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The Procedural Queer: Substantive Due Process, *Lawrence v. Texas*, and Queer Rhetorical Futures

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This essay discusses Justice Anthony M. Kennedy's choice to foreground arguments from due process rather than equal protection in the majority opinion in Lawrence v. Texas. Kennedy's choice can realize constitutional legal doctrine that is more consistent with radical queer politics than arguments from equal protection. Unlike some recent critiques of Kennedy's opinion, a queer rhetorical analysis of Lawrence reveals a futuristic, always-open-to-change vision in Kennedy's rhetorical framing of constitutional law that is significantly less damaging to possibilities for "queer world making" in the United States than other contemporary US judicial arguments of and about sexuality.

Keywords: legal rhetoric; queer futurity; equal protection; due process; Lawrence v. Texas

> As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.—Justice Anthony M. Kennedy, *Lawrence v. Texas*[1]

For those attempting to challenge heteronormativity in the United States and forward "queer" or "mainstream" "gay and lesbian" political agendas,[2] the question of the best method and venue to effect change that is at once significant, durable, and resistant to appropriation by oppressive institutions and structures is of particular concern. Should those seeking to challenge heteronormativity locate the struggle for liberation in legislative, judicial, or anti-statist arenas, and what stakes are involved in such decisions?[3] In the field of rhetoric in the United States, this question has been asked and answered by scholars working at the intersection of "critical legal rhetorical

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studies"[4] and "queer rhetorical studies."[5] Queer scholarship in rhetoric[6] and other fields[7] has expressed deep skepticism with respect to the potential of ostensibly pro-gay and lesbian judicial decisions in the United States to aid or further queer political goals.

Such skepticism is warranted. But given the significant and material effect that legislative and judicial rhetoric can have on queer lives in the United States,[8] radical queer challenges to heteronormativity in US politics and culture must take place not only through the methods and venues of often anti-statist and extra-institutional "radical" queer activism,[9] but also through those institutional locations most highly circumscribed by heteronormative politics, including the United States Supreme Court. Rhetorical analysis can contribute to radical queer politics by exploring how legislative and judicial pronouncements on sexuality in the United States can be framed and understood in ways that matter for radical queer futures, even as such pronouncements originate within, are circumscribed by, and reproduce the logic of heteronormative institutions.

Accordingly, I offer a reading of Justice Anthony M. Kennedy's celebrated and maligned majority opinion for the United States Supreme Court's 2003 decision in *Lawrence v. Texas*. Specifically, Kennedy's choice to foreground the Due Process Clause rather than the Equal Protection Clause of the Fourteenth Amendment as the basis for the majority's opinion[10] has the potential to realize a constitutional legal doctrine (highlighted in the epigraph to this paper) that is more consistent with radical queer politics than the foregrounding of the Equal Protection Clause in other recent favorable decisions in gay and lesbian civil rights cases. My purpose here is not to rehabilitate or "queer" Kennedy or the Supreme Court.[11] Nor is it to argue that legal liberalism can function as queer political advocacy. Rather, I ask the question of whether Kennedy's legal procedural[12] arguments about sexuality and the Constitution can be framed in ways that are useful to substantively radical queer politics.

The procedural arguments about the relationship between sexuality and constitutional law in Kennedy's opinion have the material consequence of expanding and restricting the boundaries of acceptable sexual life in the United States.[13] Consequently, queer rhetorical analysis of the decision should consider how the arguments about due process in *Lawrence* matter to the goal of realizing a radical queer future. Unlike some of the most powerful recent critiques of Kennedy's opinion by queer legal theorists, my analysis of *Lawrence* applies a combination of legal rhetorical, queer legal, and queer futurist theory to reveal the presence of a futuristic, always-open-to-change vision in Kennedy's framing of constitutional law that is substantively less damaging to possibilities for "queer world making"[14] in the United States than other contemporary US judicial arguments about sexuality.

I. Critical Legal Rhetoric, Queer Rhetorical Studies, and Judicial Texts

In reading *Lawrence v. Texas*, I address questions more often addressed in queer legal studies and cultural studies through legal rhetorical methods, following in part the example of "critical legal rhetorical studies." In keeping with critical legal rhetorical

methods as outlined by Marouf Hasian, Jr., Celeste Michelle Condit, and John Louis Lucaites,[15] I am interested less in an appraisal of the forensic rhetoric of Kennedy's opinion in terms of argumentative skill or effect, and more in the relationship between the rhetoric of *Lawrence* and the production of cultural sex norms and meanings in the United States. Such an approach to legal criticism is also consistent with "queer legal theory," a body of activist scholarship concerned in part with the law's quotidian operations, and with its implicated and indebted role in society, politics, and culture.[16]

In this essay, I propose to consider the import of *Lawrence* to queer lives and futures in the United States through a primary focus on the argumentative construction of the decision itself. This approach to a critically rhetorical and queer analysis of law runs contrary to calls from some critical legal rhetoricians and queer legal theorists[17] to de-emphasize legal scholarship's hegemonic focus on legal texts authored by judicial elites. For queer legal theory, these calls stem in part from queer critics' frequent opposition to liberal politics of inclusion, exemplified in Shane Phelan's definition of "queer" against "mainstream" "gay and lesbian" politics in terms of the former's rejection of and the latter's push for assimilation into heteronormative society.[18] From Phelan's perspective, the notion of a *queer* legal studies that privileges analysis of judicial argument and legal doctrine would be oxymoronic; she points to what Cathy Cohen calls the process of "secondary marginalization"[19] to argue that the legal quest for "gay and lesbian" civil rights is often enabled (intentionally and unintentionally)[20] through the exclusion of "queer" subject positions.[21]

Queer legal theory's general rejection of liberal politics of inclusion into mainstream institutions does not, however, preclude the value of institutionality to radical queer 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."[22] Their call is echoed in queer rhetoric by Charles E. Morris III, who draws on Berlant and Warner to emphasize the need for any queer rhetorical scholarship to work toward the goal of "queer world making."[23] Similarly, the critical race theorist Mari J. Matsuda argues that, given the racism of the law, it is necessary to combine an "outsider jurisprudence"[24] (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."[25] This essay temporarily brackets analysis of such "outsider jurisprudence" in order to consider both the meaning and the relative value of contrasting procedural legal doctrines to a radical queer future. Given the limited vocabulary of constitutional argument, the procedural queer on the United States Supreme Court will be understood either through equal protection[26] or substantive due process[27] doctrine.[28] The narrow analysis in this essay of the possible theoretical implications of this binary—that is, which doctrinal approach is more consistent with the possibility of a free queer future—will hopefully be useful to future critical legal rhetorical analyses of sexuality law in all of its multivalent dimensions.

II. *Lawrence v. Texas*, Substantive Due Process, and Queer Futurity

On June 26, 2003, the Supreme Court decided *Lawrence v. Texas*[29] 5–3[30] 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," "found . . . Lawrence and . . . Garner engaged in anal sexual intercourse in Lawrence's apartment."[31] The *Lawrence* decision reversed and remanded a lower court ruling upholding the so-called "Texas 'Homosexual Conduct' law"[32] criminalizing sodomy, defined as "deviate sexual intercourse" between "two persons of the same sex."[33] In doing so, the Court also overruled its 1986 decision in *Bowers v. Hardwick* that refused to consider a similar Georgia anti-sodomy law unconstitutional.[34] Writing for the 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."[35] 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.[36] 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[37] and filed a concurring opinion holding the "Texas statute" invalid under the Equal Protection Clause of the Fourteenth Amendment.[38]

Kennedy's opinion in *Lawrence* has been the focus of significant admiration and praise from elements of the gay and lesbian civil rights community.[39] Kennedy also has numerous critics, including the philosopher and gay and lesbian civil rights activist Richard Mohr and the queer theorist Jasbir K. Puar. Puar argues that Kennedy's arguments in much of the decision are ill suited to challenging heterosexist culture in a manner consistent with radical queer politics. While Mohr is dissatisfied with what he views as the poor quality of Kennedy's doctrinal arguments, Puar's criticism of *Lawrence* is invested in the position, common to much of queer legal theory, that "the law" from a radical queer perspective is "severely limited in its capacity to redress wrongs and to carry out justice."[40] I agree with this position; my purpose here is not to challenge it. Rather, I offer a rhetorical approach as a means of joining a radical queer understanding of the limits of the law with an insistence on recognizing that a Supreme Court Justice will inevitably make arguments about sexuality grounded in anti-queer valuations of an autonomous liberal subject.

The lawyer and rhetoric scholar Francis J. Mootz III argues that a practical rhetorical understanding of recent Supreme Court cases about sexuality demonstrates not only that the law is a constitutive force in culture, but that the law's constitutive nature derives from and is defined by the phronetic[41] processes of rhetorical engagement at play in a given case.[42] For Mootz, 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.[43] The close analysis in this essay will juxtapose queer legal theoretical

critiques of *Lawrence*—which impugn Kennedy's arguments for their predictable reliance on constitutional liberalism—with my own consideration of how Kennedy's specific procedural framing of these predictably liberal arguments renders the decision more valuable to radical queer politics than some queer legal theorists are inclined to acknowledge. The inclusion of a rhetorical perspective in queer legal theory allows for a better understanding of *Lawrence's* openings and potentialities for radical queer futures.

The procedural framing I am interested in is first evident in the first paragraph of the decision, which along with the penultimate paragraph literally frames the rest of the content in *Lawrence*:

> 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.[44]

In her criticism of Kennedy's opinion, 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."[45] Puar's critique of *Lawrence's* reliance on "'the broader privacy argument' over the 'narrower equal-protection argument'"[46] is well taken, but her doctrinal argument here references secondary sources rather than the text of the decision itself.[47] 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 argument 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. In this paragraph, Kennedy offers 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.[48]

Kennedy does not present his discussion of liberty and freedom in the abstract, but rather decidedly within 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 a free society consistent with the United States' democratic and legal traditions. Kennedy's arguments offer a way of framing the constitutional right to privacy that is 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.[49] 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";[50] in Breyer's ideal Supreme Court, judicial interpretation of the Constitution should be a means[51] to preserve the necessary conditions by which all citizens are encouraged, and have the full ability, to participate actively in United States civic life.[52] Kennedy does not—and should not be expected to—come close to approaching Phelan's demand that queer politics seek to queer the very status of citizenship as an institution, rather than engaging in an exclusionary[53] liberal expansion of citizenship protections to previously excluded persons and practices.[54] 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, but can also be—as in "more transcendent"—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 in which Kennedy describes and frames privacy, freedom, liberty, and queer actions reveals the possibility of a more radical interpretation of what Puar and other queer legal theorists[55] argue is an anti-radical text. I agree with Puar's interpretation of Kennedy's decision in terms of its immediate cultural meaning and effect. Nonetheless, it is possible, using a rhetorical and constitutional philosophical analysis of Kennedy's language, to argue that scholars (and thus, presumably, future judges) can choose to read this opening

passage in *Lawrence* not as a proscription of public queer cultures, but as 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 queer radical reading of the decision's first paragraph. Certainly, the relevance of this radical 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 as precedent for overturning zoning and other laws[56] restricting and outlawing queer public sex culture. The effects of the case have perhaps been most ambiguous in Texas, where the ruling has had some impact but has not forced Texas to repeal the law.[57] Second, the ways in which Kennedy frames concepts of liberty and freedom in the text 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.[58]

These barriers to the relevance of a radical queer reading of *Lawrence* might then point to the limited rhetorical significance[59] of judicial pronouncements in general. The statements that Kennedy makes about liberty, privacy and sexual conduct cannot themselves be examples or not of "queer world making," but rather may have some small ability to influence queer existence in the United States in the future. The primary rhetorical significance of the procedural and philosophical statements that judges make about constitutional doctrine and sexuality is not then in those statements' immediate effect on sexual life in the United States. 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. Sodomy laws in the United States do not often have a substantial and direct legal or material effect[60]—they are rarely enforced, and when they are, the monetary penalty is often negligible—but as Mohr insists, "unenforced sodomy laws are the chief systematic way that society as a whole tells gays they are scum."[61] Jurisprudence matters; the material importance to queer lives of the doctrinal choices made by judges in determining the validity of laws concerning sexuality should not be understated.[62] This is particularly true in the case of the choices that Kennedy faced in writing the *Lawrence* decision.

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*, the minority opinion was assigned to Scalia by Chief Justice Rehnquist, while Justice Stevens was faced with the choice of assigning the majority to either Kennedy or O'Connor. Toobin argues 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[63] 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.[64] Regardless of the other arguments in the case, Kennedy's choice not only to posit due process instead of equal protection as the controlling legal doctrine in the case,[65] but also to frame the meaning of due process jurisprudence in particular ways, is significant for how future courts might address similar cases.

Puar's reading of Kennedy is incomplete, but not because she is incorrect to deride the possibility that *Lawrence* had any immediate consequence other than (re)inscribing normative domesticity in homo as well as heteronormative cultural spaces. Rather, a temporary bracketing of Puar's and related critiques allows a practical/procedural[66] queer rhetorical consideration of how *Lawrence* might be read as hopeful to the goal of a future Court sympathetic to laws more conducive to a radical queer future. Here, Kennedy's arguments for how the Due Process Clauses should be interpreted in constitutional jurisprudence are arguably even more important than his contrasting and dual definitions of the constitutional concepts of liberty, freedom and privacy as they relate to sexual conduct.

As a rhetorical critic, I find Kennedy's opening paragraph significant in that, in contrast to more conservative and limiting statements made later in his opinion, the first paragraph suggests 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. From a legal perspective, the relevance of these initial statements about liberty is more questionable. Kennedy's opening statements are arguably an example of "dicta," 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.[67] 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[68]—a tactic derisively employed by Scalia in his dissent to the *Lawrence* majority.[69] 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,[70] 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)[71] doctrinally relevant and binding language, as it occurs immediately before and is directly connected to Kennedy's essential finding that "the Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[72]

Kennedy devotes almost the entirety of his opinion to a specific repudiation of *Bowers*; as one commentator puts it, "*Lawrence* did not so much seek to justify overruling *Bowers* as it sought to eviscerate it."[73] It is only in the third to last paragraph, immediately after the official declaration of *Bowers*' reversal, 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 first paragraph—while Kennedy's discussion of liberty, freedom, and privacy in constitutional philosophy is stated in general terms, he closes the 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.

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.[74]

Kennedy's rhetoric in this passage—again arguably more legally binding than in most other parts of the decision—epitomizes the "homonormative"[75] politics of liberal tolerance rejected by Phelan and Puar; Kennedy is 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 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,"[76] 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."[77] Procedurally, the "domestinormative," heterosexually defined doctrine of the consummation of marriage underscores Kennedy's final argument before his finding in *Lawrence* (the next several sentences in the third to last paragraph of the decision):[78]

> The case does involve two adults who . . . engaged in *sexual conduct 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.[79]

Here, unlike in *Lawrence*'s first paragraph, privacy is more directly articulated as a right accessed by privileged individuals who are already deemed worthy under the presumptive protection of United States citizenship,[80] and who are not per se queer but instead, for whatever unknown reason, decided at one time to privately engage in "homosexual conduct." The "realm of personal liberty" cited from *Planned Parenthood v. Casey* and applied to the "instant case" in *Lawrence* certainly represents a significant expansion of freedom. But that expansion, as is so often the case,[81] comes at the expense of the "nationalist, classist, and racist" "secondary marginalization"[82] of those subjects furthest from dominant cultural norms.[83] *Casey*'s "realm of personal liberty" 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.[84] The radical queer critiques of *Lawrence v. Texas* summarized here are thus less interested in specific objections to Kennedy's procedural argumentative choices than in using the doctrinal claims in *Lawrence* as a representative example of the inevitable homonormativity of United States constitutional law.[85] A queer rhetorical perspective can provide valuable insight into *Lawrence* that may be less possible in queer legal theory.

If, because of the distinction between dicta and doctrinally specific and binding arguments in a judicial opinion, it is the *Casey* paragraph that is most important for how *Lawrence* will shape future law, then *Lawrence* from either a legal or rhetorical perspective is contrary to a radical queer future. However, the rhetorical framing[86] of the decision itself—and I mean framing both rhetorically[87] and in the literal sense of how the first and penultimate paragraphs bookend the written decision—suggests, from a queer rhetorical perspective, that aspects of Kennedy's constitutional interpretation may be useful for future queer advocates attempting to combat heteronormativity in one of its most important symbolic locations. 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 *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.[88]

If this passage, immediately before the specific order from the Court that the "Texas statute" be "reversed" and "remanded,"[89] 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."[90] 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. This allows them to function as a separate and independently relevant example of a procedural "*meta*"-argument[91] 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 ability to shape future law, I believe that it is useful to juxtapose the resources for queer futurism in Kennedy's book-ending meta-argument against the arguably homo- 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 un-mutable 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 reinterpreted 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.[92] 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."[93]

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."[94] 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*,[95] 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.[96] Equal protection, on the other hand, is synonymous with decisions such as *Brown v. Board of Education*[97] that are viewed overwhelmingly as significant victories for racial justice.[98] The Equal Protection Clause is also posited by some legal scholars as the greatest hope for gay and lesbian civil rights.[99] 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."[100] 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,[101] 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. For Puar, part of the 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[102] in the liberal statist production of "new normativities and exceptionalisms through the cataloguing of unknowables."[103] This is a bleak prognosis of culture, but "queer futurity"[104] is Puar's prescribed antidote; in "queer futurity," "queerness is expanded as" a deliberately unpredictable and unforecloseable "field, a vector, a terrain."[105] 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,[106] it is this very difficulty that makes "opening up to the fantastical wonders of futurity" for Puar "the most powerful of political and critical strategies."[107] 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 procedural discussion of substantive 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[108] 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.[109] 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 queer futurity.

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[110] and other flashpoints of dispute over the exclusion of gays and lesbians from full United States citizenship[111]—the homonormative refusal on the part of 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.[112] Queer futurity is not only a political orientation. It is a particular and radical articulation of queer identity 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 homonormative and subjectifying politics of mainstream struggles for gay and lesbian recognition.[113]

How, then, can there be any potential resources for queer futurity on the 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."[114] 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.[115] Kennedy's arguments in *Lawrence v. Texas* absolutely matter to the future of radical "queer world making" in the United States. They matter not because of the desirability of the "will to institutionality," but because 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 what procedural interpretations of constitutional doctrine those jurists look to as controlling in future cases concerning queer freedom.

III. Equal Protection, Due Process, and Radical Queer Politics

The primary importance that Kennedy attaches to the Due Process Clauses is largely absent in major recent court decisions in favor of the legalization of same-sex marriage. The Supreme Court of California's May 15, 2008 ruling in *In re Marriage Cases*[116] and the Supreme Court of Iowa's April 3, 2009 ruling in *Varnum v. Brien*[117] are two recent United States high court decisions that affirm gay and lesbian civil rights goals. Both compelled state governments to recognize the legality of same-sex marriage, finding that failure to do so violated the Equal Protection Clauses of the United States Federal, and California and Iowa State Constitutions. While both *Varnum* and *Marriage Cases* are important examples of the application of equal protection doctrine to gay and lesbian civil rights, I focus here on a subsequent federal district court ruling on gay marriage, as it (like *Lawrence*) contains an interesting juxtaposition of due process and equal protection doctrine. Partially in response to *In re Marriage Cases*, California voters passed the "Proposition 8" referendum banning same-sex marriage in November 2008.[118] On August 4, 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[119] and Equal Protection[120] Clauses" of the Fourteenth Amendment.

For radical queer politics, Kennedy's primary invocation in *Lawrence* of the Due Process Clause is more useful. This is first apparent in the separate *Lawrence* opinion of Justice Sandra Day O'Connor, who in concurring only partly with the *Lawrence*

majority was able to cite the Equal Protection Clause as a reason to render the Texas "Homosexual Conduct" law unconstitutional while defending the constitutionality of the Georgia statute upheld in *Bowers v. Hardwick*. For O'Connor, the key difference between the Texas and Georgia statutes is that while Texas explicitly forbade sex between two persons of the same sex, the Georgia law in question in *Bowers* outlawed the practice of sodomy under any circumstance.[121] 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."[122] 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 argumentative and doctrinal logic to the Court's racist 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.[123]

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,"[124] and argue that because the Georgia statute outlaws *all* sodomy, it discriminates against no particular class of people.[125] Just as the *Plessy* Court was able to use equal protection to ignore differentials in racial power and privilege in Louisiana,[126] 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 prevented heterosexuals from having certain kinds of intercourse, it by definition outlawed any form of queer sex.

Both O'Connor's application of equal protection and Kennedy's 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 gay and lesbian civil rights.[127] Kennedy's insistence on the controlling nature of substantive due process in both *Bowers* and *Lawrence*[128] rhetorically enacts a future vision of a Constitution that is far more able to respond in nuanced fashion to the various ways in which US state governments might think to deprive sexual minorities of liberty. 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 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."[129] Legal classification and differential treatment cannot per se be unconstitutional, or few laws would survive judicial review. At minimum, a law's classification or differentiation––or abrogation of the due process rights––must meet the standard of "rational basis" review, where the law must be "rationally related to some legitimate government interest."[130] If a court finds that a law targets a "suspect class"[131] (a group designated for unequal treatment under the law because of a suspect classification), "strict scrutiny" review is applied, meaning that the law must be "narrowly tailored to a compelling government interest"[132] 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[133] 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.[134] 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"[135] of queer political being.[136]

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."[137] 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.[138]

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 in part be defined 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 decision for the Court in *Romer v. Evans*,[139] a law based on "moral disapproval alone" cannot survive even rational basis review.[140] 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.[141] In this light, Walker's entire discussion of the relationship between sexual orientation, marriage, and identity is arguably

dicta—Walker's justification for the application of higher levels of review in 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."[142] The "parties" in *Perry* "do not dispute that the right to marry is fundamental,"[143] 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."[144] 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.[145] 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.[146]

From a radical queer standpoint, any judicial decision on marriage equality will almost certainly represent a problematic reification of "homonormativity."[147] 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 critique of hetero and homonormative identity politics.

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 "the Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual" establishes no doctrinal precedent for the constitutional protection of queer public life. Nonetheless, Kennedy's due process finding in *Lawrence* through rational basis review is not—as it would have been were it a finding based on equal protection—in any way necessitated by Kennedy's definition and classification earlier in the decision of queer identity in terms of heterosexual relationship norms. The lesson here for queer rhetorical scholars is that claims based on equal protection are simultaneously inherently limiting and inadequate. It took 17 years for the Court to at least partially rectify the

Bowers decision and decide that rather than representing a simple and non-discriminatory state interest in "preserving morality," the Georgia statute constituted a prejudicial and substantial deprivation of liberty, and that accordingly substantive due process most certainly does apply. Due process matters to queer politics.

The distinction between equal protection and due process claims in terms of how they play out in judicial argument is accordingly of vital concern to the goal of radical "queer world making" in the United States. 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"[148] legal resource for the struggle against violently heteronormative oppression. Even radical (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.[149] Precisely because of this, queer rhetorical scholars would do well to engage a procedural queer consideration of the relative positive and negative impact different forms of constitutional judicial argument and doctrinal interpretation might have to the goal of advancing radical queer political change.

IV. Conclusion: Legal Rhetoric, Contingency, and Queer Theory

This essay highlights the need for future queer rhetorical analyses of legal decisions to consider the relationships between rhetorical, legal, and queer theoretical understandings of normativity and contingency. Similarly, Hasian, Condit, and Lucaites call for a legal studies that situates legal rhetors as participants in a "rhetorical culture," arguing that legal rhetoric should be understood in terms of the judiciary's struggle to not only make sound legal decisions but to legitimate those decisions in public.[150] This is not to say that the critical legal rhetorical scholarship advocated by Hasian, Condit, and Lucaites is unconcerned with the specific doctrinal content of legal argument in the United States. Rather, the doctrinal decisions that judges make in resolving court cases are refracted through the "particular worldview[s]" held by judges as a result of their role as actors within rhetorical culture.[151]

Consequently, "the relevant standard of justice is . . . contingent probability, not certainty."[152] If the relevant standard of justice is "contingent probability," then justice is classically rhetorical. Lucaites and Condit argue in their introduction to *Contemporary Rhetorical Theory* that both classical rhetoric[153] and the contemporary scholarship still indebted to it[154] are grounded in an understanding of rhetoric as the legitimation of decisions made in situations defined by "contingency," where actions must be taken but "decision makers are forced to rely upon probabilities rather than certainties."[155] The "impermanent" and uncertain nature of the law in rhetorical culture reveals the law as a site of constant articulation and re-articulation of imperfect and inadequate compromise between competing actors and groups in the United States.[156]

Because of its assumption of the constant and unforeclosable excess of meaning in public policy discourse, metapolitical[157] rhetorical analysis shows how rhetoric can be useful to scholarship interested in exploring the queer futurist potential of different examples of public discourse. Similarly, there are connections between queer theoretical commitments to poststructural critiques of identity politics and rhetorical theories of contingency[158] that can be useful to queer rhetorical scholarship. Continued work to theorize such connections will be useful not only because of the similarities between contingency and the queer futurist embrace of uncertainty, but also because of potentially productive tensions between poststructural queer politics and the interest in normativity common to both rhetoric and the law.

Hasian, Condit, and Lucaites argue 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." This certainly sounds like Kennedy's meta-discussion of ideal due process interpretation in *Lawrence*—but here there are evident tensions between radical queer analysis and critical legal rhetorical scholarship. 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,"[159] then the radical queer theory of Puar, Butler, Phelan, and others suggests that this "modicum of stability and predictability" will be constantly reproduced in terms of heteronormative, homonormative, or some other valence of eviscerating normative oppression.[160]

In one of her many founding texts[161] to contemporary queer theory, 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.[162]

The contingent aspect of radical queer 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 futurist analysis differ in their conclusions about the ethical value of legal rhetorical culture grounded in and understood through contingency. For the one, the temporary articulation of normative certainty in the face of contingent rhetorical situations[163] is politically productive; for the other, the value of contingent politics is the ability to constantly reject strategies of normative foundationalism.

This tension can be productive rather than prohibitive to future queer rhetorical analyses of the law. If the "standard" of justice itself is "contingent probability," then

the end goal of judicial advocacy is the temporary resolution of the uncertainty this contingent probability is reflective of.[164] Kennedy's doctrinal decisions in *Lawrence* can certainly be understood as no different than any judge finding "some judicial choices logical and others irrational" based on her inevitable (as a human being) adoption of "a particular worldview, peopled with particular kinds of human agents."[165] The end goal of radical queer politics cannot be the resolution of uncertainty, as such resolutions (for instance, Kennedy's in *Lawrence*) will likely only participate in the production of Puar's "new normativities and exceptionalisms through the cataloguing of unknowables."[166] Nonetheless, my analysis of Kennedy's meta-arguments in *Lawrence* suggests the possibility of future queer rhetorical legal scholarship grounded in queer *rhetorical* contingency.

The normative limitations of Kennedy's doctrinal arguments do not necessarily foreclose the possibility of radical interpretive openness in his meta-procedural arguments about the future of due process analysis in constitutional law. Reconsidering some of her earlier positions, Butler acknowledges in 2004 that temporarily locating sexual-liberation struggles on certain normative foundations need not necessarily foreclose the long-term radical undecidability of queer politics.[167] In this way, critical rhetorical understandings of the relationship between legal rhetoric and contingency can make a rich contribution to queer scholarship performing practical[168] queer analysis of how status quo homo- and heteronormative liberal sexual politics might be co-opted for radical queer political ends.

Notes

[1] Opinion of Kennedy, J., *Lawrence v. Texas,* 539 US 558 (2003): 18.

[2] My use of queer in opposition to "mainstream" "gay and lesbian" politics follows Shane Phelan's discussion in *Sexual Strangers: Gays Lesbians, and Dilemmas of Citizenship* (Philadelphia: Temple University Press, 2001), 3, 108–09. See also James Darsey, *The Prophetic Tradition and Radical Rhetoric in America* (New York: New York University Press, 1997), 185.

[3] Darsey, *The Prophetic Tradition,* 181, and Judith Butler, *Undoing Gender* (New York: Routledge, 2004), 3–5, 8.

[4] Marouf Hasian, Jr., *Legal Memories and Amnesias in America's Rhetorical Culture* (Boulder, CO: Westview Press, 2000), 197.

[5] "Queer Rhetorical Studies" was the name given to this emerging sub-field in the workshop of the same name at the Rhetoric Society of America's 2009 Summer Institute, led by Karma R. Chávez, Charles E. Morris III, and Isaac West.

[6] See for example Isaac West, "Debbie Mayne's Trans/scripts: Performative Repertoires in Law and Everyday Life," *Communication and Critical/Cultural Studies* 5 (2008): 246–47, and also Darsey, *The Prophetic Tradition*, 185.

[7] See for example Jasbir K. Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham, NC: Duke University Press, 2007), 114–66; Katherine M. Franke, "The Domesticated Liberty of *Lawrence v. Texas*," *Columbia Law Review* 104 (June 2004): 1399–426; and 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), 411–31.

[8] David A. J. Richards, *Women, Gays, and the Constitution* (Chicago: University of Chicago Press, 1998), 348–49.
[9] Phelan, *Sexual Strangers*, 9, and Barbara Smith, "Where's the Revolution?" *The Nation* (January 1, 1998), http://www.thenation.com/print/article/wheres-revolution
[10] Kennedy, *Lawrence v. Texas*, 14. See also notes 64, 65, 125, and 128.
[11] See for example Alexander Doty, *Making Things Perfectly Queer: Interpreting Mass Culture* (Minneapolis: The University of Minnesota Press, 1997), xi. Doty describes a method of queer rhetorical criticism that includes "adopting reception positions that can be considered 'queer' in some way, regardless of a person's declared sexual and gender allegiances." I am not interested in examining the decision in order to add to those United States cultural texts and practices that might be considered in and of themselves "queer."
[12] 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.
[13] 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*, 348–49; Puar, *Terrorist Assemblages*, 128, and Butler, *Undoing Gender*, 8.
[14] Lauren Berlant and Michael Warner, "Sex in Public," *Critical Inquiry* 24 (1998): 561.
[15] 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 (1996): 323.
[16] 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.
[17] Moran, "A Queer Case of Judicial Diversity," 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 Huffner, "Queer Victory," 430–31.
[18] Phelan, *Sexual Strangers*, 3, 108–09.
[19] Cathy J. Cohen, "Punks, Bulldaggers and Welfare Queens: The Radical Potential of Queer Politics?" *GLQ* 3 (1997): 437–65, in Phelan, *Sexual Strangers*, 8.
[20] Butler, *Undoing Gender*, 104–06.
[21] Phelan, *Sexual Strangers,* 3 and 8.
[22] Berlant and Warner, "Sex in Public," 562.
[23] Berlant and Warner, "Sex in Public," 562, 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.
[24] Mari J. Matsuda, "Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story," *Michigan Law Review* 87 (1989): 2322.
[25] Matsuda, "Legal Storytelling," 2323.
[26] "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."
[27] See explanation of substantive due process at note 37.

[28] 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.

[29] *Lawrence v. Texas,* 539 US 558 (2003).

[30] 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.*

[31] Puar, *Terrorist Assemblages*, 121.

[32] Kennedy, *Lawrence v. Texas,* 3.

[33] Kennedy, *Lawrence v. Texas*, 1–2.

[34] Kennedy, *Lawrence v. Texas*, 17.

[35] 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 37.

[36] *Lawrence v. Texas,* 539 US 558 (2003); Scalia, J., dissenting. Justice Thomas wrote a short opinion clarifying his joining of Scalia's dissent. Thomas, J., dissenting.

[37] 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 notes 129–132. 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.

[38] O'Connor, J., concurring in judgment, *Lawrence v. Texas*, 539 US 558 (2003): 1.

[39] 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, and Franke, "Domesticated Liberty," in Puar, *Terrorist Assemblages*, 118.

[40] Huffer, "Queer Victory," 430.

[41] 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.

[42] Mootz, *Rhetorical Knowledge*, 107.

[43] Mootz, *Rhetorical Knowledge*, 109.

[44] Kennedy, *Lawrence v. Texas,* 1.

[45] Puar, *Terrorist Assemblages*, 118.

[46] Puar, *Terrorist Assemblages*, 121.

[47] Puar, *Terrorist Assemblages*, 121.

[48] See the discussion regarding levels of scrutiny at notes 129–132.

[49] Stephen G. Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (New York: Vintage, 2006), 5.

[50] Breyer, *Active Liberty*, 39.

[51] Breyer, *Active Liberty*, 12, 118–20.

[52] Breyer, *Active Liberty*, 15–16.

[53] Judith Butler, *Bodies that Matter: On the Discursive Limits of 'Sex'* (New York: Routledge, 1993), 3.

[54] Phelan, *Sexual Strangers*, 3, 9, 108–09.

[55] Huffer, "Queer Victory," 430–31.

[56] Berlant and Warner, "Sex in Public," 551.

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

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

[59] See Robert Asen, "Reflections on the Role of Rhetoric in Public Policy," *Rhetoric and Public Affairs* 13 (2010): 127–29.

[60] Elze, "Oppression, Prejudice and Discrimination," 56.

[61] Richard Mohr in Elze, "Oppression, Prejudice and Discrimination," 56.

[62] Richards, *Identity and the Case for Gay Rights*, 171–72, and Richards, *Women, Gays, and the Constitution*, 348–49.

[63] 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.

[64] Toobin, "After Stevens," 45. See also Kennedy, *Lawrence v. Texas*, 14.

[65] 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."

[66] Cathy J. Cohen, "Keynote Address," *Queertopia!*: An Academic Festival Conference, Northwestern University Queer Pride Graduate Student Association (Chicago: Northwestern University, May 22, 2010). Cohen calls for queer scholars responding to proposed legislation and other state-institutional action concerning sexuality to consider the value of "pratical" alongside "radical queer politics," and to not regard the two as mutually exclusive.

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

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

[69] Antonin Scalia, *Lawrence v. Texas,* 539 US 558 (2003): 14, "the Court's discussion of these foreign views . . . is therefore meaningless dicta."

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

[71] Scalia, *Lawrence v. Texas*, 14–15.

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

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

[74] Kennedy, *Lawrence v. Texas*, 17–18, my emphasis.

[75] Puar, *Terrorist Assemblages*, 2, 17–19, 48, 127.

[76] Puar, *Terrorist Assemblages*, 123.

[77] Puar, *Terrorist Assemblages*, 123.

[78] 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): 374.

[79] Kennedy, *Lawrence v. Texas*, 18, my emphasis.

[80] See Puar, *Terrorist Assemblages*, 126–27.

[81] Butler, *Bodies that Matter*, 3.

[82] Cohen, "Punks, Bulldaggers and Welfare Queens," in Phelan, *Sexual Strangers*, 8.

[83] 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.

[84] Berlant and Warner, "Sex in Public," 562.

[85] Siobhan B. Somerville, "Queer *Loving*," *GLQ: A Journal of Gay and Lesbian Studies* 11 (June 2005): 335, in Puar, *Terrorist Assemblages*, 117.

[86] Asen, "Reflections on the Role of Rhetoric in Public Policy," 130.

[87] Asen, "Reflections," 127–29.

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

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

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

[91] G. Thomas Goodnight, "The Metapolitics of the 2002 Iraq Debate: Public Policy and the Network Imaginary," *Rhetoric and Public Affairs* 13 (2010): 69.

[92] *Black's Law Dictionary*, s.v. "loose construction," "liberal construction."

[93] Darsey, *The Prophetic Tradition*, 197.

[94] Mohr, "The Shag-A-Delic Supreme Court," 391.

[95] *Lochner v. New York*, 198 US 45 (1905).

[96] Erwin Chemerinsky, *Constitutional Law*, Third Edition (New York: Aspen Publishers, 2009), 608.

[97] *Brown v. Board of Education of Topeka*, 347 US 483 (1954).
[98] 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.
[99] 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.
[100] 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.
[101] 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.
[102] Butler, *Bodies that Matter*, 3.
[103] Puar, *Terrorist Assemblages*, 222.
[104] Puar, *Terrorist Assemblages*, 221.
[105] Puar, *Terrorist Assemblages*, 221.
[106] Butler, *Undoing Gender*, 8.
[107] Puar, *Terrorist Assemblages*, 222.
[108] Philip C. Bobbitt in Sanford V. Levinson, "The Embarrassing Second Amendment," *Yale Law Journal* 99 (1989): 643.
[109] Toobin, "After Stevens," 45.
[110] Butler, *Undoing Gender*, 104–06.
[111] See Phelan, *Sexual Strangers*, 5.
[112] Butler, *Undoing Gender*, 104.
[113] Kevin P. Murphy, Jason Ruiz, and David Serlin, "Editor's Introduction," *Radical History Review* 100 (Winter 2008): 4; Roderick A. Ferguson, "Administering Sexuality; or, The Will to Institutionality," *Radical History Review* 100 (Winter 2008): 163.
[114] Butler, *Undoing Gender*, 8.
[115] Cohen, "Keynote Address."
[116] *In re Marriage Cases,* 43 Cal. 4th 757, 183 P.3d 384; 76 Cal. Rptr. 3d 683 (California 2008). LEXIS 5247.
[117] *Varnum v. Brien*, WL 874044 (Iowa 2009), http://www.judicial.state.ia.us/wfData/files/Varnum/07-1499.pdf
[118] 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
[119] *Perry v. Schwarzenegger*, 2010 US Dist. LEXIS 78817 (N.D. Cal., Aug. 4, 2010): 117.
[120] *Perry v. Schwarzenegger*, 135.
[121] O'Connor, *Lawrence v. Texas*, 4–6.
[122] 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."
[123] *Plessy v. Ferguson*, 163 US 537 (1896).
[124] O'Connor in *Varnum v. Brien*, 49.
[125] See also Kennedy, *Lawrence v. Texas*, 14.
[126] 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.

[127] Mohr, "The Shag-A-Delic Supreme Court," 393.
[128] Kennedy, *Lawrence v. Texas*, 14.
[129] *Perry v. Schwarzenegger*, 117–18.
[130] *Perry v. Schwarzenegger*, 118.
[131] *Perry v. Schwarzenegger*, 118, also *Varnum v. Brien*, 49.
[132] *Perry v. Schwarzenegger*, 117. See also *Black's Law Dictionary*, s.v. "strict scrutiny."
[133] Puar, *Terrorist Assemblages*, 222.
[134] 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. My reading of equal protection here is also indebted to Kimberle Crenshaw's characterization of the "single-axis" disciplining of Black women petitioners to U.S. anti-discrimination statutes. 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), 140–45.
[135] 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.
[136] 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.
[137] *Perry v. Schwarzenegger*, 120.
[138] *Perry v. Schwarzenegger*, 120.
[139] *Romer v. Evans*, 517 US 620 (1996).
[140] *Perry v. Schwarzenegger*, 135. 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 Hawkins 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. *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.
[141] *Perry v. Scwarzenegger*, 135.
[142] *Black's Law Dictionary*, s.v. "strict scrutiny."
[143] *Perry v. Schwarzenegger*, 110.
[144] *Perry v. Schwarzenegger*, 110.
[145] *Perry v. Schwarzenegger*, 114, 117.
[146] *Perry v. Schwarzenegger*, 114.

[147] 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
[148] Puar, *Terrorist Assemblages*, 222.
[149] Kent A. Ono, "From Nationalism to Migrancy: The Politics of Asian American Transnationalism," *Communication Law Review* 5 (2005): 7.
[150] Hasian, Condit, and Lucaites, "The Rhetorical Boundaries of 'the Law,'" 328.
[151] Hasian, Condit, and Lucaites, "The Rhetorical Boundaries of 'the Law,'" 327.
[152] Hasian, Condit, and Lucaites, "The Rhetorical Boundaries of 'the Law,'" 328.
[153] 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.
[153] Lucaites and Condit, "Introduction," 4.
[154] Lucaites and Condit, "Introduction," 2.
[156] Hasian, Condit, and Lucaites, "The Rhetorical Boundaries of 'the Law,'" 329.
[157] Goodnight, "The Metapolitics of the 2002 Iraq Debate," 69.
[158] Jasinski, *Sourcebook on Rhetoric*, 111–12, 112n2.
[159] Hasian, Condit, and Lucaites, "The Rhetorical Boundaries of 'the Law,'" 329.
[160] Puar, *Terrorist Assemblages*, 222.
[161] Rachel Alsop, Annette Fitzsimons, and Kathleen Lennon, *Theorizing Gender* (Cambridge: Polity Press, 2002), 94–96.
[162] Butler, "Contingent Foundations," 16.
[163] Lloyd F. Bitzer, "The Rhetorical Situation," in *Contemporary Rhetorical Theory: A Reader*, ed. John Louis Lucaites, Celeste Michelle Condit, and Sally Caudill (New York: The Guilford Press, 1999), 219.
[164] See also Jasinski's discussion of "public controversy," prudence, and contingency in "Idioms of Prudence in Three Antebellum Controversies: Revolution, Constitution, and Slavery," in *Prudence: Classical Virtue, Postmodern Practice*, ed. Robert Hariman (University Park: Pennsylvania State University Press, 2003), 145–46, 177–78.
[165] Hasian, Condit, and Lucaites, "The Rhetorical Boundaries of 'the Law,'" 327.
[166] Puar, *Terrorist Assemblages*, 222.
[167] Butler, *Undoing Gender*, 4–10.
[168] Cohen, "Keynote Address."