of presumptive deference, and Thomas offers a detailed refutation of the Court's conferral of presumption in this instance.[67] Read against Thomas' opinion, I think it is fair to say that Kennedy, Rehnquist, and Scalia's elision of O'Connor's presumption argument in order to conflate "critical mass" with "quota" is a purposeful misreading of the intent of an educational institution's anti-racist actions, in order for the Court to use the Equal Protection Clause as a protection *for* racism, under the guise of attacking racism itself—a majoritarian rhetoric that would have a more sophisticated articulation in *Parents Involved*.

Kennedy et al take O'Connor to task for a putatively false application of the strict scrutiny test in *Grutter*—ignoring her anticipatory argument that given the doctrinal appropriateness of granting presumption in this particular instance, deference in this context is consistent with strict scrutiny.[68] In other words, O'Connor arrives at her conclusions of law within the confines of a particular genealogy of strict scrutiny in race-conscious admissions law. Kennedy, Rehnquist, and Scalia attempt a factual refutation of O'Connor's conclusions without a compelling response to the precedential genealogy that gives them strength. Thomas, in contrast, begins the substance of his answer to O'Connor by constructing a detailed, alternative, and largely mutually exclusive precedential genealogy of strict scrutiny in the context of race-conscious public policy.[69] By doing so, Thomas is able to isolate and respond to the notion of

diversity *per se* as a compelling state interest—something that Kennedy does not choose to do, and that Rehnquist and Scalia largely fail to do.[70] For Thomas, it is not that diversity in this case stands in for a racist policy of racial balancing, but that the goal of achieving diversity through racial means is, always and on its own terms, a form of "racial discrimination," and thus unconstitutional in the context of the important, but certainly not *constitutionally* important goal of providing a better education within elite institutions.[71]

This is all to say that O'Connor's introductory framing of the compelling interest question with the dicta-phrase "question of national importance" lies at the heart of the particular power of her opinion in *Grutter*. Even if Kennedy and his colleagues are correct that O'Connor is deceived by the Law School, and her entire defense of diversity as a compelling state interest is dicta to the finding of the case, O'Connor's *Grutter* opinion is still of great importance as a response to and buffer against Thomas' equally important separate opinion. Because O'Connor makes this argument, it becomes part of the Court's argumentative archive. As I note in Chapter One, future judicial readers of Court decisions can make productive use even of statements that may be dicta. O'Connor not only posits the framework for decision in *Grutter* as whether there can be a compelling interest in diversity, but frames this question at issue[72] as a "question of national importance." O'Connor's meta-argument about the relationship between the Equal Protection Clause, public policy, and race functions independently of the rest of the content of the decision. Here O'Connor enacts a precedential genealogy of race in constitutional law that is constitutive of a *particular* protected racialized subject of U.S. constitutional law, one whose public and civic legibility is determined by and constrained within the potential for "interest convergences" between elite (economic and racial) power in the United States and limited, largely individual, instances of minority admission to elite status.[73]

Kennedy's dissent might be read as establishing a similar buffer to Thomas's particular genealogy of race in constitutional law, given his concluding statement that:

> It is regrettable the [*Grutter*] Court's important holding allowing racial minorities to have their special circumstances considered in order to improve their educational opportunities is accompanied by a suspension of the strict scrutiny which was the predicate of allowing race to be considered in the first place.

But Kennedy has a demonstrable track record of "agreeing with the liberals in theory" but the "conservatives in specifics."[74] This means that (as he does in *Grutter*, and will later in *Parents Involved*)[75] Kennedy's opinions about race tend to construct a decisional framework within which a narrowly tailored race-conscious policy could be possible in the future, but cannot be allowed in the present, because they are not adequately "narrowly tailored." It is conceivable that a policy might legitimately address racism *through race*, but Kennedy finds "race" to be such a "corrosive category" that most well-intentioned anti-racist policies are not designed well enough to avoid actually functioning as racism. Race is corrosive; it ruins everything it touches, and should be avoided except in the most well-designed of policies responding to cases of extreme need.

This is the difference between Kennedy and O'Connor that helps to define the rhetorical situation of *Parents Involved*. The precedential genealogy underlying O'Connor's *Grutter* conclusion of law is constructed both through her "framing [of] the question at issue,"[76] and through the warrant (First Amendment judicial deference to public universities) underlying her *answer* to that question. In his opinion for the Court in *Gratz*, Rehnquist dismisses the dissenting Justice Ruth Bader Ginsburg's central objection to the manner of the Court's application of strict scrutiny as the "remarkable" suggestion that public university equal protection "violations should

be dealt with...by changing the Constitution so that it conforms to the conduct of the universities."[77] Rehnquist is willing to lecture O'Connor on a failed application of strict scrutiny under the Equal Protection Clause. At the same time, via a clear misreading of Ginsburg's dissent,[78] he simply ignores Ginsburg's indictment of the Court for the same sin. Ginsburg argues (through a critically race-conscious precedential genealogy [79]) that given the overwhelming evidence[80] of the continued effects of the "'system of racial caste'"[81] the Equal Protection Clause was originally designed to deconstruct,[82] public policies clearly designed to rectify past, and alleviate ongoing, discrimination[83] (policies that, given the present racial demographic realities of "class discrimination" in the United States, must *by definition* be race-conscious[84]) should generally survive Fourteenth Amendment "close review" by the Court.[85]

For Ginsburg, it is Rehnquist's opinion in *Gratz* that is grounded in a dangerously flawed interpretation of Fourteenth Amendment strict scrutiny review. As University of California at Berkeley Professor of Law in Access to Justice Leti Volpp says, "space is constituted through legal language, and then serves as the seemingly natural 'ground' for that language."[86] The Chief Justice, and by implication also Kennedy in his *Grutter* dissent, deliberately gives anti-racist policies a test written to ensure their failure, in order to make it seem like that failure was the fault of the policy, and not the test.

Ginsburg's analysis in *Gratz* could function as backing for O'Connor's judicial deference warrant, but O'Connor in *Grutter* neither cites Ginsburg, nor makes more than a passing reference to "inequality."[87] O'Connor's focus is instead on the affirmative benefits of educational diversity in the modern United States.[88] Many of these benefits, consistent with the Justice's opening "framing of the question at issue,"[89] are ones fundamental to the effective operation of public institutions vital to the integrity and survival of the U.S. polity.[90] The

Grutter Court is even at odds with Ginsburg's concurring opinion insofar as O'Connor works from the assumption not of a society yet implicated in the residual organization of a racial caste system, but rather of a presently "heterogeneous" society that accordingly requires a valuation of diversity in the process of educating the nation's elite.[91]

The Critical Race Theorist Derrick A. Bell argues that O'Connor's opinion in *Grutter* is most properly understood in terms of her larger body of work on race and equal protection. O'Connor's career was devoted in part to the construction of a precedential genealogy that, more than the work of even many of her conservative colleagues, has been singularly productive of the idea that it should be unthinkable and impossible to design a public policy that is both race-conscious and constitutional.[92] In the context of O'Connor's previous, highly constraining race and equal protection decisions, Bell insists on a practical evaluation of her *Grutter* opinion's utility for extra-judicial radical politics. The judicial rhetorical "question of national importance" framework underlying *Grutter* (and its antithesis in Thomas' separate opinion) is *at least* constitutive of a realm of selective, public, higher education as the one public space in which Ginsburg's demand for a *solvent* Equal Protection Clause can be even partially met.

Because Kennedy refuses to answer the question given in the same framework, the political future constituted in the judicial rhetoric of his *Grutter* dissent is exclusive of any instances where Ginsburg's vision of an *equality jurisprudence of equal protection* can be realized—even though Kennedy asserts that he could conceive of some hypothetical future policy for which Ginsburg's call might be possible. Three days after *Gratz* and *Grutter v. Bollinger*, Kennedy delivered the opinion for the Court in *Lawrence v. Texas*—an opinion wherein, in the context of sex and kinship, he simultaneously constructed a dicta-framing of the question at hand, *and* an answer to that question in the specific instance before him. This

brought to existence a set of future doctrinal possibilities for a racially silent but sex conscious Fourteenth Amendment jurisprudence of *due process*—a jurisprudence that could do the anti-inequality work with respect to yet-to-be-recognized identity categories, that Ginsburg hoped Fourteenth Amendment equal protection jurisprudence might successfully accomplish with respect to race.[93] These cases were on the same docket. Here is the first example of a queerly progressive Fourteenth Amendment, where that queer progressivism is conversely dependent on regressive (even racist) politics of race.

Doubtless to Scalia's horror,[94] the Michigan cases would be, as he predicts in his separate *Grutter* opinion,[95] productive of a new wave of race-conscious public education policymaking and the inevitably resultant jurisprudential challenges (now before the Court in *Fisher v. University of Texas at Austin*).[96] Four years after the Rehnquist Court's highly constrained affirmation of the societal necessity and thus constitutionality of race-conscious efforts to achieve diversity in public higher education, the Roberts Court, sans O'Connor, would again take up the question of voluntary race-conscious diversity policies—this time at the municipal level of public K-12 school districts.

Derrick Bell refers to O'Connor's *Grutter* opinion as a textbook (and therefore at once laudable, disappointing, and fragile) example of what Bell calls "interest convergence," or the need for progressive advocates to strategically recognize and exploit those situations where dominating, elite and oppressed, minority interests converge (because elites will never create those situations voluntarily, or not without perception of their own benefit).[97] O'Connor's opinion should be recognized as "interest convergence" because it represented for all practical purposes the most hopeful outcome on the Rehnquist Court for an anti-racist Equal Protection Clause in the context of public education policy. Unfortunately for interest convergence, the

dynamics of the Court with respect to race and equal protection had by 2007 become sufficiently *more* muddied such that the set of practical possibilities for equal protection doctrine had shifted one more step away from the liberal-conservative toward the majoritarian supremacist right.

In this new judicial rhetorical situation, Kennedy's unique brand of Fourteenth Amendment doctrinal issue framing carries more weight: and in Kennedy's Fourteenth Amendment, the politics of "interest convergence" are defined in terms of queer liberation *at the expense of* anti-racist struggle. In the next sections, I turn to a detailed analysis of: first, Chief Justice Roberts' construction of what I call a *post-racial* white subject-before-law in his plurality opinion for the Court in *Parents Involved*; and second, to my analysis of Kennedy's separate concurring opinion in the same case. I begin with a substantial discussion of Roberts' opinion, because I want to distinguish between the post-racial politics of the Roberts plurality and the color-blind politics of Kennedy's concurrence. This distinction will then form the basis for my argument that Kennedy's argumentative construction of race in *Grutter* as a "corrosive category" functions in *Parents Involved* as the "post-racial" component of his meta-textual constitution of a radical queer subjectivity before law. When Kennedy's color-blind constitutionalist arguments in *Parents Involved* are read as components of a meta-argumentative framing of the range of possible subjectivities constituted as subjects of Fourteenth Amendment protection, they form the basis for Kennedy's implicit construction of a post-racial queer subject of his Fourteenth Amendment jurisprudence.

III. Race and Equal Protection in Roberts' *Parents Involved* Plurality and Breyer's Dissent

A. Roberts' Plurality

On June 28, 2007, Chief Justice John Roberts delivered the plurality[98] opinion for the Court in *Parents Involved in Community Schools v. Seattle School District No. 1*, reversing the

United States Ninth and Sixth Circuit Courts of Appeals' respective decisions in *Parents Involved* and *Meredith v. Jefferson County Board of Education*.[99] The Court took up both cases together under the rubric of *Parents Involved*, responding to equal protection challenges to "race-conscious"[100] school assignment policies in the Seattle School District (case no. 05-908) and Jefferson County, Kentucky Public Schools (case no. 05-915) that determined school assignments (where kids get to go to school) in part[101] of the basis of a student's race, and in part on the racial composition of the school a student desired to attend.[102]

Both policies were "voluntary."[103] Seattle schools have never "been subject to court-ordered desegregation,"[104] and Jefferson County adopted the policy challenged in *Meredith* subsequent to the District Court for the Western District of Kentucky's June 20, 2000, ruling in "Hampton II" (*Hampton v. Jefferson County Board of Education*) that dissolved the desegregation order the district had been operating under since 1975.[105] Roberts' opinion was joined in part[106] by Scalia, Thomas, and Justice Samuel Alito; Thomas filed a concurrence,[107] with Justices John Paul Stevens[108] and Stephen J. Breyer (the latter joined by Stevens, Ginsburg, and Justice David H. Souter)[109] filing separate dissenting opinions. Kennedy filed a separate opinion, concurring with the Court's judgment, but only in part with Roberts' plurality opinion (Kennedy accepted Roberts' narrow tailoring arguments but objected to his compelling interest claims).[110] In combination with his *Grutter* dissent (which also agreed with only the "narrow tailoring" arguments in the other Justices' responses to O'Connor's opinion), this *Parents Involved* concurrence almost rises to the level of a trend.

In reversing the Sixth and Ninth Circuits, Roberts affirmed the plaintiff's contention that (in Roberts' words) the school districts' allocation of "children to different public schools on the basis of race violated the Fourteenth Amendment guarantee of equal protection."[111] With this

argument, Roberts draws a straight line from the white plaintiffs in *Parents Involved* and *Meredith*, to the black plaintiffs who brought suit in *Brown v. Board of Education*.[112]

In the *Western Journal of Speech Communication*'s 1990 "Special Issue on Rhetorical Criticism," the rhetorical theorist and critic Michael Calvin McGee cites the group of cases "related to" the Supreme Court's 1954 decision in *Brown* as evidence for a growing "presumption of cultural heterogeneity."[113] Fifty-three years after *Brown*, Roberts argues in *Parents Involved* that the Warren Court's equality doctrine renders "differential treatment on the basis of race" clearly verboten under the Equal Protection Clause.[114] While the Warren Court demanded school integration, Roberts now equates integration with segregation, deploying a repudiation of the "separate but equal"[115] doctrine as a reason to strike *down* Seattle and Jefferson County's attempts to integrate their schools—that is, to render them less homogeneous.[116] McGee's 1990 argument was prescient; decisions subsequent[117] to *Brown* would deploy a "presumption" of existing and satisfactory heterogeneity.

This presumption allows Roberts to argue that laws and policies mandating diversity justify themselves through the false construction of a homogenous culture that needs to be corrected—a sort of straw-homogeneity. In this perniciously unnecessary correction, Roberts argues, the Seattle and Jefferson County school districts reproduce the very discrimination they claim to be interested in rectifying. Without such a presumption of cultural heterogeneity, Rehnquist and O'Connor in *Gratz* and *Grutter* would have been unable to cite substantial Court precedent for their contention that the Court's duty in enforcing the Equal Protection Clause is more properly to enjoin racial classification, than it is to check the racist production of inequality itself.[118] A "presumption of cultural heterogeneity" is also necessary to Roberts' concluding

declaration in *Parents Involved* that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[119]

Roberts here articulates a precise distillation of an increasingly (over the past forty or so years) dominant[120] mode of jurisprudential application of the Equal Protection Clause, known to many Critical Race[121] and other legal scholars as "color-blind constitutionalism."[122] This interpretive mode—"a collection of legal themes functioning as racial ideology"[123]—relies on an ahistorical valuation of equality of "process" over substantive justice, a valuation that enables jurists to "willfully blind"[124] themselves to the reality of ongoing discrimination that specifically and primarily targets "African Americans" and other people of color.[125] As Ginsburg argues in her *Gratz* dissent, color-blind jurisprudence amounts to the normative equation of "actions designed to burden groups long denied full citizenship stature" with "measures taken to hasten the day when entrenched discrimination and its after effects have been extirpated."[126] For the Critical Race Theorist Neil Gotanda, given the "existence of American racial subordination," this "color-blind constitutionalism…fosters white racial domination" through the ideological obfuscation of the reality of institutionalized "social, economic, and political advantages" for white people in the United States.[127]

Roberts' stipulation in *Parents Involved* that "one form of injury [the Court has recognized] under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff"[128] is exemplary[129] of Gotanda's characterization of color-blind constitutionalism. The qualification "may" is not mere dicta.[130] In response to the Seattle School District's argument that the "harm" articulated by the plaintiffs in *Parents Involved* is "too speculative…to maintain standing," Roberts finds that Crystal D. Meredith and the members of the group Parents Involved in Community Schools (the plaintiffs in the combined

case) have standing not only because they have a reasonable expectation of being subject to racial discrimination in the future,[131] but also because the Equal Protection Clause renders being subject to racial classification a harm in and of itself. In other words, it is not only that the "race-based system[s]" in Seattle and Jefferson County may specifically prejudice the plaintiffs in their future applications for school placement. The possibility of prejudice inherent to any "race-based system" is *itself* an immediate "injury that the members of Parents Involved can validly claim on behalf of their [mostly white] children,"[132] regardless of the effective outcome of the policy in question. Or, as both Ginsburg and Gotanda might say, regardless of racial hierarchies of advantage that persist in status quo institutions like public schools.

"Color-blind constitutionalism" is a predominant term for describing Roberts' mode of constitutional interpretation—so much so, in fact, that commentators as diverse as CRT critics, judicial advocates of color-blind constitutionalism like Justice Clarence Thomas,[133] and popular press commentators[134] all use some variation of the notion to describe the same set of legal arguments or "collection of legal themes." I think, however, that Robert's particular deployment of color-blind constitutionalist arguments in *Parents Involved* is more accurately described as post-racial rather[135] than color-blind: a perspective that is (as I argue below) specifically useful my attempt to articulate a queer of color perspective on "racialized," color-blind applications of the Equal Protection Clause.

McGee, the Warren Court in *Brown* as arguing that traditionally "American" valuations of a homogeneous culture are damaging to those presumptively excluded from idealized homogeneity.[136] Roberts performs the converse argumentative move in *Parents Involved*. Starting from the assumption that the Seattle and Jefferson County schools have achieved an acceptably heterogeneous status quo, Roberts does not argue that attempting to achieve what we

already have will construct a problematic ideal of racial sameness that minorities cannot and would not want to achieve. Rather, Roberts dissociatively[137] articulates a call to work toward precisely this ideal of racial sameness, with a presumed heterogeneous status quo serving as both implicit and explicit warrant. Heterogeneity is both unnecessary (because we already have it) and problematic (because it will undermine our ability to get to the point where the question of hetero vs. homo no long matters). In other words, Roberts' arguments in *Parents Involved* shift from dreaming of a future of sameness to suggesting that we already live in a post-*difference* future, wherein difference exists, and is even valuable, but has lost its capacity for harm—*except for in the unnecessary meddling of well-meaning public institutions.*

The Constitution is not an absolute barrier to state encroachments into the "realm of personal liberty,"[138] and the rights enumerated in the Constitution are not guaranteed to every person in every instance. Judicial review, it bears repeating, is not a scientific application of Constitutional test, but rather the simultaneously rhetorical and dialectic argumentative juxtaposition of competing interests toward the goal of a just outcome. The circumstances under which "heightened" levels of scrutiny are applied is a question of jurisprudential interpretive theory; the manual for how strict judicial review should be in a given case is constituted by constantly evolving doctrines of constitutional law. The fascinating thing about the Court is that while these doctrines change from decision to decision, they remain in the vast archive of U.S. judicial rhetoric, and so have powerful memorial features that can be resurrected for future occasions even after they have been consigned away as no longer valid.

O'Connor, Rehnquist, Kennedy, Thomas, Scalia, and Ginsburg all mostly agree that some from of "strict" or "close" scrutiny is warranted in judicial review of policies employing racial classifications; most of the greatest contention among the Justices in the Michigan cases is

not about what form of review should be applied, but rather just what that application *means* for the decision of the Court. As I discuss in Chapter One, Judge Vaughn R. Walker grounds his application of heightened scrutiny in *Perry v. Schwarzenegger* to "Proposition 8" in his finding of a differential treatment of a "suspect class"[139] (a group designated for unequal treatment under the law because of a suspect classification). In such cases, as Walker argues, "strict scrutiny" review is typically applied, meaning again that the law must meet the dual test of being "narrowly tailored to a compelling government interest" that outweighs the negative consequences of the suspect classification.[140]

In *Parents Involved*, Roberts also bases his finding of the school district policies' unconstitutionality on an application of strict scrutiny review, but, operating within a near-identical precedential genealogy as Rehnquist and O'Connor in *Gratz* and *Grutter*, his justification for applying strict scrutiny is rather different from what a reader familiar only with the same-sex marriage cases might expect.[141] For Walker, gays and lesbians are "situated identically" to heterosexuals vis-à-vis marriage,[142] rendering legal classifications targeting them for discrimination in the context of access to marriage suspect.[143] The parallel move for Roberts in *Parents Involved* would be anything but color-blind, as the ethnicity of the plaintiffs would require the Chief Justice to establish *whiteness specifically as a suspect racial classification*—and therefore as a racial category that matters.

Instead, Roberts cites *Gratz* to (as Stevens puts it in his *Parents Involved* dissent) "grandly [proclaim] that all racial classifications must be analyzed under 'strict scrutiny.'"[144] But how is this different? While I place Roberts' and Walker's application of strict scrutiny review in juxtaposition, the doctrinal effect, at first glance, seems identical. Roberts does not explicitly perform the legal argumentative labor of establishing whiteness as a suspect

classification, but if "all racial classifications must be analyzed under 'strict scrutiny,'" it follows that jurists must apply heightened review to laws treating persons differently because those persons are white. Consider the apparent similarity between the following passages: first, Roberts' citation of *Gratz*:

> Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification;[145]

second, Walker's argument that strict scrutiny can be appropriately applied to Proposition 8:

> Strict scrutiny is the appropriate standard of review to apply to legislative classifications [such as those in Proposition 8] based on sexual orientation. All classifications based on sexual orientation appear suspect, as the evidence shows that California would rarely, if ever, have a reason to categorize individuals based on their sexual orientation.[146]

The difference is that for Walker, "all classifications based on sexual orientation are suspect" because "gays and lesbians are the type of minority strict scrutiny was designed to protect."[147] The harm that can only be justified through narrow tailoring to a compelling government interest is the simultaneous legal recognition and (oppressively) differential treatment of a *minority* group. As Ginsburg can be heard to proclaim (through Stevens) from her *Gratz* dissent, the plaintiffs in *Parents Involved* are not minorities, either in the context of the public schools to which they are granted or denied assignment, or in the broader U.S. status quo.

Stevens suggests in his dissent that Roberts should only be able to claim that the Seattle and Jefferson County integration policies must survive strict scrutiny because racial classification is the harm in and of itself, without regard to the specific differential treatment of individuals belonging to any particular racial group. This position invokes Ginsburg, who insists in her *Gratz* dissent—in an argument that is at odds with the precedential framework of

O'Connor's *Grutter* opinion as much as it is with Rehnquist's conclusion of law in the *Gratz* majority—that "our jurisprudence ranks race a 'suspect' category, not because [race] is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality."[148] Because there is no evidence that denial of assignment in the Seattle case (No. 05-908) on the basis of race carries any *racial* harm,[149] any other articulation of harm would require there to be some basis in *stare decisis* for the Court to regard differential treatment of an advantaged *majority* group with suspicion—and Stevens, echoing in my imagination the frustration of the unacknowledged Ginsburg, insists that such a precedent does not exist:

> There is a cruel irony in the Chief Justice's reliance on our decision in *Brown* v. *Board of Education,* 349 U. S. 294 (1955). The first sentence in the concluding paragraph of [Roberts'] opinion states: "Before *Brown,* schoolchildren were told where they could and could not go to school based on the color of their skin"…the Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools.[150]

In contrast to Thomas's concurring opinion in *Parents Involved*, in which his arguments conform to the view that "'our Constitution is color-blind,'"[151] Roberts mentions the phrase "color-blind" only once, in a footnote.[152] The implicitly contrasting positions Thomas and Roberts take on whether or not the Constitution is color-blind or not suggest that the taken-as-fact[153] color-blind Constitution is useful to, but is not necessary for, Robert's ultimate finding with respect to equal protection. Roberts' "Constitution is color-blind." But more specifically, it is post-racial. For the Roberts Court, policies based on racial classification are verboten because the Constitution asks us to be blind to race, but more specifically, because the Constitution

recognizes the reality of race and demands that we resist at every turn policies that constitute race as significant. Roberts carries Rehnquist and Kennedy's *Gratz* and *Grutter* trope of deceitful race-mongers into *Parents Involved*. The plurality opinion in *Parents Involved* is exemplary of Roberts' efforts throughout his career to imbue in legal argument the notion that the status quo is post-racial, against the pervasive and "'pernicious'"[154] attempts of states and municipalities to re-inscribe and come to terms with the significance and reality of racial difference in the United States.[155]

Other legal scholars have made similar arguments about post-racial trends in Roberts Court decisions.[156] A particular focus on *Parents Involved*, however, is useful because of the distinction Roberts makes here between "diversity" and "racial balancing"—a distinction that both follows and attempts to evacuate all of Derrick Bell's "interest convergence" potential from *Grutter v. Bollinger*. Rather than articulate a post-racial model of equal protection in the negative, Roberts lays the groundwork to affirmatively *replace* race-consciousness with "diversity" as a legitimate aim of government—a conception of diversity from which, in a step beyond even what O'Connor attempts in *Grutter*, the significance of racial difference would be substantively evacuated. In rejecting the possibility of a "compelling state interest" that might allow the Seattle and Jefferson County policies to pass strict scrutiny review, Roberts cites in part some of the *Brown* antecedents that McGee in 1990 was probably referring to:

> Allowing racial balancing as a compelling end *in itself* would "effectively assur[e] that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race' will never be achieved."[157]

The phrase "racial balancing as a compelling end in itself" summarizes a complex and multilayered doctrinal argument. Roberts presents two layers of juxtaposition: first, between policies attempting to achieve "racial diversity" as opposed to "broader diversity," not defined (exclusively or primarily) by race;[158] second, between policies that attempt to achieve "racial balance, pure and simple," as opposed to "racial diversity."[159]

These distinctions are vital for the conclusions of law in Roberts' opinion, as they speak to both the "narrow tailoring" and "compelling government interest" requirements of strict scrutiny. As Roberts argumentatively defines the controlling precedent, the Court prior to *Parents Involved* has established "two interests that classify as compelling" in the context of educational policies that employ racial classifications.[160] The second, "diversity in higher education," derives from *Grutter*.[161] Roberts functionally contends that the *Grutter* precedent clearly establishes that diversity can only be a compelling interest if diversity is de-racialized. His argument is not precisely that O'Connor's opinion ignores race; rather, Roberts cites O'Connor's argument from her precedential genealogy of *Bakke* (and O'Connor's own past case-history) that "racial or ethnic origin" should be only a "single" if "important element" in the diversity an educational policy seeks to achieve.[162] Here Roberts quotes O'Connor's celebration of the University of Michigan Law School's definition of diversity in all possible terms but minority inclusion. As Roberts would have it (in what reads as an implicit citation of Thomas' separate *Grutter* opinion[163]), the diversity that *Grutter* acknowledges may be a compelling government interest seems designed specifically to ensure the widest possible variety of *elite and not non-elite* participation in an educational institution.[164] But while Thomas objects to what he views as the elitism of O'Connor's position, Roberts pulls it out, brings it forward to *Parents Involved*, and celebrates it as the only acceptable constitutional affirmation of diversity.

Following his precedential framing of *Grutter*, Roberts insists that there is a doctrinal difference[165] between the use of racial classification as a tool to increase a de-racialized diversity, and racial classification as a tool to increase diversity understood primarily in terms of "racial balance."[166] The brief for the respondents on behalf of the Seattle School District argues (echoing Ginsburg in *Gratz*) that any finding that *Grutter* does not allow the district policy to pass strict scrutiny review must "[rest] on the false assumption that a desire to integrate public schools is constitutionally indistinguishable from the intent to segregate them."[167] But while Roberts goes to great lengths to sever the precedential link between the Michigan Law School affirmative action policy upheld in *Grutter* and the Seattle and Jefferson County school assignment systems, he also rejects all of the respondent's additional (non-*Grutter* dependent) claims to a compelling government interest in "racial diversity" as references to "racial balance, pure and simple,"[168] derisively noting that "racial balancing is not transformed from 'patently unconstitutional' [a point repeated *ad naseum* throughout the opinion] to a compelling state interest simply by relabeling it 'racial diversity.'"[169] Roberts refers to the unconstitutional *telos* of "racial balance," but the effect of his doctrinal arguments is to retrench in *stare decisis* the notion that policies seeking to insure minority inclusion are just as harmful as policies that seek to exclude.[170]

The Chief Justice frames his conclusions of law insistently in the terms of the unconstitutionality of "racial balance" or "proportional representation"[171] and not the language of "integration" and "segregation"/"inclusion" and "exclusion" used by the respondents, Stevens,[172] Breyer,[173] and others involved in the case.[174] Roberts' rhetorical argumentative choices here are not dicta; he has a reasonable case for arguing that policies that seek *only* "racial balancing" are not constitutional in light of the *Gratz v. Bollinger* and *Grutter v. Bollinger* majorities, but the

doctrinal ground for his application of strict scrutiny in *Parents Involved* is less stable.[175] The argumentative elision of the myriad interests articulated by Seattle and Jefferson County with "racial balance, pure and simple" is a necessary pre-requisite to Roberts' legal finding.

While Seattle and Jefferson County make no claims to proportionate race balancing as a goal in itself, Roberts dismisses (just as Kennedy, Rehnquist, and Scalia dismiss the Michigan Law School) the Respondent's arguments to this effect as mere rhetoric, "verbal formulations to describe the interest they promote [racial balance]" as "racial diversity, avoidance of racial isolation, racial integration."[176] Just as Ginsburg's "close review" distinction is mostly ignored in both the *Gratz* and *Grutter* majorities, Roberts' argument here is a rather flippant elision of Stevens and Breyer's[177] insistence in their *Parents Involved* dissents that there is a doctrinally established fundamental difference between exclusionary and inclusionary racial classifications.

Despite this insistence, Stevens and Breyer still operate within a broader paradigm of "race-neutral decisionmaking"[178] that includes their interpretation of *Grutter*. What neither see, therefore, is that even if both are correct that *Grutter* establishes that "only…racial classifications that harmfully exclude" should be presumed under strict scrutiny as "fatal in fact,"[179] the potential for construing *whiteness as a suspect racial classification* (which would mean the Seattle and Jefferson County policies do contain "racial classifications that harmfully exclude" as well as include[180]) is implicitly present in Roberts' explicit doctrinal claims.

This potential is most evident in Roberts' reference to the Ninth Circuit's prior *"Parents Involved VI"* decision against the Seattle School District. As Roberts quotes the Ninth Circuit:

> [T]he tiebreaker's annual effect is thus merely to shuffle a few handfuls of different minority students between a few schools—about a dozen additional Latinos into Ballard [High School], a dozen black students into Nathan Hale, perhaps two dozen Asians into

> Roosevelt, and so on. The District has not met its burden of proving these marginal changes . . . outweigh the cost of subjecting hundreds of students to disparate treatment based solely upon the color of their skin.[181]

The possibility of constituting white students as members of a suspect and harmed class is implicit in the Ninth Circuit's refusal to name those ethnicities that bear the cost of "disparate treatment,"[182] even as it (sarcastically) notes some of those that may benefit from inclusion. The *post-racialization of whiteness* functions as an unspoken warrant to Roberts' doctrinal distinction between "diversity" as a compelling and "racial diversity" as an illegitimate state interest.

Again, Roberts here underwrites an agenda not so much of color-blindness as an aggressively post-racial multiculturalism. Against the reality that, as the NAACP argues as *Amicus Curiae*, "race-neutral" education policies are "anything but,"[183] Roberts lays down a *race-conscious* doctrinal precedent for actively punishing policies that may disadvantage white students, under the guise of the color-blind doctrine that "all racial classifications…must in practice be treated the same" in constitutional judicial review. While Breyer notes that—given the overwhelming number of government procedures based in part on racial classification—Roberts' finding of no compelling state interest is not only doctrinally questionable, but prudentially[184] ridiculous,[185] the decision makes more sense from policy perspective if the real harm the Roberts Court is concerned with is not racial classification per se, but racial classification as a signifier for policies that seek to change the status quo of white supremacy.

This is of course how Critical Race Theorists have historically characterized not the "post-racial" but the "'color-blind constitution.'"[186] As the sociologist Nikhil Pal Singh argues,

> The imperative to be color-blind only makes sense if we assume that to perceive color automatically leads to hierarchies of value. In the United States, only one socially

> significant tradition is built on this assumption: white supremacy. Under the universal, color-blind regime, in other words, we are forced back on an unstated belief in the order of white over black.[187]

In the case of the *Parents Involved* plurality, however, "post-racial" more precisely articulates the ideal world constituted in the Chief Justice's doctrinal arguments. In this world, difference (defined as "diversity") is valued and promoted only in those situations where it does not threaten hierarchies of racial identity in the status quo, and where the existence of racial difference is acknowledged (and even celebrated) *simultaneously with the devaluation of its significance.* While Roberts declares that "the way to stop discrimination on the basis of race is stop discriminating on the basis of race," the constitutional harm Roberts would disallow through the Fourteenth Amendment is not just racial classification (the color-blind position), but the existence of race itself, or more specifically, the significant existence of race outside the normative category of whiteness.

B. Breyer's Dissent

In her *Gratz* dissent, Ginsburg quotes Yale Law Professor Stephen L. Carter at length in support of her rejection of Rehnquist's (and later, Roberts') notion of race itself, in all instances, as a constitutionally verboten classification:

> "To say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppressio[n] is to trivialize the lives and deaths of those who have suffered under racism. To pretend . . . that the issue presented in [*Bakke*] was the same as the issue in [*Brown*] is to pretend that history never happened and that the present doesn't exist."[188] Our jurisprudence ranks race a "suspect" category, "not because [race] is inevitably an impermissible

classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality."[189]

Ginsburg's use of Carter's elegant symploce here effectively delineates the stakes at the boundaries of the precedential genealogy assembled by Breyer in his *Parents Involved* dissent (which Ginsburg joins).

O'Connor's finding of law in *Grutter* relies significantly on the doctrinal argument that established First Amendment law demands a degree of judicial deference to the expertise of public universities in determining education policies most likely to achieve effective education outcomes. But this warrant to O'Connor's *Grutter* holding is entirely silent on the question of race. The *Grutter* Court is deferential to the Law School's stated need for a race-conscious admissions policy because the Law School believes the policy is necessary to a desirable and ultimately purportedly *race-neutral* compelling interest in educational diversity. In Breyer's rhetorically constructed history of Fourteenth Amendment jurisprudence, the "basic objective of those who wrote the Fourteenth Amendment" was "forbidding practices that lead to racial exclusion."[190] In this precedential genealogy (grounded in the voluntary school integration case *Swann v. Charlotte-Mecklenburg Board of Education*[191] and its antecedents) the settled doctrine of not the First Amendment, but rather the *Equal Protection Clause* demands a race-conscious judicial deference to the expert decisions made by public K-12 educational institutions, because these institutions are best placed to craft effective educational policies that resist societal and anti-Constitutional exclusions of racial minorities.[192]

The key passage in Chief Justice Warren E. Burger's April 20, 1971, opinion for a unanimous Court in *Swann* is (along with the *Bakke* and Michigan cases) another core example

of the potential material effectivity of judicial rhetoric, including those "dicta" statements by jurists that are not "a technical holding"[193] of the decisions in which they appear:

> School authorities are traditionally charged with broad power to formulate and implement educational policy, and might well conclude, for example, that, in order to prepare students to live in a pluralistic society, each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. *To do this as an educational policy is within the broad discretionary powers of school authorities*; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court. As with any equity case, the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system.[194]

For thirty-six years (until *Parents Involved*) this one dicta passage in *Swann* was cited as controlling in K-12 school integration doctrine in federal and state courts.[195] The *Swann* decision—and this passage in particular—was also directly inspirational to "hosts of different kinds of...race-conscious plans" school districts around the United States (acting voluntarily, like Seattle; under court order, like pre-*Hampton II* Jefferson County; and after the dissolution of "earlier orders," like post-*Hampton II* Jefferson County) "adopted, modified, and experimented with" toward the common goal of "greater racial integration of public schools."[196]

Breyer does not have the argumentative resources to accuse the Chief Justice of a veiled defense of white supremacy. The rhetorical situation of judicial constitutional rhetoric is fundamentally exclusive of a critique of the Constitution (and especially the Equal Protection Clause of the Fourteenth Amendment) as a document designed to maintain structures of racial

oppression and inequality in the United States.[197] Nonetheless, Breyer, in his uptake of *Swann*, does appear to acknowledge and respond to the racial politics implied in Roberts' public address. In Breyer's reading of the holding in Roberts' plurality opinion in *Parents Involved*, the Chief Justice refutes potential *Swann*-based objections to his conclusions of law in three ways: first, with an attempt to limit the reach of *Swann* to court-ordered desegregation (which Breyer argues is simply an "historically untrue" doctrinal claim);[198] second, by arguing that the *Swann* passage is dicta, and thus not binding on the *Parents Involved* plurality;[199] and third, by arguing that Court rulings subsequent to *Swann*—among them *Grutter v. Bollinger*—stipulate that all racial classifications must be subject to an identical strict scrutiny test, whatever their purpose.[200]

Breyer really rises to the rhetorical occasion to answer Roberts' dicta-claim, insisting that while technically[201] dicta, the *Swann* passage was a rare example of judicial public address with immediate resonance "throughout the Nation." Breyer thereby takes the plurality to task for attempting to obscure a radical ideological agenda behind a disingenuous treatment of juris*prudence* as "an exercise in mathematical logic."[202] Here Breyer argues that the *Swann* passage was so *publicly* influential that it must be treated as irrefutably good doctrine, despite being dicta.

But, more than just good law, Breyer suggests that Burger's paragraph was broadly *constitutive* of U.S. public culture in the aftermath of *Swann*—and constitutive as well of the place and authority of law in the American polity. The key passage in *Swann* was set forth not in "a corner of an obscure opinion or in a footnote, unread but by experts," (as the *Parents Involved* plurality, Breyer is saying, hides its refutation) but rather "prominently in an important opinion joined by all nine Justices, knowing that it would be read and followed throughout the nation."[203] Regardless of authorial intent, I believe that implicit in Breyer's (effectively hopeless) demand

that the plurality "explain to the courts and to the nation why it would abandon [such] guidance...which the law has [subsequently] continuously embodied,"[204] is the leveled charge that the plurality Justices have smugly taken the cowardly step of obscuring a naked white-majoritarian power grab of national scope behind the sophistic dismissal of arguably the most important set of words on race the Court has produced post-*Brown* as (precisely as any bully responds to powerful words they wish to dismiss) *mere rhetoric*.

In Jen Graves' well-circulated article in *The Stranger* ("Deeply Embarrassed White People Talk Awkwardly About Race: Please Don't Stop Reading This Story About Race Just Because You're Not Racist") about *Parents Involved* and the peculiar liberal politics of Seattle racism, Seattle DJ and cultural fixture Riz Rollins[205] declares that "'racist is the new nigger'";[206] meaning that in the language of the *Parents Involved* plurality that is both reflective of and reflected in white cultural discourses about race and racism in Seattle, "racist" is the term used by white people against person of color activists—that is, by white people who would slur and silence resistant racially oppressed voices in a manner acceptable to Seattle's dominant liberal political ideology. For Roberts, not only "racist" but "race" itself is the "'new nigger'"; any claim to race is more likely to be racist than racism itself.

As Carter argues in 1988, this is the claim that the "foe is not the effect of the [racial] categorization, but the categorization itself."[207] One of Carter's great contributions to a critical race understanding of the affirmative action debates (a contribution that appears throughout the jurisprudence of Ruth Bader Ginsburg) is to call out the ultimate ineffectiveness of the temptingly "neat" pro-affirmative action strategy of distinguishing "between stereotypes that are benign and stereotypes that are malign."[208] Carter argues that this distinction is the general form of the more specific judicial rhetorical strategy favored by Ginsburg, Stevens, and Breyer of

"distinguishing laws that affirmatively integrate and laws that affirmatively segregate."[209] For Carter (and as Ginsburg argues eloquently in her *Grutter* concurrence),[210] "what matters" in this judicial framework of the "question at issue"[211] is "rational relation to the holy purpose" of achieving a society free of racial hierarchy and oppression, and thereby of a national interest in rectifying the same. Carter's fear is that all affirmative action opponents have to do in response to this strategy is abandon the proposition that "*Bakke* is *Brown*," in order to shift the terms of the debate away from systemic racial inequalities of opportunity, and toward[212] the policy-destroying tautological logic of Roberts' conclusion in *Parents Involved*.[213]

Carter predicts that the result of this shift will be to enable policymaking more explicitly grounded *in racism* than what is possible even in 1988. Given the opportunity to demonize racial classification *per se*, "the critic of affirmative action programs" will be given the tools to foreclose efforts to stop racism in favor of what they can claim is the more laudable strategy of simply "teaching that racial consciousness is wrong."[214] Carter's prediction has been borne out, with remarkable accuracy, in actual jurisprudence—except that the opponents of affirmative action on the Court have *not* abandoned their position that "*Bakke* is *Brown*." Rather, they maintain this assumed comparison while also eating the cake of framing racial classification *per se* as the only appropriate target of the anti-racist mission of Equal Protection Clause jurisprudence.

Here is the conceptual underpinning of Kennedy's balancing act in his *Grutter* dissent between decrying specific policies that stir up tension via their unnecessary use of the "corrosive category of race," and his simultaneous affirmation, in the same opinions, of the theoretical laudability of future, more narrowly-tailored uses of race to alleviate racism.[215] Given the racial categorization-as-foe framework in which Kennedy operates, it is a simple matter for the

"moderate"[216] Justice to conclude, in each *specific* instance, that the more constitutional and effective anti-racist strategy will be to reject anti-racist policies in favor of the alternative of judicial opposition to racial classification. There nonetheless remains a subtle but materially important (materially important as in implicative of "millions of tiny, individual, racialist decisions...made each day"[217]) judicial rhetorical distinction between the framework of possibility for future policy implicit in the Rehnquist/Scalia/Roberts and O'Connor/Kennedy opinions in *Grutter* and *Parents Involved*.

In the framework of possibility implicit in the judicial rhetoric of John R. Roberts, the application of strict scrutiny to race-conscious attempts to combat racism is a farce that only thinly disguises the white supremacist agenda of the Court, because in the radically regressive doctrinal framework of *Parents Involved*, "'strict scrutiny'" is transformed even beyond its restrictive form in *Grutter* into "a rule that is fatal in fact across the board."[218] In the framework of possibility implicit in the judicial rhetoric of Anthony Kennedy and Sandra Day O'Connor, "racial classification" is at least not quite a *slur*. It is dangerous, "corrosive," a thing to be treated with such reverent caution that Kennedy (and here, the value of the interest convergence between O'Connor's *Grutter* opinion anti-racist political struggle is yet more underscored) seems unable again and again to articulate an example of the constitutionally acceptable race-conscious education policies he says are possible in theory. But despite all of this, "race" in this framework is not automatically and without question synonymous, as it is in Roberts' judicial rhetoric, with "race-baiter." The framework of possibility in Kennedy and O'Connor's judicial rhetoric includes a world in which the adaptive, interest-convergence survival of affirmative action programs is possible, even given the present Court, because the present Court is one in which Kennedy will retain significant influence for the foreseeable future.

IV. Race and Equal Protection in Kennedy's Separate Concurrence

The *Parents Involved* plurality is not blind to race: its attention to race is the implicit doctrinal warrant for a reframing of equal protection[219] as a constitutional defense for normative white power in U.S. politics and culture. Carter's critique of discourses of future solvency in affirmative action debates is well taken, but in closely comparing Kennedy and Roberts' *Parents Involved* opinions, I am also mindful of Patricia J. Williams' distinction between "color-blindness as a legitimate hope for the future" and the "naïveté" of relying on willful color-blindness in the status quo as the policy mechanism to achieve that hope. As Williams summarizes the latter position, "'I don't think about color, therefore your problems don't exist.' If only it were so easy."[220] If the *Parents Involved* plurality is radically post-racial, I read Kennedy's doctrinally significant[221] separate opinion as more simply color-blind.

For Roberts, Seattle and Jefferson County fail both halves of the strict scrutiny test (Breyer's "rule that [for the plurality] is fatal in fact across the board"). Among other reasons, Roberts argues that "the districts have failed to show that they considered methods other than explicit racial classifications to achieve their stated ends," violating *Grutter*'s admonition that "'serious, good faith consideration of workable race-neutral alternatives'" are required for a policy to meet the narrow tailoring requirement.[222] Kennedy concurs with the plurality's "judgment" in the case, but only in part with the plurality opinion. The Justice mostly agrees with Roberts' narrow tailoring analysis—that the policy mechanisms in question were unconstitutional—but not with Roberts' findings as to a lack of compelling state interest.

Kennedy's opening paragraph (which frames[223] the significance of his doctrinal departures from both the plurality and dissents) is emblematic of the tension Williams articulates between the "naïveté" of a color-blind status quo and the common dream of a color-blind future:

> The Nation's schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all…two school districts…seek to teach that principle by having classrooms that reflect the racial makeup of the surrounding community. That the school districts consider these plans to be necessary should remind us our highest aspirations are yet unfulfilled. But the solutions mandated…must themselves be lawful. To make race matter now so that it might not matter later may entrench the very prejudices we seek to overcome…the state-mandated racial classifications at issue…are unconstitutional as the cases now come to us.[224]

Kennedy's arguments here identify and refute the post-racial ideological underpinnings of Roberts' findings with respect to the "compelling state interest" half of the strict scrutiny test. Just as he does in his *Grutter* dissent, Kennedy frames racial difference here as significant not only for its potential future role in a de-racialized multiculturalism, but also for its status quo implication in racism.

Kennedy's refutation of the doctrinal holdings in the *Parents Involved* plurality and Thomas concurrence also parallel Williams in decisively rejecting Roberts' post-racial axiom:

> The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.[225]

For Roberts and in particular for Thomas,[226] the "color-blind Constitution" functions as the basis from which to articulate a constitutional articulation of post-racial ideology. Thomas somewhat famously[227] declares in his concurrence that "my view of the Constitution is Justice Harlan's

view" in Harlan's lone[228] dissent in *Plessy v. Ferguson*: "'our Constitution is color-blind, and neither knows nor tolerates classes among its citizens.'"[229] Kennedy's rejection of the doctrinal significance of this quotation follows Williams's urge for us to "be careful not to allow our intentions to verge into outright projection." Because the *Plessy* majority instantiated the "separate but equal" doctrine in affirming a racist law demarcating blacks and whites into separate train cars,[230] Harlan's dissent was not a statement as to how U.S. law and society *does* but rather *should* operate. Kennedy insists that doctrinally, Harlan's "axiom" is a required constitutional "aspiration" that nonetheless cannot be regarded as "universal constitutional principle."[231] In this moment, Kennedy appears to distance himself from decades of color-blind precedent, produced through the persistent constitutional rejection (outside the *Swann* context of public school integration policy) of the voluntary efforts of local governments to recognize and attempt to alleviate through law the reality that racial discrimination is not past but "persistent" in its detriment to minorities, and in its conference of continued racial advantage upon whites.[232]

Nonetheless, Kennedy's diction at the beginning of his decision is strikingly race value-neutral—so much so that it rhetorically underwrites "color-blind" doctrine. The opening paragraph lays the groundwork for his finding, contra-Roberts, that racial diversity is a "compelling state interest," but Kennedy does not use the phrase "racial diversity" at any point in his opinion. Instead, Kennedy says obtusely that "the dissent finds that the school districts have identified a compelling interest in increasing diversity, even for racial isolation," and that because the plurality does not acknowledge this interest, he cannot join the plurality.[233] Even as Kennedy rejects Roberts' dismissal of the racial diversity as a legitimate goal, he grammatically avoids articulating his own affirmative defense of concern for the same. The doctrinal effect is that when Kennedy says that "diversity, depending on its meaning and definition, is a compelling

educational goal a school district may pursue," the Justice *enables* but does not prescribe, as the *Swann* Court and Breyer's *Parents Involved* dissent do, a finding of constitutional legitimacy for policies primarily or solely designed to increase racial diversity.[234]

Here Carter's prescience once again looms large. The harm of racial segregation as Kennedy describes it sounds more like a failure on the part of educators to reveal the reality of our presently color-blind nation, rather than the need to enact structural change to achieve the dream of a color-blind future.[235] Kennedy says that racial diversity is necessary to "teach the principle that our strength comes…from uniting," in the present tense, and the Justice presents "diversity of race" as only one of three necessary components for this educational project.[236] In Kennedy's United States, it is not racial "hierarchies of value,"[237] but "prejudice" that "we seek to overcome";[238] prejudice might be foundational to such hierarchies, or it could simply function to obscure a person's ability to see that racial hierarchies of value are no longer extant or relevant in our "exemplary"[239] society.

Kennedy's juxtaposition of "the enduring hope…that race should not matter" with the "reality…that too often it does"[240] still occurs within the context of what Williams calls a "self-congratulatory stance of preached universalism" that allows the Court to "indulge in the false luxury of a prematurely imagined community."[241] Supreme Court rhetoric must as a question of duty valorize the Constitution, but there is a difference between a Justice framing on the one hand: (as Justice Harold Blackmun does in his 1989 *Richmond v. J.A. Croson Company* dissent, and as Kennedy does in *Lawrence v. Texas*) "the great promises of the Constitution's preamble and of the guarantees embodied in the Bill of Rights" as dreams of a future that have been actively repudiated throughout much of our history;[242] and on the other (as Kennedy does in *Parents Involved*), those same "great promises" as inherent in "our Nation" which "from [its]

inception has sought to preserve and expand the promise of liberty and equality on which it was founded."[243] The United States is a country founded on slavery and genocide, "driven by bitter histories of imposed hierarchy,"[244] but Kennedy (unsurprisingly) enacts a vision of a United States exceptional in its equality whose injustices are aberrant flaws to be rectified. If Roberts' racial ideology is color-blind, but more specifically post-racial, Kennedy's is less post-racial, but more historically and traditionally color-blind.

Singh's use of the phrase "color-blind" suggests that color-blind and post-racial ideology are indistinct. Nonetheless, for Williams, unlike Singh, the "imperative to be color-blind" certainly makes sense if one is interested in the realization of a genuinely just, free, and pluralistic society. My analysis of Roberts' opinion for the plurality demonstrates that the racial ideology Singh describes is more productively labeled "post-racial," a question of diction that also explicates the difference between Singh's and Williams's characterizations of the racist status quo. The important distinction here is that while Kennedy may constitute a color-blind politics that consistently fail to challenge white supremacy, that failure is, following Williams, a tactical one (albeit one that, given Kennedy's history of such 'tactical' failure, functions on a strategic level). In the ideal world of the Roberts Court, the failure to challenge racial "hierarchies of value" is the evident *goal*.

Kennedy, like Roberts, strikes down two voluntary attempts on the part of school officials to address institutionally protected economies of white privilege plaguing their communities. Kennedy, like Roberts, finds that it does not matter for the purposes of applying strict scrutiny whether the use of racial classification is designed to include or exclude minorities.[245] Kennedy, like Roberts, finds that the mechanisms the school districts have implemented are not "narrowly tailored" to their goals.[246] And like Roberts, Kennedy

determines that a primary reason for the failure of the narrow tailoring half of the strict scrutiny test is what he views as the inexplicable and indefensible division of race (on the part of the Seattle School District) into the categories "white" and "non-white."[247] When I say that Kennedy's failure is tactical, I do not mean it is politically or morally insignificant. Kennedy's opinion at once preserves the future ability of the Equal Protection Clause to protect efforts to alleviate racism, and ensures that such protection will be basically worthless in a United States context where the failure to implicate whiteness as a racial category unique in its universal, legally codified privilege[248] is a primary reason why just efforts to truly achieve a color-blind future "are so often doomed to frustration."[249]

In the near future, Kennedy's and Roberts' opinions will have the same effect; Kennedy's defense of a more traditionally color-blind position against the pernicious post-racial ideology of the plurality and Thomas' concurrence did not—I can only surmise—do much to comfort the respondents in *Parents Involved*. It certainly did not bring much comfort to the City of Seattle, where "segregation across Seattle Schools is worse than it was in the 1980s."[250] Kennedy, concurring with Roberts, may decry the "white/non-white" basis of the Seattle allocation policy's racial classification as puzzlingly anti-pluralist, but as Jen Graves eloquently argues in *The Stranger*, "[it is] not that racial experience is monolithic. It's not black and white. But it's *real*. And across all measurable strata, white people in Seattle have it better [than everyone else]."[251]

The Court has granted certiorari in the next school integration case, *Fisher v. University of Texas at Austin*,[252] which will probably be decided in favor of the white petitioner according to the precedent laid out by the *Parents Involved* plurality.[253] Such an outcome is likely, however, as much because Roberts will still be the Chief Justice, and because Thomas, Scalia,

and Alito will still vote with him, as it is for any forcible reason of precedent. Kennedy's *Parents Involved* opinion would provide him with at least some basis in *stare decisis* to determine that the University of Texas at Austin admissions policy is finally[254] the one that meets his exacting narrow tailoring requirements. But as the constitutional law Professor Erwin Chemerinsky points out, Kennedy has "never voted to uphold an affirmative action program."[255] Even if Kennedy decides to attempt a majority in favor of the respondents (a prospect complicated also by Justice Elena Kagan's recusal from the case[256]), a *Fisher* decided for the respondents, regardless of who wrote the opinion, would go no farther than *Grutter* in its defense of racial classification for the purpose of minority inclusion. And, because of its different context of higher education admissions, it would do little to repair the damage wrought to *Swann* by the *Parents Involved* plurality.

The potential difference between a *Fisher* decision grounded in Kennedy or Roberts' *Parents Involved* opinions is nonetheless significant—even if both possible opinions, as is likely, would hold for the Plaintiffs. Adam Liptak, the Court reporter for the *Times*, declares "diversity is the last man standing, the sole remaining legal justification for racial preferences in deciding who can study at public universities."[257] In a *Fisher* decided for the Plaintiffs, the opinion that gains the most votes—that is, Kennedy's or Roberts'—will determine which of three very different outcomes is realized: diversity remaining upright as a post-racial "man," diversity remaining upright as a "man" in a world of unfortunately present racial significance who is generally blind to his own, and of diversity being knocked down from recognized constitutional existence altogether.

Just as O'Connor's highly limiting *Grutter* opinion is an important example of "interest convergence," so too is Kennedy's even more limiting opinion in *Parents Involved*. Kennedy's

argumentative choices in *Parents Involved* can be read as invitations for a future Court more inclined to, as Blackmun pleads in *Croson*, stop its present regression and "do its best to fulfill the great promises" of the Constitution.[258] The political constitution of the Court will change. The manner in which it does so can be influenced by social movements grounded in progressive identity politics,[259] but future judges will continue to be argumentatively and politically constrained by the range of possible interpretation of constitutional precedent laid down in previous judicial opinion. Not all opinions are equal in *stare decisis*. If his opinion accomplishes no other good, Kennedy's refusal to join Roberts in *Parents Involved* at least undermines the plurality's future credibility by preventing a majority.[260] Future post-Roberts Courts, if they are so inclined, will have the ready option of choosing to find Kennedy's *Parents Involved* analysis more controlling on a school integration or related cases than the plurality's—or even, because of the relative weakness of a plurality opinion—a weakness created entirely by Kennedy's decision to write separately—choosing to repudiate Roberts' radical white-power grab in a re-affirmation of Burger's unanimous opinion for the Court in *Swann*.

This may not mean anything more than that Kennedy allows for a future Equal Protection Clause that is color-blind rather than post-racial, but such a perspective may give too much weight to the iconic significance of individual opinions, read as whole cloth. As Kennedy argues in *Parents Involved*, there can and should be "rare instances" in which a Court can draw on arguments from separate, non-majority opinions to more credibly "maintain our own positions in the face of *stare decisis* when fundamental points of doctrine are at stake."[261] The implication (unlikely, but present) is that Kennedy may have reconsidered his concurrence with much of Roberts' application of strict scrutiny if the *Parents Involved* dissents had relied on "separate opinions" rather than on the *Gratz* and *Grutter* majorities.[262]

Stevens, in fact, does rely on some of these separate opinions, which is perhaps why when Kennedy refers to "the dissent," he means "Breyer's dissenting opinion,"[263] functionally excluding Stevens from his consideration. As Stevens argues, "the [plurality's] only justification for refusing to acknowledge the obvious importance" of the difference between minority inclusion and exclusion in determining the application of *stare decisis* "is the citation of a few recent opinions—none of which even approached unanimity."[264] Stevens' argument here is an excellent example of the questionable impact the Roberts plurality will have on precedent in a circumstance where the Chief Justice no longer controls the majority of the Court.

More importantly, Stevens—and ironically, Thomas's confident invocation of Harlan's dissent in *Plessy*—provides a template for the possibility that some of Kennedy's arguments and not others may be effectively sutured into a broader judicial "text" from which a future Court may derive a doctrinal basis for interpreting the Equal Protection Clause on the basis of neither color-blind nor post-racial ideology. But my argument here is not that Kennedy's framing arguments in his *Parents Involved* opinion should be read as components of a possible future constitutional meta-text *about race*. Rather, the particular way that Kennedy frames the relationship between the Equal Protection Clause and the subjectivity of petitioners to the Court so as to distinguish himself from Roberts' post-racial position in *Parents Involved* suggests a different meta-text—one that constitutes the possibility of a post-racially queer subject of Fourteenth Amendment jurisprudence.

V. *Parents Involved*, *Romer*, and *Lawrence*

Kennedy's opinion in *Lawrence* offers a future vision of constitutional law that could be aligned in favor of a Constitution standing as a "perhaps even forever unknowable"[265] legal resource for the struggle against violently heteronormative oppression. I have discussed David L.

Eng's argument about the relationship between Kennedy's due process arguments and the "racialization of intimacy"; here I want to begin this section by turning to Jasbir K. Puar's related critique, articulated through the metaphor of "racist and nationalist queer liberal imaginaries" "[sneaking] in through the backdoor" of the decision.[266] Puar focuses in part on the "silences" in both the decision and popular and critical responses to it around the "symbolic economy of [the] interracial pair" (Lawrence and Garner) who are the plaintiffs in *Lawrence*. These silences demonstrate for Puar the multiple ways in which the decision participates in and is productive of the "either/or logic that endlessly produces racialized subjects as heterosexual and gay subjects as white,"[267] as well as ongoing discursive politics of anti-miscegenation that persist in both hetero and homosexual communities in the United States.[268]

The same passage that I identify in Chapter One as central to my claims regarding Kennedy's framing of due process—the penultimate paragraph in his *Lawrence* majority—is also exemplary of Puar and Eng's "queer liberal" imaginary:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[269]

Just as I argue in Chapter One for the temporary "bracketing" of those aspects of Kennedy's doctrinal arguments that rely on liberal, anti-radical valuations of privacy, so I suggest here that parts of Kennedy's opinion (and not others) still suggest the difficult possibility of a Constitution

protective of not a liberal, but radically nominalist or anti-essentialist, queer "subject before the law."[270] I maintain this argument partly because (as I note previously) the history of the Due Process Clauses—especially the Fifth Amendment version—is not fundamentally implicated in the peculiar racial history of the Fourteenth Amendment. Due process protections do not require any statist demarcation and valuation of identity categories; the radical potential of due process jurisprudence is inherent in precisely what Mohr identifies as its its apparent relative lack of utility for mainstream liberal queer agendas.

Nonetheless, the optimistic reading I offer, as a component of radical queer knowledge of Fourteenth Amendment rhetoric, of a possible future for radical queer subjectivities constituted in substantive due process rhetoric is, if not foundationally naturalized as white, at least racialized in the sense that the *racialized* components of these possible subjectivities position are occluded in the rhetoric through which it is produced. Kennedy's meta-framing of substantive due process in *Lawrence*, and his more explicitly doctrinal framing of his equal protection arguments in *Parents Involved*, can be read and interpreted as independently significant fragments of the whole opinions of which they are a part. But they are also vital components of a Kennedy Fourteenth Amendment text, linked both sideways and linearly across time and precedent, whose potential for radical queer politics is grounded in an implicit idea of a post-racial queer legal subject.

The absence of an explicit suspect classification argument in Roberts' and similar applications of strict scrutiny to affirmative action and other school integration programs does not mean that these applications do not rely argumentatively on an *implicit warrant* of suspect classification. In his treatise *Constitutional Law*, Chemerinsky argues that "no topic in constitutional law is more controversial than affirmative action,"[271] primarily because of the

fraught doctrinal history in determining how scrutiny should be applied in cases of minority inclusion. Indeed, Sandra Day O'Connor's opinion for the Court in *Croson*[272] (read against Blackmun's dissent) shows, in light of my arguments about Roberts and post-racial ideology, that the *Parents Involved* plurality is not the first, but rather the most radical and far-reaching (especially in its specific destruction of *Swann*) articulation—as Puar says, silently "floating upon" the explicit doctrinal arguments—of a white racialized subject as a suspect class.

In *Lawrence v. Texas*, both Kennedy's and O'Connor's opinions rely on liberal valuations of privacy and individual liberty that are problematic to radical queer politics, but given the choice between the two, Kennedy's is preferable from a radical queer standpoint. School integration policies will be inevitably subject to Supreme Court review for the foreseeable future. Given the choice, advocates for addressing racial disparity in schools through the "candid" method of "direct assignments based on student racial classifications"[273] should pick Stevens's—and parts of Breyer's—dissent as their constitutional defense. The more realistic decision for courts in the near future, however, will be the *Parents Involved* plurality or the *Parents Involved* Kennedy, and Kennedy is clearly preferable. The problem is that both of these least worst choices—between Kennedy and O'Connor's opinions in *Lawrence*, and between Kennedy and Roberts's opinions in *Parents Involved*—are articulated here in isolation: when read together as an assemblage of Fourteenth Amendment discourse, Kennedy's framing of due process in *Lawrence* and equal protection in *Parents Involved* become more ideologically insidious from the perspective of queer of color politics.

Kennedy's framing of the relationship between equal protection jurisprudence and subjectivity before the law is strikingly similar to his due process rhetoric in *Lawrence:*

And if this [the idea that if race is the problem, race is the instrument with which to solve

> it cannot be accepted as an analytical leap forward] is a frustrating duality of the Equal Protection Clause it simply reflects the duality of our history and our attempts to promote freedom in a world that sometimes seems set against it. Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin.[274]

If Kennedy's particular framing of due process in *Lawrence* suggests a Constitution that may eventually be available to the demands of queer "subjects before the law" without the restrictions inherent in "equality model" requirements of essentialist definition and fixed subordinate identity, his similar framing of an ideal mode of interpretation for the Equal Protection Clause in *Parents Involved* renders that queer subject radical, even poststructural, but also post-racial. The imperative to avoid policies that might constitute a petitioner's racial identity suggests that the post-racial mutability, and radical queer mutability of identity in Kennedy's Fourteenth Amendment rhetoric are inextricably linked.

In *Parents Involved*, Kennedy argues that the Equal Protection Clause should be read in a similar light as his (at once originalist[275] and loosely-constructivist) valorization in *Lawrence* of the Due Process Clauses' lack of specificity. Those who designed both clauses intended their meaning to change over time. But in *Parents Involved* (responding to Breyer's claims as to the original reasons for ratifying the Fourteenth Amendment), the Justice evacuates rather than evokes the originalist significance of the framer's intent, calling for a broad mode of equal protection jurisprudence that aligns the Equal Protection Clause toward a future apart from its unfortunately necessary role in our sordid racist *history*. For Kennedy, just as the Due Process Clauses should not be applied restrictively because our inherently limited jurisprudence has failed to conceive of all legitimate permutations of identity and relationship, so should the Equal

Protection Clause be protected as a resource for self-constitution through the Constitution, rather than maintained as a barrier to each individual's quest to locate their own subjectivity vis-à-vis our "exemplary"[276] polity. Here Kennedy's insistence on a color-blind politics that still recognize the necessity of anti-racist action is predicated on his framing of the Equal Protection Clause as presently enabling a post-racial legal subjectivity.

The similarity between Kennedy's framing of due process and equal protection in two opinions four years apart is no aberration; the Justice who is (erroneously, I think) known to many for his changeable and overly rhetorical legal character[277] has been remarkably consistent in his nominalist framing of both equal protection and due process. Kennedy begins his opinion in *Romer v. Evans* (517 U.S. 620, 1996),[1] with the declaration that:

> One century ago, the first Justice Harlan admonished this Court [in his *Plessy* dissent] 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.[278]

For Kennedy, the neutrality of Equal Protection in *Romer* primarily concerns the question of government *interest*, while the neutrality of equal protection in *Parents Involved* primarily concerns the best way to narrowly tailor a race-conscious policy toward the dream of a heterogeneous society free of racial oppression. As I argue above, one of the most progressive moments in *Parents Involved* is Kennedy's rejection of Thomas' framing of Harlan's axiom that,

[1] The decision struck down Amendment 2 to the Colorado State Constitution: "'No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.'" CO Const. Art. II, § 30b., 1992.

again, "'our Constitution is color-blind, and neither knows nor tolerates classes among its citizens.'"[279] In *Romer*, Kennedy cites the same passage from the *Plessy* dissent, except that he chops off the axiom that "our Constitution is color-blind." In *Parents Involved*, Kennedy ostensibly seeks to preserve the Equal Protection Clause from those who would wield it for the purpose of harmful discrimination. But in *Romer*, he tellingly does not seem to consider Harlan's dictate as to color-blindness useful to a finding about sexual-identity discrimination. In other words, *Romer*'s uptake of Harlan's dissent is color-blind in precisely the way that Kennedy rejects in his refutation of Thomas' *Parents Involved* concurrence.

Kennedy goes on to argue in *Romer* that "it is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."[280] This statement, combined with his more doctrinally famous[281] declaration that "[the amendment's] sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests," seems to presage Kennedy's sweeping interpretation of the scope of the Due Process Clauses in *Lawrence*, as well as his statement in *Parents Involved* that "under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin." In both *Romer* and *Lawrence*,[282] however, Kennedy finds no need to apply heightened scrutiny to the statutes under review; it is enough that they, remarkably,[283] fail to survive even the rational basis test.

Kennedy's spirited defense of the application of strict scrutiny in *Parents Involved* is no more than consistent with his arguments in *Grutter*, and with the long-standing "conservative"

treatment of the test with respect to race on the Rehnquist and Roberts Courts. But when Kennedy's *Parents Involved* opinion is considered along with *Romer* and *Lawrence* as a component of his *meta*-Fourteenth Amendment rhetoric, the contrast between the levels of scrutiny in *Parents Involved*, and *Romer* and *Lawrence* is striking. Read together as fragments comprising a whole doctrinal text, Kennedy's arguments in *Romer*, *Lawrence*, and *Parents Involved* imagine a "living Constitution"[284] where the Due Process Clauses are available to queer subjects unfettered by statist definition, and where the Equal Protection Clause, simultaneously, is prevented except in the most specific and remarkable instances from being used as a tool to maintain the validity of state *recognized* classifications.

I say state "recognized" to emphasize the post-racial ideology inherent in Kennedy's declaration that "racial labels" are "state-mandated" even in the case of the Seattle and Jefferson County policies, but when taken separately, these interpretations of due process and equal protection seem positive from a radical queer perspective only if that perspective is foundationally *independent* of race. On its own, Kennedy's opinion in *Parents Involved* is a "color-blind" check against the post-racial politics of Roberts' plurality opinion. On its own, Kennedy's substantive framing of equal protection and due process in *Lawrence* is productive of latent possibilities for radical queer of color politics in U.S. judicial rhetoric. When taken together, as parts of a coherent whole, these opinions as an assemblage of Kennedy's Fourteenth Amendment rhetoric constitute a subject before the law whose post-raciality is essential to the radical legibility of her queerness.

VI. Conclusion: Post-Racial Queer

By taking up these opinions and fragments of legal discourse in terms of their relationship to one another not only through doctrinal argument from precedent, but also their

implication through: ideology; synthesis and antithesis; and mutual uptake and elision; I attempt to examine the ways in which doctrinal arguments about race and sexuality are each productive of and implicated in the other—and also, more directly, *are each the other*. The "post-racially queer subject" is a critical formulation; it is also a further development of my argument as to the demarcated range of identities that might successfully look to the present and future Court for recognition, access, and protection under and through the presently inevitable fantasy of U.S. constitutional sovereignty. Roberts and Kennedy might often be described as "conservative" and "moderate," but the "collocation"[285] of various doctrinal arguments through which Kennedy frames his application of due process and equal protection arguments offers a more useful distinction—from a queer of color perspective—between the Court's leading "conservative" and "swing" Justices. Read through the assembled collocation of Kennedy's Fourteenth Amendment rhetoric, the latent possibility of a radical queer subject of Kennedy's Fourteenth Amendment is dependent on the unspoken idea of the post-racial queer.

By "post-racial queer subject" I mean, finally, a radically nominalist form of sexualized subjectivity that retains a judicially recognized imperative to seek the protection of U.S. constitutional sovereignty, against ongoing statutory, institutional, and other valences of anti-queer oppression. Furthermore, persons articulated through this form of subjectivity will be permitted to stand before the law as who they claim to be, with the understanding that the law's judicial representatives will accept the nature of this claim, and that furthermore this claim of *particular* being is not a necessary component of a successful petition for judicial protection. This radical queer subject, therefore, will not only be free of the requirement to self-define and describe via the legal sovereign's own oppressively single-axis "framework for difference"—it will also be permitted to approach the law via an explicit repudiation of that framework, and to

demand judicial institutional recognition of that repudiation as a component of the judiciary's own argumentative re-legitimation of its sovereignty. This is the potential for a radical queer subject-before-law that I see in Kennedy's meta-argumentative framing of substantive due process in *Lawrence*. When I say, based on my reading of Kennedy's arguments in *Romer* and *Parents Involved*, that this radical potential depends on the idea of a post-racial queer legal subject, I mean Kennedy's meta-text suggests that the condition that must be met for a radical queer legal subjectivity is the acceptance of the present and future of a post-racial society. In the constitutive judicial rhetorical framework of Kennedy's meta-textual Fourteenth Amendment, the mutability and freedom of the radical queer subject-before-law is a condition of—is made possible through—her radical post-raciality.

This racialized (where race is abject) queer subject position suggested in Kennedy's due process and equal protection rhetoric is not grounded in a homogeneous, white-normative assumption of identity, but is rather a whole constituted out of fragments of at once radical and conservative possibility. This is cold comfort, but given the presently inevitable significance of Chief Justice Roberts' Supreme Court, Kennedy may be all the comfort to be had. The task of a queer of color legal rhetoric vis-à-vis Kennedy's Fourteenth Amendment is thus to critically seek out what possibilities for queer futures there may be on the Court, working always from the assumption that these futures will have the inherent potential for both the dual production and dual foreclosure of possibilities for radically progressive jurisprudence.

Notes to Chapter Two:

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[1] Jen Graves, "Deeply Embarrassed White People Talk Awkwardly About Race: Please Don't Stop Reading This Story About Race Just Because You're Not Racist," *The Stranger* (August 30, 2011), http://www.thestranger.com/seattle/deeply-embarrassed-white-people-talk-awkwardly-about-race/Content?oid=9747101.

[2] Terry Threadgold, *Feminist Poetics: Poiesis, Performance, Histories* (New York and London: Routledge, 1997 & 2002), 102.

[3] Peter Odell Campbell, "The Procedural Queer: Substantive Due Process, *Lawrence v. Texas*, and Queer Rhetorical Futures," *Quarterly Journal of Speech* 98, 2 (May 2012): 218-219.
[4] David L. Eng, *The Feeling of Kinship: Queer Liberalism and the Racialization of Intimacy* (Durham: Duke University Press, 2010), Kindle Edition, introduction, ch. 1.
[5] Eng, *The Feeling of Kinship*, Kindle Edition, ch. 1.
[6] Kimberlé Crenshaw, "Demarginalazing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," *The University of Chicago Legal Forum* (1989): 139.
[7] Crenshaw, "Demarginalizing the Intersection of Race and Sex," 140, 145.
[8] Janet E. Halley, "Like Race Arguments," *What's Left of Theory?: New Work on the Politics of Literary Theory*, ed. Judith Butler, John Guillory, and Kendall Thomas (New York and London: Routledge, 2000), 67, in Eng, *The Feeling of Kinship*, Kindle Edition, ch. 1.
[9] Halley, "Like Race Arguments," 67.
[10] Halley, "Like Race Arguments," 67-68.
[11] Halley, "Like Race Arguments," 67-68.
[12] Butler, "Preface 1999," viii.
[13] Siobhan B. Somerville, "Queer *Loving*," *GLQ: A Journal of Lesbian and Gay Studies* 11 (2005): 337 (see also 357-358).
[14] Center for Individual Rights, "Ending Racial Double Standards: CIR's Lawsuits against the University of Michigan," *The Center for Individual Rights* (March 23, 2010), http://www.cir-usa.org/cases/michigan.html.
[15] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).
[16] Opinion of O'Connor, J., *Grutter v. Bollinger*, 539 U.S. 306, 539 U.S. ___ (June 23, 2003): 10-11, available at available at http://www.law.cornell.edu/supct/pdf/02-241P.ZO.
[17] Francis J. Mootz III, *Rhetorical Knowledge in Legal Practice and Critical Legal Theory* (Tuscaloosa: The University of Alabama Press, 2006), 74.
[18] Erwin Chemerinsky, *Constitutional Law*, Third Edition (New York: Aspen Publishers, 2009), 847.
[19] Opinion of Sparks, District Judge, *Fisher v. University of Texas at Austin (Fisher I)*, 645 F. Supp. 2d 587 (W.D. Tex. 2009): 593-599; Derrick A. Bell, *Silent Covenants:* Brown v. Board of Education *and the Unfulfilled Hopes for Racial Reform* (Oxford and New York: Oxford University Press, 2004), 146-149, 158-159.
[20] Opinion of Rehnquist, C.J., *Gratz v. Bollinger*, 539 U.S. 244, 539 U.S. ___ (June 23, 2003): 27, available at http://www.law.cornell.edu/supct/pdf/02-516P.ZO.
[21] Rehnquist, *Gratz v. Bollinger*, 27.
[22] Rehnquist, *Gratz v. Bollinger*, 22; Bell, *Silent Covenants*, 148.
[23] O'Connor, J., *Grutter v. Bollinger*, 16, 22, 31-32.
[24] Rehnquist, C.J., dissenting, *Grutter v. Bollinger*, 539 U.S. 306, 539 U.S. ___ (June 23, 2003): 1-4, 8-10, available at http://www.law.cornell.edu/supct/pdf/02-241P.ZD.
[25] Rehnquist, *Gratz v. Bollinger*, 1: "we granted certiorari in this case to decide whether the University of Michigan's use of racial preferences in undergraduate admissions violate[s] the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil
Rights Act of 1964 (42 U. S. C. § 2000d), or 42 U. S. C. §1981."
[26] Brief for the Petitioners, *Gratz v. Bollinger*, 2002 U.S. Briefs 516 (January 16, 2003): 13-14, 16-18.
[27] Lloyd F. Bitzer, "The Rhetorical Situation," *Contemporary Rhetorical Theory: A Reader*, ed. John Louis Lucaites, Celeste Michelle Condit, and Sally Caudill (New York: The Guilford Press, 1999), 219. "Let us regard rhetorical situation as a natural context of persons, events, objects, relations, and an exigence which strongly invites utterance."
[28] O'Connor, *Grutter v. Bollinger*, 9.
[29] See for example Ryan C. Black and Ryan J. Owens, "Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence," *The Journal of Politics* 71 (July 2009): 1062-1072.
[30] O'Connor, *Grutter v. Bollinger*, 9.
[31] Black and Owens, "Agenda Setting in the Supreme Court," 1067.
[32] Mootz, *Rhetorical Knowledge*, 74.
[33] Mootz, *Rhetorical Knowledge*, 75.
[34] Bell, *Silent Covenants*, 159.
[35] O'Connor, *Grutter v. Bollinger*, 31; Thomas, *Grutter v. Bollinger*, 8.
[36] Opinion of Thomas, J., concurring in part and dissenting in part, *Grutter v. Bollinger*, 539 U.S. 306, 539 U.S. ___ (June 23, 2003): 8, available at http://www.law.cornell.edu/supct/pdf/02-241P.ZX1.

[37] Thomas, J., concurring, *Gratz v. Bollinger*, 539 U.S. 244, 539 U.S. ___ (June 23, 2003): 1-2, available at http://www.law.cornell.edu/supct/pdf/02-516P.ZC1; Breyer, J., concurring in judgment, *Gratz v. Bollinger*, 539 U.S. 244, 539 U.S. ___ (June 23, 2003): 1, available at http://www.law.cornell.edu/supct/pdf/02-516P.ZC2; Kennedy, J., dissenting, *Grutter v. Bollinger*, 539 U.S. 306, 539 U.S. ___ (June 23, 2003): 2-3, 9, available at http://www.law.cornell.edu/supct/pdf/02-241P.ZD1; Rehnquist, *Grutter v. Bollinger*, 1-4, 8-10.
[38] Mootz, *Rhetorical Knowledge*, 107; see also 109: "the law is not a resource for making decisions when disputes arise, but rather is the activity of framing disputes and then making judgments"; and Campbell, "The Procedural Queer," 206, citing Mootz at 107 and 109 (206n42 and n43): "the procedural arguments of jurists are significant not only for the literal implications of a court's ultimate judgment, but for the way in which a jurist's legal procedural argumentative choices set the frame through which ultimate judgment will be made on the statute or practice in question."
[39] Mootz, *Rhetorical Knowledge*, 107.
[40] Kennedy, *Grutter v. Bollinger*, 2-3, 9; Rehnquist, *Grutter v. Bollinger*, 1-4, 8-10.
[41] O'Connor, *Grutter v. Bollinger*, 13.
[42] Rehnquist, *Grutter v. Bollinger*, 9-10.
[43] Kennedy, *Grutter v. Bollinger*, 9.
[44] Rehnquist, *Grutter v. Bollinger*, 2-3, 10; Kennedy, *Grutter v. Bollinger*, 2.
[45] O'Connor, *Grutter v. Bollinger*, 15; Kennedy, *Grutter v. Bollinger*, 2.
[46] Rehnquist, *Grutter v. Bollinger*, 2, quoting O'Connor, *Grutter v. Bollinger*, 15.
[47] Brief for Respondents, *Grutter v. Bollinger*, 2002 U.S. Briefs 241 (February 18, 2003): i, in O'Connor, *Grutter v. Bollinger*, 15; Rehnquist, *Grutter v. Bollinger*, 2-3.
[48] Kennedy, *Grutter v. Bollinger*, 2.
[49] Kennedy, *Grutter v. Bollinger*, 2-3 (emphasis added): "the majority *fails to confront the reality* of how the Law School's admissions policy is implemented. The dissenting opinion by the Chief Justice, which I join in full, demonstrates beyond question why the concept of critical mass is a *delusion* used by the Law School to mask its attempt to make race an automatic factor...and to achieve numerical goals indistinguishable from quotas;" Rehnquist, *Grutter v. Bollinger*, 1: "stripped of its 'critical mass' viel, the Law School's program is revealed as a naked effort to achieve racial balancing;" and 5-6: "the Law School's...alleged goal of 'critical mass' is simply a sham;" Opinion of Scalia, J., concurring in part and dissenting in part, *Grutter v. Bollinger*, 539 U.S. 306, 539 U.S. ___ (June 23, 2003): 1, available at http://www.law.cornell.edu/supct/pdf/02-241P.ZX.
[50] Rehnquist, *Grutter v. Bollinger*, 6, quoting O'Connor, *Grutter v. Bollinger*, 17; Kennedy, *Grutter v. Bollinger*, 3.
[51] Mootz, *Rhetorical Knowledge*, 107.
[52] Scalia, *Grutter v. Bollinger*, 1.
[53] Kennedy, *Grutter v. Bollinger*, 7.
[54] Philip Bobbitt, *Constitutional Interpretation* (Oxford: Blackwell Publishing, 1991), 12-13, 18, 20-22.
[55] Thomas' phrase for 'not dicta.' Thomas, *Grutter v. Bollinger*, 8, citing O'Connor, *Grutter v. Bollinger*, 21: "a close reading of the Court's opinion reveals that all of its legal work is done through one conclusory statement: the Law School has a 'compelling interest in securing the educational benefits of a diverse student body.'"
[56] See for example Kenneth Murchison, "Four Terms of the Kennedy Court: Projecting the Future of Constitutional Doctrine," *University of Baltimore Law Review* 39, 1 (Fall 2009): 1-2.
[57] Ginsburg, J., dissenting, *Gratz v. Bollinger*, 539 U.S. 244, 539 U.S. ___ (June 23, 2003): 1-5, available at http://www.law.cornell.edu/supct/pdf/02-516P.ZD2; Breyer, *Gratz v. Bollinger*, 1.
[58] O'Connor, *Grutter v. Bollinger*, 16-18.
[59] O'Connor, *Grutter v. Bollinger*, 17.
[60] O'Connor, *Grutter v. Bollinger*, 17.
[61] O'Connor, *Grutter v. Bollinger*, 17, citing Brief for Respondents, *Grutter v. Bollinger*, 13.
[62] Kennedy, *Grutter v. Bollinger*, 7.
[63] O'Connor, *Grutter v. Bollinger*, 23, citing Opinion of Powell, J., *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978): 323.
[64] O'Connor, *Grutter v. Bollinger*, 23-24.
[65] Mootz, *Rhetorical Knowledge*, 71-72.
[66] O'Connor, *Grutter v. Bollinger*, 22.
[67] Thomas, *Grutter v. Bollinger*, 6-7, 10-18.

[68] O'Connor, *Grutter v. Bollinger*, 16: "our scrutiny of the interest asserted by the law school is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university."
[69] Thomas, *Grutter v. Bollinger*, 3-5.
[70] Thomas, *Grutter v. Bollinger*, 7-8.
[71] Thomas, *Grutter v. Bollinger*, 7-8, 9; Bell, *Silent Covenants*, 152-153, 156-158; Mootz, *Rhetorical Knowledge*, 71-72.
[72] Mootz, *Rhetorical Knowledge*, 107.
[73] Bell, *Silent Covenants*, 151, 157-159.
[74] Dahlia Lithwick, "Affirmative Inaction: Anthony Kennedy is sort of Horrified by Voluntary School Desegregation," *Slate Supreme Court Dispatches: Oral Argument from the Court*, Slate Magazine (December 4, 2006):
http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2006/12/affirmative_inaction.html.
[75] Opinion of Kennedy, J., concurring in part and concurring in the judgment, *Parents Involved in Community Schools v. Seattle Parents Involved in Community Schools v. Seattle School District No. 1*; *Meredith v. Jefferson County Board of Education et al.*, 551 U.S. 701 (June 28, 2007), 551 U.S. ___ (June 28, 2007): 17-18, available at http://www.law.cornell.edu/supct/pdf/05-908P.ZC1.
[76] Mootz, *Rhetorical Knowledge*, 107.
[77] Rehnquist, *Gratz v. Bollinger*, 27n22.
[78] Ginsburg, J., *Gratz v. Bollinger*, 8n11.
[79] Ginsburg, *Gratz v. Bollinger*, 5-6.
[80] Ginsburg, *Gratz v. Bollinger*, 1-4. See also Bell, *Silent Covenants*, 153.
[81] Ginsburg, *Gratz v. Bollinger*, 1, citing Ginsburg, J., dissenting, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995): 273.
[82] Ginsburg, *Gratz v. Bollinger*, 4.
[83] Ginsburg, *Gratz v. Bollinger*, 5-6.
[84] Ginsburg, *Gratz v. Bollinger,* 6.
[85] Ginsburg, *Gratz v. Bollinger*, 5, and 1: "Educational institutions, the Court acknowledges, are not barred from any and all consideration of race when making admissions decisions...But the Court once again maintains that the same standard of review controls judicial inspection of all official race classifications...This insistence on 'consistency'...would be fitting were our Nation free of the vestiges of rank discrimination long reinforced by law...But we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain."
[86] Leti Volpp, "Imaginings of Space in Immigration Law," *Law, Culture, and the Humanities* (March 7, 2012): 1.
[87] O'Connor, *Grutter v. Bollinger*, 26.
[88] O'Connor, *Grutter v. Bollinger*, 18-21.
[89] Mootz, *Rhetorical Knowledge*, 107.
[90] See for example O'Connor, *Grutter v. Bollinger*, 18-19: "the Nation's officer corps"; 19: military readiness; 19: "preparing students for work and citizenship," "education as pivotal to 'sustaining our political and cultural heritage.'"
[91] O'Connor, *Grutter v. Bollinger*, 20: "in order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training."
[92] Bell, *Silent Covenants*, 150-151.
[93] Ginsburg, J. concurring, *Grutter v. Bollinger*, 539 U.S. 306, 539 U.S. ___ (June 23, 2003): 1-4, available at http://www.law.cornell.edu/supct/pdf/02-241P.ZC.
[94] See for example O'Connor, J., concurring, *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (April 17, 1990): 902, "the Court's parade of horribles," citing Opinion of Scalia, J., *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (April 17, 1990): 888-889.
[95] Scalia, *Grutter v. Bollinger*, 3-4: "I do not look forward to any of these cases."
[96] *Fisher v. University of Texas at Austin*, 132 S. Ct. 1536 (2012).
[97] Bell, *Silent Covenants*, 138, 149-151, 157.
[98] "An opinion lacking enough judges' votes to constitute a majority, but receiving more votes than any other opinion." *Black's Law Dictionary*, 7th ed., ed. Bryan A. Garner (St. Paul, MN: West Group, 1999), s.v. "opinion,"

"plurality opinion." *Parents Involved* is a tricky case—because Kennedy's opinion received no votes, but concurs in part with the judgment, it is an open question as to whether the opinion is "good law"; that is, whether it has similar significance in *stare decisis* as the plurality's ruling.

[99] *Parents Involved In Community Schools v. Seattle School District no. 1*; *Meredith v. Jefferson County Board of Education*, Nos. 05-908, 05-915, 551 U.S. 701 (2007). The Court overturned both cases on appeal in the same decision, which is referred to collectively as *Parents Involved in Community Schools v. Seattle School District no. 1*. References to *Parents Involved* in this essay refer to the combined case before the Supreme Court; I use *Meredith* when specifically referencing *Meredith's* case history prior to the combined Supreme Court case.

[100] Breyer, J., dissenting, *Parents Involved in Community Schools v. Seattle School District No. 1*; *Meredith v. Jefferson County Board of Education et al.*, 551 U.S. 701, 551 U.S. ___ (June 28, 2007): 4, available at http://www.law.cornell.edu/supct/pdf/05-908P.ZD1.

[101] Breyer, *Parents Involved*, 5.

[102] Opinion of Roberts, C.J., *Parents Involved in Community Schools v. Seattle School District No. 1*; *Meredith v. Jefferson County Board of Education et al.*, 551 U.S. 701, 551 U.S. ___ (June 28, 2007): 1-4, 7-9, available at http://www.law.cornell.edu/supct/pdf/05-908P.ZO. See also James D. Anderson, "Race-Conscious Educational Policies vs. a 'Color-Blind Constitution': A Historical Perspective," *Educational Researcher* 36 (June/July 2007): 249; Graves, "Deeply Embarrassed White People;" Breyer, *Parents Involved*, 4-6.

[103] Roberts, *Parents Involved*, 7.

[104] Roberts, *Parents Involved*, 3-4.

[105] Roberts, *Parents Involved*, 7, and *Hampton v. Jefferson County Board of Education*, 102 F. Supp. 2d 358 (2000). See also "Hampton I," *Hampton v. Jefferson County Board of Education*, 72 F. Supp. 2d 753 (1999).

[106] *Parents Involved*, 1: "CHIEF JUSTICE ROBERTS announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II, III-A, and III-C, and an opinion with respect to Parts III-B and IV, in which JUSTICES SCALIA, THOMAS, and ALITO join."

[107] Thomas, J., concurring, *Parents Involved in Community Schools v. Seattle School District No. 1*; *Meredith v. Jefferson County Board of Education*, 551 U.S. 701, 551 U.S. ___ (June 28, 2007), available at http://www.law.cornell.edu/supct/pdf/05-908P.ZC.

[108] Stevens, J., dissenting, *Parents Involved in Community Schools v. Seattle School District No. 1*; *Meredith v. Jefferson County Board of Education*, 551 U.S. 701, 551 U.S. ___ (June 28, 2007), available at http://www.law.cornell.edu/supct/pdf/05-908P.ZD.

[109] Breyer, *Parents Involved*, 1.

[110] Kennedy, *Parents Involved*, 1.

[111] Roberts, *Parents Involved*, 2 (see also 40-41). See also Anderson, "Race-Conscious Educational Policies," 249, 256.

[112] See also Anderson, "Race-Conscious Educational Policies," 256.

[113] Michael Calvin McGee, "Text, Context, and the Fragmentation of Contemporary Culture," *Western Journal of Speech Communication* 54 (Summer 1990): 285.

[114] Roberts, *Parents Involved*, 40-41.

[115] Roberts, *Parents Involved*, 35. See also Donald E. Lively and Stephen Plass, "Equal Protection: The Jurisprudence of Denial and Evasion," *The American University Law Review* 40 (Summer 1991), 1313, and Erwin Chemerinsky, *Constitutional Law*, 768.

[116] Roberts, *Parents Involved*, 40-41.

[117] The relationship between Warren's opinion in *Brown* and the "color-blind constitutionalism" discussed below is a matter of some dispute; I think that the more interesting question is perhaps not whether *Brown itself* is an inaugural moment for color-blind jurisprudence, but the ways in which the Court subsequent to *Brown* has reframed the *Brown* court's application of equal protection in terms of "majoritarian convenience." Lively and Plass, "The Jurisprudence of Denial and Evasion," 1313.

[118] Rehnquist, *Gratz v. Bollinger*, 17-21; O'Connor, *Grutter v. Bollinger*, 13-14.

[119] Roberts, *Parents Involved*, 40-41.

[120] Anderson, "Race-Conscious Educational Policies," 256; Neil Gotanda, "A Critique of 'Our Constitution is Color-Blind,'" *Stanford Law Review* 44 (November 1991): 2; Chemerinsky, *Constitutional Law*, 767-770.

[121] See for example Gotanda, "A Critique of 'Our Constitution is Color-Blind;'" Victor C. Romero, "Critical Race Theory in Three Acts: Racial Profiling, Affirmative Action, and the Diversity Visa Lottery," *Albany Law Review* 66 (2003), 384: "CRT questions whether color-blind policies will ever lead to an elimination of racism;" Paula C. Johnson, "Jam Tomorrow and Jam Yesterday: Reflections on *Grutter, Gratz*, and the Future of Affirmative Action,"

Jurist (September 5, 2003), http://jurist.law.pitt.edu/forum/symposium-aa/johnson-printer.php; Brando Simeo Starkey, "Inconsistent Originalism and the Need for Equal Protection Reinvigoration," *Georgetown Journal of Law and Modern Critical Race Perspectives*, Forthcoming (March 31, 2010), 25-26, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1579197; Jocelyn C. Frye, Robert S. Gerber, Robert H. Pees, and Arthur W. Richardson, "The Rise and Fall of the United States Commission on Civil Rights," *Harvard Civil Rights-Civil Liberties Law Review* 22 (1987), 499.

[122] Anderson, "Race-Conscious Educational Policies," 249, and Gotanda, "A Critique of 'Our Constitution is Color-Blind,'" 2.

[123] Gotanda, "A Critique of 'Our Constitution is Color-Blind,'" 2.

[124] Thomas P. Crocker, "Envisioning the Constitution," *American University Law Review* 57 (October 2007), 38: "under current Supreme Court jurisprudence, the majority is un-persuaded by…color conscious reasoning. The justification for this willful blindness…" See also Lively and Plass, "Equal Protection: The Jurisprudence of Denial and Evasion," 1313: "modern equal protection jurisprudence likewise is characterized by denial and evasion…like the separate but equal doctrine, *de facto* segregation, discriminatory intent, and color-blindness have represented analytical methodologies for avoiding meaningful confrontation with racial discrimination. By avoiding serious attention to and consequent accounting for racial injustice, they compound a jurisprudential legacy reflecting denial that is both constitutional and psychological."

[125] Bernie D. Jones, "Critical Race Theory: New Strategies for Civil Rights in the New Millennium?" *Harvard BlackLetter Law Journal* 18 (2002), 24: "those formalists who jumped onto the color-blind/equal process bandwagon forgot a crucial fact: African Americans 'had actually been treated differently historically,' and 'the effects of this difference in treatment continued into the present.'"

[126] Ginsburg, *Gratz v. Bollinger*, 4.

[127] Gotanda, "A Critique of 'Our Constitution is Color-Blind,'" 2-3.

[128] Roberts, *Parents Involved*, 10.

[129] See also Anderson, "Race-Conscious Educational Policies," 256.

[130] Dicta are portions of a judicial opinion that, while accorded some authority because of the inherent credibility of the judge, are either unnecessary or irrelevant to the doctrinal findings in the ruling. *Black's Law Dictionary*, s.v. "dictum."

[131] Roberts, *Parents Involved*, 11: "although apparently Joshua [the son of the plaintiff Meredith] has now been granted a transfer to Bloom, the school to which transfer was denied under the racial guidelines, the racial guidelines apply at all grade levels. Upon Joshua's enrollment in middle school, he may again be subject to assignment based on his race."

[132] Roberts, *Parents Involved*, 10.

[133] Thomas, J., concurring, *Parents Involved*, 1 & 26. See also Anderson, "Race-Conscious Educational Policies," 256, and Starkey, "Inconsistent Originalism," 25-26.

[134] See for example Graves, "Deeply Embarassed White People."

[135] I mean to suggest that "post-racial" and "color-blind" are mutually implicated by not synonymous. For example, Marissa Jackson implicitly juxtaposes "post-racial" and "color-blind" by arguing that "colorblindness" is what *enables* recent claims of a post-racial U.S. status quo. Marissa Jackson, "Neo-Colonialism, Same Old Racism: A Critical Analysis of the United States' Shift toward Colorblindness as a Tool for the Protection of the American Colonial Empire and White Supremacy," *Berkeley Journal of African-American Law & Policy* 11 (2009): 156. "Post-race" and "color-blind" are also often used synonymously, including in the context of legal analysis of *Parents Involved*. See for example Barnes, Chemerinsky, Jones, "A Post-Race Equal Protection"; 974: "the impulse to declare society post-race has surfaced repeatedly in U.S. constitutional jurisprudence. Most recently, it is found in judicial assertions [as in *Parents Involved*] that the Equal Protection Clause requires colorblindness and bars any effort at race-based remedies for discrimination and segregation."

[136] McGee, "Text, Context," 285.

[137]James Jasinski, *Sourcebook on Rhetoric*," s.v. "dissociation," 176.

[138] Opinion of O'Connor, Kennedy, and Souter, JJ., *Planned Parenthood v. Casey*, 505 U.S. 833 (June 29, 1992): 847; *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

[139] *Perry v. Schwarzenegger*, 2010 U.S. Dist. LEXIS 78817 (N.D. Cal., Aug. 4, 2010): 118; also Opinion of Cady, J., *Varnum v. Brien*, WL 874044 (Iowa 2009): 49, available at http://www.judicial.state.ia.us/wfData/files/Varnum/07-1499.pdf.

[140] *Perry v. Schwarzenegger*, 117. See also *Black's Law Dictionary*, s.v. "strict scrutiny."

[141] See for example Cady, *Varnum v. Brien*, 49.

[142] *Perry v. Schwarzenegger*, 113.
[143] *Perry v. Schwarzenegger*, 121-122.
[144] Stevens, *Parents Involved*, 3.
[145] Roberts, *Parents Involved*, 11, citing opinion of Rhenquist, C.J., *Gratz*, 22.
[146] *Perry v. Schwarzenegger*, 122.
[147] *Perry v. Schwarzenegger*, 121.
[148] Ginsburg, *Gratz v. Bollinger*, 4-5.
[149] Breyer, *Parents Involved*, 35, referencing Kozinski, J., concurring, *Parents Involved in Community Schools v. Seattle School District No. 1*, 426 F.3d 1162 (2005): 1193-1194: "that a student is denied the school of his choice may be disappointing, but it carries no racial stigma and says nothing at all about that individual's aptitude or ability."
[150] Stevens, *Parents Involved*, 1-2.
[151] Thomas, *Parents Involved*, 36.
[152] Roberts, *Parents Involved* 22, n. 14.
[153] Anderson, "Race-Conscious Educational Policies," 256: "Many contemporary judges, attorneys, scholars, and pundits not only have forgotten this history of American constitutional law but have created a fictive history, one that assumes the color-blind proposals rejected by the 39th Congress actually define our living constitution. In delivering the opinion of the Supreme Court in the Louisville and Seattle cases, Chief Justice Roberts proclaims, 'When it comes to using race to assign children to schools, history will be heard'…He hears a history that proclaims a Constitution that 'prevents states from according differential treatment to American children on the basis of their color or race'…Justice Thomas, demonstrating virtually a blind faith in the myth of a color-blind Constitution, rebukes the four dissenting justices for 'disfavoring a color-blind interpretation of the Constitution'…Arguing that the Constitution generally prohibits government race-based decision making, except for remedial purposes, Thomas tells us that he is 'quite comfortable in the company I keep.' 'My view of the Constitution,' he continues, 'is Justice Harlan's view in Plessy'…'government may not make distinctions on the basis of race'…Chief Justice Roberts claims to hear the voices of the plaintiffs in Brown v. Board of Education, and Justice Thomas hears the voice of Justice Harlan in Plessy v. Ferguson, but neither hears the voices of the Reconstruction Congress that framed the Fourteenth Amendment and the 1866 Civil Rights Act."
[154] Roberts, *Parents Involved*, 11, Rhenquist, *Gratz v. Bollinger*, 22.
[155] Colorado School of Law Professor Helen Norton arrives at a similar conclusion in her analysis of Kennedy's opinion and Scalia's concurrence in *Ricci v. DeStefano* (opinion of Kennedy, J.; Scalia, J., concurring, *Ricci v. DeStefano*, 557 U.S. ___; 129 S. Ct. 2658, 2009): "in Ricci v. DeStefano, for example, the Court for the first time characterized a public employer's attention to its practices' racially disparate impact as evidence of its discriminatory, and thus unlawful, intent. This destabilizes the long-standing premise …that a majority of the Court does not view a decision maker's attention to its practices' racially disparate impact as the sort of attention to race that threatens equality values. Decades after holding that the Equal Protection Clause does not *require* government to reconsider its actions that disproportionately exclude people of color and women so long as those actions are not motivated by an intent to harm, the Court has now concluded that statutory antidiscrimination law-and perhaps the Equal Protection Clause as well-*prohibits* government from doing so under certain circumstances…if applied in the constitutional setting, as concurring Justice Scalia predicted, such an understanding of equality would treat a government decision maker's attention to racial and gender hierarchies as inherently suspicious-and thus unconstitutional unless the government's action can survive heightened scrutiny." Helen Norton, "The Supreme Court's Post-Racial Turn Towards a Zero-Sum Understanding of Equality," *William and Mary Law Review* 52 (October 2010): 203-204.
[156] Norton, "The Supreme Court's Post-Racial Turn," 203-204.
[157] *Parents Involved*, 22, my emphasis.
[158] Roberts, *Parents Involved*, 17.
[159] Roberts, *Parents Involved*, 17-18.
[160] Roberts, *Parents Involved*, 12.
[161] Roberts, *Parents Involved*, 13, citing *Grutter v. Bollinger*, 539 U.S. 306 (2003).
[162] Roberts, *Parents Involved*, 14.
[163] Thomas, *Grutter v. Bollinger*, 6-7, 10-18.
[164] Roberts, *Parents Involved*, 13-14: "we [the *Grutter* Court] described the various types of diversity that the law sought: '[The law school's] policy makes clear there are many possible bases for diversity admissions, and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had

successful careers in other fields.'"

[165] Roberts, *Parents Involved*, 24: "the principle that racial balancing is not permitted is one of substance, not semantics."

[166] Roberts, *Parents Involved*, 14.

[167] Brief for Appellee-Respondent, 2005 U.S. Briefs 908; 2006 U.S. S. Ct. Briefs LEXIS 1039; in *Parents Involved*, No. 05-908, 14.

[168] Roberts, *Parents Involved,* 18.

[169] Roberts, *Parents Involved*, 24.

[170] Stevens, *Parents Involved*, 2, n2.

[171] Roberts, *Parents Involved*, 23.

[172] Stevens, *Parents Involved*, 2, n2.

[173] See for example, Breyer, *Parents Involved*, 21, 32-34.

[174] See for example Brief for the National Association of the Advancement of Colored People as *Amicus Curiae* in Support of Respondents, 2005 U.S. Briefs 908; 2006 U.S. S. Ct. Briefs LEXIS 1029; in *Parents Involved*, Nos. 05-908, 05-915, 4, 21-22.

[175] See for example the entirety of Stevens, dissenting, *Parents Involved*; Breyer, *Parents Involved*, 31, "no case…has ever held," and 33, "the plurality cannot avoid this simple fact;" Brief *Amicus Curiae* of Anti-Defamation League In Support of Respondents; *Parents Involved*, Nos. 05-908, 05-915; 2005 U.S. Briefs 908; 2006 U.S. S. Ct. Briefs LEXIS 1011 (October 1, 2006).

[176] Roberts, *Parents Involved*, 24.

[177] Breyer, *Parents Involved*, 33.

[178] Barbara J. Flagg, "The Transparency Phenomenon, Race-Neutral Decisionmaking, and Discriminatory Intent," *Michigan Law Review* 91 (1993), in *Critical White Studies*: *Looking Behind the Mirror*, ed. Richard Delgado and Jean Stefancic (Philadelphia: Temple University Press, 1997), 221, 223-224.

[179] Breyer, *Parents Involved*, 33.

[180]See also Norton's analysis of "the possibility that the Court has adopted a new, zero-sum understanding of equality that may be triggered by an assumption of post-racial success in some contexts—an assumption that 'empathy' for some groups is inevitably accompanied by 'prejudice' against others." Norton, "The Supreme Court's Post-Racial Turn," 203.

[181] Roberts, *Parents Involved*, 26, quoting *Parents Involved in Community Schools v. Seattle School District No. 1*, 377 F.3d 949 (2004).

[182] See also Breyer, *Parents Involved*, 35.

[183] Brief for the National Association of the Advancement of Colored People as *Amicus Curiae* in Support of Respondents, 2005 U.S. Briefs 908.

[184] Philip Bobbitt in Sanford Levinson, "The Embarrassing Second Amendment," *Yale Law Journal* 99 (December 1989), 643.

[185] Breyer, *Parents Involved*, 33: "as *Grutter* specified, '[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause'…and contexts differ dramatically one from the other. Governmental use of race-based criteria can arise in the context of, for example, census forms, research expenditures for diseases, assignments of police officers patrolling predominantly minority-race neighborhoods, efforts to desegregate racially segregated schools, policies that favor minorities when distributing goods or services in short supply, actions that create majority-minority electoral districts, peremptory strikes that remove potential jurors on the basis of race, and others. Given the significant differences among these contexts, it would be surprising if the law required an identically strict legal test for evaluating the constitutionality of race-based criteria as to each of them."

[186] Gotanda, "A Critique of 'Our Constitution is Color-Blind,'" 2.

[187] Nikhil Pal Singh, *Black Is A Country: Race and the Unfinished Struggle For Democracy* (Cambridge: Harvard University Press, 2004), 24.

[188] Stephen L. Carter, "When Victims Happen to be Black," *Yale Law Journal* 97 (January 1, 1988): 433-434, in Ginsburg, *Gratz v. Bollinger*, 4.

[189] *Norwalk Core v. Norwalk Redevelopment Agency*, 395 F. 2d 920 (CA2 1968): 931-932, in Ginsburg, *Gratz v. Bollinger*, 4-5.

[190] Breyer, *Parents Involved*, 28.

[191] *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971).

[192] Breyer, *Parents Involved*, 3-6, 28-33.

[193] Breyer, *Parents Involved*, 22.

[194] Opinion of Burger, C.J., *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (April 20, 1971): 16, available at http://www.law.cornell.edu/supct/html/historics/USSC_CR_0402_0001_ZO.html; cited in Breyer, *Parents Involved*, 3, and 22 (emphasis added by Breyer).
[195] Breyer, *Parents Involved*, 22: "a longstanding and unbroken line of legal authority tells us that the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals, even when the Constitution does not compel it...the statement [in *Swann*] was not a technical holding in the case. But the Court set forth in *Swann* a basic principle of constitutional law—a principle of law that has found 'wide acceptance in the legal culture.'"
[196] Breyer, *Parents Involved*, 3.
[197] Cheryl I. Harris, "Whiteness as Property," *Harvard Law Review* 8 (June 1993), 1713.
[198] Breyer, *Parents Involved*, 30.
[199] Breyer, *Parents Involved*, 30-31.
[200] Breyer, *Parents Involved*, 31.
[201] Breyer, *Parents Involved*, 22, 30.
[202] Breyer, *Parents Invovled*, 30.
[203] Breyer, *Parents Involved*, 30-31.
[204] Breyer, *Parents Involved*, 30-31.
[205] Trent Moorman, "Riz Rollins: Seattle Mystic," *The Stranger* (June 24, 2010): http://lineout.thestranger.com/lineout/archives/2010/06/24/riz-rollins-seattle-mystic.
[206] Riz Rollins in Graves, "Deeply Embarrassed White People."
[207] Carter, "When Victims Happen to be Black," 434.
[208] Carter, "When Victims Happen to be Black," 434.
[209] Carter, "When Victims Happen to be Black," 434.
[210] Ginsburg, *Grutter v. Bollinger*, 3: "however strong the public's desire for improved education systems may be...it remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities. Despite these inequalities, some minority students are able to meet the high threshold requirements set for admission to the country's finest undergraduate and graduate educational institutions. As lower school education in minority communities improves, an increase in the number of such students may be anticipated. From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action."
[211] Mootz, *Rhetorical Knowledge*, 107.
[212] Carter, "When Victims Happen to be Black," 434.
[213] Roberts, *Parents Involved*, 40-41.
[214] Carter, "When Victims Happen to be Black," 434-435.
[215] Kennedy, *Grutter v. Bollinger*, 8-9.
[216] Lithwick, "Affirmative Action."
[217] Carter, "When Victims Happen to be Black," 434.
[218] Breyer, *Parents Involved*, 33.
[219] See also Stevens, *Parents Involved*, 3-4: "Rejecting arguments comparable to those that the plurality accepts today, [the Supreme Judicial Court of Massachusetts] noted [in *School Community of Boston v. Board of Education*, 352 Mass. 693 (1967)]: 'It would be the height of irony if the racial imbalance act, enacted as it was with the laudable purpose of achieving equal educational opportunities, should, by prescribing school pupil allocations based on race, founder on unsuspected shoals in the Fourteenth Amendment.'"
[220] Patricia J. Williams, *Seeing A Color-Blind Future: The Paradox of Race* (New York: The Noonday Press, 1997), 4.
[221] According to David D. Meyer's (then Associate Dean for Academic Affairs and Professor of Law, University of Illinois College of Law) closing statements to his Spring 2010 Constitutional Law I class, two of the most significant issues facing the Court in the next decade will be first, whether equal protection or due process analysis will be more controlling in civil liberties cases, and second, the way in which both are applied. Kennedy, Meyer insisted, is likely to be a major figure in these decisions, as evidenced in part by his concurring opinion in *Parents Involved*.
[222] Roberts, *Parents Involved*, 27.
[223] That is, if Kennedy's opening is dicta, it is nonetheless significant to the meaning and effect of his doctrinal claims. In *Parents Involved*, Kennedy once again demonstrates his knack for meta-argumentative *framing*. See also Campbell, "The Procedural Queer," 212-213.

[224] Kennedy, *Parents Involved*, 1-2.
[225] Kennedy, *Parents Involved*, 7-8.
[226] Jeffrey Toobin, "Partners: Will Clarence and Virginia Thomas Succeed in Killing Obama's Health-Care Plan?" *The New Yorker* (August 29, 2011), 41: "Thomas may be best known for his belief in a 'color-blind Constitution'…but color blind, for Thomas, is not blind to race. Thomas finds a racial angle on a broad array of issues, including those which appear to be scarcely related to traditional civil rights…in Thomas' view, the Constitution imposes an ideal of racial self-sufficiency, an extreme version of the philosophy associated with Booker T. Washington, whose portrait hangs in his chambers."
[227] See for example Anderson, "Race-Conscious Educational Policies," 256. The popular Supreme Court historian Jeffery Toobin argues in the *New Yorker* that Thomas' fondness for invoking *Plessy* at speaking events is emblematic of his particular view of the appropriate role for the Supreme Court in society. Toobin, "Partners," 42.
[228] Chemerinsky, *Constitutional Law*, 767.
[229] Thomas, *Parents Involved*, 26.
[230] *Plessy v. Ferguson*, 163 U.S. 537 (1896). See also Chemerinsky, *Constitutional Law*, 768: "separate but equal thus became the law of the land even though separate was anything but equal."
[231]Kennedy, *Parents Involved*, 8.
[232] Blackmun, J., dissenting, *Richmond v. J.A. Croson Company*, 488 U.S. 469.
[233] Kennedy, *Parents Involved*, 2.
[234] Kennedy, *Parents Involved*, 2-3.
[235] Carter, "When Victims Happen to be Black," 435: "thus the critic of affirmative action programs is able to concede that racism is a greater enemy than racialism, and yet point as well to the risks involved in perpetuating racialism. A society without racism is an excellent goal, the argument might conclude; teaching that racial consciousness is wrong is a vital step along the way."
[236] Kennedy, *Parents Involved*, 1, my emphasis.
[237] Singh, *Black Is A Country*, 24.
[238] Kennedy, *Parents Involved*, 1.
[239] Singh, *Black Is a Country*, 3.
[240] Kennedy, *Parents Involved*, 7.
[241] Williams, *Seeing A Color-Blind Future*, 5.
[242] Blackmun, *Croson*, 562.
[243] Kennedy, *Parents Involved*, 7.
[244] Williams, *Seeing a Color-Blind Future*, 5.
[245] Kennedy, *Parents Involved*, 3.
[246] Kennedy's narrow tailoring finding in No. 05-915—that he would be more inclined to find the Kentucky integration policy constitutional if the respondents for Jefferson County were simply able to better explain some of the specific reasoning behind their policy choices—would be more compelling to me if he did not have a long history of declaring that attempts on the part of Southern localities to heal longstanding racial harm could be constitutional *if only* the ordinances were better written. Opinion of Kennedy, J., concurring in part and concurring in the judgment, *Croson*, 519: "the nature and scope of the injury that existed; its historical or antecedent causes; the extent to which the city contributed to it, either by intentional acts or by passive complicity in acts of discrimination by the private sector; the necessity for the response adopted, its duration in relation to the wrong, and the precision with which it otherwise bore on whatever injury in fact was addressed, were all matters unmeasured, unexplored, and unexplained by the city council." See also Marshall, J., dissenting, *Croson*, 555: "the majority's view that remedial measures undertaken by municipalities with black leadership must face a stiffer test of Equal Protection Clause scrutiny than remedial measures undertaken by municipalities with white leadership implies a lack of political maturity on the part of this Nation's elected minority officials that is totally unwarranted. Such insulting judgments have no place in constitutional jurisprudence." It isn't just Kennedy—the Court has a long history, among multiple collections of judges, of striking down affirmative action programs with the helpful assurance that the school in question is welcome to try a better designed program (with less emphasis on race). Chemerinsky, *Constitutional Law*, 833-834, referring especially to *Regents of the University of California v. Bakke* 438 U.S. 265 (1978).
[247] Kennedy, *Parents Involved*, 6.
[248] Harris, "Whiteness as Property," 1713.
[249] Williams, *Seeing a Color-Bind Future*, 6.
[250] Graves, "Deeply Embarassed White People."

[251] Graves, "Deeply Embarrassed White People."
[252] *Fisher v. University of Texas at Austin*, 132 S. Ct. 1536 (February 21, 2012): 1.
[253] Adam Liptak, "College Diversity Nears Its Last Stand," *The New York Times* Sunday Review (October 15, 2011), 1-2, available at http://www.nytimes.com/2011/10/16/sunday-review/college-diversity-nears-its-last-stand.html?_r=2&pagewanted=1&src=rechp.
[254] See for example Kennedy, *Croson*, 519.
[255] Chemerinsky in Liptak, "College Diversity," 1.
[256] Ralph K.M. Haurwitz, "UT's Race-Conscious Admissions Policy Facing Supreme Court Test," *Austin American-Statesman* (February 21, 2012), http://statesman.com/news/…/uts-race-conscious-admission-policy-facing-supreme-court-2191410.html.
[257] Liptak, "College Diversity," 1.
[258] Blackmun, *Croson*, 562.
[259] Ari Ezra Waldman, "Occupy Wall Street Has Chosen the Wrong Enemy," *Towleroad* (October 19, 2011), http://www.towleroad.com/2011/10/owsenemies.html.
[260] Stevens, *Parents Involved*, 2-3, n2.
[261] Kennedy, *Parents Involved*, 11-12.
[262] Kennedy, *Parents Involved*, 11-12.
[263] Kennedy, *Parents Involved*, 2: "the opinion of the Court and Breyer's dissenting opinion (hereinafter dissent)…"
[264] Stevens, *Parents Involved*, 2-3, my emphasis.
[265] Jasbir K. Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham and London: Duke University Press, 2007), 222.
[266] Puar, *Terrorist Assemblages*, 130.
[267] Puar, *Terrorist Assemblages*, 131.
[268] Puar, *Terrorist Assemblages*, 130-135.
[269] Kennedy, *Lawrence v. Texas*, 18.
[270] Pierre de Vos, "The Constitution Made Us Queer: The Sexual Orientation Clause in the South African Constitution and the Emergence of Gay and Lesbian Identity," *Law and Sexuality: The Global Arena*, ed. Carl F. Stychin and Didi Herman (Minneapolis: University of Minnesota Press, 2001) 207.
[271] Chemerinsky, *Constitutional Law*, 768.
[272] See note 246.
[273] Kennedy, *Parents Involved*, 16.
[274] Kennedy, *Parents Involved*, 17.
[275] *Black's Law Dictionary*, s.v. "originalism."
[276] Singh, *Black Is a Country*, 3.
[277] See for example Richard D. Mohr, "The Shag-A-Delic Supreme Court: 'Anal Sex,' 'Mystery,' 'Destiny,' and the 'Transcendent' in Lawrence v. Texas," *Cardozo Women's Law Journal* 10 (2004): 391, and Toobin, *The Nine: Inside the Secret World of the Supreme Court* (New York, New York: Random House, 2007): 66, 191.
[278] Opinion of Kennedy, J., *Romer v. Evans*, 517 U.S. 620 (1996): 623.
[279] Thomas, *Parents Involved*, 26.
[280] Kennedy, *Romer v. Evans*, 633.
[281] See for example *Perry v. Schwarzenegger*, 135.
[282] Kennedy, *Lawrence v. Texas*, 18.
[283] Kennedy, *Romer v. Evans*, 633, 635.
[284] Toobin, *The Nine*, 66.
[285] Threadgold, *Feminist Poetics*, 102.

CHAPTER THREE: M*ARRIAGE* C*ASES*

"A rose by any other name may smell as sweet, but to the couple desiring to enter into a committed lifelong relationship, a marriage by the name of 'registered domestic partnership' does not."

- Circuit Judge Stephen Reinhardt, for the Ninth Circuit Court of Appeals in *Perry v. Brown*

Lawrence v. Texas is not about marriage. "The present case," Kennedy insists, "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[1] *Lawrence* is about sex, sodomy, homosexuality, and consent—all taken up, in Kennedy's opinion, through the doctrinal lens of privacy, or in Eng's terms, a "legal genealogy" of sex and privacy in U.S. Constitutional law.[2] Part of the significance of Kennedy's 2003 opinion is thus that it makes a distinction between U.S. state and federal judicial pronouncements on the constitutionality of "gay marriage,"[3] beginning just five months after *Lawrence* with the Massachusetts Supreme Judicial Court's ban of any exclusion of gay and lesbian couples from Massachusetts "civil marriage" in *Goodridge v. Department of Public Health*.[4] In the words of their authors, *Lawrence* is about people who engage in "sexual practices common to a homosexual lifestyle";[5] while the marriage cases are about "people of the same sex"[6] who wish to marry. If *Lawrence* concerns a *person's* (limited) *right to act queerly*[7]; the innovation of the post-*Lawrence* marriage cases is that they are primarily interested in *queer peoples' right to marry* (other people, queerly).[8]

The Texas and Georgia sodomy laws ruled unconstitutional by U.S. Supreme Court Justice Anthomy M. Kennedy's 2003 Court order[9] are still on the books in 2013,[10] as are similar laws in Massachusetts,[11] fifteen other states,[12] and the United States' Uniform Code of Military Justice.[13] Nonetheless, the primary foci of national "GLBTQ" organizational politics no longer include resistance to sex criminalization. The "struggle" for queer justice has come to be defined

instead[14] through the *telos* and *topos* of "recognition of marriage as the boundary between a meaningful and supported existence and remaining subject to other's intentions and worldviews."[15] Marriage is now the putative boundary between a just and unjust society for gay and lesbian persons. The rhetoric establishing marriage as such functions to exclude those individuals and groups who are primarily affected by non-marital and familial politics of exclusion and oppression, from the benefits of lesbian and gay civil rights victories. Regardless of the outcome of marriage "recognition" struggles, sodomy laws will continue their active role in the daily lives of, in particular, queer, trans, poor people of color. The recent liberatory progress of U.S. state and federal judicial rhetoric on marriage has accordingly done less than it might seem for "marginalized queer families of all kinds."[16]

This is not to downplay the significance of that progress. The primacy of marriage in national gay and lesbian civil rights rhetoric underscores the opportunity the "marriage equality" frame represents for the national GLBTQ civil rights movement to foment public address that will have immediate and tangible material effect. Judicial and presidential[17] declaration as a remedy for the criminalization of queer sex has failed. At best, judicial and presidential repudiations of sex criminalization—including Kennedy's *Lawrence* opinion and Barack Obama's recent National Defense Authorization Act signing statements—have been only a partial remedy for the various and significant injustices perpetuated by sodomy statutes. But the adaptive quality of judicial rhetoric has allowed the major attention of the national "well-resourced" "LGBT legal" movement[18] to turn once again to the Supreme Court—this time to demand the Justices' response to federal and California prohibitions on same sex marriage. No matter what the Court determines, it is nearly certain that early twenty-first century U.S. judicial rhetoric will prove empirically more immediately *effective* when stipulating boundaries of

legitimate marriage, than when stipulating boundaries of legitimate sex. This is because marriage is a legally produced category. One cannot *be married* without recognition from law. What judges say about the boundaries of sex criminalization produces but does not actually determine those boundaries, but judicial statements about the boundaries of marriage become the boundaries themselves. Judicial arguments about marriage are thus an ideal focus for the rhetorical study of judicial institutional illocutions that function as "sovereign performatives"[19] of relational and sexual identity. This chapter examines some of these arguments through a reading of some of the marriage cases soon to have their day in Court. The Supreme Court has decided to take up the question of same sex marriage through multiple and contrasting precedential genealogies, each of which represent a different set of futures for Fourteenth Amendment jurisprudence, and LGBT and queer of color legal subjectivity. I read portions of these precedential genealogies to argue for the possibility of a Fourteenth Amendment right to marriage that queerly contests the bounds of that institution.

I. Gay Marriage Arrives at Court

Goodridge led directly to Massachusetts becoming the first U.S. state to endorse the solemnization of gay and lesbian marriage applicants, but the decision is a shaky landmark for what Chandan Reddy calls the "gay marriage movement,"[20] as it might have done more to foment same-sex marriage prohibition than legalization. *Goodridge* appears to be a major catalyst for the first of three waves of state *prohibitions* of same-sex marriage: the first in 2004 and 2005, after *Goodridge*; the second in 2006, after the final defeat of the federal constitutional Marriage Protection Amendment[21] in the U.S. Congress;[22] and the third in 2008, after Chief Justice Ronald M. George of the California Supreme Court on May 15 ordered marriage licenses issued to same sex couples in *In re Marriage Cases* (43 Cal.4th 757, 2008).[23]

California voters passed the November 4, 2008, "initiative constitutional amendment" "Proposition 8"[24] (repealing *In re Marriage Cases*) at the same time as Arizona's Proposition 102[25] and Florida's Amendment 2.[26] Proposition 8 is not the first state constitutional amendment to overturn a state court's legalization of same sex marriage;[27] nor, qualitatively, is it the worst.[28] New Mexico, New Jersey, and Rhode Island are presently the only U.S. states that do not allow same sex marriage, which do not also specifically ban it;[29] this leaves thirty-eight states with explicit bans, most of which have far less legal recognition for same-sex relationships than does California. Nonetheless, in 2013, the California "marriage amendment" retains—in both queer legal study and popular U.S. media—a stronger synecdochal relationship to gay and lesbian politics than other individual state actions on marriage, or other national sites of dispute over gay and lesbian civil rights.[30] California's population and U.S. popular cultural importance make major decisions by the state easy objects of study, but I think Proposition 8 is so important not because it concerns California, but because it represents the segment of the national "marriage fight"[31] that is about *marriage itself*.

The passage of Prop 8 instigated protests throughout California and the United States.[32] By focusing on California's amendment as the frame through which to address gay and lesbian civil rights broadly, these public actions begged a question that became the center of a strategic debate among same sex marriage campaigners: should the energies of the political movement that had opposed the initiative's passage, and similar political movements in other states, be directed primarily toward legalization through popular amendments; federal court challenges; or through a state-by-state legislative and "state courts" approach?[33] In May 2009—just before the California Supreme Court rejected a state constitutional challenge to the amendment—the American Civil Liberties Union (ACLU), Lambda Legal (the organization that represented

Lawrence and Garner), the National Center for Lesbian Rights, the National Gay and Lesbian Task Force, and others published "Make Change, Not Lawsuits," a lengthy argumentative fact sheet urging individual members of the "gay marriage movement" to avoid suing governments or employers over their right to marry, out of concern for the possibility of "bad rulings," which would make it "much more difficult for us to win marriage, and will certainly make [achieving recognized gay marriage] take much longer."[34] Chief Justice George's unsurprising[35] determination for the California Supreme Court in *Strauss v. Horton* that Proposition was "valid"[36] as an amendment "equal in effect to any other provision of the California Constitution"[37] reinforced the stakes of this debate over strategy by functionally requiring that any federal legal challenge to Proposition 8 hinge on claims of the substantive value of "marriage" itself—on whether the chance to achieve the status of marriage should be construed as a fundamental component of the liberty interests protected by the Fourteenth Amendment.[38]

After *Strauss*, *The Nation*'s Richard Kim[39] called on queer activists to recognize the "relative equality" of post-Proposition 8 "marriage and domestic partnership" in California as a reason to shift gay rights movement energies away from an expensive repeal campaign, and toward broader labor and economic inequalities unaffected by, as the Ninth Circuit would later put it, "California's same-sex couples"' access to the "designation of the term marriage."[40] Kim's strategic proposal was distinct from the more visible public debate over tactics, as it questioned the desirability both of a judicial focus for the "gay marriage movement," *and* the ultimate goal of the *movement itself.* This proposal is particularly fascinating because it articulates, from a queer social movement perspective, an argument against focusing attention on the substantive content of the "*term*"[41] "marriage" that echoes the position (that there are more important civil rights considerations than access to the term "marriage") of the State of

California and dissenting Justice Carol A. Corrigan in opposition to the majority's order in *Marriage Cases*.

Needless to say, Kim's proposal was not followed—Proposition 8 was challenged in Federal District Court and found to be unconstitutional by Chief Judge Vaughn R. Walker's 2010 ruling for the Northern District of California in *Perry v. Schwarzenegger* (704 F.Supp.2d 921),[42] a decision narrowly affirmed in Circuit Judge Stephen Reinhardt's opinion for the Ninth Circuit in *Perry v. Brown* (671 F.3d 1052, 2012).[43] The "gay marriage movement" seems to be succeeding with precisely the multi-cameral approach[44] to achieving access to civil marriage that every major organizational member of the movement hoped to avoid in 2009—but of course, the ultimate contribution of recent state and federal court, legislative, and executive victories to the success of this ad-hoc, multi-cameral approach remains a contingent proposition. Just as the ACLU et al warned in 2009, the ability of the movement to expand rapidly into more hostile electoral territory (states with recent constitutional gay marriage bans) now depends in large part on the outcome of two cases before the Supreme Court:[45] *Hollingsworth v. Perry*,[46] the current iteration of the challenge to Proposition 8; and *United States v. Windsor*,[47] the result of New York City resident Edith Windsor's suit against the federal Defense of Marriage Act (DOMA).[48] As of this writing, these will be argued in turn before the Court on March 26 and 27, 2013.[49]

Hollingsworth and *Windsor* are both about marriage, but they represent distinct doctrinal histories. The *Perry* cases, which directly affect only the manner in which individual states can set marriage policy, are primarily about the constitutional value of the "designation of the term marriage"[50] itself, because there was little other means of substantively distinguishing between the effective California of Proposition 8 and that desired by its challengers. Conversely, the original plaintiff in Windsor had equal access to the designation of marriage under New York

State law, but were denied access to any of the federal benefits accorded to heterosexually married persons in identical situations (Windsor was allowed to be married, legally, but as of this writing does not have access to federal benefits meant for people who are married). The questions about the substantive content of a "designation" that animate the *Perry* cases are barely mentioned in *Windsor*'s entire line of precedent. Accordingly, I focus primarily on the *Perry* cases and their California Supreme Court antecedents as an ideal laboratory for studying the substantive content of legal marriage recognition rhetoric.

The particular focus of *Perry* cases on the constitutional content of the "term" marriage—and the debate their various judicial authors stage over the material and performative significance of rhetoric—make them exemplary of one of the animating questions of this dissertation: that is, the role and implication of judicial rhetoric in constituting and delimiting the range of possible queer subjectivities before U.S. law. In the following sections, I first perform an analysis of the rhetorical debate over the "term" marriage in *Marriage Cases*, before turning to Circuit Judge Reinhardt's particular doctrinal invocation of Kennedy's opinion in *Romer v. Evans*, one that I argue suggests some potential—even from within the fraught and limited space of marriage politics—for queer "nominalist" subjectivity.

II. *Marriage Cases*, "Marriage," and Queer Relations

In *In re Marriage Cases*, the California Supreme Court took up "six consolidated appeals" of cases brought in the "wake of" its previous holding in *Lockyer v. City and County of San Francisco* (33 Cal.4th 1055, 2004) that San Francisco had erred in issuing marriage licenses to same-sex couples prior to a judicial review of the constitutionality of "the California statutes limiting marriage to a union between a man and a woman."[51] These included: California Family Code § 300 (a) (1977), "marriage is a personal relation arising out of a civil contract between a

man and a woman"; and Family Code § 308.5—"only marriage between a man and a woman is valid or recognized in California"[52]—the statute popularly enacted in 2000 through Proposition 22.[53] *Marriage Cases* is a state court decision concerned with the meaning and appropriate application of the California State Constitution; it is relatively unfettered by, and not intrinsically connected to, the U.S. federal judicial opinions that make up the other objects of study in this project.[54] The *Marriage Cases* nonetheless have an important effect on the federal judicial debate that would come after: the argumentative framework of their majority influenced the design of Proposition 8 as a "singular and limited change"[55] to the California Constitution; and the Ninth Circuit took George's re-affirmation of this argumentative framework in *Strauss* to be controlling on its interpretation of Proposition 8's effect on California law.[56]

For a rhetorical critic, *In re Marriage Cases* is an argumentative delight—not necessarily because the arguments between the California Justices are framed "as arguments," but because the major stasis points in their doctrinal debate are explicitly concerned with the relationship between language, identity, and rights. The argumentative exchange between the majority and dissenting opinions in *Marriage Cases* functions implicitly as a debate about the substantive value and impact of rhetoric itself.

George previews his conclusion in *Marriage Cases* with a "like-race" simile[57] that helps preserve an interesting distinction between gay identity and queer relationship forms, arguing that because California may not deny a person access to rights on the basis of their "race or gender," both "gay" people and "same-sex couples" have the right to form the same "family relationships" as both "heterosexual" people, and "opposite-sex couples":[58]

> Our state now recognizes that...an individual's sexual orientation—like a person's race or gender—does not constitute a legitimate basis upon which to deny or withhold legal

> rights. We therefore conclude that in view of the substance and significance of the fundamental constitutional right to form a family relationship, the California Constitution properly must be interpreted to guarantee this basic civil right to all Californians, whether gay or heterosexual, and to same-sex couples as well as to opposite-sex couples.[59]

In the footnote to this passage, the Chief Justice notes that "for convenience...in this opinion we shall use the term 'gay,' with reference to an individual, to relate either to a lesbian or to a gay man, and the term 'gay couple' to refer to a couple consisting of either two women or two men."[60] In the context of the footnote, this passage contains a tautological approach to defining the gay legal subject, begging the question of whether the gayness of same-sex couples derives from their gay members, or whether a person's gay identity is determined by their participation in relationships with individuals of the same sex.

This question is compounded by the fact that George actually uses the term "gay couple" only three times in a one-hundred page[61] decision;[62] variants of "same-sex couple" appear more times than it would be useful to note. *Marriage Cases* defines "gay individuals" as "persons who are sexually attracted to persons of the same sex and thus, if inclined to enter into a marriage relationship, would choose to marry a person of their own sex or gender."[63] Unlike "gay couple," George appears to assume that the term "same-sex couple" is self-defining. But his definition of both "gay couple" and "gay individuals" functions to interpellate same-sex couples themselves as discrete entities that are ontologically gay. Both George's definition of "gay individuals" and his footnote about "gay couples" can be usefully read in the converse, as in—"in this opinion, we shall use the term 'same-sex' to refer to a couple consisting of either two lesbians or two gay men"; "two persons in a marriage relationship who are of the same sex are sexually attracted to each other because of their identical sex and are thus gay." "Same-sex

couples" are interpellated as "gay" through the logic of desire in George's definitional arguments: both because each member of these couples must be gay (anyone who is not gay would not choose a partner of the same sex); and because there is something intrinsically gay (that is, relating to same-sex desire) about two people of the same sex joining together as members of a couple.

One of the more important questions before the Court in *Marriage Cases* is the substantive weight of the "designation of marriage"[64] itself—this is particularly true if the case is read as an argumentative exchange between the majority, portions of the Attorney General's brief for the state of California, and Justice Carol A. Corrigan's dissent, in which she argues that "this case involves only the *names* of [domestic partnerships and marriages]."[65] The civil right of gay and lesbian individuals who are not in a state-recognized relationship to enter into marriage, and the civil right of gay and lesbian individuals who *are* in a state-recognized relationship to have that relationship recognized as a marriage, are conflated in the majority opinion as the "state constitutional right of same-sex couples to marry."[66] The defendants in the case argue that California's marriage laws "do not prohibit gay individuals from marrying a person of the opposite sex," and are thus not an example of discrimination "on the basis of sexual orientation."[67] They concede that these statutes may have "a 'disparate impact' on gay persons," but this alone is not enough to trigger the strict scrutiny test.[68] George responds—as Walker would do in *Perry v. Schwarzenegger*[69]—by describing marriage as a definitional component of sexual orientation identity, meaning that laws prohibiting gay persons from marrying other gay persons do so on the basis of their sexual orientation and are thus "clearly and directly" discriminatory.[70]

In making this argument, George seamlessly transitions between "gay individuals" and "same-sex couples."[71] He moves from the data that "a statute that limits marriage to a union of persons of opposite sexes, thereby placing marriage outside the reach of couples of the same sex...imposes different treatment on the basis of sexual orientation" to the claim that "the current California statutes realistically must be viewed as discriminating against gay persons on the basis of their homosexual orientation."[72] The terminological slippage between same-sex couples and gay persons as the entities subject to discrimination is important to the structural (logical) resistance of George's doctrinal arguments to Corrigan and the Attorney General's primary objection—as the Chief Justice says in a different context, this slippage is not "mere semantics"[73] in a case about whether "domestic partners have a constitutional right to the name of 'marriage.'"[74] I read the evident confusion about what term to use for LGBTQ persons who wish to marry as a confusion over the topic of queer sexuality itself. It may be that the reason judges cannot agree on terminology is that they have never had to encounter questions that contest not only the right of access to marriage, but demands for access to marriage that may undermine fundamental heterosexual assumptions about the nature of sexual relationships.

In the brief for the State of California, the Attorney General's office (hereinafter "Attorney General") claims that following the "Domestic Partnership Act,"[75] the substantive elements of what both the State of California and the Court agree is a "right to marry" protected by the California Constitution's guarantee of due process and its equal protection clause are identical to the "human rights" the state has granted registered domestic partners through legislation and popular initiative.[76] The key to this argument is the assertion that the designation of the term "marriage"—unlike the "rights, protections, and benefits" the California Family Code grants to "registered domestic partners" the "same" as to spouses[77]—is not itself a part of these

"human rights that inform a man's right to marry a woman, and vice-versa."[78] "The label [marriage]," the Attorney General claims, is not related to the "right to marry."[79] "The label" is the mere "use of a word by the government to describe a particular legal status," and the "use of a word" cannot be described as a fundamental right,[80] liberty interest,[81] component of the "California Constitution's right to privacy,"[82] or a right of association or expression.[83]

The primary arguments on both sides of this dispute over the substance of the "label" work through the common argumentative strategy of "dissociation."[84] In Perelman's philosophy of argument, dissociating the "real from the apparent" among "elements described in the same way" works to "elaborate a philosophical reality which is opposed to the reality of common sense."[85] In this way the apparent is judged in terms of the real, which itself is constructed through the apparent.[86] Thus "reality"—"term II"—is "normative in relation" to the apparent—"term I"—because it is reality that "confirms" the apparent as the "authentic expression" of itself or else "disqualifies it as error and false appearance."[87] As the rhetorical critic and encyclopedist James Jasinski puts it, "dissociative arguments not only divide but also redefine or reconstruct."[88] Reality is "both normative and explanatory,"[89] a rule constructed through appearance that, through the *argumentative* dissociation among different elements of that appearance, becomes the naturalized standard by which those elements are ordered hierarchically in terms of relative distance from the posited truth[90]—or, rhetorically, the desired endpoint of persuasion. Thus an argument in which the late Venezuelan President Hugo Chávez' consistent and evident popularity is used as data for the claim that his government was *un*democratic, works to propose and defend an anti-populist theory of ideal democratic governance.[91]

George cannot say that the "designation" "marriage" determines what marriage is for the purpose of adjudicating the right to marry—this would satisfy the petitioners' immediate

demands while making possible an egregiously unequal future Family Code wherein gays and lesbians would be allowed to "marry," but would still be treated differently, as couples, than married heterosexuals. The majority's arguments thus appear tautological,[92] as in, the "designation" marriage is a substantive component of the right to marry, because everyone understands that marriage is marriage and other things are not. This tautology can be explained as a dissociation, where "term I"—the appearance of marriage—is divided into the elements "marriage" and "domestic partnership," so as to judge both against "term II," or the reality of marriage contained within the "right":

> We need not decide in this case whether the name "marriage" is *invariably* a core element of the state constitutional right to marry so that the state would violate a couple's constitutional right even if...the state were to assign a name other than marriage as the official designation of the formal family relationship for *all* couples...rather [the state] has drawn a distinction between the name...of opposite-sex couples (marriage) and that for same-sex couples (domestic partnership)....embodied in the California constitutional right to marry is a couple's right to have their family relationship accorded dignity and respect equal to that accorded other officially recognized families...assigning a different designation for the family relationship of same-sex couples while reserving the...designation of "marriage"...for opposite-sex couples...[risks] denying the family relationship of same-sex couples such equal dignity and respect....although the provisions of the current domestic partnership legislation afford same-sex couples most of the substantive elements embodied in the constitutional right to marry, the current California statutes nonetheless must be viewed as...impinging upon a same-sex couple's constitutional right to marry under the California Constitution.[93]

Both the designations "marriage" and "domestic partnership" are elements of the substantive *thing*—a state-recognized official family relationship—that is marriage, but "domestic partnership" is normatively inferior in a world where the reality of marriage is constructed through the term itself. Thus for George "marriage" is a substantive component of the "right to marry"; the former ("marriage") is only actually marriage if it corresponds to the substantive components of the latter ("right to marry"), which includes the former as a fact of its construction. "Term II" becomes the *naturalized* standard against which the elements of "term I" are judged; and so it is here—in Perelman's terms, this is judicial argument as "demonstration" rather than "persuasion." George frames his conclusion about the substance of the "designation" as derivative of the reality of what marriage presently means in California, rather than as his own argumentative construction and normative defense of that reality against another.

Corrigan and the Attorney General use diction implicitly to construct a different ("counter") dissociation,[94] where the elements of "term I" are not "marriage" and "domestic partnership," but rather "terminology" and "substance."[95] The Attorney General grammatically dissociates the "use of a word to describe" and "particular legal status," while Corrigan charges that, "the majority fails to recognize the case involves only the *names* of those unions,"[96] so as to emphasize the "distinction between substance and nomenclature."[97] In this argument the illusory component of "term I" is not "domestic partnership" but "nomenclature"; marriage (as term II) is defined in substantive terms, and so it is most accurate to adjudicate the "right to marry" in non-terminological fashion. This dissociative tactic is apparent even in the contrast between the adjectives "word," "name," (Attorney General and Corrigan) and "designation" (George) to modify the noun "marriage"; "designation" emphasizes the correspondence with reality of the *statutory utterance* in question, while "word" and "name" emphasize the a-materiality of state-

produced labels for real things; suggesting a greater distance between signifier and signified as components of the marriage sign. As a function of argument structure, George's is the only one among the three interlocutors to naturalize the civil right of family recognition as marriage.

George provides detailed evidence to support his claim that the "designation of marriage" itself is an important substantive component of the "right to marry" as protected by both the due process and equal protection clauses.[98] Rather than directly addressing the benefits, George lists the designation as conferring upon formally related couples, Corrigan inverts the majority's argument, framing George's rhetoric not as an attempt to imbue the designation marriage with substantive value, but instead as an attempt to "denigrate" the substantive quality of state-recognized domestic partnerships.[99] Here, substance is again placed above terminology in the Justice's dissociative pairing, with respect to how Corrigan describes the central question of law ("whether domestic partners have a constitutional right to the term 'marriage'"[100]):

> The people are entitled to preserve this traditional understanding [of marriage as between a man and a woman] in the terminology of the law, recognizing that same-sex and opposite-sex unions are different. What they are not entitled to do is *treat* them differently under the law.[101]

The difference between terminology and treatment are made clear in Corrigan's account; if they are in fact different—having different meanings—there can be no claim to discrimination as a result of terminology unless the Court foolishly *makes* it so—thereby also underwriting the Attorney Generals' suggestion that granting "suspect classification" status to sexual orientation could damage "gay men and lesbians" by inspiring "'reverse discrimination' sexual orientation lawsuits brought by heterosexuals."[102]

Using this logic, George's explanation of the substantive content of the marriage designation is actually a diminishment of the substantive content of domestic partnerships. If the interest of the dissents in preventing "marriage" from becoming an umbrella term for all state recognized couple relationships can be critically bracketed—because, as none of the arguing parties or Justices recognize, neither the plaintiffs' victory in court nor a similar legislative change would allow *all* family relationships in California to be termed "marriage" by the state—a critical queer reading of Corrigan and the Attorney General enables the position that is George who would do more to enshrine inequality of family recognition in the California Constitution. In this critical queer reading, a specifically judicial requirement for the state to designate same-sex unions "marriages" would only serve to render material a difference between heterosexuals and homosexuals that before the majority's finding was *merely terminological*. In other words, some of the arguments in Corrigan's dissent can be read as functioning to resist the California Court's performative sovereignty over the nature and identity of kinship in California.

In his separate dissent, Justice Marvin R. Baxter further argues that it is impossible to find that same-sex couples must be granted access to the fundamental right to marry, because marriage *traditionally* is inherently exclusive to heterosexual couples, not same-sex ones. What the majority calls granting a class of persons access to a fundamental right, Baxter (and to a lesser extent Corrigan) call a judicial redefinition of a popularly recognized and defined institution contrary to all precedent and the will of California voters,[103] thus violating the judicial caution mandated by "separation of powers."[104] Baxter accordingly describes the majority as "finding a constitutional right to *same-sex* marriage,"[105] at once ignoring and repudiating George's argument that the case is not about judicial redefinition of marriage or the creation of a new civil right, but rather adjudication of the question of whether adequate justification exists to

deny gay men and lesbians the same right to marry that is accorded heterosexuals.[106] As Corrigan says, "plaintiffs seek both to join the institution of marriage and at the same time to alter its definition."[107]

At first reading, Baxter and Corrigan's objections almost seem deliberately obtuse: for Baxter's summary of the Court's finding in terms that the Chief Justice specifically divests his opinion from; and for Corrigan's re-framing of the entire question of the case—whether or not the manner in which the statutes in question define marriage is constitutional—in terms that structurally erase the majority's lengthy doctrinal argument that the current "definition" (Corrigan's mere withholding of a "name") is discriminatory as a matter of doctrinal fact. George's responses (the right to marry must be evaluated in terms of the "*substantive* content" of that right[108]; a portion of that content is the "freedom 'to join in marriage with the person of one's choice'";[109] and the "tradition" of limiting marriage to a "union between a man and a woman" is not "sufficient justification for perpetuating...the restriction or denial of a fundamental constitutional right"[110]) also seem to avoid the crux of the matter. If marriage is a "union of opposite sexes," the "freedom 'to join in marriage with the person of one's choice'" does not grant a person the *impossible* right to marry someone of the same sex.[111] Indeed, that freedom to marry who we choose is abrogated by many other substantive restrictions on the definition of marriage,[112] leaving room for Corrigan's argument that California's creation of a substantively equal institution of "domestic partnership" is from an equal justice perspective a reasonable and even laudable legislative response to the intrinsic limitations of marriage twice recognized by California's legislature and populace.[113]

George rejects the "tradition" justification, but the dissenting opinions do not offer that justification on its own—rather, they present it through a conflation of what marriage has been

traditionally, with what marriage fundamentally is after § 300 (a) and Proposition 22. The dissent's traditional argument works much better than it first seems after reading George's (convincing) opinion, if it is read via the warrant (explained in greatest detail by the Attorney General's office) that the heterosexual nature of marriage is a *substantive component of the right to* marry, that is somehow also not exclusive of gay and lesbian access to that right. In stronger terms, gays and lesbians have the right to marry partners of the same sex, even though a present component of that right in California is the intrinsic heterosexuality of marriage. This would mean that (in the logic of Corrigan's arguments) judicial deference to how the people of California view marriage as a substantive right would require starting from the presumption of the constitutionality of marriage as heterosexual.[114] Without this warrant, the dissenting arguments actually function to underwrite the majority's (and concurring Justice Joyce L. Kennard's)[115] response. With this warrant, the dissociative diction in Corrigan's dissent, I argue, has the beneficial effect of highlighting the ideologically obscured reality of marriage as a more exclusive than inclusive institution.[116]

Corrigan and Baxter say that marriage is intrinsically heterosexual and that the people of California *also now* say it is so,[117] meaning any change to that definition is not an adjudication of rights claims, but rather a change to marriage itself beyond the scope of proper judicial power. This argument contests but also underwrites George's response that marriage has traditionally been intrinsically heterosexual, *but now* the legislature (in 1977)[118] and the people of California (in 2000 with Proposition 22) say it is so, meaning that the question of whether these popular and legislative statutory declarations constitute a violation of liberty and discrimination against a suspect class is an appropriate matter for judicial review. Corrigan chides George for failing to "recognize the case involves only the *names* of those unions," but it is precisely the fact that the

case does involve only the names that allows George to ground the majority's holding on a determination of the constitutional value of the names themselves.[119]

Corrigan states "the voters who passed Proposition 22...decided to keep the meaning of marriage as it has always been." The grammatical construction of this sentence (the past tense of the verbs, the use of a pronoun for "meaning"/heterosexual) enables the warrant that the heterosexual definition of marriage is a substantive component—even a legitimate benefit for the purpose of the rational basis test—of both the right to marry *and* the right to enter into a domestic partnership in California.[120] This warrant is what allows for Corrigan's rather elegant conclusion that any change to that definition should come only through popular initiative—a move she would happily support.[121] The Justice's phrasing elides the distinction that first the California Legislature, and then California voters, took action to "keep the meaning of marriage as it has always been" *traditionally*, by adding in each case *new statutory restrictions* to that meaning. George's response (that it is the statutory declaration of the intrinsic heterosexuality of marriage, rather than the reality that marriage in California law has been intrinsically heterosexual, that works to specifically disadvantage the value of domestic partnerships and so is per se discriminatory toward gay people) is thus itself grounded in the related warrant that the ability to enter into marriage-like relationships is a fundamental component of the ability to fully be a homosexual person.[122]

Corrigan and Baxter are right, in a sense: George does seek to redefine what marriage is, but not quite in the way that his interlocutors in *Marriage Cases* say he does. Just as the Attorney General charges,[123] George begins to shift the "right to marry" from the right to enter into a rhetorically malleable institution with substantive content, to a right to a designation that forms an important part of the substantive content of a more strictly defined institution. *In re*

Marriage Cases is the first in a line of decisions (now possibly to be extended at the Supreme Court)[124] that would change marriage from an institutional civil right to a signifier for (where that signifier will be a fundamental substantive component of) a broader institution that will replace "marriage" but still bear its name. This will do much to performatively entrench the construction of constitutionally legible queer identity—legitimated queer subjectivity before U.S. constitutional law—via the restrictive terms of the "domestinormative" family.[125]

This is where not only the slippage in the rhetoric of George's opinion between gay individuals and same-sex couples as rights-bearing entities, but also his related inability to define a queer subject in terms other than coupling comes into play. George holds marriage vital to a fully valuable and dignified life that is not fully possible without the designation itself, and also defines gay identity through homosexual desire. Therefore: homosexuals who wish to marry will marry other homosexuals (because a homosexual is someone who wishes to marry someone of the same sex), dyadic coupling for purposes that can be described as beneficial to the public and to the state is a pre-requisite to a dignified *and constitutionally legible* homosexual life; and this life can be lived in full only through governmental bestowal of the term "marriage." Contrastingly, for Corrigan in particular, a state-recognized union of two persons of the same sex must as a matter of equal protection of law be afforded the same benefits and public dignity as a union of two persons of the opposite sex, but the designation of marriage is not a vital component of that dignity.[126]

What is deprived in California law (leaving aside, as the California Justices mostly do, the federal context) is the designation of marriage only. This designation, only as it relates to a marriage-like legally recognized relationship, is vital because it is a pre-requisite to being fully dignified as a legal subject. What is deprived in the withholding of the marriage designation is

therefore the right to be fully recognized as a subject realized in, bound, and privileged by law. George spends significant time in his decision responding to the more explicitly anti-equality arguments from Baxter, the Court of Appeals, and the anti-gay rights Proposition 22 Legal Defense fund,[127] but much of this refutation is moot if the debate is framed, as Corrigan does, as one that is "only" about "the names."

Much of George's refutation of Baxter involves answers to Baxter's (and the defenders of Proposition 22's) arguments that gay individuals should not be treated equally under the law. But Corrigan assumes that they should be so treated, insisting that

> Domestic partnerships and marriages have the same legal standing, granting to both heterosexual and homosexual couples a societal recognition of their lifelong commitment. This parity does not violate the [California] Constitution, [*sic*] it is in keeping with it. Requiring the same substantive legal right is, in my view, a matter of equal protection. But this does not mean that the traditional definition of marriage is unconstitutional.[128]

The debate between George and Corrigan over the substantive value of statutory terminology provides a critical opportunity to examine the debate over same-sex marriage narrowly, in terms of the distinction between "everything but marriage" statutory regimes, and the material consequences of the judicial argumentative frameworks constructed to render such regimes unconstitutional. My examination here uses the terms of this judicial argument as one frame through which to take up the "struggle...for recognition of marriage" critically as a struggle for the right to be defined as normal by the state, a determination that works as a synecdoche for all other efforts to realize queer (counter)publicity.

Here, I acknowledge that Corrigan does much to elide the heterosexism that is clearly, as George argues, an intrinsic component of the California marriage statutes.[129] In the status quo of

California circa 2008, George describes reality: "domestic partnership" is a "new and unfamiliar designation"; in contrast to the "historic and highly respected designation of marriage."[130] "Domestic partnership" may be substantively equal to "marriage" in California, but the difference in designation has a substantial negative impact on the ability of a state-recognized couple to maintain that status while moving about the Union, and on their ability to either collect federal benefits or to bring challenges to the federal Defense of Marriage Act.[131] Particularly in the context of equal protection, it is difficult to understand how Corrigan can maintain that there is no constitutional violation in the people of California's twice-affirmed (as of May 2008) decision to call the otherwise identical[132] relationships of same-sex couples a different name than that which the justifications for these restrictive statutes insist is synonymous with "dignity and respect."[133] As Justice Kennard eloquently notes in her concurrence, the gay and lesbian couples who took part in the 2004 "marriage ceremonies" invalidated in *Lockyer* did so with "great joy and celebration,"[134] a joy that in many cases surely derived in part from the parties' hitherto proscribed ability to demonstrate publicly and be recognized for their love and commitment on the *same terms* as any heterosexual person. Corrigan's opinion does not address the real and substantive value that many of these couple members—some of them the actual plaintiffs before her bench—placed on the "word" marriage, and her called-for remedy would have asked those plaintiffs to accept the continued devaluation[135] of those pre-*Lockyer* ceremonies by one of California's four mouths (the Court) while waiting for the affirmation of another (the people and/or the legislature).

I do not present my favorable comparison of Corrigan to George literally as the position that I think *Marriage Cases* should have been decided in the opposite direction—although in the wake of Washington's Referendum 74,[136] approving the Washington Senate's re-classification of

all state-recognized domestic partnerships as marriages through Senate Bill 6239,[137] it is at least interesting to speculate about what legislative and popular initiative results a Corrigan-written decision in *Marriage* Cases may have led to. (Perhaps instead of Proposition 8, the popular initiative the dissenting Justice calls for, to open California's marriage designation to same-sex couples?) My own stakes in marriage and domestic partnership as a political question are not those of the respondents in *Lockyer* or the plaintiffs in *Marriage Cases*. All of my relationships have been heterosexual, and so eligible for (what I agree with George is) the substantive designation of marriage in every U.S. jurisdiction. George rightly insists on the substantive content of the "*opportunity*" alone to establish a marriage and "to obtain the substantial benefits such a relationship may offer."[138] I may choose whether or not to ask the state to recognize my own partner relationships in the same terms as it recognizes others like mine, and I have not yet known (and probably never will) what it is to be denied such recognition as even a possibility for my future life. As Reddy—a resident of Washington State—argued in a recent talk at the University of Illinois at Urbana-Champaign, part of the overwhelming resilience of the "gay marriage movement" against challenges like Richard Kim's is that iterations of this movement, including Washington State's Washington United for Marriage,[139] successfully conflate queer justice goals with legal recognition via marriage, leaving little practical space for an ethical, anti-oppressive *legal* politics outside of that conflation.[140]

Reddy noted, with respect to Referendum 74, that this Washington State election would represent his first opportunity to vote as a United States citizen, and that while he opposed the universalizing politics of the "gay marriage movement," does this mean he should vote "no?" if he participates in this election? A "no" vote in Washington in 2012, just like a "yes" vote in 2008 California, is an alignment with the motives and goals of groups like the Proposition 22

Legal Defense Fund[141] and Preserve Marriage Washington (the group responsible for placing Referendum 74 on the ballot to challenge SB 6239's implementation),[142] and of purveyors of state-bigotry like the Republican Congresspersons attempting to act as intervening respondents in *United States v. Windsor* (because the Obama administration as the plaintiff United States would have the Supreme Court review the case in order to find for the respondent).[143] The critical task is therefore both to recognize and work to create radical queer legal political meaning for the situation produced by not only the passage of Proposition 8, but also the overall process of that passage, which includes the doctrinal story begun in *Lockyer* and *Marriage Cases*.

In other words, it behooves what Reddy calls "progressive"[144] opponents of the "gay marriage movement" to consider—counterfactually—the implications of the judicial opinions like Corrigan's that the marriage movement would consider setbacks, were they to have become force of law. The proper question for "the sexual progressive" is less a consideration of how to win back the rights and recognition lost in Proposition 8, and more what "speech of bodily groups that are the material foundations of the US nation-state"[145] is enabled, encouraged, foreclosed, and/or demanded by the rhetorical situation of the political conflict over marriage. Reddy describes how the public conflict over Proposition 8 has increased access to hitherto less available argumentative techniques and strategies for the efforts of "various," and especially Latino, "nonnational popular constituencies" to build rhetorics of "relation to state power in which they are not its expropriated object but in fact the ground for the state form,"[146] as these are rhetorics that center on "family rights as foundational rights that precede and ground the identity of the state."[147] The argumentative exchange between the various Justices in *Marriage Cases* remains a polysemous text, one that both suggests and forecloses specific doctrinal and statutory possibilities for sexually progressive modes of familial definition.

My claim about polysemy is indebted to Derrick A. Bell's concept of "interest convergence."[148] It is important to recognize that whatever the "real" motives of Corrigan and the Attorney General were as individual rhetors and/or mouthpieces of state institutions, their advocacy works in service[149] of a regressive political movement designed to permanently marginalize a group of people through the discursive regime of marriage, a regime that will for the intermediate future remain a primary governing force over individual, group, and organizational movement among the multiple layers of United States labor, family, civil, and criminal law.[150] Just after the decision in *Marriage Cases*, Ann Bradley's *Daily News of Los Angeles* editorial chided Corrigan for consigning California gays and lesbians to a second-class status via a *Plessy v. Ferguson*-esque segregationist logic[151]—but as the blogger Leland Traiman suggests,[152] this position is a bit unfair to Corrigan's arguments when read in light of what I read as Baxter's apparent personal homophobia. Corrigan, at least, is not Baxter: but I am not spending all of this time on an "at least she's not Baxter!" argument. Rather, the political possibilities of Corrigan's opinion are *excessive* of her arguments' relationships to certain elite heteronormative interests. The judicial debate staged at the California Supreme Court between marriage and domestic partnership as an "equal" institution provides critical opportunity to seek what "fortuity"[153] can be found for radical, anti-establishmentarian queer political goals in the California and U.S. judicial rhetoric surrounding Proposition 8. As Bell demonstrates in a similar exercise with *Brown v. Board of Education*, such counterfactual exercises can be useful when seeking out such "fortuity" in the inevitably anti-radical judicial rhetoric of U.S. constitutional law.[154]

Corrigan's dissent suggests a "marriage" with no intrinsic value other than that given to it by popular vote, suggesting conditions of possibility for legal demands on behalf of relationship

forms currently excluded not only from marriage, but all legally described legitimate family structures in California and the United States. Her opinion represents one—predictably conservative, given its institutional context—example of how it might be possible in future to argue for state recognition of relationships which *cannot ever be*[155] marriage, as equal in value to the state (and in dignity for individual and group)[156] as the venerable institution.[157] Corrigan enacts a judicial rhetorical separation of the components of the "marriage" sign, bracketing the signifier designation from the signified relationship form and demanding that each be treated separately for the purpose of constitutional review. The particular argumentative tactic Corrigan employs works through an exemplary appearance/reality dissociation of majoritarian definitions of what family should be, from the substantive components of what families really are.

There can be no such thing in the world of the majority. The Chief Justice's shift from a defense of gay individuals' right of access to civil institutions *like* marriage, to the argument that the designation of "marriage" itself is a substantive component of this right, functions to collapse signifier and signified into an indissociable entity. Under the sign "marriage," George powerfully sutures: monogamous, economically elite, and procreation related dyad-pairs; with the limit points of legal family. Responding to the Attorney General, George acknowledges the constitutional (due process and equal protection) viability of a world in which "California were to assign a name other than marriage as the official designation of the family relationship for *all* couples,"[158] but he does so almost in the same breath as a specific argument for the substantive content of the term "marriage" itself. In any case, this concession is still grounded in a dissociative warrant that sutures a statist terminological recognition of dyadic family relationship, with the substantive value of family relationship *per se*. This logic privileges biological reproduction as a warrant for state support and recognition. Even though George argues that

procreation is no longer a necessary or inherent component of the value of marriage, the value of reproduction still grounds the reasons for the state to privilege the non-biological bond between husband and wife, and after *Marriage Cases*, wife and wife and husband and husband.[159] The majority's conferral of substantive weight on the marriage designation naturalizes marriage-like relationships as the limit of familial subjectivity before law. Corrigan's dissent and (in some ways) the Attorney General's brief for California resist that naturalization by insisting on separating the question of access to the term, from the question of constitutional proscription of discrimination against marriage-like relationships without adequate justification.

Writing on the relationship between territoriality and immigration law Leti Volpp argues that "space is constituted through legal language, and then serves as the seemingly natural 'ground' for that language."[160] This principle works also within the conceptual rhetorical space of constitutional doctrine. For example, Baxter does not acknowledge the right to enter state-valued family relationships as one naturally attached to homosexual persons. Instead, he chides the majority for basing its notion of gay individuals' right to marry people of the same sex on the recent legislative conferral of related benefits through the Domestic Partner Act, which he says the majority uses in turn as the evidentiary basis for the judicial destruction of legislative intent with respect to the definition of marriage.[161] Thus for Baxter the majority simultaneously performs legislative encroachment on judicial power, and judicial encroachment on legislative.

George responds by declaring that, "the capability of gay individuals to enter into loving and enduring relationships comparable to those entered by heterosexuals is in no way dependent upon the enactment of the Domestic Partner Act; the...[DPA]...simply constitutes an explicit official recognition of that capacity."[162] "That capacity"—one entirely restricted, through both the grammar and ideological citation of the majority opinion, to "dyadic heterosexually based

family forms"[163]—is a conceptual version of Volpp's "space" tautologically "constituted through legal language"; a form of legal subjectivity that is both constituted in law and a pre-requisite to that constitution. The decision in *Marriage Cases* hinges on the notion that precisely the "explicit official recognition" of "loving and enduring relationships" is a vital pre-requisite to those relationships' full existence. It is because the socially constructed institution of marriage has defined particular family forms as eligible for constitutional projection as fundamental rights-bearing entities, that similar entities have the right to be called marriages.

The Attorney General maintains that marriage should be treated differently from other "fundamental rights," because the foundation of the right itself is state regulation—this argument works as both evidence and warrant for the claim that the "term" marriage is not part of the substance of the "right to marry" that the Court is bound to protect.[164] Marriage is accordingly "not a fundamental interest in the same way as other interests are deemed fundamental"; it is a right whose boundaries are necessarily subject to popular redefinition because it is a right whose basic components have no clear natural (or at least pre-jurisprudential) basis.[165] Instead, the Attorney General and Corrigan both argue, there *is* at least a pre-jurisprudential "common law" right to enter into personal and private relationships "with a beloved person," [166] these relationships should be "free from government interference,"[167] and those relationships whose members are "in the same position as married couples when it comes to the substantive legal rights and responsibilities of family members" should as a principle of equal protection be treated identically as parties to a marriage.[168] Corrigan's and the Attorney General's notion of what "relationships with a beloved person" might legitimately consist of are clearly informed and restricted by "domestinormative" ideology. Both also go to great lengths in order to preserve what is to me a nakedly "sophistic" (in the improper[169] way in which George uses the

term[170]) claim about the substantive immateriality of words. The Attorney General's contention that "the state is unaware of any legal precedent establishing a fundamental interest in the use of a word by the government to describe a particular legal status"[171] is particularly thin—what of "alien"; "felon"; "enemy combatant"? Nonetheless, their arguments suggest a potentially more progressive future of state family regulation than the majority's.

In Corrigan's dissent (and also in the Attorney General's "fundamental interest" analysis), the very denigration of the "term" marriage as a word with no substantive content (other than the popular understanding of one specific tradition) makes a future conceivable wherein "relationships with a beloved person" currently excluded by the foundational assumption of "couple" could be rhetorically constituted as rights-bearing entities under the dissociative framework of the dissents' non-marriage related "right to marriage." Judith Butler asks, "how does one oppose...homophobia without embracing the marriage norm as the exclusive or most highly valued social arrangement for queer sexual lives?"[172] Corrigan's dissent is not an answer, but it does make thinkable a doctrinal future for legally valued voluntary "bonds of kinship" that have little connection to marriage at all.

Baxter expresses concern that the majority's reasoning could result in future, greater expansions of the definition of marriage into areas including "polygamous and incestuous marriages" that (unlike same-sex marriage) the Justice cannot conceive of as ever reflecting popular will.[173] This "dangerous" possibility is grounded in what Baxter calls George's judicial activism[174] in "inserting in our Constitution an expanded definition of the right to marry that contravenes express statutory law."[175] I think it is viable to say that George attempts to articulate a *new right*, but it is a new right *called marriage*, defined not through an "expanded definition of the right to marry," but rather limited precisely by that definition as the "term II" reality in force

at the time of the opinion. By insisting on ending the intrinsic heterosexuality of the "term" marriage itself, George does not expand the definition of the right to marry.[176] Instead he grants "same-sex couples" access to the existing institution of civil marriage by naturalizing the substantive components of this right as what they have currently been made out to be:

> The right to marry, as embodied in article I, sections 1 and 7 of the California Constitution, guarantees same-sex couples the same substantive constitutional rights as opposite-sex couples to choose one's life partner and enter with that person into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage.[177]

The "dangerous" possibility that Baxter fears seems more possible in the argumentative framework of Corrigan's dissent than in that of George's opinion. There is potential in this possibility, as there remains, in both California and the rest of the United States, a strong disconnect between multi-modal activism for "GLBTQ," gender, racial, and economic justice, and the public communication and operations of the "gay marriage movement."[178]

The "initiative...amendment" (now Article I, § 7.5) to the California Constitution adopted by Proposition 8 declares, "Only marriage between a man and a woman is valid or recognized in California."[179] The particular history of California's Family Code and the Domestic Partner Act as outlined in *Marriage Cases* made the grammatical and statutory focus of § 7.5 very different from the simultaneously adopted Article I, § 27 of the Florida Constitution ("Amendment 2"), which reads "insasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized."[180] § 7.5 is concerned with what *kinds of marriages California recognizes as such*. § 27, although it is titled "Marriage Defined," is not directly

concerned with marriage (for example, with whether marriage-like relationships can come to be called marriage), but rather with stripping legal recognition from any union that resembles marriage in its substantial characteristics.

The contrast between California's Proposition 8 and Florida's Amendment 2 thus provides some comparative constitutional support for Kim's plea that "in more than a dozen states gay couples have no partnership rights whatsoever...are there more-inclusive movement goals than an initiative that would give only California's same-sex couples the M-word?"[181] Kim's bold and rather unheralded argument can work against the "gay marriage movement"'s overall elision[182] of pressing racial and economic justices issues, but it retains an assumptive focus on the "couple" as the primary family form. The queer, trans, and legal theorists Dean Spade and Craig Willse's related statement on the passage of Proposition 8, "I Still Think Marriage is the Wrong Goal," does more to articulate the objection to marriage *itself* as a "coercive state structure that perpetuates racism and sexism through forced gender and family norms"[183]—echoing Butler's pre-*Goodridge* discussion of the complexities of "queer" resistance to "lesbian and gay marriage" in *Undoing Gender.*[184] Read together, Kim and Spade & Willse's call to action demands a rejection not of one tactic or another in the struggle for relationship equality, but rather a strategic divestment from the "same-sex marriage battle"[185] as a whole.

What Corrigan calls California's "historic" determination, via the Domestic Partner Act, of marital parity for a category of non-marriage relationships certainly made that state, as Kim urges, a potentially productive space for a more radical "queer political agenda."[186] Given the particular framework of Corrigan's dissent, the campaign for Proposition 8 could conceivably have worked as a resource for queer politics against marriage, and for a refocusing of movement energy against interlocking economic, gender-based, nationalist, white suprematist, and cissexist

oppressions[187]—as the campaign did in fact work as an argumentative resource for "nonnormative" Latino immigrant community family claims.[188] This possibility was foreclosed not by the passage of Proposition 8 itself, but rather by the doctrinal meaning of the resulting constitutional amendment—as that meaning was constituted through the rhetoric of George's opinions for the Court first in *Marriage Cases*, and then in *Strauss v. Horton*.

III. *Strauss v. Horton*

The primary questions before the California Supreme Court in the *Strauss v. Horton* challenge to Proposition 8 and the resulting § 7.5 were: whether the initiative was properly a constitutional amendment, rather than a full "revision" requiring a more stringent adoption process than a popular initiative;[189] whether the Proposition functioned as a separation of powers-violating popular "'readjudication' of the issue resolved in the *Marriage Cases*";[190] and whether the amendment should be rejected as an abrogation of the "rights of privacy and due process" "guaranteed" as "inalienable" under Article I, § 1 of the Constitution.[191] One year and eleven days after his opinion in *Marriage Cases*, George argued for the *Strauss* majority that Proposition 8 was properly an amendment rather than a full revision,[192] and did not re-adjudicate his earlier opinion, as this had been written in the context of a previous constitution now rendered obsolete by the new amendment.[193] George also found no ground for the Court to hold § 7.5 incompatible with the basic rights of liberty and equality enumerated in Article I, § 1, as a founding and peculiar[194] principle of the state's Constitution is that those "constitutional rights" declared "inalienable" are also subject to reasonable regulation and interpretation of application by various representatives of the state (including the People)[195]—in short, it is a founding principle of the California Constitution that no part of the Constitution can be immune from amendment.[196]

George acknowledges that *Marriage Cases* held (as he describes his earlier opinion) that denying "the right to equal access to the designation 'marriage'...does in fact diminish the rights of same-sex couples under" Article I, § 1.[197] The strong implication here is that *Marriage Cases* created a new right subordinate to the inalienable rights of liberty and equality in § 1, and thus subject to amendments that clarify the meaning of how those rights should be applied (even though, as I note below, *Marriage Cases*-George did not actually create a "right to equal access" *to the designation*, as *Strauss*-George claims). Prop 8 has no effect (in terms of California law) on same-sex couples' access to the rest of the "fundamental substantive components encompassed within the constitutional rights of privacy and due process."[198] Accordingly, George argues, Proposition 8 did not have a "sweeping constitutional effect" that would require a more rigorous amendment process than a majority popular initiative[199]—rather, the amendment "establishes a...substantive state constitutional rule"[200] that is the "new" benchmark for determining the constitutional meaning of the term marriage itself.[201]

This argument that *Marriage Cases* recognized a right of designation that remains subject to the interpretation of California voters looks like a misapplication by the Chief Justice of his own *Marriage Cases* precedent, because in the earlier opinion, George actually appears to lean more heavily on what Janet E. Halley calls the "natural rights argument"—an argument for a right that is prior to law and permits no revision. Halley reserves particular disdain for the "justice-based right to marry" argument common to "gay marriage campaigns," both because this claim is used as a catch-all response to progressive critiques of the marriage institution, and because in its tautological reduction of claim, data, and warrant[202] (a natural right is immovable, because it is natural, and natural rights are irrefutable), it is a dangerously *weak* argument that can harm the campaigner just as much as the oppressor.[203] Halley's objection echoes Mary Ann

Glendon's earlier warning about the proliferation of "excessively prodigal and absolutist rights talk" in U.S. jurisprudence.[204] But where Glendon is broadly concerned with how "absolute" rights claims in U.S. popular discourse have come to be used as "trumps" in every comparative justice argument,[205] Halley's critique is more specific to the "*natural* rights argument," which "in the absence of any agreed upon metaphysics of formal rights...posits that rights are definitionally entitlements that trump all other claims."[206] Halley can thus distinguish the formalist rights claims of the gay marriage movement, and the "rhetorically alert pragmatism" of Critical Race Theory's defense of rights against critics like Glendon.

Marriage Cases makes a rich text for any student of rights talk, in part because it is hard to parse the formalist and constructivist warrants in George's "right to marry" arguments. George first defines marriage as a "basic, *constitutionally protected* civil right," citing the California Court's earlier decision in *Perez v. Sharp* in order to give the right to marry a legally constructed—"civil" rather than "natural"[207]—origin point. In matters of California law, the California Supreme Court has no higher authority than the California Constitution. As such it would not be a stretch to consider (as George does in *Marriage Cases*) the initiative statute Proposition 22 an invalid exclusion of gays and lesbians from a "'fundamental right of free men [and women],'" and then to later rule (as George does in *Strauss*) that the initiative constitutional amendment Proposition 8 is a valid redefinition of what that right fundamentally is.[208] As Justice Kennard notes in her *Strauss* concurrence,

> Unlike the state Constitution that this court interpreted in the *Marriage Cases*...the currently existing California Constitution, while continuing to protect the rights of same-sex couples to form officially recognized family relationships, now restricts marriage to opposite-sex couples. As members of the judicial branch, the justices of this court have a

solemn obligation to interpret and enforce the entire state Constitution, including that new and valid voter-enacted restriction.[209]

But George goes on in *Marriage Cases* to make the argument that the right to marry, as a fundamental right, is one that is not created in, but rather properly recognized by, constitutional law.[210] The Chief Justice frames *Marriage Cases* as a "recognition that the [California] constitutional right to marry applies to same-sex couples as well as to opposite-sex couples."[211] The "right to marry" is not created by but rather "embodied in article I, sections 1 and 7 of the California Constitution." In the grammar of George's *Marriage Cases* opinion it is this prior right and not the Constitution itself that "guarantees same-sex couples the same substantive constitutional rights as opposite-sex couples to...enter...into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage."[212] As I argue in the previous section, the majority opinion in *Marriage Cases* responds to the dissents not by emphasizing an independent right to the designation, but rather by arguing that marriage cannot be marriage without the designation—a state-recognized relationship not *called* "marriage" is not marriage, and so access to that relationship cannot satisfy the "right to marry."

Strauss advances the different position that the designation "marriage" is only one of the many "constitutionally based incidents" of the right to marry that George outlines in *Marriage Cases*.[213] Thus George can offer an analogy between Proposition 8 and previous initiative constitutional amendments that "made very important substantive changes in fundamental state constitutional principles," and that were still held to be "amendments" rather than "revisions." In these past situations, the rights in question were not eliminated, but rather "diminished."[214] This analogy would not be possible under the dissociative logic of *Marriage Cases*. George could

have, as I read it, explained his position with much greater brevity—perhaps Kennard should have written the majority—but Kennard's summary of the Court's position in *Strauss* also rests on the assumption that "the state Constitution does not prohibit constitutional amendments qualifying or restricting rights that the state Constitution describes as 'inalienable.'" As Justice Carlos R. Moreno—the only dissenting judge in *Strauss*—argues, George can only hold that Proposition 8 is a "qualification" or "restriction" of a right (because it denies only one of the many incidents of that right to gay and lesbian persons, as George takes care to emphasize even though amendments need not "be supported by a compelling state interest"[215]) if he elides the underlying logic of *Marriage Cases'* description of the substantive *rhetorical* content of the "right to marry."[216] Following this logic means that a "qualification" or "restriction" of the right to marry that includes banning a suspect class of persons access to the designation of "marriage" and requiring that class to apply instead for a different form of state-relationship recognition is not a "diminishment" at all, but rather a fundamental denial of the right itself.

I am with Moreno; I think *Strauss* can be read as only either a reframing of the *Marriage Cases* precedent, or rather a willful violation of that precedent in order to avoid structural conflict among the branches of the Bear Republic. George's opinion in *Marriage Cases* is clear on this point. "Denying the designation of marriage to same-sex couples cannot fairly be described as a 'narrow' or 'limited' exception to the requirement of equal protection";[217] and any attempt to *either separate or subsume* the designation of "marriage" from or into the "right to marry," as George does in *Strauss*, must create a "fundamentally different"[218] regime of legal recognition. In Moreno's words, "the rule the majority crafts today...allows same-sex couples to be stripped of the right to marry that this court recognized in the *Marriage Cases*."[219]

Strauss-George's inaccurate reframing of the holding in *Marriage Cases* as establishing a "right to equal access to the designation 'marriage'" is an odd echo of the argumentative logic of Corrigan's dissent. These portions of the *Strauss* opinion read as a kind of weak version of Corrigan's strong repudiation of the substantive significance of the mere "term" marriage in terms of equal protection doctrine. It is telling, then, that George does not cite Corrigan in any part of the *Strauss* majority. The oddly "progressive" potential of Corrigan's argumentative framework is evident in a counterfactual scenario in which George did do so, in order to strike *down* Proposition 8 in a manner consistent with the logic of *Strauss*—arguing perhaps that Prop 8 unforgivably erred in not elevating *the term* "domestic partnership" to constitutionally recognized status as part of the language of § 7.5, or even that the Proposition should have better worded the amendment to signal broad parity between the newly constitutionally recognized heterosexual institution of marriage and any other non-marriage kin relationships that the people of California might recognize in the future.

Instead, given the relationship between *Strauss* and *Marriage Cases*, George's new position in *Strauss* that "right to equal access to the designation 'marriage'" is an independent and substantive component of Article 1, § 1's "rights of privacy and due process" participates in what Moreno calls the *Strauss* majority's weakening of "our state Constitution as a bulwark of fundamental rights" for "all... minorities" "disfavored" in the "will of the majority."[220] A small but significant portion of George's opinion in the earlier case is devoted to holding that the denial of the right to marry through the designation denial does not discriminate "on the basis of" sex or gender, because the statutes in force prior to Proposition 8 did not forbid men from marrying men because they are men, or women from marrying women because they are women.[221] Rather, those statutes discriminated on the basis of what George argues is the

separate category of "discrimination on the basis sexual orientation"[222]—a category *not* included in the forms of discrimination disallowed under Article I of the state Constitution either before or after Proposition 8.[223] When placed in juxtaposition, George's two opinions offer a contradictory view of the relationship between marriage and "marriage." When read together, as two components of a meta-argument about the nature and content of the "right to marry," those portions of each opinion that frame the relationship between the term and the substantive content of the right work together to naturalize the normativity of monogamous, dyadic life-relationships, a normativity that precedes the constitution of law in the founding document of the state. It is dyad-kinship, and not marriage itself, that *Marriage Cases* and *Strauss* together defend through the tautological formalism of natural rights.

If George's two opinions are read together, as documents expressing a cohesive doctrinal logic, they function to separate those gay and lesbian Californians *who would marry* from minority status. The rhetoric of these opinions creates an implicit majoritarian queer legal identity—an identity that serves as the warrant for George's rejection of the idea that Proposition 8 might have the "sweeping constitutional effect" described by Moreno—whose worst experience of discrimination will by constitutional definition be denial of access to the marriage designation on the basis of their sexual orientation, an identity form the Court recognizes—in a fascinating but implicitly analogically separated parallel to Roberts' post-racial framing equal protection—as shared by both gays and lesbians, and straight Californians.[224] Proposition 8 thus becomes little more than a regrettable detour from the *post-sexual difference* politics the Court attempts to embrace in *Marriage Cases*. Through *Strauss*, Proposition 8 has the dual effect of reinforcing the anti-progressive, queer liberal[225] politics of George's *Marriage Cases* rhetoric, while at the same time inflecting those politics with an explicit division between majoritarian

straight, and majoritarian queer subjects before California constitutional law. Bridging this divide once again represents the progressive political limit of the current iteration of the case that is now before the Supreme Court as *Hollingsworth v. Perry*.

The pre-*Lockyer* "marriage ceremonies," representing what Justice Kennard in *Marriage Cases* called the "public validation that only marriage can give,"[226] will "remain 'empty and meaningless in the eyes of the law.'"[227] Those currently recognized through or eligible for registered domestic partner status in California (who were not issued marriage licenses between *Marriage Cases* and Proposition 8)[228] must wait for this "public validation" until such time as this or a future United States Supreme Court finds for the respondents in *Hollingsworth*, or the people of California choose once more to amend their Constitution. But—following George's ontological slippage in *Marriage Cases*—these couples remain eligible for the constitutional validation of their voluntarily constructed relationships as valued components of civil and economic society, and the state. This is in sharp contrast to other relationships of beloveds (and/or economic and other kinships of convenience or necessity!), including: polyamorous relationships; single-parent families; [229] multiple member, extra-legal and counter-heteronormative arrangements of kinship;[230] and other *particularly queer of color* relation- and kinship forms already abjected in the overwhelming dominance of the dyadic metaphor as the mode of signifying non-blood kin relationship. All of these are foundationally excluded from constitutional validation in all but the most inconceivably liberal outcomes of the present marriage cases before the Court.

From a radical queer and queer of color perspective, the risk in ignoring calls from commentators like Kim and Spade and Willse to set aside the chance for either a legislative or judicial mulligan on California marriage equality (in favor of more productive foci of efforts for

progressive politics) was not that a world exists in which the Supreme Court could rule for the current intervenor-petitioners by elevating Baxter-esque arguments to the level of Fourteenth Amendment law, thereby placing the entire "gay marriage movement" at risk of a multi-year setback. There is also the converse world wherein the Court recognizes same-sex couples' inclusion in the fundamental rite/ght of marriage. This recognition would define queer subjectivity under U.S. constitutional law in far more restrictively racialized, classed, and sexualized terms of committed dyadic coupling than did Kennedy's substantive "right to privacy" due process arguments in *Lawrence.* There will be no good outcome on the Court for a radical queer and/or queer of color politics of kinship recognition, but there is one less bad possibility—a possibility implicit in Ninth Circuit Judge Stephen Reinhardt's choice to frame his judgment on California's marriage cases in terms of Anthony Kennedy's Fourteenth Amendment.

IV. *Perry v. Schwarzenegger*

In May 2009—the same time as *Strauss*—Kristin Perry, Sandra Stier, Paul Katami and Jeffrey Zarillo ("two same-sex couples" "denied marriage licenses" in California's Alameda and Los Angeles Counties) challenged Proposition 8 in federal court, "alleging" in *Perry v. Schwarzenegger* (hereafter *Schwarzenegger*[231]) that the initiative "violates the Fourteenth Amendment to the United States Constitution."[232] The official representatives of California, including Governor Arnold Schwarzenegger, "refused to argue in favor of Proposition 8's constitutionality," and so the District Court allowed[233] Hak-Shing William Tam, Dennis Hollingsworth (now the named plaintiff before the Supreme bench), Gail J. Knight, Martin F. Gutierrez, Mark A. Jansson, and Protectmarriage.com to act as intervening defendants in their roles as supporters and sponsors of the original ballot initiative.[234] As I discuss in Chapter One,

District Court Chief Judge Vaughn R. Walker held Proposition 8 "unconstitutional under both the Due Process and Equal Protection Clauses" of the Fourteenth Amendment.[235]

Walker held a bench trial before rendering his decision; his findings of fact with respect to marriage are largely parallel to George's dissociative arguments in *Marriage Cases*. Walker first enumerates the benefits of marriage in terms of its non-terminological content. As a feature of both the fact of their official/legal status, and their monogamous, long-term, dyadic structure, marriages are: beneficial to society; confer substantial economic, legal, and political benefit and protection to their members; and are pre-requisites for the ability to fully live a happy and satisfying life.[236] The reason that Californian couples in nearly identical domestic partnerships do not enjoy these benefits is not only because of the fact of federal discrimination and lack of consistent extra-California recognition of these unions,[237] but also because the status of marriage attains "benefits" unique to the "cultural meaning of marriage" itself.[238]

Walker's trial findings thus underscore what is particularly *rhetorically* interesting about the George-Corrigan argumentative exchange in *Marriage Cases*. Trial testimony included a specific examination of the (Corrigan-esque) "just a word" claim,[239] but the question presented in the trial was about the substantive content of the status of marriage itself, rather than the question of whether terminology is *per se* an appropriate point of comparison between two forms of state-recognized relationships.[240] From various testimonies, Walker found that, as a matter of "adjudicative fact,"[241] couples achieve full happiness and respect from society and their family only if they are married.[242] In contrast to the rhetorical situation created by Corrigan and the Attorney General's specific arguments in *Marriage Cases*, Walker did not arrive at this finding in the context of the possibility that the state might conceivably do away with the marriage designation altogether.[243] His decision accordingly goes perhaps a step further than George's

Marriage Cases opinion in collapsing the distinction between the status of marriage, and not only the legal but also the socio-cultural definition of a beneficial family. The testimony the Chief Judge cites in the "fact" portion of *Schwarzenegger* does not clarify whether the unique qualities of marriage result more from societal perceptions about the status, or from something intrinsic to the status itself. I think the most accurate interpretation of the testimony cited is that the unique qualifies of marriage result from something intrinsic to the status itself as inevitably derivative of its perceived value in society (see Appendix 1).[244]

While George in *Marriage Cases* found that the "designation" marriage is indissociable from the "right to marry," Walker—like George in *Strauss*—suggests through his framing of the trial testimony that there is a "right to marry" which holds some additional ineffable quality apart from the factual lack of equal access in federal and other jurisdictions to the various "substantive rights" enjoyed by all Californians in state-recognized dyadic relationships.[245] This comes in part through the indicated intent and electoral framing of the ballot-proposition itself.[246] In other words, Walker in *Schwarzenegger* responded to a situation that did not exist in *Marriage Cases*. Part of the function of Proposition 8 was to more clearly indicate a right to "marry [terminologically]" (separate from the broader non-terminological "right to marry" articulated by Corrigan in early 2008), for the express purpose of denying lesbian and gay individuals access to that newly clarified right.[247]

This shift in doctrinal exigence from *Marriage Cases* to *Perry*—created by the particular circumstance of an initiative constitutional amendment designed to nullify a California Supreme Court ruling—would form the basis for Reinhardt's unusual ruling in *Perry v. Brown*. As Moreno argues presciently in his *Strauss* dissent, the particular oddity of Proposition 8 is that it is *not* (contrary to George's argument for the *Strauss* majority) the popular repeal of a right that

had only found its original expression in the popular will. Rather, Prop 8 represents a repeal by the electorate of a right "lately...recognized" *by the judiciary*, which unlike the majoritarian public-at-large, has the "special constitutional role [of] protector of minority rights." For Moreno, Proposition 8 is a popular majoritarian usurpation of the judiciary's original "countermajoritarian" ruling. As such, the decision to allow § 7.5 to remain valid is a decision contrary to the particular ethos[248] of Californian and U.S. constitutional republicanism.[249] Reinhardt does not cite Moreno's dissent in *Brown*—perhaps because he is obliged defer to the California Court's official position in *Strauss* on "Proposition 8's precise effect on California law."[250] Nonetheless, Reinhardt's opinion on the initiative's U.S. constitutionality does much to validate what I imagine was Moreno's deep frustration at finding himself alone in the *Strauss* minority.

V. Conclusion: *Perry v. Brown*

Instead of deciding, as Walker did, the "'broader issue'"[251] of whether the Constitution would "*ever*" permit laws denying same-sex couples "the right to marry," Reinhardt confined his opinion to the narrow holding that, following the precedent of Kennedy's *Romer v. Evans* opinion, Proposition 8 represented an unconstitutional repeal of a previously existing right for no "purpose" or "effect" "other than to lessen the status and human dignity of gays and lesbians in California."[252] As Kennedy declared in his 1996, "the Constitution simply does not allow for 'laws of this sort.'"[253] Reinhardt's framework for decision—which inscribes the importance of the state-constitutional debate in *Marriage Cases* at the level of U.S. constitutional doctrine—has the effect of reinforcing the significance of the "official designation of 'marriage'" over the "incidents" of the institution,[254] while also underwriting the terminology/substance dissociation that forms the core of Justice Corrigan's doctrinal logic in *Marriage Cases*.

Prop 8 came to Reinhardt in the context of some contentious judicial politics: the Circuit Judge had recently been overturned by the Supreme Court via a particularly scathing opinion written by Justice Kennedy (whom the popular media is prone to framing as Reinhardt's particular intended interlocutor in *Brown*[255]); and the "left-leaning" judge had to refuse a request from the *Perry* defendant/proponents to "recuse himself from hearing the appeal" because of a position his spouse had formerly held at the American Civil Liberties Union (a friend of the court in the pending case).[256] This context may have informed some popular and academic commentary that framed Reinhardt's narrow opinion as an attempt to shield the "broader issue" from Supreme Court review, while also crafting an anti-Prop 8 opinion specifically designed to "play to Justice Anthony Kennedy's gut," by grounding the Ninth Circuit's legal conclusions primarily through a parallel case argument connecting California's constitutional amendment to Kennedy's *Romer v. Evans* opinion striking down Colorado's "Amendment II."[257] These questions of Reinhardt's intent—pandering to Kennedy or taking the responsible course of deciding a case only on the grounds "necessary to" its resolution—obscure the significance of Reinhardt's doctrinal argumentative choice to queer relational politics.

Brown is certainly a surprisingly conservative decision by the "most liberal judge on the country's most liberal appeals court."[258] Reinhardt passes on the opportunity to affirm a Fourteenth Amendment "right to marry" that is inclusive of same-sex couples.[259] But I argue that Reinhardt's decision, whatever his motives, leaves open certain more radical possibilities for future law. The Circuit Judge's *Romer*-inspired decisional framework makes thinkable a doctrinal future wherein the Fourteenth Amendment can be a basis for petitions for official state-recognition of *and protection for* kinship forms foundationally excluded from the sign of marriage.

It is difficult to read *Brown* as a politically cautious decision, given Reinhardt's own public statements on the importance of the case. Reinhardt chose to write a concurring explanation of the Ninth Circuit's certified question to the California Supreme Court as to whether the intervening defendants in *Perry* had standing,[260] given that the Governor refused to defend Proposition 8, and that it was unclear whether "backers of ballot propositions can step in to defend voter-approved measures in court when state officials refuse to do so."[261] In this concurring explanation, Reinhardt frames his decision to "set forth a few explanatory remarks" about the certified question as a matter of public duty: a duty engendered in the "substantial" importance of the question at hand in the Prop 8 appeal; an importance evidenced by the fact that "oral argument before the [Ninth Circuit in *Perry* on the question of standing] was viewed on television and the Internet by more people than have ever watched an appellate court proceeding in the history of the Nation."[262] Given the importance of the question at hand, Reinhardt acknowledges that these viewers "may wonder why [the issue of standing] is of such great importance," and he goes on to suggest that standing is a "problem" rendered necessary only by legislative actions that function generally to hinder the judiciary's ability to address important questions of constitutional "merit."[263]

The Ninth Circuit's ruling is certainly, as Reinhardt acknowledges, an example of strict avoidance of any gratis dicta.[264] It is thus by definition a *doctrinally* conservative opinion. But Reinhardt went out of his way (in a document that he must know almost none of this viewing public will ever read) to remind the public audience of his eventual opinion of not only how important the "merits" of *Perry* are to the "tens of thousands of same-sex couples who wish to marry" in California,[265] but also of his annoyance[266] over the procedural circumstances preventing the Ninth Circuit from immediately considering these merits. It is unlikely that the

Circuit Judge chose to avoid answering the "broader questions in this case" because he wished to avoid the issue of same-sex marriage, or because he wanted to play some procedural game with Kennedy. A far more tenable critical perspective is to take Reinhardt at face value when he says that the "unique and strictly limited effect of Proposition 8 allows us to address the amendment's constitutionality on narrow grounds,"[267] grounds that I argue help the Ninth Circuit to avoid the California Supreme Court's interpellation of a queer familial abject subject of California law.

Reinhardt's opinion—written, perhaps, in a style designed to appeal to that same public that watched the initial appellate proceedings in record numbers—offers the most explicit description out of all the texts I take up in this chapter of the rhetorically substantive value of the term "marriage." "'Marriage,'" Reinhardt declares, "is the name that society gives to the relationship that matters most between two adults."[268] The Circuit Judge takes great care to establish the "singular" and substantive import[269] of the word in quotidian American cultural life, using a jumble of (conspicuously White and Anglo) literary and pop cultural references to echo—without referencing—Walker's inclusion of plaintiff Paul Katami's statement in the Northern District's findings of fact that "none of our friends have ever said—'hey, this is my domestic partner.'"[270] From the daily newspaper, to Groucho Marx, to Shakespeare, to *How to Marry a Millionaire*, Reinhardt offers various examples of how "marriage" is overwhelmingly and assumptively presented as the most important non-blood kin relationship that can be possible in the United States.[271]

The difference between the testimony included by Walker in *Schwarzenegger* and Reinhardt's apparent précis is that while the latter assumes the necessity of describing from whence the importance of the designation comes, the *Perry* plaintiffs (as Walker records them) speak as if there is something more intrinsic to "marriage" that gives it a unique relationship to

committed love. While the plaintiffs describe the different social capital attached to other designations, I read Walker's presentation of their testimony also as an argument for a naturalistic quality to marriage that should not have to be explained. For example (the statements not in quotes are Walker's paraphrase of witness statements):

> Stier: To [plaintiff Sandra B.] Stier...nothing about domestic partnership indicates the love and commitment that are inherent in marriage, and for Stier and [plaintiff Kristin M.] Perry, "[domestic partnership] doesn't have anything to do...with the nature of our relationship and the type of enduring relationship we want it to be"...Stier: Marriage is...the way to tell [your family, parents, society, and community]...and each other that this is a lifetime commitment. "And I have to say...it's different. It's not the same. I want—I don't want to have to explain myself."[272]

This is a powerful argument (as I read it, the heterosexual defendant/proponents would not find it necessary to defend the validity of their own claims to marriage, and so prove both their bigotry and the reasonableness of the plaintiff's equality claims in demanding such an explanation only from homosexual persons in same-sex relationships) that also excludes the possibility of a queer transformation of the marriage institution via its forced opening to same-sex couples. Contrastingly, even though Walker's findings of fact as to the "meaning" of domestic partnerships are taken as a given by the Ninth Circuit,[273] Reinhardt seems to find it necessary to offer his own explanation of why (in what is an actual sentence from a legal document presented by its author as one of the most important in the history of U.S. appellate public address) "a rose by any other name may smell as sweet, but to the couple desiring to enter into a committed lifelong relationship, a marriage by the name of 'registered domestic partnership' does not."[274]

As I note in the Introduction, in the peculiarly "sovereign" realm of judicial argument, "the decision of a case is deemed to be correct, and the parties must abide by the court's conclusions." Perelman accordingly reminds the critic of judicial argument that "more often than not it is these conclusions that matter to the parties, far more than the facts themselves, which are little more than a basis from which legal consequences flow."[275] In the *Perry* cases, it is not the "facts themselves," but the manner in which they are presented as evidence that I argue has political effect beyond a narrow view of the "legal consequences" of each judge's conclusions of law.[276]

Because Walker grounds his conclusions in his factual findings from a bench trial, his sovereign conclusions about the substantive distinction between domestic partnership and marriage derive from the experiential arguments of the testifying plaintiffs, which function as data for Walker's claims through the implicit warrant that naturalizes the plaintiffs' as the given experience of marriage and not-marriage for all gay and lesbian persons.[277] Walker finds both that "domestic partnerships lack the social meaning associated with marriage" (finding No. 52) and that "the availability of domestic partnership does not provide gays and lesbians with a status equivalent to marriage because the cultural meaning of marriage and its associated benefits are intentionally withheld from same-sex couples in domestic partnerships" (finding No. 54). The presented data for the first claim is primarily the testimony of academic experts, while the latter is primarily the testimony of the plaintiffs.[278] When considering the specifically cultural meaning of the status of marriage itself, and thus the nature of the harm of withholding that status, Walker (in keeping with the individualist demands of U.S. constitutional jurisprudence) appears primarily interested in the nature of that harm as it is experienced by the plaintiffs—but

this does not alter his (and subsequently Reinhardt's) framing of that harm in terms of persons excluded from marriage, generally, in California.

One of Reinhardt's judicial responsibilities in *Brown* is to adjudicate a dispute as to whether the Northern District's findings are "'adjudicative [instead of legislative] facts'...capable of being 'found' by a court through a clash of proofs presented in adjudication."[279] Because the finding (No. 52) that "'[d]omestic partnerships lack the social meaning associated with marriage'—that [as Reinhardt describes it] the difference between the designation of 'marriage' and the designation of 'domestic partnership' is meaningful" was "conceded by Proponents," the Ninth Circuit can proceed as if this finding were a given.[280] In fact, Reinhardt's citation includes No. 52 as the "only [apart from Proponents' public statements about the intent and meaning of Proposition 8] fact found by the district court that matters to our analysis," functionally *excluding the plaintiff testimony* (that provides the evidence for the claim in No. 54 about the "cultural meaning of marriage") from the Ninth Circuit's precedent. Rather than extend this testimony into the appellate level, Reinhardt chooses to provide his *own* evidence as to the cultural meaning of the status of marriage, and the harm of being excluded from that meaning. Reinhardt's presentation of this evidence—drawn from what appears to be his own experience of U.S. popular culture and everyday life, supplemented by doctrinal precedent—also works to universalize as natural particularly white and heterosexual experiences of marriage in relation to other ways in which people in the United States mark dyadic kinship commitments. But Reinhardt, unlike Walker or the plaintiff testimony in No. 54, insistently separates the experience of designated-marriage from those kinship forms. The two are obviously related, but not the same; denial of access to the former generates harm independent from the later.

Both Reinhardt and Walker erase the difference of gay and lesbian dyadic kinship pairs (thus abjecting queer kinship). But while Walker moves from the particular to the universal—naturalizing the experience of particular same-sex couples' experience with marriage—Reinhardt does the converse, assuming that every person must experience implicit cultural arguments about the meaning of "marriage" in the same way, and therefore so must gays and lesbians:

> We see tropes like "marrying for love" versus "marrying for money" played out...in our...literature because of the recognized importance and permanence of the marriage relationship. Had Marilyn Monroe's film been called *How to Register a Domestic Partnership with a Millionaire*, it would not have conveyed the same meaning as did her famous movie, even though the underlying drama for same-sex couples is no different. The *name* 'marriage' signifies the unique recognition that society gives to harmonious, loyal, enduring, and intimate relationships. *See Knight v. Super. Ct.*, 128 Cal. App. 4th 14, 31 (2005) ("[M]arriage is considered a more substantial relationship and is accorded a greater stature than a domestic partnership."); *cf. Griswold*, 381 U.S. at 486.[281]

Both George and Walker naturalize marriage as an intrinsic component of queer identity. As I note in Chapter One, Walker's equal protection analysis posits the desire to marry someone of the same sex as fundamental to gay and lesbian identity. While *Strauss* does some work to sever the "marriage" component, *Marriage Cases* and *Schwarzenegger* taken together perform a sovereign interpellation of a normative gay legal subject defined specifically in terms of "marriage," rather than even marriage-like kinship forms.

Reinhardt does not do this. He quite literally separates the signifier from signified, the "name" from the "incidents." In *Strauss*, George separates the right to the designation of marriage from the right to marry in order to subordinate it as one (and by implication the least

important) among many incidents of the broader right. Reinhardt contrastingly takes the separation as far as it can reasonably go in the context of a marriage case on the appellate bench, constructing a framework for his eventual decision via literary and film references designed to both draw a bright line between the "recognition" and the "institution" of marriage, and to subordinate the "incidents of marriage" to both: the "status of 'marriage' is distinct from the incidents of marriage...[which are] both elements of the institution and manifestations of the recognition that the State affords to those who are in stable and committed lifelong relationships."[282] In the doctrinal world of *Perry v. Brown*, "the designation of 'marriage'" is not *itself* the "highest form of a committed relationship," but rather, as a matter of present and inescapable fact, the most significant "manner in which the State attaches respect and dignity" to that relationship form. Reinhardt's "framing of the question"[283] is thus:

> Did the People of California have legitimate reasons for enacting a constitutional amendment that serves only to take away from same-sex couples the right to have their life-long relationships dignified by the official status of 'marriage,' and to compel the state and its officials and all others authorized to perform marriage ceremonies to substitute the label of 'domestic partnership' for their relationships?[284]

This frame allows the Circuit Judge to make a direct comparison between Proposition 8 and Colorado's Amendment 2, which Kennedy found in violation of the Equal Protection Clause in his opinion for the Court in *Romer v. Evans*. Reinhardt finds the Proposition and the Amendment "remarkably similar."[285] Just as Kennedy found that Amendment 2 "has the 'peculiar property' of 'withdraw[ing] from homosexuals, but no others,' an existing legal right," so also does Proposition 8. Just as Kennedy found that Amendment 2 "'by state decree...put[s] [homosexuals] in a solitary class with respect to' an important aspect of human relations," so

also does Proposition 8.[286] George argues in *Strauss* that Proposition 8 is not a substantial revision to California's whole system of law, because it merely "carves out a narrow and limited exception" to the "state constitutional rights" of equal protection and so does not "*fundamentally alter* the meaning substance" of those rights.[287] In *Brown*, Reinhardt uses this statement as conclusive evidence for his argument that it is precisely because Proposition 8 only withholds a designation—one granted certain gay and lesbian couples for only a short period of time[288]—that, as Kennedy said in *Romer* of Amendment 2, the California initiative "denies 'equal protection of laws in the most literal sense.'"[289] The difference between Prop 8 and Amendment 2 is significant in terms of the relative size of their effect on various "substantive rights."[290] But for Reinhardt, even this difference only serves to amplify the applicability of *Romer* to Proposition 8—the latter, as a "surgical" excision of "one specific right: the right to use the designation 'marriage' to describe a couple's officially recognized relationship," is not so much distinct from the *Romer* precedent as it is even more exemplary of it than the original Colorado policy that inspired Kennedy's argument in the first place.[291]

Deciding *Perry* entirely through *Romer* has two important doctrinal implications. First, as Kennedy determined with respect to Amendment 2, any law that works *only* to deprive a suspect class of certain "privilege, benefit, or protection" or right[292] is "constitutionally illegitimate" if the only basis for the law is "'animus toward the class it affects,'"[293] regardless of whether the right taken away is not or even should not be protected as a "federal constitutional right."[294] The Ninth Circuit's refusal to "consider whether...states that fail to afford the right to marry to gays and lesbians must do so" should thus be read not as an excess of judicial caution, but rather as part and parcel of the opportunity to deploy the very specific *Romer* precedent as a powerful shield against actions like that taken by the "People of California" (a shield secure, for

example, against the possibility that the Supreme Court's earlier ruling in *Baker v. Nelson* might give the Court a convenient way to decline to issue a ruling requiring states to conform their own marriage policies to a federal judicial decree).[295]

Reinhardt's rather odd discussion of the great weight and importance of the "name" marriage could certainly be used in support of a broader finding about the federal constitutionality of marriage bans, but instead the Circuit Judge uses this discussion as evidence for his ability to approach the case through the narrow *Romer* frame. *Romer* helps make a case that is wholly and inescapably about the normative and inevitable centrality of marriage in the United States *not really about marriage at all*, but rather about whether the Constitution permits the exemplary use of an already exclusionary legal designation to rhetorically mark a set of persons as different for no reason other than hate—to, as Reinhardt concludes his opinion, "dishonor a disfavored group by taking away the official designation of approval of their committed relationships and the accompanying societal status, and nothing more."[296]

Second, the *Romer* frame requires that Proposition 8 must pass only the rational basis test.[297] This means that Reinhardt need not issue any pronouncement on the fundamental relationship between marriage and "same-sex" identity. Instead, the Ninth Circuit "must consider only whether the *change* in the law [that Proposition 8 effected]—eliminating...the [*Marriage Cases* granted] right of" only "same-sex couples to have the official designation and status of 'marriage' bestowed on their relationships...was justified by a legitimate reason."[298] This means that Reinhardt's opinion, in stark contrast to other "pro marriage" decisions, *assumes* the normative value of the marriage institution, but does not need to cite and so *affirmatively re-articulate* that value as a reason for extending marriage to same-sex couples. *Brown*'s statements about the relationship between same-sex coupling and the value of marriage instead

consist of a series of defense arguments against defendant objections—holding that *Marriage Cases*, in effect, did nothing to harm or contradict anything that was already considered valuable about marriage in the pre-*Marriage Cases* status quo.[299]

George and Walker's opinions in *Marriage Cases* and *Schwarzenegger* can be read as enacting what might be a particular nightmare for radical queer of color political interaction with the judiciary—the merging of the "pictorialist 'like race'"[300] argument that "gay men and lesbians are like racial minorities because they share an 'immutable characteristic,'" with the marriage as "natural right" argument, through the performative constitution of the desire to marry someone of the same sex as a new "immutable characteristic" of "gay men and lesbians"––a new immutable characteristic that can now function as an "indicia of suspectness" in equal protection jurisprudence about marriage.[301] Reinhardt's peculiar doctrinal argumentative approach to the marriage cases does not participate in this constitution—but not because Reinhardt does not reproduce the normative ideology of marriage as the ideal form of kinship. Rather, Reinhardt constructs a decision about marriage based not in this ideology itself, but rather on the fact of that produced ideology in our current society, as it applies to a situation where the production of marriage as normative ideal is used against a group of people for no good reason.

In a world where Corrigan had written the majority opinion in *Strauss* to strike down Proposition 8, I imagine that her decision would have looked very similar to Reinhardt's in *Brown*. Given the overwhelming (as Reinhardt himself argues) normative centrality of marriage in U.S. public culture, it is not presently conceivable that a federal judicial marriage case would include a critique of marriage *itself*—except that in the California judiciary, such a critique is in fact not only conceivable, but has already been advanced, by Corrigan in her dissent and the

Attorney General in his brief in *Marriage Cases*. Both of these examples of legal and judicial argument, however, would have aided policies that are, even in the context of a progressive critique of marriage, deeply oppressive. It is important that Reinhardt's particular decisional framework in *Perry v. Brown*, of course, allows a more liberatory end. Precisely by distinguishing the "name" marriage as an independent and significant component of the state—by breaking open the sign into the signifier "marriage," and the separate signified institution to which the governmental speech act currently points, so as to be able to respond to the peculiar politics of Proposition 8 with the equally peculiar doctrinal politics of *Romer*—Reinhardt's opinion creates a trajectory of rhetorical possibility for future practical attempts to engage constitutional law in the service of queer kinship forms.

While Halley is "uncertain whether *Romer's* nominalism will appear in other equal protection decisions,"[302] I argue in Chapter One that it appears instead in Kennedy's opinion in *Lawrence*, for a decision that eschews equal protection in favor of due process. Nearly ten years later—and seventeen years after *Romer*—Circuit Judge Stephen Reinhardt once again brought "*Romer's* nominalism" into an "equal protection decision," one surrounded, no less, by precedent that generally insists on talking about marriage in terms of a fundamental, due process *and* equal protection derived right enjoyed by an essential and immutable subject position whose nature accrues partially and tautologically from that right of marriage itself. As I argue in Chapter Two, however, Kennedy seems to have validated Halley's concern that the "queer shift toward nominalism" begun in *Romer* might aid in the doctrinal erasure of race as an ongoing and structural social and political reality in the United States[303]—and so the radical potential of the possible queer subject constituted in Kennedy's meta-Fourteenth Amendment rhetoric may be dependent for its radicalism on that subject's constitution as post-racially queer.

The queer nominalist doctrinal possibility suggested by Reinhardt's opinion may offer a slightly more hopeful story—even if for no other reason that, given the argumentative framework through which Reinhardt arrives at his particular and surprising[304] conclusion of law, the miscegenation analogy barely makes an appearance in the Circuit Judge's arguments about marriage. The Supreme Court may yet, in *Windsor*, strike down the Defense of Marriage Act with a narrow equal protection finding that requires the federal government to recognize same-sex marriages performed in states that will allow them, but that does not go so far as to require states to do so. If such an immediate Supreme Court future also included a fairly straightforward affirmation of Reinhardt's application of *Romer* to Proposition 8, the question of marriage would turn once more to social and legislative movement.

It is therefore possible that the judicial argumentative dissociation of "marriage" from *marriage* that Corrigan begins in *Marriage Cases* may yet prove a resource for future attempts not to demand state recognition for queer kinship forms *as marriages*, but rather to demand that the judiciary intervene against regressive and hateful efforts to ban, criminalize, and persecute the results of sexually and racially progressive politics that are, and have been, constructing queer of color kinship forms in contradiction to the heterosexual, "domestinormative" family. The potential judicial intervention that I speak of would necessarily be a negative intervention. Kennedy's meta-argumentative Fourteenth Amendment, extended by Reinhardt into the marriage debates, is "hands off." It contains no possibility for sovereign actions in support of, for example, radical queer of color contra-marriage kinship communities. But if it did, a petition to the Court for such support would, as discussed in the introduction, rhetorically constitute a performative affirmation of U.S. legal sovereignty over those forms of queer of color being and relation it was brought in to help protect. The limit of the politics I advance in this project is the inevitability of

state-violence directed at the efforts, proponents, and constituents of radical queer of color politics. Given that inevitability, a queer of color legal praxis should include a consideration of what limited, often latent, and highly constrained possible "openings"[305] exist in present U.S. judicial rhetoric, openings that may be exploited in the service of queer of color political goals. Reinhardt and Corrigan's judicial performative distinctions between "marriage" and marriage may represent some of those openings.

There may yet be an answer to Judith Butler's question about kinship—is it "always already heterosexual?"[306] The answer may lie in the radical possibility of an "appeal to the state" that will "finally" render radical queer and queer of color kinship forms publicly coherent, as a nominalist[307] contestation rather than normative reproduction of the "ideological account of kinship" that is currently an intrinsic component of any desire for "recognizability" as a relational (coupled) subject of U.S. constitutional law.[308] The desirability of that legal/public coherence will be one of the questions I take up in the conclusion.

Notes to Chapter Three:

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[1] Opinion of Kennedy, J., *Lawrence v. Texas,* 539 U.S. 558, 539 U.S. ___ (June 26, 2003): 18, available at http://www.law.cornell.edu/supct/pdf/02-102P.ZO.

[2] David L. Eng, *The Feeling of Kinship: Queer Liberalism and the Racialization of Intimacy* (Durham: Duke University Press, 2010), 36-38.

[3] Chandan Reddy, *Freedom with Violence: Race, Sexuality, and the U.S. State* (Durham: Duke University Press, 2011), 183: "so-called universal marriage—more accurately, gay marriage"; Opinion of George, C.J., *In re Marriage Cases*, 43 Cal.4th 757, California Supreme Court S147999 (May 15, 2008): 7n5.

[4] Opinion of Marshall, C.J., *Goodridge v. Department of Public Health,* 440 Mass. 309 (November 18, 2003): 312-313, available at http://masscases.com/cases/sjc/440/440mass309.html.

[5] Kennedy, *Lawrence v. Texas*, 18.

[6] Marshall, *Goodridge v. Department of Public Health*, 334.

[7] See also Laurence H. Tribe, "*Lawrence v. Texas*: The 'Fundamental Right' That Dare Not Speak Its Name," *Harvard Law Review* 117, 6 (April 2004): 1930-1931.

[8] George, *In re Marriage Cases*, 7-8, 94-95.

[9] Syllabus, *Lawrence v. Texas,* 539 U.S. 558, 539 U.S. ___ (June 26, 2003): 1, available at http://www.law.cornell.edu/supct/pdf/02-102P.ZS, "*Held:* The Texas Statute...violates the Due Process Clause"; Kennedy, *Lawrence v. Texas*, 17, "*Bowers v. Hardwick*...now is overruled"; and 18, "the Texas Statute furthers no legitimate state interest which can justify its intrusion...the judgment of the Court of Appeals...is reversed, and the case is remanded for further proceedings not inconsistent with this opinion."

[10] "States that Still Criminalize Sodomy," *Equality Matters Blog*, Equality Matters: A Campaign for full LGBT Equality (August 8, 2011), http://equalitymatters.org/blog/201108080012; Tim Murphy, "The Unconstitutional

Anti-Gay Law That Just Won't Die," *Mother Jones* (April 12, 2011), http://motherjones.com/politics/2011/04/lawrence-texas-homosexual-conduct-statute.

[11] MGL Ch. 272, § 34-35, available at http://www.malegislature.gov/Laws/GeneralLaws/PartIV/TitleI/Chapter272/Section34: "whoever commits the abominable and detestable crime against nature, either with mankind or with a beast, shall be punished by imprisonment in the state prison for not more than twenty years" (§ 34); "whoever commits any unnatural and lascivious act with another person shall be punished by a fine of not less than one hundred nor more than one thousand dollars or by imprisonment in the state prison for not more than five years in jail or the house of correction for not more than two and one half years" (§ 35).

In 2002, a challenge to §s 34 and 35 (*Gay and Lesbian Advocates and Defenders v. Attorney General*, 436 Mass. 132, 2002) was "dismissed" by the Massachusetts Supreme Judicial Court "for lack of standing," although the Court "clarified that the state's two sodomy laws could not be applied to private, consensual acts." Ellen Ann Anderson, *Out of the Closet and Into the Courts: Legal Opportunity Structure and Gay Rights Legalization* (Ann Arbor, University of Michigan Press, 2006), 105. See also Ireland, J., *Gay and Lesbian Advocates and Defenders (GLAD) v. Attorney General*, also known as *Doe v. Reilly*, 436 Mass. 132 (February 21, 2002): 133-134; and Gay and Lesbian Advocates and Defenders, "Hate Crimes, Sex Laws, and Police in Massachusetts," *GLAD.org* (July 2, 2012): http://www.glad.org/rights/massachusetts/c/hate-crimes-sex-laws-and-police-in-massachusetts.

[12] "States that Still Criminalize Sodomy," *Equality Matters Blog*.

[13] Uniform Code of Military Justice, art. 125, 10 U.S.C. § 925 (2013). A 2012 attempt to repeal Article 125 failed due to objections that the repeal would leave the military powerless to bring charges related to servicemembers' sex with animals. Dwight Sullivan, "The Weirdest Military Justice Story of 2011: The Strange Tale of the Non-Repeal of Article 125," National Institute of Military Justice Blog *CAAFlog* (January 2, 2012): http://www.caaflog.com/2012/01/02/the-weirdest-military-justice-story-of-2011-the-strange-tale-of-the-non-repeal-of-article-125-warning-includes-offensive-material/.

While the National Defense Authorization Act for Fiscal Year 2013 contains extensive provisions for "improved sexual assault prevention and response in the armed forces," the bill contains no repeal of Article 125. H.R. 4310, 112th Cong. (2012): Subtitle H, §s. 570-579. In fact, the "forcible sodomy" provision of Article 125 is cited—H.R. 4310 § 572(c)(2)—as a "covered offense" for the "new requirement" that the military develop procedures for the "administrative separation" of a servicemember convicted of a "covered offense" of sexual assault who is not "punitively discharged" on the basis of that conviction. H.R. 4310 § 572(a)(2).

[14] Chandan Reddy, *Freedom with Violence: Race, Sexuality, and the U.S. State* (Durham: Duke University Press, 2011), 211.

[15] Reddy, *Freedom with Violence*, 212.

[16] Dean Spade and Craig Willse, "I Still Think Marriage is the Wrong Goal: Statement," *Make* (2008): http://makezine.enoughenough.org/prop8.html; Reddy, *Freedom With Violence*, 203-204; Willse and Spade, "Freedom in a Regulatory State," 310-311: "the agenda put forth by the most well-resourced LGBT organizations works towards achieving formal legal equality...these organizations see the security and entitlements distributed by regulatory state institutions and in so doing, fail to oppose the very mechanisms that maintain and produce inequality." See also Judith Butler, *Undoing Gender* (New York and London: Routledge, 2004), 5, 104-106, 111.

[17] For example, U.S. President Barack Obama issued "signing statements" accompanying his ratification of both the FY 2012 and 2013 Defense Authorization Acts. Both statements offer objections to aspects of the legislation, and these objections are arguably assertions of Presidential fiat for how the legislation will be implemented in actual military policy—the first concludes with the assertion that "my administration will seek to mitigate...concerns through the design of implementation procedures and other authorities available to me as Chief Executive and Commander in Chief," and the second includes the stipulation that "if section 1025 operates in a manner that violates constitutional separation of powers principles, my Administration will implement it to avoid the constitutional conflict." Barack Obama, "Statement by the President on H.R. 1540," The White House Office of the Press Secretary, *Whitehouse.gov* (December 21, 2011), http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540; and "Statement by the President on H.R. 4310," The White House Office of the Press Secretary, *Whitehouse.gov* (January 3, 2013), http://www.whitehouse.gov/the-press-office/2013/01/03/statement-president-hr-4310. See also David S. Birdsell, "George W. Bush's Signing Statements: An Assault on Deliberation," *Rhetoric and Public Affairs* 10, 2 (2007): 337.

The FY 2012 statement, which came shortly after the repeal of "Don't Ask, Don't Tell," makes no mention of Article 125 or the efforts to repeal it. The FY 2013 statement also does not mention Article 125, although it includes a specific objection to H.R. 4310 § 533, "Protection of Rights of Conscience of Members of the Armed Force and

Chaplains of Such Members," on the grounds that it is an improper attack on the repeal of "Don't Ask, Don't Tell," promising that "my Administration remains fully committed to continuing the successful implementation of the repeal of Don't Ask, Don't Tell, and to protecting the rights of gay and lesbian service members; Section 533 will not alter that."

[18] Instead of the "mainstream" gay and lesbian civil rights movement—Craig Willse and Dean Spade, "Freedom in a Regulatory State?: *Lawrence,* Marriage, and Biopolitics," *Widener Law Review* 11 (2004-2005): 311, 309n2, 310n5.

[19] Judith Butler, *Excitable Speech: A Politics of the Performative* (New York and London: Routledge, 1997), 74.

[20] Reddy, *Freedom With Violence*, 183, 184-185, 191, 211-213.

[21] Representative Marilyn N. Musgrave, "Marriage Protection Amendment," H. J. Res. 88, 109th Cong. (June 6, 2006).

[22] The Library of Congress, "Bill Summary and Status, 109th Congress, H.J.Res.88, Major Congressional Actions," *Library of Congress Thomas* (2006): http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HJ00088:@@@R; and "Bill Summary and Status, 109th Congress, S.J.Res.1, Major Congressional Actions," *Library of Congress Thomas* (2006): http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SJ00001:@@@R.

[23] "We determine that the language of section 300 limiting the designation of marriage to a union 'between a man and a woman' is unconstitutional and must be stricken from the statute, and that the remaining statutory language must be understood as making the designation of marriage available both to opposite-sex and same-sex couples...plaintiffs are entitled to the issuance of a writ of mandate directing the appropriate state officials to take all actions necessary to effectuate our ruling in this case so as to ensure that county clerks and other local officials throughout the state, in performing their duty to enforce the marriage statutes in their jurisdictions, apply those provisions in a manner consistent with the decision of this court." George, *In re Marriage Cases*, 120-121.

[24] Opinion of Reinhardt, Circuit Judge, *Perry v. Brown*, Nos. 10-16696, 11-16577 (9th Cir., February 7, 2012): 14, available at
http://cdn.ca9.uscourts.gov/datastore/general/2012/02/07/1016696com.pdf.

[25] Arizona Secretary of State, "2008 Ballot Propositions: Proposition 102," *2008 Ballot Propositions and Judicial Performance Review* (Arizona Department of State: Office of the Secretary of State, 2008), http://www.azsos.gov/election/2008/info/pubpamphlet/english/prop102.htm; Karma R. Chávez, "Exploring the Defeat of Arizona's Marriage Amendment and the Specter of the Immigrant as Queer," *Southern Communication Journal* 74, 3 (July-September 2009): 321-322; YESforMarriage.com, "Simple. Clear. Arizonans Said Yes for Marriage" (2008 and 2011): http://www.yesformarriage.com/; Associated Press, "AZ Voters OK Ban On Gay Marriage, Reject Payday Loan Reform," *Tuscon Citizen Morgue, Part I, 2006-2009* (November 5, 2008): http://tucsoncitizen.com/morgue/2008/11/05/101723-az-voters-ok-ban-on-gay-marriage-reject-payday-loan-reform/.

[26] Lindsay Peterson, "Florida Voters Pass Same-Sex Marriage Amendment," *The Tampa Tribune*, Tampa Bay Online Metro (November 5, 2008), http://www2.tbo.com/news/metro/2008/nov/05/na-florida-voters-ban-same-sex-marriage-ar-101912/.

[27] Kevin G. Clarkson, David Orgon Coolidge, and William C. Duncan, "The Alaska Marriage Amendment: The People's Choice on the Last Frontier," *Alaska Law Review* 16 (1999): 213-268.

[28] See the "Florida Marriage Protection Amendment" (Amendment 2) in Kurt S. Browning, "Proposed Constitutional Amendments To Be Voted on November 4, 2008: Notice of Election," Florida Division of Elections (2008), http://election.dos.state.fl.us/constitutional-amendments/pdf/GEN579Re.pdf: invalidating any non-heterosexual "legal union that is treated as marriage or the substantial equivalent thereof."

[29] Guardian US Interactive Team, "Gay Rights in the U.S., State by State," *The Guardian* (May 8, 2012, updated 2013), http://www.guardian.co.uk/world/interactive/2012/may/08/gay-rights-united-states. See also National Gay and Lesbian Task Force, "State Laws Prohibiting Recognition of Same-Sex Relationships," *NGLTF.org* (November 7, 2012), http://www.ngltf.org/downloads/reports/issue_maps/samesex_relationships_11_7_12.pdf . New Jersey has "broad relationship recognition" through civil unions; New Mexico and Rhode Island "recognize same-sex marriages performed in other states"; and Rhode Island has "limited relationship recognition." National Gay and Lesbian Task Force, "Relationship Recognition for Same-Sex Couples in the U.S.," *NGLTF.org* (January 23, 2012), http://www.ngltf.org/downloads/reports/issue_maps/rel_recog_1_23_13_color.pdf. After a Gubernatorial veto of a "Marriage Equality" bill, "the marriage fight in New Jersey" is now located primarily in *Garden State Equality v. Dow*, a case with strong parallels to the California line of marriage designation cases. Arthur S. Leonard, "A Parting Shot Heard Around the State? Retiring NJ Judge Revives Federal Equal Protection Claim in Same-Sex Marriage Case," *Leonard Link* (February 22, 2012), http://newyorklawschool.typepad.com/leonardlink/2012/02/a-parting-shot-heard-around-the-state-retiring-nj-judge-revives-federal-equal-protection-claim-in-sa.html.

[30] Reddy, *Freedom With Violence*, 182-185.

[31] Leonard, "A Parting Shot Heard Around the State?"
[32] Wyatt Buchanan, "Prop 8 Protests Could Become National Movement," *SFGate*/*San Francisco Chronicle* (November 15, 2008), http://www.sfgate.com/news/article/Prop-8-protests-could-become-national-movement-3261906.php.
[33] American Civil Liberties Union, Gay and Lesbian Advocates and Defenders, Gay and Lesbian Alliance Against Discrimination, Lambda Legal, et al, "Make Change, Not Lawsuits," Press Release, Gay and Lesbian Advocates and Defenders (May 2009), http://www.glad.org/uploads/docs/publications/make-change-not-lawsuits09.pdf; see also Buchanan, "Prop 8 Protests;" Margaret Talbot, "A Risky Proposal: Is it Too Soon to Petition the Supreme Court on Gay Marriage?", *The New Yorker* (January 18, 2010): 1-2, http://www.newyorker.com/reporting/2010/01/18/100118fa_fact_talbot; Mike Sacks, "Gay Marriage Ruling, Written to Appeal to Justice Kennedy, Could Backfire," *The Huffington Post* (February 10, 2012), http://www.huffingtonpost.com/2012/02/10/gay-marriage-ruling-justice-kennedy-appeal-9th-circuit_n_1268676.html.
[34] ACLU et al, "Make Change, Not Lawsuits," 1-2.
[35] See for example Richard Kim, "Post Prop-8," *The Nation* (June 15, 2009): 5, "as expected, the California Supreme Court upheld Proposition 8 by a vote of 6-1." Kim probably refers to the lack of "any federal constitutional challenge" in the original legal challenge. Reinhardt, *Perry v. Brown*, 15.
[36] Reinhardt, *Perry v. Brown*, 15; Opinion of George, C.J., *Strauss v. Horton*, 207 P.3d 48, Cal. 2009 (May 26, 2009): 115-116.
[37] Reinhardt, *Perry v. Brown*, 14. George, *Strauss v. Horton*, 115-116.
[38] Sacks, "Gay Marriage Ruling;" ACLU et al, "Make Change, Not Lawsuits;" Reinhardt, *Perry v. Brown*, 15-16; George, *Strauss v. Horton*, 61, 63, 116-117.
[39] Kim, "Post-Prop 8," 5.
[40] Reinhardt, *Perry v. Brown*, 16.
[41] Reinhardt, *Perry v. Brown*, 16. Emphasis added.
[42] Opinion of Walker, Chief Judge, *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, No. C 09-2292 VRW (N.D. Cal., Aug. 4, 2010).
[43] Reinhardt, *Perry v. Brown*, 14.
[44] See also, for example, Garden State Equality, "About Garden State Equality" (2012), http://www.gardenstateequality.org/about/: "our marriage equality bill passed in 2012...now our sights are on overriding the Governor's veto...pursuing all roads to justice, we are also the lead plaintiff in the marriage equality lawsuit *Garden State Equality v. Dow*."
[45] Adam Liptak, "Justices to Hear Two Challenges on Gay Marriage," *The New York Times* (December 8, 2012): A1, available December 7 online at http://www.nytimes.com/2012/12/08/us/supreme-court-agrees-to-hear-two-cases-on-gay-marriage.html?_r=0.
[46] "Petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted," *Hollingsworth v. Perry*, No. 12-144, 133 S. Ct. 786 (December 7, 2012): 786; "in addition to the question presented by the petition, the parties are directed to brief and argue the following question: Whether petitioners have standing under Article III, §2 of the Constitution in this case."
[47] "Petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit granted," *United States v. Windsor*, No. 12-307, 133 S. Ct. 786 (December 7, 2012): 787; "in addition to the question presented by the petition, the parties are directed to brief and argue the following questions: Whether the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case; and whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case."
[48] Lyle Denniston, "Same-Sex Marriage: DOMA Briefs (FINAL UPDATE)," *SCOTUSblog* (February 22, 2013), http://www.scotusblog.com/?p=159783.
[49] Supreme Court of the United States, Docket Files, "No. 12-144," *Supremecourt.gov* (February 25, 2013), http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-144.htm; SCOTUSblog, "United States v. Windsor" (2013), http://www.scotusblog.com/case-files/cases/windsor-v-united-states-2/.
[50] Reinhardt, *Perry v. Brown*, 16.
[51] George, *In re Marriage Cases*, 1.
[52] Cal. Fam. Code § 300 (a) and 308.5, available at http://www.leginfo.ca.gov/cgi-bin/displaycode?section=fam&group=00001-01000&file=300-310; George, *In re Marriage Cases*, 13; Reinhardt, *Perry v. Brown*, 8.

[53] George, *In re Marriage Cases*, 9-10n6: "four of the six actions in this coordination proceeding were filed by parties (the City and County of San Francisco and same-sex couples, and organizations supporting these parties) who challenge the constitutional validity of the current California marriage statutes, and two of the actions were filed by parties (the Proposition 22 Legal Defense and Education Fund (hereafter Fund or Proposition 22 Legal Defense Fund) and the Campaign for California Families (Campaign)) who maintain that the current statutes are constitutional. For convenience and ease of reference, in this opinion we shall refer collectively to the parties who are challenging the constitutionality of the marriage statutes as plaintiffs. Because the various parties defending the marriage statutes (the state, represented by the Attorney General, the Governor, the Fund, and the Campaign) have advanced differing legal arguments in support of the statutes, this opinion generally will refer to such parties individually. In those instances in which the opinion refers to the parties defending the marriage statutes collectively, those parties will be referred to as defendants."

[54] Kennard, J., concurring, *In re Marriage Cases*, 43 Cal.4th 757, California Supreme Court S147999 (May 15, 2008): 5, available at http://www.courts.ca.gov/documents/S147999.pdf.

[55] Reinhardt, *Perry v. Brown*, 34.

[56] Reinhardt, *Perry v. Brown*, 34, citing Opinion of Kennedy, J., *Romer v. Evans*, 517 U.S. 620 (1996): 626.

[57] Janet E. Halley, "Like Race Arguments," *What's Left of Theory?: New Work on the Politics of Literary Theory*, ed. Judith Butler, John Guillory, and Kendall Thomas (New York and London: Routledge, 2000), 52.

[58] George, *In re Marriage Cases*, 7.

[59] George, *In re Marriage Cases*, 7.

[60] George, *In re Marriage Cases*, 7n5.

[61] By final published pagination: *In re Marriage Cases,* 43 Cal. 4th 757, 183 P.3d 384; 76 Cal. Rptr. 3d 683, LEXIS 5247 (California 2008).

[62] George, *In re Marriage Cases*, 67, 79n52.

[63] George, *In re Marriage Cases*, 94.

[64] George, *In re Marriage Cases*, 81. See also *ibid* at 5, 8-9, 11, 25, 45n26, 47-48n27, 82, and 102n66.

[65] Corrigan, J., concurring and dissenting, *In re Marriage Cases*, 43 Cal.4th 757, California Supreme Court S147999 (May 15, 2008): 6, available at http://www.courts.ca.gov/documents/S147999.pdf; emphasis in original.

[66] George, *In re Marriage Cases*, 81.

[67] George, *In re Marriage Cases*, 94.

[68] George, *In re Marriage Cases*, 93.

[69] Walker, *Perry v. Schwarzenegger*, 120. See also the discussion in Chapter One, at note 247.

[70] George, *In re Marriage Cases*, 94.

[71] George, *In re Marriage Cases*, 94-95.

[72] George, *In re Marriage Cases*, 95.

[73] George, *In re Marriage Cases*, 53.

[74] Corrigan, *In re Marriage Cases*, 1: "the single question [for dispute] in this case is whether domestic partners have a constitutional right to the name of 'marriage.'"

[75] Answer Brief of State of California and the Attorney General to Opening Briefs on the Merits, *In re Marriage Cases*, California Supreme Court No. S147999 (June 14, 2007): 63, available at http://www.courts.ca.gov/documents/02State_of_Cal_Answer_to_Opening_Brief_on_Merits.pdf. See also George, *In re Marriage Cases*, 38.

[76] Answer Brief of State of California, *In re Marriage Cases*, 61-63.

[77] Cal. Fam. Code § 297.5 (a), available at http://www.leginfo.ca.gov/cgi-bin/displaycode?file=297-297.5&group=00001-01000&section=fam.

[78] Answer Brief of State of California, *In re Marriage Cases*, 62.

[79] Answer Brief of State of California, *In re Marriage Cases*, 62.

[80] If the ability to have this "label" used by the government "to describe a particular legal status" is not a fundamental right, then its denial to members of that legal status is similarly not a matter for strict scrutiny review under the "California Constitution's equal protection clause." Answer Brief of State of California, *In re Marriage Cases*, 38-39.

[81] Answer Brief of State of California, *In re Marriage Cases*, 63.

[82] Answer Brief of State of California, *In re Marriage Cases*, 64.

[83] Answer Brief of State of California, *In re Marriage Cases*, 66-67.

[84] Chaïm Perelman, *The Realm of Rhetoric*, trans. William Kluback (Notre Dame, IN and London: University of Notre Dame Press, 1982), 52.

[85] Perelman, *The Realm of Rhetoric*, 52.
[86] Perelman, *The Realm of Rhetoric*, 127.
[87] Perelman, *The Realm of Rhetoric*, 127.
[88] James Jasinski, *Sourcebook on Rhetoric: Key Concepts in Contemporary Rhetorical Studies* (Thousand Oaks: Sage Publications, 2001), s.v. "dissociation," 176.
[89] Perelman, *The Realm of Rhetoric,* 128.
[90] Perelman, *The Realm of Rhetoric*, 127.
[91] See for example National Public Radio, "Hugo Chavez: The Legacy of a Polarizing Leader," *Talk of the Nation* (March 6, 2013), http://www.npr.org/2013/03/06/173636643/hugo-chavez-the-legacy-of-a-polarizing-leader?ft=1&f=5.
[92] Perelman, *The Realm of Rhetoric*, 136.
[93] George, *In re Marriage Cases*, 8-9. Emphasis in original.
[94] Jasinski, *Sourcebook on Rhetoric*, s.v. "dissociation," 178.
[95] A form of the "letter-spirit" dissociative pair. Jasinski, *Sourcebook on Rhetoric*, s.v. "dissociation," 178.
[96] Corrigan, *In re Marriage Cases*, 6.
[97] Corrigan, *In re Marriage Cases*, 4.
[98] George, *In re Marriage Cases*, 59-61, 63, 80-87, 93-95.
[99] Corrigan, *In re Marriage Cases*, 2.
[100] Corrigan, *In re Marriage Cases*, 1.
[101] Corrigan, *In re Marriage Cases*, 4. Emphasis in the original.
[102] Answer Brief of State of California, *In re Marriage Cases*, 36-37.
[103] Baxter, J., concurring and dissenting, *In re Marriage Cases*, 43 Cal.4th 757, California Supreme Court S147999 (May 15, 2008): 1-2, available at http://www.courts.ca.gov/documents/S147999.pdf; Corrigan, *In re Marriage Cases*, 1, 4: "the majority concludes that the voters' decision to retain the traditional definition of marriage is unconstitutional...what is unique about this case is that plaintiffs seek both to join the institution of marriage and at the same time to alter its definition. The majority maintains that plaintiffs are not attempting to change the existing institution of marriage. This claim is irreconcilable with the majority's declaration that '[f]rom the beginning of California statehood, the legal institution of civil marriage has been understood to refer to a relationship between a man and a woman.' The people are entitled to preserve this traditional understanding in the terminology of the law, recognizing that same-sex and opposite-sex unions are different. What they are not entitled to do is *treat* them differently under the law." Emphasis in original.
[104] Baxter, J., *In re Marriage Cases*, 1.
[105] Baxter, *In re Marriage Cases*, 1. "Constitutional" is italicized in the original; I italicize "same-sex."
[106] George, *In re Marriage Cases*, 52-53.
[107] Corrigan, *In re Marriage Cases*, 4.
[108] George, *In re Marriage Cases*, 63.
[109] George, *In re Marriage Cases*, 52, citing Opinion of Traynor, J., *Perez v. Sharp*, 32 Cal.2d 711 (October 1, 1948): 715, 717.
[110] George, *In re Marriage Cases*, 66, 66-68.
[111] Baxter, *In re Marriage Cases*, 9-10.
[112] See also Joseph A. Pull, "Questioning the Fundamental Right to Marry," *Marquette Law Review* 90 (2006): 23-24.
[113] Corrigan, *In re Marriage Cases*, 6-8.
[114] Corrigan, *In re Marriage Cases*, 7, 5-6.
[115] Kennard, *In re Marriage Cases*, 5.
[116] Spade and Willse, "I Still Think Marriage is the Wrong Goal."
[117] Corrigan, *In re Marriage Cases*, 6.
[118] Reinhardt, *Perry v. Brown*, 8.
[119] George, *In re Marriage Cases*, 120-121.
[120] Corrigan, *In re Marriage Cases*, 5-7: "the legitimate purpose of the statutes defining marriage is to preserve the traditional understanding of the institution...for that purpose, plaintiffs are not similarly situated with spouses. While their unions are of equal legal dignity, they are different because they join partners of the same gender. Plaintiffs are in the process of founding a new tradition, unfettered by the boundaries of the old one...society may, if it chooses, recognize that some legally authorized familial relationships unite partners of the same gender while others join partners of opposite sexes."

[121] Corrigan, *In re Marriage Cases*, 1, 4, 8.
[122] George, *In re Marriage Cases*, 59, 95: "the legal commitment to long-term mutual emotional and economic support that is an integral part of an officially recognized marriage relationship provides an individual with the ability to invest in and rely upon a loving relationship with another adult in a way that may be crucial to the individual's development as a person and achievement of his or her full potential (59)...it is sophistic to suggest that [different treatment on the basis of sexual orientation] is avoidable by reason...that the marriage statutes permit a gay man or a lesbian to marry someone of the opposite sex, because making such a choice would require the negation of the person's sexual orientation" (95).
[123] Answer Brief of State of California, *In re Marriage Cases*, 63.
[124] *Hollingsworth v. Perry*, No. 12-144, 133 S. Ct. 786 (December 7, 2012).
[125] Jasbir K. Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham and London: Duke University Press, 2007), 123.
[126] Corrigan, *In re Marriage Cases*, 4.
[127] George, *In re Marriage Cases*, 68-79.
[128] Corrigan, *In re Marriage Cases*, 3.
[129] George, *In re Marriage Cases*, 94.
[130] George, *In re Marriage Cases*, 81.
[131] Walker, *Perry v. Schwarzenegger*, 81-82.
[132] George, *In re Marriage Cases*, 82.
[133] George, *In re Marriage Cases*, 81-82, 94-95.
[134] Kennard, *In re Marriage Cases*, 4.
[135] Kennard, *In re Marriage Cases*, 4.
[136] Washington United for Marriage, "WUM Statement Following PMW Concession of Loss" (2012), http://washingtonunitedformarriage.org/wum-statement-following-pmw-concession-of-loss/.
[137] An Act Relating to Providing Equal Protection for all Families in Washington (Chapter 3, Laws of 2012), ESSB 6239.SL, http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Session%20Laws/Senate/6239-S.SL.pdf.
[138] George, *In re Marriage Cases*, 62, emphasis in original.
[139] Washington United For Marriage, http://washingtonunitedformarriage.org/.
[140] Chandan Reddy, "Race, Sexuality, and the Critique of State Violence: Thoughts on the Vanishing Present," Department of Asian American Studies, University of Illinois at Urbana-Champaign (Urbana, IL: Asian American Cultural Center, October 25, 2012). See also Spade and Willse, "I Still Think Marriage is the Wrong Goal"; and Butler, *Undoing Gender*, 5: "the recent efforts to promote lesbian and gay marriage also promote a norm that threatens to render illegitimate and abject those sexual arrangements that do not comply with the marriage norm in either its existing or revisable form. At the same time, the homophobic objections to lesbian and gay marriage expand out through the culture to affect all queer lives."
[141] Wikipedia, "ProtectMarriage.com" (December 12, 2012), http://en.wikipedia.org/wiki/ProtectMarriage.com; ProtectMarriage.com, "Who We Are" (2013), http://protectmarriage.com/who-we-are.
[142] Preserve Marriage Washington: One Man, One Woman, "Why Preserving Marriage Matters," (2012), http://preservemarriagewashington.com/marriage.php.
[143] Lyle Denniston, "DOMA: House GOP Seeks Lead Role," *SCOTUSblog* (February 22, 2013), http://www.scotusblog.com/?p=159842; Bipartisan Legal Advisory Group of the United States House of Representatives, "Brief on Jurisdiction for Respondent," *United States v. Windsor and Bipartisan Legal Advisory Group*, S. Ct. No. 12-307 (February 22, 2013): i-ii, 11-19, available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-307_resp_blag.authcheckdam.pdf; Bipartisan Legal Advisory Group of the United States House of Representatives, "Brief on the Merits for Respondent," S. Ct. No. 12-307 (January 22, 2013): 43-58, available at http://sblog.s3.amazonaws.com/wp-content/uploads/2013/01/BLAG-merits-brief-1-22-131.pdf.
[144] Reddy, *Freedom with Violence*, 217.
[145] Reddy, *Freedom With Violence*, 218.
[146] Reddy, *Freedom With Violence*, 217: "the Mormon church attempted to court communities of color and immigrant communities, not only by suggesting that they shared an identity as a unified homophobic constituency (ultimately a poor basis for a coalition) but by acting as an institution within the public sphere that could mediate immigrant communities' emphasis on family rights as foundational rights that precede and ground the identity of the state...it has been precisely on the terms of family rights that groups of undocumented Latinos have sought to counter their depiction as a criminal population."

[147] Reddy, *Freedom With Violence*, 217: "the Mormon church attempted to court communities of color and immigrant communities, not only by suggesting that they shared an identity as a unified homophobic constituency (ultimately a poor basis for a coalition) but by acting as an institution within the public sphere that could mediate immigrant communities' emphasis on family rights as foundational rights that precede and ground the identity of the state...it has been precisely on the terms of family rights that groups of undocumented Latinos have sought to counter their depiction as a criminal population."
[148] Derrick A. Bell, *Silent Covenants:* Brown v. Board of Education *and the Unfulfilled Hopes for Racial Reform* (Oxford and New York: Oxford University Press, 2004), 151, 157-159, 190.
[149] David Suissa, "Where's the Struggle?" *Jewish Journal* (November 20, 2008), http://www.jewishjournal.com/opinion/article/wheres_the_struggle_20081119/; see also Michael Petrelis, "Lesbian CA SC Jurist Corrigan & Prop 8 Case," *The Petrelis Files* (March 4, 2009), http://mpetrelis.blogspot.com/2009/03/lesbian-ca-sc-jurist-corrigan-prop-8.html.
[150] National Gay and Lesbian Task Force, "Why Civil Unions Are Not Enough," *NGLTF.org* (May 17, 2005), http://www.ngltf.org/downloads/reports/fact_sheets/WhyCivilUnionsAreNotEnough.pdf; George Chauncey, *Why Marriage?: The History Shaping Today's Debate Over Gay Equality* (New York: Basic Books, 2004), 71-77; Walker, *Perry v. Schwarzenegger*, 81-82.
[151] Ann Bradley, "Lesbian Justice Failed on Equality Question," *The Daily News of Los Angeles* (May 29, 2008): A21.
[152] Leland Traiman, "Justice Carol Corrigan," *National Marriage Equality* (November 6, 2009), http://nationalmarriageequality.blogspot.com/2009/11/justice-carol-corrigan.html.
[153] Bell, *Silent Covenants*, 189.
[154] Bell, *Silent Covenants*, 20-28.
[155] Butler, *Undoing Gender*, 106: "the stable pair who would marry if only they could are cast as illegitimate but eligible for a future legitimacy, whereas the sexual agents who function outside the purview of the marriage bond and its recognized, if illegitimate, alternative form now constitute sexual possibilities that will never be eligible for a translation into legitimacy."
[156] Chauncey, *Why Marriage*, 87-89.
[157] Chauncey, *Why Marriage*, 59-60.
[158] George, *In re Marriage Cases*, 81.
[159] George, *In re Marriage Cases*, 73-77.
[160] Leti Volpp, "Imaginings of Space in Immigration Law," *Law, Culture, and the Humanities* (March 7, 2012): 1.
[161] Baxter, *In re Marriage Cases*, 6-7, 12-14: "according to the majority...the Legislature's adoption of progressive laws on the subject of gay and lesbian rights, including the DPA, makes it impossible not to recognize a *constitutional* right to same-sex legal unions with full equivalency to opposite-sex legal unions. This development, the majority ultimately concludes, requires the invalidation of Family Code section 308.5. In other words, in the majority's view, the *Legislature's own actions* have, by indirection, caused this initiative statute to be erased from the books. To say the least, I find such a constitutional approach troubling." Emphasis in original.
[162] George, *In re Marriage Cases*, 68.
[163] Butler, *Undoing Gender*, 104.
[164] Answer Brief of State of California, *In re Marriage Cases*, 61.
[165] Answer Brief of State of California, *In re Marriage Cases*, 57. See also Chauncey, *Why Marriage*, 59.
[166] Answer Brief of State of California, *In re Marriage Cases*, 61.
[167] Answer Brief of State of California, *In re Marriage Cases*, 62.
[168] Corrigan, *In re Marriage Cases*, 3.
[169] Perleman, *The Realm of Rhetoric*, 5-7.
[170] George, *In re Marriage Cases*, 95: "in our view, it is sophistic to suggest that this conclusion is avoidable by reason of the circumstance that the marriage statutes permit a gay man or a lesbian to marry someone of the opposite sex, because making such a choice would require the negation of the person"s sexual orientation."
[171] Answer Brief of State of California, *In re Marriage Cases*, 63.
[172] Butler, *Undoing Gender*, 5.
[173] Baxter, *In re Marriage Cases*, 17-18.
[174] Baxter, *In re Marriage Cases*, 17: "the bans on incestuous and polygamous marriages are ancient and deep-rooted, and, as the majority suggests, they are supported by strong considerations of social policy. Our society abhors such relationships, and the notion that our laws could not forever prohibit them seems preposterous. Yet here, the majority overturns, in abrupt fashion, an initiative statute confirming the equally deep-rooted assumption that

marriage is a union of partners of the opposite sex. The majority does so by relying on its own assessment of contemporary community values, and by inserting in our Constitution an expanded definition of the right to marry that contravenes express statutory law. That approach creates the opportunity for further judicial extension of this perceived constitutional right into dangerous territory. Who can say that, in ten, fifteen, or twenty years, an activist court might not rely on the majority's analysis to conclude, on the basis of a perceived evolution in community values, that the laws prohibiting polygamous and incestuous marriages were no longer constitutionally justified?"
[175] Baxter, *In re Marriage Cases*, 17.
[176] Butler, *Undoing Gender*, 104, 106.
[177] George, *In re Marriage Cases*, 79.
[178] Reddy, *Freedom With Violence*, 183, 184-185, 191, 211-213.
[179] Cal. Const. art. I, § 7.5. (2008).
[180] Art. I, § 27, "Marriage Defined," Fla. Const. (2008).
[181] Kim, "Post Prop-8," 5. Incidentally, given their public history, the "M-word" reference is could be a dig at Andrew Sullivan. Andrew Sullivan, "Gluttony," *The Stranger* (1999): http://www.thestranger.com/seattle/Content?oid=606090/; Richard Kim, "Andrew Sullivan, Overexposed," *The Nation* (June 5, 2001): http://www.thenation.com/doc/20010618/kim20010605/; Sullivan, "Why the M Word Matters to Me," *Time* (February 8, 2004): http://www.time.com/time/magazine/article/0,9171,588877,00.html.
[182] Spade and Willse, "I Still Think Marriage is the Wrong Goal."
[183] Spade and Willse, "I Still Think Marriage is the Wrong Goal."
[184] Butler, *Undoing Gender*, 5.
[185] Spade and Willse, "Marriage is the Wrong Goal."
[186] Spade and Willse, "I Still Think Marriage is the Wrong Goal."
[187] Spade and Willse, "I Still Think Marriage is the Wrong Goal."
[188] Reddy, *Freedom with Violence*, 217.
[189] George, *Strauss v. Horton*, 60-61.
[190] George, *Strauss v. Horton*, 115; Reinhardt, *Perry v. Brown*, 15.
[191] George, *Strauss v. Horton*, 116.
[192] George, *Strauss v. Horton*, 61-63.
[193] George, *Strauss v. Horton*, 115; Kennard, J., concurring, *Strauss v. Horton*, 207 P.3d 48, Cal. 2009 (May 26, 2009): 123.
[194] George, *Strauss v. Horton*, 62-63.
[195] George, *Strauss v. Horton*, 116-117.
[196] George, *Strauss v. Horton*, 116-117.
[197] George, *Strauss v. Horton*, 116.
[198] George, *Strauss v. Horton*, 116.
[199] George, *Strauss v. Horton*, 116.
[200] George, *Strauss v. Horton*, 115.
[201] George, *Strauss v. Horton*, 115-117.
[202] See Perelman, *The Realm of Rhetoric*, 41-47.
[203] Halley, "Like Race Arguments," 56.
[204] Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991), 168.
[205] Glendon, *Rights Talk*, 3-5, 8.
[206] Halley, "Like Race Arguments," 56, my emphasis.
[207] Glendon, *Rights Talk*, 21-25.
[208] George, *In re Marriage Cases*, 62, emphasis in original.
[209] Kennard, *Strauss v. Horton*, 124.
[210] George, *In re Marriage Cases*, 68-70.
[211] George, *In re Marriage Cases*, 72. See also 69, 77-78, 78n49.
[212] George, *In re Marriage Cases*, 79.
[213] George, *Strauss v. Horton*, 61.
[214] George, *Strauss v. Horton*, 99-100.
[215] George, *Strauss v. Horton*, 61-62.
[216] Moreno, J., concurring and dissenting, *Strauss v. Horton*, 207 P.3d 48, Cal. 2009 (May 26, 2009): 129-132.
[217] Moreno, *Strauss v. Horton*, 130.

[218] Moreno, *Strauss v. Horton*, 131.
[219] Moreno, *Strauss v. Horton*, 129.
[220] Moreno, J., concurring and dissenting, *Strauss v. Horton*, 207 P.3d 48, Cal. 2009 (May 26, 2009): 129.
[221] George, *In re Marriage Cases*, 85-93.
[222] George, *In re Marriage Cases*, 91, 93-100.
[223] Cal. Const. art. I, § 8, 31(a)(c)(g).
[224] George, *In re Marriage Cases*, 95.
[225] Eng, *The Feeling of Kinship*, xi, 23-24.
[226] Kennard, *In re Marriage Cases*, 2.
[227] Kennard, *In re Marriage Cases*, 4; citing Kennard, J., concurring and dissenting, *Lockyer v. City and County of San Francisco,* 33 Cal.4th 1055 (2004): 1132.
[228] National Gay and Lesbian Task Force, "Relationship Recognition"; Opinion of George, *Strauss v. Horton*, 122; Reinhardt, *Perry v. Brown*, 14-15.
[229] Cathy J. Cohen, ''Keynote Address,'' Queertopia!: An Academic Festival Conference, Northwestern University Queer Pride Graduate Student Association (Chicago: Northwestern University, May 22, 2010).
[230] See for example Marlon M. Bailey's discussion of how "Black and Latina/o queer members" of the "'house/ball community" in Detroit and other U.S. locales "use performance to create an alternative discursive terrain and a kinship structure that critiques and revises dominant notions of gender, sexuality, family, and community." Bailey, "Gender/Racial Realness: Theorizing the Gender System in Ballroom Culture," *Feminist Studies* 37, 2 (Summer 2011): 366-367. See also Emily A. Arnold and Marlon M. Bailey, "Constructing Home and Family: How the Ballroom Community Supports African American GLBTQ Youth in the Face of HIV/AIDS," *Journal of Gay and Lesbian Social Services* 21 (2009): 173-174.
[231] In judicial rhetoric, the shorthand "*Perry IV*," etc. is used (as in the different *Bowers* cases I discuss in Chapter One). In this chapter, given the number of different *Perry*s, I use *Schwarzenegger* and *Brown*, both for ease of reading and because the change in Gubernatorial plaintiffs is a clear way to distinguish the progression of the case.
[232] Reinhardt, *Perry v. Brown*, 16.
[233] Reinhardt, *Perry v. Brown*, 17.
[234] *Perry v. Brown*, 2-3.
[235] Walker, *Perry v. Schwarzenegger*, 136; Reinhardt, *Perry v. Brown*, 18-19.
[236] Walker, *Perry v. Schwarzenegger*, 63-71.
[237] Walker, *Perry v. Schwarzenegger,* 81-84.
[238] Walker, *Perry v. Schwarzenegger*, 79-84; see also Reinhardt, *Perry v. Brown*, 18n4.
[239] Walker, *Perry v. Schwarzenegger*, 82.
[240] Walker, *Perry v. Schwarzenegger*, 82-84.
[241] Reinhardt, *Perry v. Brown*, 31.
[242] Walker, *Perry v. Schwarzenegger*, 82.
[243] See for example Answer Brief of State of California, *In re Marriage Cases*, 61; citing Pull, "Questioning the Fundamental Right to Marry," 23-24; and Edward A. Zelinsky, "Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage," *Cardozo Law Review* (2006): 1161, 1182.
[244] Walker, *Perry v. Schwarzenegger*, 30-31, 79-84; findings of fact Nos. 50-54, 56.
[245] Walker, *Perry v. Schwarzenegger*, 85. See also Reinhardt, *Perry v. Brown*, 18n4.
[246] Walker, *Perry v. Schwarzenegger*, 85.
[247] Walker, *Perry v. Schwarzenegger*, 85. See also Moreno, *Strauss v. Horton*, 129-131, 135-136, 138-140: "Proposition 8 represents an unprecedented instance of a majority of voters altering the meaning of the equal protection clause by modifying the California Constitution to require deprivation of a fundamental right on the basis of a suspect classification. The majority's holding is not just a defeat for same-sex couples, but for any minority group that seeks the protection of the equal protection clause of the California Constitution. This could not have been the intent of those who devised and enacted the initiative process."
[248] Thus, an argument in the "ethical" modality. Philip C. Bobbitt, *Constitutional Interpretation* (Oxford: Blackwell Publishing, 1991), 12-13, 18, 20-22.
[249] Moreno, *Strauss v. Horton*, 139.
[250] Reinhardt, *Perry v. Brown*, 15.
[251] Reinhardt, *Perry v. Brown*, 6, citing *Sweatt v. Painter*, 339 U.S. 629 (1950): 631.
[252] Reinhardt, *Perry v. Brown*, 5.
[253] Reinhardt, *Perry v. Brown*, 5, citing Opinion of Kennedy, J., *Romer v. Evans*, 517 U.S. 620 (1996): 633.

[254] Reinhardt, *Perry v. Brown*, 6.
[255] Sacks, "Gay Marriage Ruling."
[256] Nathan Koppel, "Ninth Circuit Judge Stephen Reinhardt Feels High Court's Wrath," Law Blog, *The Wall Street Journal* (January 19, 2011), blogs.wsj.com/law/2011/01/19/ninth-circuit-judge-stephen-reinhardt-feels-high-courts-wrath/.
[257] Sacks, "Gay Marriage Ruling."
[258] Sacks, "Gay Marriage Ruling."
[259] Reinhardt, *Perry v. Brown*, 6.
[260] Reinhardt, Hawkins, and N.R. Smith, Circuit Judges, "Order Certifying a Question of to the Supreme Court of California," *Perry v. Schwarzenegger*, No. 10-16696 (9th Cir., January 4, 2011): 1-2, available at http://cdn.ca9.uscourts.gov/datastore/general/2011/01/04/1016696o.pdf.
[261] Ashby Jones, "Prop 8 Case Gets Bumped Over to California Supremes," *Wall Street Journal* Law Blog (January 4, 2011), http://blogs.wsj.com/law/2011/01/04/prop-8-case-gets-bumped-over-to-california-supremes/.
[262] Reinhardt, Circuit Judge, concurring, "Order Certifying a Question of to the Supreme Court of California," *Perry v. Schwarzenegger*, Nos. 10-16696 and 10-16751 (9th Cir., January 4, 2011): 4-5, available at http://cdn.ca9.uscourts.gov/datastore/general/2011/01/04/1016751opc.pdf.
[263] Reinhardt, "Order Certifying a Question," 5-6.
[264] Reinhardt, *Perry v. Brown*, 6, 33-34.
[265] Reinhardt, "Order Certifying a Question," 10.
[266] Reinhardt, "Order Certifying a Question," 6n3, and 7-8: "all I can say now is that the issues concerning standing were wholly avoidable in this case... it is clear that all of this would have been unnecessary and Plaintiffs could have obtained a statewide injunction had they filed an action against a broader set of defendants, a simple matter of pleading. Why preeminent counsel and the major law firms of which they are a part failed to do that is a matter on which I will not speculate." See also David Lat, "Breaking: Ninth Circuit Certifies Standing-Related Question to California Supreme Court," *Above the Law* (January 4, 2011), http://abovethelaw.com/2011/01/breaking-ninth-circuit-certifies-standing-related-question-to-california-supreme-court/: "Ouch — those definitely qualify as benchslaps. If you've ever been reprimanded by a judge, it's kind of nice to know that legendary litigators like Messrs. Boies and Olson get snarked on too."
[267] Reinhardt, *Perry v. Brown*, 6, 33-34.
[268] Reinhardt, *Perry v. Brown*, 37.
[269] Reinhardt, *Perry v. Brown*, 37.
[270] Paul Katami in Walker, *Perry v. Schwarzenegger*, 83, findings of fact No. 54(k).
[271] Reinhardt, *Perry v. Brown*, 37-39.
[272] Sandra M. Stier in Walker, *Perry v. Schwwarzenegger*, 83, findings of fact No. 54(h)(i).
[273] Reinhardt, *Perry v. Brown*, 32-33.
[274] Reinhardt, *Perry v. Brown*, 37.
[275] Perelman, *The Idea of Justice and the Problem of Argument* (London: Routledge and Kegan Paul, 1963), 103.
[276] Mootz, *Rhetorical Knowledge*, 107, 109; Campbell, "The Procedural Queer," 206, 206n42-43.
[277] Joan W. Scott, "The Evidence of Experience," *Critical Inquiry* 17 (Summer 1991): 777. "When the evidence offered is the evidence of 'experience,' the claim for referentiality is further buttressed...**i**t is precisely this kind of appeal to experience as uncontestable evidence and as an originary point of explanation-as a foundation on which analysis is based-that weakens the critical thrust of histories of difference."
[278] Walker, *Perry v. Schwarzenegger*, 80, 82-83, findings of fact Nos. 52 and 54.
[279] Reinhardt, *Perry v. Brown*, 31.
[280] Reinhardt, *Perry v. Brown*, 32-33, quoting Walker, *Perry v. Schwarzenegger*, 80, finding of fact No. 52.
[281] Reinhardt, *Perry v. Brown*, 38-39, emphasis in original.
[282] Reinhardt, *Perry v. Brown*, 39.
[283] Reinhardt, *Perry v. Brown*, 41.
[284] Reinhardt, *Perry v. Brown*, 40.
[285] Reinhardt, *Perry v. Brown*, 44.
[286] Reinhardt, *Perry v. Brown*, 44-45.
[287] George, *Strauss v. Horton*, 61.
[288] Reinhardt, *Perry v. Brown*, 41-42.
[289] Reinhardt, *Perry v. Brown*, 44.
[290] Reinhardt, *Perry v. Brown*, 45.

[291] Reinahrdt, *Perry v. Brown*, 45-46. "Proposition 8 is no less problematic than Amendment 2 merely because its effect is narrower; to the contrary, the surgical precision with which it excises a right belonging to any gay and lesbian couples makes it even more suspect."
[292] Reinhardt, *Perry v. Brown*, 46.
[293] Reinhardt, *Perry v. Brown*, 48.
[294] Reinhardt, *Perry v. Brown*, 46.
[295] Reinhardt, *Perry v. Brown*, 47, 47n14.
[296] Reinhardt, *Perry v. Brown*, 76.
[297] Reinhardt, *Perry v. Brown*, 47-48.
[298] Reinhardt, *Perry v. Brown*, 50.
[299] See especially Reinhardt, *Perry v. Brown*, 62-63.
[300] Halley, "Like Race Arguments," 50.
[301] Halley, "Like Race Arguments," 50.
[302] Halley, "Like Race Arguments," 67-68.
[303] Halley, "Like Race Arguments," 68.
[304] O'Scannlain, Circuit Judge, dissenting, Order to Deny the Petition for Rehearing En Banc, *Perry v. Brown*, 681 F.3d 1065 (June 5, 2012): 20.
[305] Judith Butler, "Preface 1999," in *Gender Trouble: Feminism and the Subversion of Identity* (New York and London: Routledge, 1990, 1999), viii.
[306] Butler, *Undoing Gender*, 102.
[307] Halley, "Like Race Arguments," 66-68.
[308] Butler, *Undoing Gender*, 116-117.

CHAPTER FOUR: CONCLUSION—QUEER *PHRONĒSIS*

"*The right to read credibility is not a controversial component of the immigration judicial system, as all major court processes in the United States provide similar power to judges. However, some asylum claimants have less ground to cover in performing credibly before court officials. These are individuals whose experiences of persecution fit into the more concrete categories of race, religion, and nationality.*"

—Sara L. McKinnon, "Citizenship and the Performance of Credibility"[1]

In Isocrates' *Antidosis*, the rhetorician warns against a group of philosophers in Athens[2] who lead their students astray from true forms of virtue by teaching a form of *phronēsis*—the "practical understanding" of "what is best for the most part"[3]—that is limited to their squabbling council (rather than reflective of prevailing common sense), and deployed not in the service of the good of the polity, but rather in the interest of increasing the popularity of their particular intellectual clique.[4] For Isocrates, phronesis (also[5] "prudence,"[6] "practical wisdom,"[7] "practical reason"[8]) is truly virtuous only[9] if it is informed by and directed toward the polity's collective understanding of its own good ends. Many years later, the philosopher Hans-Georg Gadamer offers the potential for mediation between Isocrates and his professional competition (as Isocrates presents them). The worth of phronesis, Gadamer argues, is in its recognition that while human judgment is informed by the *telos* of "identification with the communal," political and ethical decisions are necessarily contingent, responding in each instance to situations that could not be predicted by our collective understanding of what has come before.[10] Gadamer orients the rhetorical process of identification toward a communal whose boundaries are defined through constant situational challenge and fluctuation.

Identification, or more precisely the constitution of subjectivity, is central to this project, insofar as I perform a "queering" of judicial argument. I posit this "queering" as a form of exercising[11] "queer politics";[12] that is, as a practical exploration of possibilities for the

exploitation of potentials for the articulation of radical subjectivities in relation to sovereign judicial rhetoric, exploitation intended for the service of anti-establishmentarian, "radical" queer of color political agendas. I seek out these possibilities for radical exploitation in: substantive due process rhetoric grounded in liberal, heteronormative theories of racialized kinship; post-racial confluences of radically nominalist due process and equal protection arguments; and ostensibly conservative judicial arguments against the legalization or total constitutional protection the right to marry a person of the same sex.

In this way, as I argue in the Introduction, rhetorical criticism as the practice of evaluating discursive responses to political contingencies can be a significant component of a radical queer praxis. This chapter considers one possible theoretical basis for such a praxis. Any such possibility is difficult to conceive, as it entails holding together establishment and disestablishment, subject and abject. I offer the Aristotelian virtue of *phronēsis* as a tempting ground for such a hermeneutic. Its classical articulation and contemporary uptake in rhetorical and legal theory suggests the possibility of a middle ground—a means of bridging contradiction—that retains a kind of radicalism not despite, but because of, its avowedly conservative nature.

Phronesis is fundamental to the realization of the critical rhetorical ideal of law in culture.[13] It is not so much a useful but *necessary* and inescapable hermeneutic for a critical response to Western and U.S. jurisprudence that is committed (as I am) to a reading of examples of judicial opinion in part on the terms of their own internal doctrinal logic. As I will demonstrate, the theoretical basis I propose for a radical or "critical"[14] queer of color rhetorical praxis of judicial criticism cannot be phronesis itself, but this particular political synthesis nonetheless requires that phronesis be implicated and taken up. Insofar as phronesis is conflated

with reason, Gadamer is interested not in reason as ideological "rationality," but rather in "reasonableness" (*Vernünftigkeit*),[15] or "the practical *knowledge of* practical reason" that "teaches us the conditions under which reason becomes practical."[16]

A radical queer of color "practical knowledge of practical reason" will not "teach us" such conditions as they are currently taken to be extant in racialized, heteronormative discursive structures of institutional and state power. Rather, a radical queer of color *Vernünftigkeit* can productively destabilize the assumptive nature of such conditions as it provides the basis for asking the question "those conditions under which reason becomes practical" *to whom*. In other words, I hope to articulate a radical queer of color epistemology[17] of the phronetic processes of judicial rhetoric. Such an epistemology can be the basis for a kind of *queering*, or provisional queer identification with judicial rhetorical choices that matter differently to (even as they participate collectively in the differential abjection of) possibilities for the sovereign constitution of queer subject positions in U.S. law.

I. Phronesis and Law

Aristotelian *phronēsis* —in this way, rather like "queer"—is hard to grasp.[18] In Book 1, Chapter 9 of the *Rhetoric*, Aristotle lists "the parts…of virtue,"[19] or the "ability for doing good." The virtue *phronēsis* is central to the rest. Because the "greatest virtues are necessarily those most useful to others," those who are virtuous in a manner that is most useful to the most people are "most" honored,[20] and phronesis is that "virtue of intelligence whereby people are able to plan well for happiness in regard to the good and bad things that are mentioned earlier" (that is, each of the other parts of virtue and their opposites).[21] But unlike some of the other virtues, Aristotle does not define phronesis in specific terms of action. If a person consistently makes decisions that result in "the good" and not the "bad things" that define the other virtues and their

opposites, that person might be said to *have* phronesis, but this does not tell us how she came by it, or how we might emulate her virtuous quality. Phronesis is, as James Jasinski argues, thus "frequently…defined by negation." It is "a way of guiding action" that is "most often" described by post-Aristotelian critics not affirmatively but in terms of its difference from other frameworks through which individuals might make decisions.[22]

The slipperiness of phronesis is exemplified in the difficulty of establishing a definitional relationship between the word, and the quality it and its "roughly synonymous terms"[23] signify.[24] For example, the conflation of phronesis and "prudence" is part of the reason for the latter term's frequent association with an ethic of "moderation and compromise,"[25] but it would not be an accurate reading of Aristotle to conflate phronesis with the virtue of moderation, per se. As Aristotle defines the term specifically in the *Rhetoric*, phronesis is the virtue of making virtuous decisions, the status of which as such is determined not in their production of *one particular* form of good, but rather any number of "good" and not "bad things." The second clause of Aristotle's definition, as George A. Kennedy renders it, with my emphasis— "people are able to plan well for happiness *in regard to* the good and bad things that are mentioned earlier"—can also be read as "people are able to plan well for happiness" in the specific and varied contexts of the other parts of virtue.

In "Speculation and Judgment," the philosopher Jacques Taminiaux does associate phronesis with the middle ground, but not in the sense of absolute definition, where phronesis is the virtue of moderation itself. For Taminiaux, "what is at stake" in phronesis as a "type of knowledge specifically adjusted to human affairs" (in the context of Taminiaux' argumentative characterization[26] of Athenian civil society[27]) is the means of arriving at sound decisions "by searching again and again for a mean between extremes."[28] Taminiaux' diction does appear at

first to underwrite Jasinski's frustration, *qua* Eugene Garver, with the citation of Aristotle toward the valorization of "moderation and compromise as the essence of prudence."[29] His description also appears inconsistent with Aristotle's manner of including phronesis in his list of the virtues (parts of virtue) as I describe in the previous paragraph. Taminiaux, however, locates Aristotelian phronesis in the context of a *particular* Athenian political praxis grounded in "the ambiguities of human affairs," where the "mean" sought by phronesis is not compromise per se in the policy sense, but the temporary stability sought by negotiation between the rules that govern civil society, and the necessary fact of their instability and transience in the context of a government by "plurality" carried out through constant debate.[30]

Taminiaux grounds his definition specifically in the context of debates over the nature of politics among Athenian civic theorists, but as Jasinski argues in a modern context, phronesis ("practical wisdom") can be broadly or even universally descriptive of the process by which "communities [attempt] to negotiate contingency and indeterminacy."[31] "Able to plan well...in regard to" is thus a key phrase in Aristotle's Chapter 9 definition of phronesis. For example, it may be "agreed by all that"[32] "justice is a virtue by which all, individually, have what is due to them and as the law requires; and injustice [is a vice] by which they have what belongs to others and not as the law requires."[33] But, in order to make decisions consistent with justice in the context of a legal system that necessitates the specific and contextual persuasion of an audience consisting of members of the broader plurality, there can be no universal application of "what the law requires" in every case. Each person charged with responsibility for making a decision according to and consistent with the general value of justice must have some means of doing so well despite the ambiguity of the principle.

The "capacity"[34] for such means is a quality of the phronetically virtuous, but here of course we return to the question of what are those means, and what constitutes this capacity? For the moment, I will address the latter question only. For Garver, it is the articulation of a "middle ground" of policy "'halfway between an ethics of principles, in which those principles univocally dictate action…and an ethics of consequences, in which the successful result is all.'"[35] For Taminiaux, it is the location of decisionmaking in light of virtues "not at all in terms of the strict observation of a clear rule."[36] This manner of approach to decisions requires a framework for judgment inclusive of both what appears "to be agreed by all [to be wisdom]"[37] and "what appears to each individual, that is, to *doxa*, individual opinion."[38] Taminiaux's version of Garver's "ethics of consequences" is the relationship between phronesis and the futurity of latent potential; phronesis "is an effort to link particulars to universals that are forever potential and never fully given beforehand." Judgment consistent with phronesis must be "[planned] well" in regards to virtue—this means that the judgment must occur with the decisionmaker's full cognizance of both the specific and non-generalizable consequential import of her actions, *and* the judgment's immediate and future implications for goodness, generally.[39] In terms of the relationship between the virtue of phronesis and the virtue of justice, a specific legal decision *planned well* must simultaneously accord justice to the relevant parties (it must ensure that each has their due as the law requires, and if not, make it so) and be directed toward a *telos* of justice that is generally consistent with preserving and reproducing conditions of possibility for the "good and beautiful life"[40] in the polity as a whole.

Given Taminiaux's interpretation, Aristotle's diction in Chapter 9 (as Kennedy renders it) embeds phronesis into justice. While the capacity for phronesis is not only a pre-requisite for the realization of the virtues,[41] the virtue of justice goes so far as to be inclusive of phronesis as a

necessary part. The grammatical structure of the sentence "justice is a virtue by which all, individually, have what is due to them and as the law requires" renders the relationship between "what is due" and what "the law requires" productively ambiguous. The phrasing suggests both that justice is realized when a person has "what is due" to her according to the requirements of the law, and that "justice is…as the law requires." The conjunction "and" means that both are necessary components of justice; neither realizes justice without the other. The determination of: what, in a given case a person is due; what a person is due according to the requirements of the law; and of whatever else the law may require; are necessarily contingent decisions that must be ("as the law requires") made together. They must be made in light of the relationship between individual claims and the (inherently contested and realized through contestation)[42] understanding of both the specific case and the broader issues that inform it. Phronetic virtue is the primary condition of possibility for virtuous law.

II. Phronesis and Legal Rhetorical Criticism

While contemporary critics use phronesis and its "roughly synonymous terms" largely interchangeably, Aristotle and Plato used the term to mean rather different things. "Prudence" is a dominant term in uptakes[43] of phronesis in rhetorical criticism and theory. Robert Hariman defines Aristotelian phronesis under prudence, distinguishing the "more democratic" Isocratic and Aristotelian concept of prudence as a "distinctive mode of intelligence" "practiced through" the operations of deliberative democracy against Plato's earlier "codification" of prudence as an elite/techno(ē)cratic virtue of the "ideal ruler."[44] I use "phronesis" instead of the "prudence" preferred by Jasinski and Hariman because of my specific interest in *Vernünftigkeit*, which is inclusive both of "prudence" and Platonic phronesis as Hariman describes it. Gadamer argues that the difference in how Aristotle and Plato use phronesis is illustrative of the critique of

Plato's antidemocratic ethos that Hariman argues is implicit in Aristotelian prudence. According to Gadamer, Aristotle consistently[45] uses *phronēsis* to "explicitly [distinguish] practical knowledge from both theoretical and technical knowledge," a meaning-in-context that, as Taminiaux also suggests,[46] reflects the "customary usage" of the time.[47] Plato expands[48] the meaning of the term to both refer specifically to its original/customary meaning of "practical reasonableness," and to be "synonymous with both technē and episteme."

This highlights a relationship in Platonic theory between "practical reason and technical know-how" that belies the important differences between the two. *Reasoning* is obviously common to both "practical" exigencies and those (the examples in Aristotle are primarily scientific) "requiring the recourse to general knowledge that characterizes technē and epistēmē." The "exercise of practical reason," however, involves the difficult task of arriving at a reasoned ("well-advised," or as Kennedy translates, "plan[ned] well") judgment without "recourse" to this "previously acquired general knowledge," because it necessarily occurs in response to situations characterized by the uncertain contingency fundamental to human relations.[49] The implication for Gadamer is that the virtue of phronesis in Aristotle might be described as the capacity to arrive at good decisions supported not through the anti-democratic, elite Platonic ethos of what might be called *technē*-cratic wisdom, but rather through "nothing other than good reasons"—or to put it more colloquially, good arguments that, to a reasonable person, simply make sense.[50] The clash between Aristotelian and Platonic *phronēsis* is central to critical rhetorical uptakes of judicial argument. It is not only that phronesis *qua* Gadamer is informative of the critical rhetorical ideal of the law in culture, but also that phronesis works as a summary of what is claimed as the good in prominent critical legal rhetorical scholarship.

In the "The Rhetorical Boundaries of 'the Law'," Hasian, Condit, and Lucaites offer a rhetorical perspective as a corrective to what they see as the anti-structuralist tendency of critical legal studies and related scholarship to treat the law as a obfuscatory "tool"[51] in the service of hegemony rather than an "active and protean component of…rhetorical culture."[52] As Roger Stahl argues in *Rhetoric & Public Affairs* in 2002, the courts are "in the business of definition and argumentation, crafting meaning within the culturally determined realms of probability, acceptability, subjectivity, [and] hegemony."[53] Hasian, Condit, and Lucaites seek to build a bridge between "professionalist" and "critical" legal theory; in critical legal rhetorical studies, legal rhetors and institutions are participants in a "rhetorical culture," where legal discourse should be understood in terms of the judiciary's struggle to not only make sound legal decisions from a technical/rationalist perspective but to legitimate those decisions in public.[54] While Hasian, Condit, and Lucaites frame their position as opposed to critical approaches to legal analysis, I believe, as I argue in the introduction, that a rhetorical critical practice understanding of the role that judicial rhetors play in public culture should be a site of mutually informative inquiry with, rather than an opposition to, poststructural critique that understands this role as the oppressive (re)legitimation of legal sovereignty.

Phronesis is the virtue implicit in Hasian, Condit, and Lucaites' response to both critical legal theory and positivist law. Gadamer cautions against taking Aristotle's critique of Platonic good to be directed against an "ideal of an objective theory, neutral in regard to all the interests at stake in any practical application of it, and consequently capable of any application one might wish to make," as this ideal is inconsistent not only with Aristotelian phronesis, but with all of the virtues as they are described and espoused in both Plato and Aristotle.[55] A critic could certainly make the case that what Anthony T. Kronman calls the "ideal of scientific law

reform"—exemplified in Richard A. Posner's "Law and Economics" movement[56]—gestures toward this "ideal of an objective theory," and Hasian, Condit, Lucaites offer similar objections to Critical Legal Studies, framing the latter in some ways as the radical leftist converse to legal positivism. Aristotelian phronesis is complementary to their affirmative articulation of the alternative mode represented by critical legal rhetoric. While Gadamer claims a "fundamental distinction" in Aristotelian theory "between theoretical and practical knowledge," it importantly does not follow that the two are mutually exclusive.[57] In the "question of the good in…social life" each person must have their own concept of good that they are able to work out in relation to others, but here "there can be no specialized knowing and no specialists." As in Plato's (also phronetic) "true dialectical art of giving justification," the question of what is good cannot be deferred to the ethos of elite subjectivity, nor to a body of theoretical knowledge that exists prior to justificatory dialogue.[58] Gadamer's identification of the "art of giving justification" as phronetic underwrites his argument that the impossibility of such a deferral to the elite does not fundamentally disconnect the practical knowledge of phronesis from the theoretical knowledge of techne and episteme.

The question of "practical reason" is the question of "right thing to do," and the answer to the question is necessarily specific to the case, rather than one present in some kind of "universal teleology."[59] The "reasonable, practical deliberation" through which a decisionmaker arrives at "the right thing to do" cannot be—as in Posner's law—the correct scientific examination of a predetermined set of rules laid out for specific application to particular cases. But just as with the early Critical Race Theory objection to the totalizing theoretical methods of Critical Legal Studies,[60] the phronetic critique of theory does not entail "subordination of theory to practice." Rather, theory derives from practice in a relationship continued in terms of mutual constitution.

The "highest awareness" that can be attributed to phronesis, "which in each instance is conscious of the rightness of its choice and decision," is both productive of "sophia (wisdom)," that "theoretical knowing which has attained complete self-fulfillment,"[61] and that thing itself.[62] In Gadamer's synthetic reading of Aristotelian and Platonic virtue, phronesis as virtue is reasonableness—a concept in many ways *descriptive* of the Athenian notion of the empirical contingency inherent to the *polis*[63]—elevated to prescriptive ideal.[64]

A specific example in the law might be the relationship between doctrine and *stare decisis*. Here phronesis can shed some light on the tension between the ability of judges to rhetorically invent and frame the genealogies of precedent underlying an opinion, and the situational constraints imposed by those same genealogies on the possible range of judicial arguments that can be articulated in a given opinion. Each person charged with responsibility for making a decision according to and consistent with the general value of justice must have some means of doing this well despite the ambiguity of the principle. Each decision that is made (whether it is made well or not—whether or not it is virtuous) will thus alter and inform the collective understanding of "what is due to them" and what "the law requires" in a given case, so further participating in the process of the constant making and unmaking of the specific content (phronesis) and general knowledge (episteme) of judicial virtue. Because for Aristotle the right thing to do is the end suggested by the practical response to the case, the virtue of phronesis lies partially in that, as Gadamer argues, "one ought to be aware of what one is actually doing when one does what is right."[65] The lack of virtue in anti-prudential jurisprudence is thus not (or not only) that *any* mode of jurisprudential argument is *actually* anti-prudential, but rather that the manner in which some modes of judicial argument productively frame[66] the precedential

genealogies controlling in a given case obscure the play of hegemonic ideology in the reproduction of doctrine ostensibly for its own sake.

Here then is a critical rhetorical idea of law in culture. Judicial rhetoric must, as a component of its situational requirements, make use of doctrinal theory—a body that could be read as the codification of collective wisdom concerning the law—but always in a manner specific to the contingency of the case, and with the recognition that the application of doctrine is not and should not be framed in terms of a set of rules for how to apply the law. Phronesis is negotiation between extremes, but this is not the application of a rule "to be the mean between two extremes," but rather a theoretical conception of extremes as on the one hand, theoretical/general, and on the other, the constantly renewed practical knowledge of experienced situation.[67]

As Francis J. Mootz argues in his exploration of critical legal rhetoric, the contingency of legal judgment is phronetic, rather than a radical,[68] where phronesis in a legal context is: "the capacity to converse with another and to make practical-moral judgments on the basis of a common, historically transmitted tradition, despite the lack of any firm rules guiding these judgments."[69] Critical legal rhetoric is thus underwritten by Gadamer's uptake of Aristotle's negotiated synthesis of practical and epistemic knowledge and their relationship to the good.[70] For Gadamer, "the definitive juxtaposition of theoretical and practical knowing, and hence of the theoretical and practical virtues of knowing, in no way infringes upon the unity of reason, which governs us in both these directions [in which our reasoning might move]."[71] The law as a rhetorical process constitutes a practical *engagement* with theory, of "practical encounters that have critical dimensions,"[72] suggesting that legal critique which treats the law as an overly

determined ideological construct ignores the inevitable range of material possibilities called into being by every specific operation of the law, rhetorically, in culture.

Taminiaux parallels Gadamer in arguing that while "technē deliberates only about the adequate means for predefined ends, phronēsis deliberates about well-doing in general." This deliberation is not terms of a "*science* of the good in general," or "what we find to be good in the theoretical realm,"[73] but rather what is good to be done "in relation to *kairos*," or the "opportune moment"[74] for a decision in context.[75] Taminiaux agrees with Gadamer that Aristotle's insistence *contra* Plato that "phronēsis is a doxastic virtue" does not mean that it is a virtue mired always in the "particular perspectives of individuals" and thus incapable of articulating what is Ideal; rather, "phronēsis is the aptitude of *pondering* doxa…for the ever-potential universal that is the good and beautiful life."[76] Here again, it is the capacity for practical knowledge that gives rise to the capacity for wise theory, and in this way, phronesis again underwrites the contribution that knowledge of rhetoric can bring to a critical understanding of the law.

The law is an "activity" and not a "resource;" legal decisions are the rhetorical exercise of "framing disputes and *then* making judgments:"[77] "framing the question at issue is not a matter of demarcating the perspicacious features of the world-in-itself that can later be investigated, but rather is the activity of rhetorical engagement that provides us with a world in the first instance."[78] Aristotle makes it difficult to parse the relationship between the ethics of the framework for action and the action itself. This difficulty, in the context of a phronetic rhetorical legal criticism, highlights the specific importance of judicial *argument.* The argumentative framework through which a judicial rhetor frames her opinion has material effects independent from the decision itself. The argumentative frames that influence and constrain a

conclusion of law—the statement of policy in an opinion—both influence future policy, and, in the context of particular legal situations, are policy itself.

III. A Practical Hermeneutic of Radical Engagement

The mode of legal rhetorical criticism I practice throughout this dissertation suggests that a critical rhetorical engagement with the processes of legal decisionmaking—processes that are inevitably and inescapably derivative of Aristotelian thought[79]—must be an engagement with the virtue of phronesis, and the question of the capacity for phronesis in contemporary jurisprudence. This is a disciplinary requirement in the sense of rhetoric's extant canonical attachment to classical rhetorical notions of the negotiation of contingency,[80] but also in the sense of the inescapable relationship between classical rhetorical valuations of reason, and norms of operation in contemporary legal institutions.[81] Phronesis, once again, is thus a tempting ground for a hermeneutic of radical queer of color rhetorical legal criticism. A radical queer of color engagement with legal rhetoric can provide some basis to normatively distinguish among different judicial arguments that have materially different implications for the coercive regulation, oppression, and abjection of racialized queer subjectivities performatively constituted in U.S. judicial rhetorics of constitutional interpretation. But for such a hermeneutic to succeed, there must first be some possibility for a radical queer valuation of the different potentials for phronetic capacity among varied examples of judicial rhetoric.

Lauren Berlant and Michael Warner stipulate the need for an institutional focus in queer theory and politics, a call echoed in queer rhetorical criticism by Charles E. Morris III. For Morris, Berlant, and Warner, while the benefits of queer theory's deconstructive analytical potential are clear—that is, to expose the workings and origins of heternormative ideology, to identify and strip the 'normative' from 'hetero'—the need for institutional and constructive

politics is also apparent, as the status quo demands an answer to "questions of political utility."[82] I argue that these "questions of political utility" are necessarily bound up in the law,[83] especially given a nation-state that depends in part on the official marginalization of "sexual underclasses" for its "national symbolic and political coherence."[84] The law matters, rhetorically.

Here I turn again to Charles Morris's study of the famous and highly public "Trial of Leopold and Loeb," where the queer rhetorical critic takes as his text for rhetorical criticism the *mis-en-scène* of a major court trial because of his recognition of the "muscle and materiality" that "jurisprudence" provides toward heteronormativity.[85] While "the most important site of legal change may not be in the courtroom,"[86] courts, and I argue *the* Court in particular, retain centrally important roles in determining the particular manner in which discursive and material relations of domination will be reinforced against attempts at change. On the one hand, even credulous, practically intended, radically exploitative petitions to legal sovereignty can at best gain freedom for some at the expense of providing the rhetorical opportunity for judicial rhetors to legitimate their sovereign power over others; on the other hand, failure to so engage risks leaving unchecked the "muscle" of heteronormativity that renders the queer citizenship theorist Shane Phelan decidedly pessimistic[87] about the immediate possibilities for her project of "wholesale rethinking" of law and citizenship along queer lines.

Here is where, optimistically, I posit phronesis as a vehicle for queer rhetorical legal criticism, aimed at producing radical perspectives on the operations of judicial argument, as one component of a radical queer of color praxis. Given the risk of, as Judith Butler argues, the validation of the sovereign performatives of judicial rhetoric, phronesis can be one way of describing the potential in rhetorical practice for articulating the critical valuation of some judicial arguments over others, without risking the suggestion that either choice should be

endorsed as a *good*.[88] The virtue of phronesis vis-à-vis the community or public is in the ability to resolve the contradiction[89] between the determinacy of the local and present situation and the imperative of the future ideal. Phronesis, as I note above, is an epistemological virtue containing the capacity for resolving the contradiction of individual and community:

> Aristotle says that phronēsis is a doxastic virtue. This does not mean that phronēsis is trapped in the appearances and strictly attaches to the particular perspectives of individuals. On the contrary, phronēsis is the aptitude of *pondering* doxa, which means the attitude of searching—while pondering the specifics of a particular situation—for the ever-potential universal that is the good and beautiful life.[90]

Further, phronesis holds the radically particular and the radically universal as dual and mutually productive representations of the highest forms of human achievement and virtue. Simultaneously, a phronetic moral economy maintains the subordination of the radically universal to the radically particular, where the latter is both the pre-requisite to and the only ultimately virtuous expression of the former.[91]

In this way, phronesis as the ground of virtuous law suggests the possibility for one kind of queering—for the articulation and normative evaluation of latent radical queer of color possibilities in foundationally anti-radical jurisprudence. Conceiving of this version of queering in the context of legal rhetorical action as the enactment of a *queer phronesis* suggests the possibility of holding together: on one hand, the need to engage the present "muscle and materiality" of jurisprudence in its own spaces and on its own terms; with on the other, the absolutely contradictory imperative to reject inscriptions of the performative power of law as a foundation of radical politics. In phronetic terms, these possibilities are first: the demands of the moment engendered in the inevitable action of law-as-sovereign on persons rhetorically as they

are constituted through the derealizing fields of legal subjectivity; and second, radical extra-institutional and anti-establishmentarian efforts to realize queer of color counter-publicity against the racialized heteronormative nation-state and its dominant institutions.[92]

I call this an optimistic possibility because it is overly so. Gadamer reminds us that because for Aristotle, the capacity for phronesis is the pre-requisite to the practical realization of the other virtues (including justice), it is only in the "realm of practice" that "moral decisions" are possible.[93] In phronetic decisionmaking, "holding to a principle…is not merely a logical act," meaning that "practical reasonableness is displayed not only in knowing how to find the right means but also in holding to the right ends."[94] While the "means" of action in phronesis can be understood in ways that are consistent with radical politics as I define them, an attempt to articulate a radical queer of color phronesis can nonetheless not escape the *telos* of phronesis itself, which is decidedly and inherently contrary to radicalism. This is apparent in at least two ways.

First, as Jansinski suggests, the prudential capacity that "communities deploy in an effort to negotiate contingency and indeterminacy" is not *toward the valuation of radicalism*, but rather toward an attempt to articulate stability in response to the contingent realities of politics. Similarly, in critical legal rhetoric, Hasian, Condit, and Lucaites illustrate the *telos* of normativity implicit in phronesis through their argument that the "impermanent" "feeling" resulting from understanding the law as part and parcel of "rhetorical culture" "has the advantage of allowing openness to needed change; and in point of fact, assumes that publicly warranted changes will be made."[95] As with Jasinski's "practical wisdom" of the community, this is not an argument for the radical democratic potential of uncertainty,[96] but rather the phronetic claim that it is through response to contingency that civic ideals can be re-articulated in the communal—a

position that functions as a kind of philosophical modality of judicial arguments about the relationship between morality, popular sensibility, public policy, and the nature of the state. The *telos* of phronesis is thus a part of, rather than an opposition to, the judicial rhetorical practice of constantly re-affirming the sovereignty of law in the practice of providing argumentative justification for judicial decisions. The relationship between critical legal rhetoric and phronesis suggests that part of the advantage of understanding the law in terms of rhetorical culture is the ability to see legal decisions as productive of "a modicum of stability and predictability" through "'compromise,' 'stand-off,' or 'concordance' among social actors motivated by competing interests."[97] The insight of radical queer of color critique of the relationship between politics and political/legal/cultural institutions is that this "modicum of stability and predictability" will be constantly reproduced in terms of racialized, heteronormative oppression.[98]

Second, both the method and *telos* of Aristotelian phronesis—particularly as it is taken up in contemporary rhetorical theory—has a particular relationship to the assumed univeralism of the democratic political community that is hard to parse with radical queer of color politics. This is apparent in my earlier uptake of Hariman's study of "bureaucratic style" vis-à-vis my critical race theory informed critique of Butler's theory of the rhetorical legitimation of legal sovereignty. Hariman's call for a practical knowledge of "how" (*qua* Constable) bureaucratic style functions to govern everyday life so as to better "survive" it presumes, as I noted, a universal *subject* of bureaucracy that in so presuming participates in (and does nothing for) the abjection of bureaucratic style's abject.

In section one, I raised the two questions of first, what constitutes the capacity to realize the virtue of phronesis, and second, what are the means to realize that capacity, but attempted to answer only the former. In his treatise *Norms of Rhetorical Culture*, Thomas B. Farrell asks the

same question: if, as he argues, "virtue in the *Rhetoric*…[is] a powerful capacity awaiting propitious realization," then "how is" that capacity "implemented?"[99] The answer is in "the adjudication of a reasoning, competent audience that confirms, qualifies, or denies the allegation of virtuous qualities on behalf of some other person, action, or project—thereby ensuring virtue's enactment for itself."[100] Farrell arrives at this answer through his argument for the "collective character of practical reasoning in rhetoric."[101] For all but the most "stalwart moral agent[s]," phronesis is "imaginable only where premises of thought are permeable to the interests of others in an atmosphere of civic friendship and public exposure."[102]

Here the relationship between contingency and phronetic virtue is situated squarely in human relation-in-community, which begs the question of a community of and for whom and on the basis of what kinds of relationships? This question implies an objection to the real oppressions of Aristotle's Athens—but in the sense of an inescapable relationship between phronetic virtue and abjection, rather than a claim of poisoned well. Farrell argues, "Aristotle's advice is incomplete, as is the art, the worldview it presents, and the world in which it thrives." But the problematic *telos* of phronesis is not only ancient Athens, but also the problem of exclusion and abjection that inheres in any rhetoric of an inclusive public. Gadamer argues that Aristotle's methodological attempt at consistency in his arguments concerning universality and particularity underwrite an inherently conservative aspect of phronesis. The realization of phronetic virtue is unlikely to engender, even in the way that theory can derive from the radical embrace of the particular, broad ethical objections to evils like slavery *that are generally accepted by the given popular context.*[103] Farrell's response is to locate Aristotelian particularity and "partisanship" as a "universal feature of human being." As Farrell reads *The Rhetoric*, the manner in which "larger civic obligations"—the *telos* of the polity—can derive from partisanship

is in the productive ability to move from "partialist" to "our complicity in the interests of others" because of our universal membership in certain partialist human concerns.[104]

Farrell's position reminds me of Butler's warning against Aristotelian projects that take community as it is currently theorized and seek to expand it in the particular: "it may…seem that I am simply calling for a more concrete and internally diverse 'universality'…but…such a totalizing notion could only be achieved at the cost of producing new and further exclusions."[105] If phronesis, understood rhetorically, is a virtue defined through "collective character," than in the context of the queer phronesis I attempt above, the wonderful phronetic gesture from the particularity of judgment about queer subjects before the law, toward a theoretical relationship between that judgment and imagined community will be unable to break from the feedback loop of state- and institutional-heteronormative reinscription. In Michael Warner's terms, a queer phronesis could only be part of queer publicity *and not* counter-publicity. A counterpublic must not only retain some "awareness of its subordinate status" to the "dominant public" but also articulate ways of imagining publicity—"stranger sociability and reflexivity"—that are explicitly contrary to and disavowed by existing dominant public epistemologies.[106] While "an understanding of queerness has been developing that is suited to just this necessity," Warner offers this optimistic statement with—echoing Jasbir K. Puar's theory of "homonormativity"—the caveat that of course, a corollary "lesbian and gay public has been reshaped so as to ignore or refuse the counterpublic character that has marked its history."[107] This latter is not counter to heteronormativity but is rather contained within and productive of the legible space of dominant publicity.

If a truly radical queer of color political public is to be realized, it would "need to inhabit a culture with a different language ideology, a different social imaginary." This culture is hard to

conceive—like Phelan, Warner suggests that it would "need to be one with a different role for state-based thinking, because it might be only through its imaginary coupling with the state that a public acts."[108] It other words, it might need to be a public that is foundationally opposed to, rather than necessarily dependent on, appeals to the protection of law-as-sovereign that form the basis of both coercive power and protection from domination in a democratic state.

Absent this prior queer reconceptualization of the state institution (inclusive of the law), a queer public would not be a public at all, but a social movement akin to our present "queer liberalism" that may be specifically contrary[109] to the radical queer "hope of transforming not just policy but the space of public life itself."[110] If Farrell is right that the capacity for phronetic virtue is realized through the deliberative interaction between decisionmaker and *public*, a radical queer of color (counterpublic) phronesis is not only unlikely, but conceptually impossible. The individual particularity of phronesis is dual with the productive dream of an imagined community. Gadamer's insight is that this community is unlikely to genuinely evolve through phronetic judgment (judgment about particular situations) in ways that are contrary to pre-existing, overwhelmingly agreed upon social norms. The more likely outcome is that, as Aristotle himself implicitly suggests in his list of virtues in Book 1, Chapter 9, phronetic judgment will more often underwrite the prior normative assumptions of the community—regardless of the ostensibly progressive form that judgment might take.

But here, at least, is a form of description, grounded partly in the "classical" rhetorical theories that inform our present judicial rhetorics, of precisely how the judicial sovereign performatively operates. It is the potential of this kind of description that I believe makes phronesis useful as a component of a queer of color rhetorical praxis.

IV. Queer Political Knowledge of Phronesis

The difficulties of a queer phronesis are particularly evident in the context of the "sideways" intersectional queer of color mode[111] of reading doctrine that I employ in this project. Radical queer of color politics is mutually exclusive not only with "assimilationist political drives," but with what the queer of color theorist Roderick A. Ferguson identifies as the "will to institutionality" that is part and parcel of the oppressively subjectifying politics of mainstream struggles for gay and lesbian recognition.[112] To repeat the question of the Introduction: how then, can there be any basis for a radical queer of color politics of judicial rhetorical choice? How can this be not a simple articulation of the "will to institutionality" through a reinscription of the foundationalist *matter* of institutional power?

One answer is in Cathy J. Cohen's recent call for queer scholars responding to proposed legislation and other state-institutional action concerning sexuality to consider the value of "practical" alongside "radical queer politics," and to not regard the two as mutually exclusive.[113] I read the link that Cohen posits between "practical" and "radical" queer politics is a rhetorical one. Given the present inevitability of a United States legislative and judicial system organized through the queerly racialized subordination of marginalized populations, it is for Cohen incumbent upon queer scholars to adopt a "practical"—in phronetic terms, cognizant of the demands of judgment inherent in a particular case—queer of color politics that insistently promotes radical queer ways of framing, repurposing, and responding to non-queer, anti-radical mainstream official state actions concerning sexuality.[114]

Here "practical" is not a repudiation, but rather knowledge-in-service of, radical politics that assume the discursively constructed nature of the power of the state. Richard Rorty uses his reading of "Baudrillard's account of America as Disneyland" as the bugaboo basis of his attack

on the naïve "cultural left" view that "the nation-state is obsolete"—the lesson being that any actually progressive politics will need to start from the position that America is real and that we need to operate in it as such in order to work effectively against oppressive institutions.[115] The politics I propose, following Chandan Reddy's call for "projects of social transformation" that seek simultaneously to counter-legitimize and effectively confront the "ideal image" of the "modern state," which despite being "reduced" to "little more than security functions" dressed up through self-legitimizing rhetorics, of course retains the significant functional ability to injure and set back those projects invested in constructing forms beyond the state.[116] To reverse Rorty, it is precisely an understanding of both how American functions as Disneyland, and also (and importantly to my reading of judicial rhetoric), how its functioning as Disneyland continues to underwrite the notion of "America," that provides the practical knowledge necessary to achieve transformation both inside and outside the rhetorically simulated sovereign, but always against it.

As one rhetorical theoretical basis for such analysis-as-praxis, I offer the possibility not of a queer phronesis, but of a radical queer engagement with the law that is strategically informed by phronesis, read through the radical assumptions of queer of color political philosophy. Here Berlant and Warner's notion of a "queer commentary" is useful. In their essay "What Does Queer Theory Teach Us About X?" Berlant and Warner discuss the possibility for a queer political *perspective* by calling for a conceptual shift from "queer theory" to "queer commentary" as an intellectual and political practice.[117] Queer commentary "aspires to create [queer] publics," and these publics are—as Warner will later argue—defined not in terms of their identarian membership, but rather through their existence as political and geographic space for the realization and enablement of particular, subjective, and embodied ways of being and knowing. "Queer commentary" is interested in queering not in the sense of describing an

existing thing as always-already queer.[118] Instead, the queering of queer commentary is the practice of creating, through varied and often contradictory practice, queer possibilities for being and knowing: practical and conceptual queer futures. Conceiving of queer theory as the political practice of queer commentary thus enables at once the articulation of specific radical queer political goals, the refusal or deferral of that articulation in order to offer a contextual and practically constrained perspective on some aspect of culture, and various combinations thereof. Cohen and Berlant and Warner each offer a particularist response to the higher theorizing tendencies of queer theory that is clearly and explicitly derivative of core theoretical concepts in queer theory—concepts that are in turn committed to their derivation from mutable and contingent particular experiences of queer and queered subjectivity in culture.

The particularist queer and queer of color theory of Berlant, Warner, and Cohen is not so much parallel to as it is a radical queer commentary on the relationship between the particular and the universal—phronesis and episteme/techne—present in Aristotelian phronesis qua Taminiaux and Gadamer. Jasbir K. Puar's articulation of queer of color futurity works in the same way. A queer futurist *telos* for Puar at once: is necessitated by the exigencies of judgments made locally in response to subjective and communal experiences of racist and heteronormative oppression; explicitly disavows the particular as a mode of judgment or action; and engages in that disavowal precisely and paradoxically to leave open the vector of possibilities for specific and particular queer futures.[119] As in Aristotle, the particular and the universal are paradoxically held together as both opposed and in some sense the same. In phronesis, the universal is subsumed by the particular, which is elevated to the status of divine ideal. Contrastingly, Cohen and Puar's articulation of radical queer of color particularity assumes the subordination of the particular to the theoretical, which is itself understood as an indefinable and productively

uncertain general articulation of the specific: as Butler says, the "ungrounded ground" of radical poststructural progressive politics.[120]

What I propose is not a queer phronesis, but a critical queer of color commentary on or *knowledge of* phronesis. If *Vernünftigkeit* is the "practical knowledge of practical reason" that "teaches us the conditions under which reason becomes practical," a radical queer of color knowledge of these conditions-in-law underwrites a mode of critical action. This mode of action does not relate to the practice and criticism of institutionalized legal judgment as itself a queer practice (a queer phronesis), but rather approaches the criticism and practice of legal judgment with a practical understanding of the implications of that judgment from a radical queer of color perspective. Rather than a paradoxical affirmation of the fundamentally universal and fundamentally particular, a practical/radical queer of color rhetorical critique of judicial rhetoric will involve the paradoxical affirmation of a specific *telos* of particularity—this form of judicial argument should be valued over this other form, given the present inevitability of one or the other—within the framework of a queer of color political perspective that rejects any valuation of the law's claims to sovereign legitimacy reform as necessarily reproductive of oppression.

The United States is founded and still re-articulated[121] through the c(C)onstitution of "whiteness as property,"[122] or the formulation and re-formulation of a national society predicated on the valuation of greater and lesser abjections from the privileged norm. In such a *constitutional* society, legal rhetoric, as Chandan Reddy argues, operates as both the "structure and archive" for the "differentiated social formation" of U.S. culture.[123] Scholarship that operates entirely within the rhetorical framework of the law's archive (as its jurisprudential archivists maintain it) will not only fail to discern, but also will participate in reproducing[124] the racialized "hierarchies of value"[125] part and parcel even of rhetorical moves toward queering the

law. For Reddy, critical queer of color legal scholarship needs to mark forms of queer of color subjectivity which are subject to but not subjects of the law, which are not legible within the rhetorical formulations of judicial opinion. These forms of subjectivity are subjected to the law while being denied legal subjectivity—as the "limit of the archive, the point at which the archive's own [racialized] conditions for existence might be retraced."[126] In this light, the contribution of this dissertation is both basic and vital. I posit (and here I cite as inspirational the work of Sara L. McKinnon[127]) the necessity of a close reading of judicial argumentative choice as a necessary and mostly overlooked component of this retracing.

V. Conclusion: Rhetorical Legal Subjects

Shortly after the Court's decision in *Lawrence*, Craig Willse and Dean Spade published "Freedom in a Regulatory State?: *Lawrence,* Marriage, and Biopolitics." Willse and Spade's law note contests the "status granted" Kennedy's opinion by contemporary "LGBT legal organizations and advocates"[128] as "'Our Biggest Victory Yet!'"[129] Willse and Spade advocate instead a "more cautious reading," wherein Kennedy's decision represents a "shift" rather than a "challenge" to the "mechanics of discipline" that represent the biopolitical technology of the juridical disciplining of queer/of color bodies.[130] This juridical disciplining of queer bodies occurs through what I would call, rhetorically, a process of the judicial rhetorical and racialized constitution of legitimate queer subjects before the law.

Specifically, the "rearticulation" of sodomy into an "act constitutive of a sympathetic identity group" that is at the heart of Kennedy's opinion in *Lawrence* is constitutive of particular forms of homosexual identity as newly legitimated members of the U.S. polity.[131] *Lawrence's* judicial rhetorical move—Kennedy's "rearticulation"—marks a "regrouping" of U.S. legal "punitive and violent" coercive power in and through the newly recognized legitimate

homosexual subject to "not only address the queer as a disciplined subject, but ensure the [biopolitical] domination of some queers nonetheless."[132]

Willse and Spade read Kennedy's inevitable and generically predictable "rhetorical positioning of the case" as a position derivative of, rather than confrontational to, "existing legal" doctrinal commitments to state-institutional investments in particular forms of family structure, sexual being, and relation. What is interesting about *Lawrence*, they argue, is not that Kennedy framed his opinion in such "centrist" and "non-controversial" terms—terms that made the opinion's status as a marker of rather than a challenge to the biopolitical state-regulation of queer bodies both predictable and inevitable. Rather, *Lawrence* is interesting because those "[LGBT] movements that were, at their inception, opposed to such coercion" adopted in their response to the decision such an enthusiastic embrace of "state regulatory power regarding sexuality and family structure."[133]

The conditions of possibility for the doctrinal argumentative construction of Kennedy's opinion *itself* were latent in and indeed inherent to the limited space of U.S. judicial rhetorical culture. But the successful operation of *Lawrence* as a mechanism of biopolitical state power in U.S. queer publics (an operation that Willse and Spade presciently predicted would become central to the project of the marriage equality movement, as an expansion of the biopolitical regulation of some marked as legitimately queer and the domination of others marked as not[134]) is made possible not by Kennedy's arguments that (in Willse and Spade's reading) say it should be so. Rather, *Lawrence*'s success as a mechanism of racialized and heteronormative biopower is enabled by "the incomplete conception of the operations of power"[135]—or indeed complicity in those operations—of an increasingly dominant queer public that has come to embrace as a

central component of queer culture a "technology of power that organizes all parts of a population in terms of access to resources necessary for survival"—that is, marriage.[136]

In this chapter, I have focused primarily on the political operation of what Willse and Spade address as an aside to their major claim: the argumentative mode of reasonable judicial argument in response to highly controversial and divisive issues. In their introduction to *Contemporary Rhetorical Theory*, Lucaites and Condit argue that this mode of argument is central to the ideal process of rhetorical decisionmaking in "classical" theory that continues to be cited and deployed in contemporary times. Rhetoric is the "legitimation of decisions made in situations defined by 'contingency,' where actions must be taken but 'decisionmakers are forced to rely on probabilities rather than certainties.'"[137] There is no better example of this form of rhetorical operation than in judicial culture.[138] As I note above, judicial rhetoric, understood in these terms, is definitionally phronetic—it is the application of "practical wisdom" by public rhetors central to the process by which "communities attempt to negotiate contingency and indeterminacy."[139] And as James Jasinski has argued recently, there may be no better example of phronetic judicial rhetoric than the recent opinions of Justice Anthony M. Kennedy.[140] Thus Willse and Spade observe that "the rhetorical positioning of the majority [in *Lawrence*] is no surprise." A phronetic understanding of judicial rhetoric is simply another way of describing the adaptability of state power as it evolves through different modes of regulation—including the present and ongoing evolution represented in the continuing shift from the disciplinary to the biopolitical.[141]

Foucault argues that while the law in the extant state retains the final and "absolute" disciplinary "menace" of death, the increasingly normalizing function of law as a technology of "bio-power" means that the "judicial institution is increasingly incorporated into a continuum of

apparatuses…whose functions are for the most part regulatory."[142] Foucault cautions against an over-valuation of the significance of juridical power on the basis of Constitution, as "Constitutions [including the United States']…were" simply "the forms that made an essentially normalizing power acceptable."[143] This position, echoed partly in Black Legal Studies and queer of color legal critique, supports an approach to legal texts that is more discursive than rhetorical, moving away from what Foucault might argue (what Butler does argue, through Foucault) is a legal scholarly tendency toward a false re-inscription of judicial rhetoric's sovereign illocutionary power.[144]

This is similar to Willse and Spade's contention that what is most interesting about *Lawrence* is not the argumentative choices made by Kennedy in his decision, but rather the political effects of "well-resourced" "LGBT legal" movements'[145] embrace and articulation of those choices as a victory for the dream of a future liberated queer culture. If part of the advantage of understanding the law in terms of rhetorical culture is the ability to see legal decisions as productive of "a modicum of stability and predictability" through "'compromise,' 'stand-off,' or 'concordance' among social actors motivated by competing interests,"[146] Willse, Spade, and other practitioners and theorists of radical queer and queer of color politics suggest that this "modicum of stability and predictability" is no more than the marker of the juridical function in the statist control over and systemic elimination of queerly racialized bodies on the margins.

Conversely, Butler argues in 1992 that the risk and benefit of radical, anti-structural and disestablishmentarian democratic politics are one and the same:

> That [normative] foundations [of identity] exist only to be put into question is…the permanent risk of the process of democratization. To refuse that contest is to sacrifice the

> radical democratic impetus of…politics. That the category is unconstrained, even that it comes to serve [oppressive] purposes, will be part of the risk of this procedure.[147]

Following Butler, the contingent aspect of radical queer of color politics has less to do with the inevitably probabilistic nature of situations that demand attempts at change, than with the political choice to embrace uncertainty itself as the basis and desired end result of politics of resistance to ever shifting boundaries of oppression. Here critical legal rhetorical and radical queer of color analysis differ in their conclusions about the ethical value of legal culture grounded in and understood through the practical negotiation of inevitable contingency. For the one, the temporary articulation of normative certainty in the face of contingent rhetorical situations is politically productive;[148] for the other, the value of contingent politics is the ability to constantly reject strategies of normative foundationalism.

I see judicial rhetoric as much more of a two-way street. The law has no effect—indeed no meaningful existence—apart from the historical-cultural conditions of possibility from whence it came, conditions that work to continuously reproduce, alter, and re-legitimize the role of law in society. This process is not linear or precisely rhetorical, but rather dialogic. On the one hand, judicial rhetoric evolves and circulates under the constraints of conditions of rhetorical possibility latent in the culturally produced realm of law. The Constitution did not create the United States, and it does not, after all, precisely constitute it. Rather, the shifting set of possibilities for the effectivity of constitutional discourse in the U.S. polity illuminate the text itself as a living exemplar of the set of hierarchical relationships of identity and capital that form what the United States is as a polity.[149] Constitutional rhetoric—in particular the judicial rhetoric of constitutional law—is not only enabled by and granted certain limited effective power

by culture, but is also simultaneously constitutive of the limited realm of rhetorical possibility for a person's articulation of self as a subject before the law of the United States.

As Halley says, "lawyers," presenting arguments on behalf of persons who may or may not self-express as legible legal subjects, "can do things that alter the social definition of [a] group itself. They can 'make up people' in ways that weak constructivist views of group formation ignore."[150] Those with the power to publicly represent the interests of a social group construct people in a variety of institutional and extra-institutional discursive locations; Halley's nod, described in Chapter One, to the particular exigence of arguing to a judge highlights the specific politics of identity construction in the context of U.S. *judicially produced* subjectivity. The affirmative "construction" of identity through the process of legal argument—the creation of forms of subjectivity before U.S. law—is a dialogically creative and destructive material rhetorical act.

The prevailing theory of identity in U.S. law works, again, according to a "single-axis" model—legal subjects are recognized by judicial rhetors literally in terms of only one identity per claim upon the law.[151] This theory is hegemonic; it is part of the ideological fabric of U.S. jurisprudential practice, and so is specifically spoken and defended only when necessary to reject or constrain attempts to approach the U.S. judiciary through a multiple-axis framework. Those who would approach the bench face, as a condition of that approach, a judicial rhetorical version of Althusser's coercive hail.[152] All constructions of identity vis-à-vis U.S. judicial law are therefore coercively normative. Just as any subject-less declaration of "I" within heteronormative social matrixes is founded upon the abjection of the queer anti-subject,[153] so are all constructions of identity before U.S. judicial law simultaneously constructions of abject, legally subject-*less* identities at the violent margins of institutional legal culture.

Constitutional rhetoric is thus constitutive of possibilities for people in everyday contexts to participate in constructing the structures of what remains effectively a constitutional society.[154] The relationship between bodies and law is not quite one in which the law constitutes the bodied/material subject; nor is it (quite) one in which the subjective identity of pre-discursive materiality is given intelligibility through legal inscription.[155] Given the instrumentality of the law, Butler argues for legal analysis that is more concerned with the fact of relation between bodies and the law as an inscriptive force, and less with the specific content of subjective identity produced through the "force of that inscription."[156] The implication is that the normatively subjectified body is not—even as it is faced with the overwhelming structural and constitutive determinacy of institutional legal language—wholly demarcated by the particular cultural intelligibilities conferred through the "active archive"[157] of judicial and other legal rhetoric.[158]

My argument is that the judicial rhetorical delimitation of realms of possibility for a person's articulation of self as legal subject, have material implications for the lives and existence of marginalized populations in the United States—an argument for which I offer the case studies in this dissertation as empirical proof. If this is the case, then the rhetorical analysis of the differential impacts of argumentative choices made by judicial rhetors need neither be a repudiation of, nor a middle ground negotiation of, anti-structuralist and normative rhetorical praxis. Critical rhetorical attention to the specific argumentative construction of legal discourse can thus be a disestablishmentarian political praxis grounded in a radical epistemology of legal rhetorical action via judicial argument. In the case of judicial rhetoric specifically, such a critical praxis can be productively understood as a radical queer political epistemology of the material operation of phronetic virtue in constitutional law.

Notes to Chapter Four:

[1] Sara L. McKinnon, "Citizenship and the Performance of Credibility: Audiencing Gender-Based Asylum Seekers in U.S. Immigration Courts," *Text and Performance Quarterly* 29, 3 (July 2009): 206.
[2] These probably include Aristotle, who had "recently begun" a series of lectures "thought to have been provided by disapproval of Isocrates' teaching." George A. Kennedy, "From *Antidosis*," in *On Rhetoric: A Theory of Civic Discourse*, Appendix I:E, 2nd ed., trans George A. Kennedy (Cambridge: Oxford University Press, 2007), 268.
[3] Isocrates in Kennedy, "From *Antidosis*," 269, 270-271.
[4] Isocrates in Kennedy, "From *Antidosis*," 268, 84-85.
[5] See also James Jasinski, *Sourcebook on Rhetoric: Key Concepts in Rhetorical Studies* (Thousand Oaks, CA: Sage Publications), s.v. "prudence/phronesis," 468.
[6] Aristotle, *On Rhetoric: A Theory of Civic Discourse*, 2nd ed., trans. George A. Kennedy (Cambridge: Oxford University Press, 2007), 77, 1.9.13. All future references are to this edition.
[7] Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge: The Belknap Press of Harvard University Press, 1993), 20: "the value of prudence or practical wisdom."
[8] Hans-Georg Gadamer, "The Power of Reason," *Praise of Theory: Speeches and Essays*, trans. Chris Dawson (New Haven and London: Yale University Press, 1998), 40-41.
[9] Isocrates in Kennedy, "From *Antidosis*," 268, 85.
[10] Gadamer, "The Power of Reason," 40-41.
[11] Alexander Doty, *Making Things Perfectly Queer: Interpreting Mass Culture* (Minneapolis: The University of Minnesnowta Press, 1997), xiv.
[12] Michael Warner, *Publics and Counterpublics* (Brooklyn: Zone Books, 2002), 210.
[13] Kronman, *The Lost Lawyer*, 20-21; Marouf Hasian, Jr., Celeste Michelle Condit, and John Louis Lucaites, "The Rhetorical Boundaries of 'The Law': A Consideration of the Rhetorical Culture of Legal Practice and the Case of the 'Separate But Equal Doctrine,'" *Quarterly Journal of Speech* 82 (November 1996): 328. See also Aristotle, *On Rhetoric*, 77, 1.9.13: "prudence (*phronēsis*) is a virtue of intelligence whereby people are able to plan well for happiness in regard to the good and bad things [including "justice" and "injustice"] that have been mentioned earlier."
[14] Chandan Reddy, *Freedom with Violence: Race, Sexuality, and the U.S. State* (Durham: Duke University Press, 2011), 148-149.
[15] Gadamer, "The Power of Reason," 40, and Chris Dawson in Gadamer, "The Power of Reason," 40n3: "Gadamer uses two different words in this book that I have translated as 'rationality,' and there is a stark contrast between them. *Vernünftigkeit* is the "reasonableness" that derives from Gadamer's notion of practical reason, while *Rationalität*…is the dominant 'rationality' of modern society that Gadamer detects in the word 'rationalization.'"
[16] Gadamer, "The Power of Reason," 40 (my emphasis).
[17] Isocrates (Kennedy, "From *Antidosis*," 269, 270 & 271) offers an explanation for how phronesis might contribute to radical/contingent epistemology: "As for wisdom (sophia) and philosophy (philosophia)…my view, as it happens, is very simple. For since it is not within the nature of mankind to acquire certain knowledge (epistēmē) by which we might know what one should do or say [in every case], from what remains possible I think those are wise (sophoi) who can come upon opinions that are best for the most part, and those are philosophers who occupy themselves with studies from which they will most quickly gain practical understanding (phronēsis) of that sort."
[18] Jasinski, "Prudence/Phronesis," 468.
[19] Aristotle, *On Rhetoric*, 76, 1.9.5.
[20] See also Thomas B. Farrell, *Norms of Rhetorical Culture* (New Haven and London: Yale University Press, 1993), 74-75.
[21] Aristotle, *On Rhetoric*, 77, 1.9.13.
[22] Jasinski, "Prudence/Phronesis," 468.
[23] "Prudence, phronesis, practical reason—these roughly synonymous terms try to name an intellectual capacity and/or performative sensibility that has provided the imagination of thinkers, decision makers, and practicing public advocates since the days of Aristotle." Jasinski, "Prudence/Phronesis," 468.
[24] Jasinski, "Prudence/Phronesis," 468.
[25] Jasinski, "Prudence/Phronesis," 466.
[26] Jacques Taminiaux, *Poetics, Speculation, and Judgment: The Shadow Work of Art From Kant to Phenomenology*, trans. Michael Gendre (New York: SUNY Press, 1993), 3: "according to current scholarship, the Greek *polis*, of which Athens became the highest example, emerged as a peculiar regime or *politeia*…when government started to

be publicly shared among individuals who were at the same time in a position of equality and rivalry, through the unique medium of speech."
[27] Taminiaux, *Poetics*, 4.
[28] Taminiaux, *Poetics*, 4.
[29] Jasinski, "Prudence/Phronesis," 466.
[30] Taminiaux, *Poetics*, 4-5, 8.
[31] Jasinski, "Idioms of Prudence in Three Antebellum Controversies," in *Prudence: Classical Virtue, Postmodern Practice*, ed. Robert Hariman (State College: Penn State Press, 2003), 146.
[32] Isocrates, *Antidosis*, 268, 84.
[33] Aristotle, *On Rhetoric*, 76, 1.9.7.
[34] Jasinski, "Prudence/Phronesis," 464; Robert Hariman, "Preface," in *Prudence: Classical Virtue, Postmodern Practice*, ed. Robert Hariman (State College: Penn State Press, 2003), x. Hariman actually defines phronesis ("prudence") *as* this capacity, but it is unclear whether Hariman means that prudence is the capacity for phronesis, or whether he uses prudence as a direct synonym for phronesis.
[35] Eugene Garver, *Machiavelli and the History of Prudence* (Madison: University of Wisconsin Press, 1987), 12, in Jasinski, "Prudence/Phronesis," 466.
[36] Taminiaux, *Poetics,* 4.
[37] Isocrates, *Antidosis*, 268, 84.
[38] Taminiaux, *Poetics*, 4-5.
[39] Taminiaux, *Poetics*, 9.
[40] Taminiaux, *Poetics*, 9.
[41] See also Hariman, "Preface," x.
[42] See also Farrell, *Norms of Rhetorical Culture*, 74.
[43] See for example Jasinski, "Prudence/Phronesis," 467; Jasinski, "The Forms and Limits of Prudence In Henry Clay's (1850) Defense of the Compromise Measures," *Quarterly Journal of Speech* 81 (1995), 456; Jasinski, "Idioms of Prudence," 146; Hariman, "Preface," x; Hariman, *Political Style: The Artistry of Power* (Chicago: University of Chicago Press, 1995), 112, 124.
[44] Hariman, "Preface," ix-x.
[45] Gadamer, *The Idea of the Good in Platonic-Aristotelian Philosophy*, trans. Christopher Smith (New Haven and London: Yale University Press, 1986), 37.
[46] Taminiaux, *Poetics*, 8-9.
[47] Gadamer, *The Idea of the Good,* 37-38.
[48] According to Gadamer, "it is not the case…that Aristotle restricted a ceremonious artificial word of Plato's to the ethical realm. Quite the reverse: Plato in fact widened the customary usage." Gadamer, *The Idea of the Good*, 37-38.
[49] Gadamer, *The Idea of the Good*, 35-36.
[50] Gadamer, *The Idea of the Good*, 36.
[51] Hasian and Earl Croasmun, "Rhetoric's Revenge: The Prospect of a Critical Legal Rhetoric," *Philosophy and Rhetoric* 29, 4 (1996): 392.
[52] Hasian, Condit, and Lucaites, "The Rhetorical Boundaries of 'the Law,'" 323.
[53] Roger Stahl, "Carving Up Free Exercise: Dissociation and 'Religion' in Supreme Court Jurisprudence," *Rhetoric & Public Affairs* 5 (2002): 441.
[54] Hasian, Condit, and Lucaites, "The Rhetorical Boundaries of 'the Law,'" 328.
[55] Gadamer, *The Idea of the Good*, 161.
[56] Edward M. Panetta and Marouf Hasian, Jr., "Anti-Rhetoric as Rhetoric: The Law and Economics Movement," *Communication Quarterly* 42, 1 (Winter 1994): 57. Another example could be the particular form of constitutional "originalism" espoused by Supreme Court Justice Clarence Thomas. See for example Jeffrey Toobin, "Partners: Will Clarence and Virginia Thomas Succeed in Killing Obama's Health-Care Plan?" *The New Yorker* (August 29, 2011), 42. See also *Black's Law Dictionary*, 7th ed., ed. Bryan A. Garner (St. Paul, MN: West Group, 1999), s.v. "originalism."
[57] Gadamer, *The Idea of the Good*, 160-161.
[58] Gadamer, *The Idea of the Good*, 40-41.
[59] Gadamer, *The Idea of the Good*, 160.
[60] See for example Anthony E. Cook, "For Mary Joe Frug: A Symposium On Feminist Critical Legal Studies And Postmodernism: Part One: A Diversity Of Influence: Reflections on Postmodernism," *New England Law Review* 26

(Spring 1992): 765; Jose A. Bracamonte, "Foreward: Minority Critiques of the Critical Legal Studies Movement," *Harvard Civil Rights-Civil Liberties Law Review* 22 (1987), 297-298; and Richard Delgado, "The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?" *Harvard Civil Rights-Civil Liberties Law Review* 22 (1987), 306.

[61] Gadamer, *The Idea of the Good*, 171.

[62] Gadamer, *The Idea of the Good*, 176.

[63] Gadamer, *The Idea of the Good*, 162; also Taminiaux, *Poetics*, 4-5.

[64] Gadamer, *The Idea of the Good*, 170, 175-176.

[65] Gadamer, *The Idea of the Good*, 162-163.

[66] See also Francis J. Mootz III, *Rhetorical Knowledge in Legal Practice and Critical Legal Theory* (Tuscaloosa: The University of Alabama Press, 2006), 107.

[67] Gadamer, *The Idea of the Good*, 163.

[68] See also Gadamer, *The Idea of the Good*, 171: Aristotle's "separation of practical philosophy from theoretical philosophy in no way implies a lack of coherence or an inconsistency in the content [of his thought]. On the contrary, it is solely out of methodological and argumentative caution that Aristotle forbids himself any and every extension [of his practical thought] into more universal considerations. Not that such a universal, more theoretical background does not show through in many places. But Aristotle makes use of it in his argument only where it is based in universally accepted, given facts that provide a methodological foundation for theoretical philosophy too."

[69] Mootz, *Rhetorical Knowledge*, 8.

[70] Mootz, *Rhetorical Knowledge*, 8.

[71] Gadamer, *The Idea of the Good*, 171.

[72] Mootz, *Rhetorical Knowledge*, xvi.

[73] Gadamer, *The Idea of the Good*, 160.

[74] John Poulakos, "Toward a Sophistic Definition of Rhetoric," *Contemporary Rhetorical Theory: A Reader*, ed. John Louis Lucaites, Celeste Michelle Condit, and Sally Caudill (New York: The Guilford Press, 1999), 26.

[75] Taminiaux, *Poetics*, 8-9. See also John Louis Lucaites and Celeste Michelle Condit, "Introduction," *Contemporary Rhetorical Theory: A Reader*, ed. John Louis Lucaites, Celeste Michelle Condit, and Sally Caudill (New York: The Guilford Press, 1999), 2.

[76] Taminiaux, *Poetics*, 9, my emphasis.

[77] Mootz, *Rhetorical Knowledge*, 109, my emphasis.

[78] Mootz, *Rhetorical Knowledge*, 107.

[79] Aristotle, *On Rhetoric*, 47-49, 1.3.1-1.3.6; 50-51, 1.3.7-1.3.9; 83-110, 1.10-1.15.

[80] See also Peter Odell Campbell, "The Procedural Queer: Substantive Due Process, *Lawrence v. Texas*, and Queer Rhetorical Futures," *Quarterly Journal of Speech* 98 (May 2012): 220-222.

[81] Mootz, *Rhetorical Knowledge*, xiv-xvi.

[82] Lauren Berlant and Michael Warner, "What Does Queer Theory Teach Us About *X*?" *PMLA* 110 (May 1995): 347-348; and Morris, "Introduction: Portrait of a Queer Rhetorical/Historical Critic," in *Queering Public Address: Sexualities in American Historical Discourse*, ed. Charles E. Morris III (Columbia: The University of South Carolina Press, 2007), 3-6.

[83] Lauren Berlant and Elizabeth Freeman, "Queer Nationality," in Lauren Berlant, *The Queen of America Goes to Washington City: Essays on Sex and Citizenship* (Durham and London: Duke University Press, 1997), 148.

[84] Berlant, *The Queen of America Goes to Washington City*, 221.

[85] Morris, "Passing by Proxy: Collusive and Convulsive Silence in the Trial of Leopold and Loeb," *Quarterly Journal of Speech* 91, 3 (August 2005): 267.

[86] Isaac West, "Debbie Mayne's Trans/scripts: Performative Repretoires in Law and Everyday Life," *Communication and Critical/Cultural Studies* 5 (2008): 248.

[87] Shane Phelan, *Sexual Strangers: Gays, Lesbians, and Dilemmas of Citizenship* (Philadelphia: Temple University Press, 2001), 9.

[88] Lynne Huffer, "Queer Victory, Feminist Defeat? Sodomy and Rape in *Lawrence v. Texas*," in *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations*, ed. Martha Albertson Fineman, Jack E. Johnson, and Adam P. Romero (Burlington, VT: Ashgate Publishing Company, 2009), 430-431.

[89] Gadamer, *The Idea of the Good*, 161-163, 175.

[90] Taminiaux, *Poetics*, 9.

[91] Gadamer, *The Idea of the Good*, 175: "both dispositions of knowing and reason are something supreme. Practical reasonableness, phronēsis, as well as theoretical reasonableness are 'best-nesses'…that which is highest in the

human being—which Aristotle likes to call 'nous' or the divine—is actualized in both of them…this paradoxical doctrine…affirms [the] subordination [of one thing to another] and nevertheless acknowledges two forms of one highest thing."
[92] Warner, *Publics and Counterpublics*, 119 & 124.
[93] Gadamer, *The Idea of the Good*, 165.
[94] Gadamer, *The Idea of the Good*, 165.
[95] Hasian, Condit, and Lucaites, "The Rhetorical Boundaries of 'the Law,'" 329.
[96] Judith Butler, "Contingent Foundations: Feminism and the Question of 'Postmodern,'" *Feminists Theorize the Political*, ed. Judith Butler and Joan W. Scott (New York and London: Routledge, 1992), 16: "that [normative] foundations [of identity] exist only to be put into question is . . .the permanent risk of the process of democratization. To refuse that contest is to sacrifice the radical democratic impetus of . . . politics. That the category is unconstrained, even that it comes to serve [oppressive] purposes, will be part of the risk of this procedure." See also Campbell, "The Procedural Queer," 221.
[97] Hasian, Condit, and Lucaites, "The Rhetorical Boundaries of 'the Law,'" 329.
[98] Jasbir K. Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham and London: Duke University Press, 2007), 222. See also Butler, "Contingent Foundations," 8.
[99] Farrell, *Norms*, 75.
[100] Farrell, *Norms*, 75.
[101] Farrell, *Norms*, 74.
[102] Farrell, *Norms*, 76.
[103] Gadamer, *The Idea of the Good*, 162, 171-172.
[104] Farrell, *Norms*, 100.
[105] Butler, "Contingent Foundations," 8.
[106] Warner, *Publics and Counterpublics*, 119, 121-122.
[107] Warner, *Publics and Counterpublics*, 122.
[108] Warner, *Publics and Counterpublics*, 125.
[109] David L. Eng, *The Feeling of Kinship: Queer Liberalism and the Racialization of Intimacy* (Durham: Duke University Press, 2010), 29-31.
[110] Warner, *Publics and Counterpublics*, 124.
[111] Siobhan Somerville, "Queer *Loving*," *GLQ: A Journal of Lesbian and Gay Studies* 11 (2005): 337. See also 357-358.
[112] Roderick A. Ferguson, "Administering Sexuality; or, The Will to Institutionality," *Radical History Review* 100 (Winter 2008): 163.
[113] Cathy J. Cohen, ''Keynote Address,'' Queertopia!: An Academic Festival Conference, Northwestern University Queer Pride Graduate Student Association (Chicago: Northwestern University, May 22, 2010). See also Campbell, "The Procedural Queer," 210n66.
[114] Cohen, "Keynote Address."
[115] Richard Rorty, *Achieving Our Country: Leftist Thought in Twentieth-Century America* (Cambridge: Harvard University Press, 1998), 98-99.
[116] Reddy, *Freedom With Violence*, 19, 13-15.
[117] Lauren Berlant and Michael Warner, "What Does Queer Theory," 343.
[118] Berlant and Warner, "What Does Queer Theory," 344. See also Doty, *Making Things Perfectly Queer*, xi-xii.
[119] Puar, *Terrorist Assemblages,* 222.
[120] Butler, "Contingent Foundations," 16.
[121] Eng, *The Feeling of Kinship*, 5-6: "the law has not de-legitimated whiteness as property. Rather, it has adapted and re-adapted it for a changing historical landscape in which 'whiteness as property evolved into a more modern form through the law's ratification of the settled expectations of relative white privilege as a legitimate and natural baseline.' In short, racial attitudes shift, but the right to exclude remains a historical constant, one ultimately rendering liberal notions of continuous social progress illusory."
[122] Cheryl I. Harris, "Whiteness as Property," *Harvard Law Review* 8 (June 1993): 1713-1724.
[123] Reddy, *Freedom With Violence*, 166.
[124] Reddy, *Freedom With Violence*, 166.
[125] Nikhil Pal Singh, *Black Is A Country: Race and the Unfinished Struggle For Democracy* (Cambridge: Harvard University Press, 2004), 24.
[126] Reddy, *Freedom With Violence*, 166.

[127] McKinnon, "Citizenship and the Performance of Credibility," 205-212, 218.
[128] Craig Willse and Dean Spade, "Freedom in a Regulatory State?: *Lawrence,* Marriage, and Biopolitics," *Widener Law Review* 11 (2004-2005): 1-2.
[129] Lamda Legal in Willse and Spade, "Freedom in a Regulatory State," 2.
[130] Willse and Spade, "Freedom in a Regulatory State," 315-316.
[131] Willse and Spade, "Freedom in a Regulatory State," 314-315.
[132] Willse and Spade, "Freedom in a Regulatory State," 316.
[133] Willse and Spade, "Freedom in a Regulatory State," 315.
[134] Willse and Spade, "Freedom in a Regulatory State, 321.
[135] Willse and Spade, "Freedom in a Regulatory State," 315.
[136] Willse and Spade, "Freeodom in a Regulatory State," 312.
[137] Lucaites and Condit, ''Introduction,'' 2-4, in Campbell, "The Procedural Queer," 220.
[138] Campbell, "The Procedural Queer," 220, citing Hasian, Condit, and Lucaites, ''The Rhetorical Boundaries," 329.
[139] Jasinski, "Idioms of Prudence," 146.
[140] James Jasinski, "Reconstituting a Prudential Middle Ground Regarding Racial Classifications: From *Bakke* to *Parents Involved*," paper presented at the Rhetoric Society of America, Philadelphia, PA (May 27, 2012).
[141] Willse and Spade, "Freedom in a Regulatory State," 318-319.
[142] Michel Foucault, *The History of Sexuality: Volume I: An Introduction* (New York: Vintage Books Edition, 1990), 144.
[143] Foucault, *History of Sexuality*, *Vol. 1* 144.
[144] J.L. Austin, *How to Do Things With Words*, 2nd Edition, ed. J.O. Urmson and Marina Sbisà (Cambridge: Harvard University Press, Harvard University Press, 1975), 5, 130-131.
[145] Willse and Spade, "Freedom in a Regulatory State," 311, 309n2, 310n5.
[146] Hasian, Condit, and Lucaites, "The Rhetorical Boundaries of 'the Law,'" 329.
[147] Butler, "Contingent Foundations," 16.
[148] Lloyd F. Bitzer, "The Rhetorical Situation," *Contemporary Rhetorical Theory: A Reader*, ed. John Louis Lucaites, Celeste Michelle Condit, and Sally Caudill (New York: The Guilford Press, 1999), 219. "Let us regard rhetorical situation as a natural context of persons, events, objects, relations, and an exigence which strongly invites utterance."
[149] Reddy, *Freedom With Violence*, 166.
[150] Janet E. Halley, "Like Race Arguments," *What's Left of Theory?: New Work on the Politics of Literary Theory*, ed. Judith Butler, John Guillory, and Kendall Thomas (New York and London: Routledge, 2000), 46.
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[154] Pierre de Vos, "The Constitution Made Us Queer: The Sexual Orientation Clause in the South African Constitution and the Emergence of Gay and Lesbian Identity," *Law and Sexuality: The Global Arena*, ed. Carl F. Stychin and Didi Herman (Minneapolis: University of Minnesota Press, 2001) 207.
[155] Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York and London: Routledge, 1990), 186.
[156] Butler, *Gender Trouble*, 186.
[157] Reddy, *Freedom With Violence*, 166.
[158] Butler, *Gender Trouble*, 186: "what constitutes a subversive repetition within signifying practices of gender…sex poses as 'the real' and the 'the factic,' the material or corporeal ground upon which gender operates as an act of cultural inscription. And yet gender is not written on the body as the torturing instrument of writing in Kafka's 'In the Penal Colony' inscribes itself unintelligibly on the flesh of the accused. The question is not: what meaning does that inscription carry within it, but what cultural apparatus arranges this meeting between instrument and body, what interventions into this ritualistic repetition are possible?"

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