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Judging Sodom: gay identity in Bowers, Romer & Lawrence

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Judging Sodom:

Gay Identity in *Bowers*, *Romer* & *Lawrence*

By

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MASTER'S THESIS

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Logan Steele

November 25, 2014

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A Thesis

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ABSTRACT

This paper presents a novel method for understanding how the Supreme Court constructs identities. Applying Michel Foucault's concept of governmentality to pivotal Supreme Court decisions which solidified gay identity were analyzed using *Bowers v. Hardwick*, *Romer v. Evans*, and *Lawrence v. Texas*. The results of this investigation show that the Court's construction of gay identity changed with each case, sculpted by what they perceived at the time as most productive for American society. The work presented here has profound implications for the future study of the Supreme Court and contributes to our understanding of the workings of institutions in the modern world.

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Introduction

This paper is about the Supreme Court's decisions in three landmark gay rights cases. It tracks the Court's thinking as it changed from criminalization of gay intimate sexual relations, in 1986, to reversing this decision in 2003. This paper is an analytics of government, an analysis of the conditions that create specific institutions and ways of doing things, how they emerge, exist, and change.[1] This type of study seeks to explain the emergence of a particular set of practices, for example, the Supreme Court's analysis of gay and lesbian sexual identity, examine the sources of the elements that constitute the practice, and follow how these practices have developed into stable ways of doing things.[2] An analytics of government examines how these practices become institutions, how they create and rely upon particular forms of knowledge and how the institution reforms itself and this knowledge, over time.[3] It looks to the ways in which the Supreme Court has been instrumental in defining the ways in which the state has perceived, created perceptions, and managed the sexual practices of Americans. In this thesis, I will argue that Supreme Court decision-making in gay rights cases was based on how it perceived the productivity of gay identity in each case. I argue that in each instance: *Bowers v. Hardwick* (1986), *Romer v. Evans* (1996), and *Lawrence v. Texas* (2003), the Supreme Court, driven by the logic of governmentality, came to form an identity for gay people based on what was most useful and

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[1] Mitchell Dean, *Governmentality: Power and Rule in Modern Society, 2nd Edition* (London: SAGE Publications, 2010), 30-31.
[2] Ibid, 31.
[3] Ibid.

productive for society. For this paper, the explicit construction of sexual identities means what the Court has laid out within the text of its decisions. Implicit construction involves what the Court has neglected to mention: the many assumptions about gays and straights that are taken for granted. This is an important field of study because of the immense power of the Supreme Court. Specifically, the Court has the authority to interpret the Constitution and define what laws mean. As law professor James Boyd White puts it:

> The criticism of opinions, on all these grounds-rational, political, and moral-is an essential part of the activity of law. It is crucial to the legal practice, for it is on the basis of such criticism that one will argue for or against the authority of a particular opinion or line of opinions. The opinion is not merely an epiphenomenon to the law…but is central to the activities of mind and character of the law as we know and value it.[4]

Its decisions have also had an enormous impact on American culture by deciding such things as who can marry whom, who is entitled to citizenship, and how different groups are allowed to interact with each other in public. It has played an extensive role in defining group identity for subcultures and how those groups are perceived in American society. For example, cases such as *Plessy v. Ferguson* and *Brown v. Board of Education* have helped shape the identity of African-Americans. In *Brown v. Board of Education*, Chief Justice Earl Warren described the position of African-Americans in the South under segregation; he found that, "To separate [African-American children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in

[4] James Boyd White, "What's an Opinion For?," *University of Chicago Law Review*, vol. 6, 1995, 1368.

the community that may affect their hearts and minds in a way unlikely ever to be undone."[5] Chief Justice Warren goes on to state that public education, the cornerstone of American society, teaches children everything they need to know to become fully formed citizens and adults.[6] Through this line of reasoning, Chief Justice Warren helped cement, in the broader American consciousness, the sense that African-Americans were not as fully developed people as white Americans because they have not traditionally received the same quality of education. Relying on this logic, he overturns segregation in an effort to bring about equity for African-Americans in education. Those in the legal profession are keenly aware of the impact that the law has on the lives of those people that the law directly affects, but also on the legal practitioners themselves, how they come to view the law and their place within it. James Boyd White argues that, "the way [an] opinion is written has large consequences for the future. It deeply affects and shapes the way we think and argue and, in so doing, constitute ourselves through the law."[7] This is because the opinions of courts do not merely reflect yes or no votes on the correctness of any given law, but are arguments that lay in detail the justifications for their decisions. Studying the details and character of judicial decisions is important because so much of what is constituted as the law and legal reasoning has not come from statutes or even the direct text of the Constitution. Much of the law has emerged through interpretations that have created doctrines and legal mechanisms based on interpretations of these texts. Studying the Court's construction of gay identity is important because of the Court's ability to control legal recognition and protection of groups of people, as well as shape their own views on the law.

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[5] *Brown v. Board of Education*, 347 U.S. 483 (1954), p.495.
[6] Ibid, p. 494.
[7] James Boyd White, p. 1368.

I focus on three conceptions of gay and lesbian identity: the "criminal other" of *Bowers v. Hardwick*, the "just like everyone else" of *Romer v. Evans*, and the "just-like straights" identity of *Lawrence v. Texas*. How did the Court perceive alternative sexual orientations in *Bowers*? How did this reading affect straight relationships? How did this change with *Romer* and *Lawrence*? How did state intervention in the sexual lives change under *Lawrence*? What new rights were granted? What new responsibilities were outlined? These are important questions because the Supreme Court's decisions have an impact on the law, the decisions of lower courts, the decisions and thinking of members of Congress and the executive, and they hold weight with the public.

The paper is divided into six parts. In the first section, I will discuss Michel Foucault's concept of governmentality and its significance for a study of the Supreme Court. Second, in the literature review, I will address what other scholars have said about the Supreme Court's role in identity construction of groups. The third section will discuss the Court's conception of gays as criminals in *Bower v. Hardwick*. The fourth section will cover the Court's conception of gays as a damaged group in need of protection in *Romer v. Evans*. Fifth, I will discuss how the Court has come to view gays as "just like" straights in *Lawrence v. Texas*. Finally, I will conclude the paper with an analysis of my argument.

Literature Review

Legal opinions have broad impact on the political, legal, and economic lives of people. Legal, political, and literary scholars have attempted to decipher the meanings of these three cases and determine how they affect the legal and social standing of the gay and lesbian community in the United States. Three major approaches have driven the scholarship

on gay rights. This literature review will examine a variety of scholars' approaches to analyzing the Court's decisions in *Bowers*, *Romer*, and *Lawrence*. It will explore their strengths and weaknesses, in comparison to my own work in order to place my study within this research and to distinguish my study from other literature.[8] The first focus will investigate these Supreme Court rulings through the lens of queer theory. Queer theory is a way of conceiving of gender, sex, and sexual orientation that has been adopted by scholars from a large number of disciplines in the humanities and social sciences. Queer theory uses "the post-structuralist figuring of identity as a constellation of multiple and unstable positions… [and] analytical models which dramatize incoherencies in the allegedly stable relations between chromosomal sex, gender and sexual desire" to reveal the socially constructed nature of gender and sexual identity.[9] In the second section, I look at how law and literature scholars have studied Supreme Court decisions.[10] What seems important about their viewpoint is: their emphasis on narratives, character portrayal, and voice in judicial opinions. This differs from the view of legal scholars who seem to be more interested in studying the specific mechanisms of a decision.[11] Queer theorists focus on the broader socio-political categories of subjects at play in a decision. Third, I look to legal scholarship on gay rights that focuses on the specific legal mechanisms that govern decisions. Finally, I chart a

[8] My research most closely resembles, and takes many elements from, queer theory research. Authors such as Kathrine Franke and Teemu Ruskola have reached the same conclusion that *Lawrence* uses a "just like straight" logic to come to its conclusion, see note 15. What these scholars lack, however, is a logical framework, governmentality, that explains the motives of institutions. This, of course, is something that my paper possesses and sets my paper apart from other scholars.

[9] Annamarie Jagose (1996), "Queer Theory", *Australian Humanities Review*, http://www.australianhumanitiesreview.org/archive/Issue-Dec-1996/jagose.html (accessed September 15, 2014).

[10] This is an interdisciplinary movement from scholars of English, rhetoric, communications, and law that has tried to study the law as a literary text. Prominent scholars in the "law and literature" movement include: Benjamin N. Cardozo, Ronald Dworkin, Eric Heinze, Ian Ward, Robin West, and James Boyd White.

[11] By specific legal mechanisms I mean the study of law that focuses on the specifics of legal reasoning such as: the interpretation of the Due Process Clause, the interpretation of the Equal Protection Clause, the notion of heightened scrutiny, a myriad of other things.

different approach which focuses on the logic of governmentality present in judicial decision-making, and I point to arguments and ideas that these other approaches have missed.

In this first section, I will discuss queer theory. Queer theory concepts such as the construction of social/sexual identities, performativity, and heteronormativity, have influenced how these scholars interpret the decisions of the Supreme Court.[12] This has allowed theorists to shed light on the ways in which the courts and laws shape how we act and how we perceive ourselves and others.[13] Queer theorists have focused on the power differential between different social groups, particularly the privileged position that heterosexuality possesses in society. It brings to light the privileged position of heterosexuality, especially the straight, married couple in terms of economic, political, and social benefits afforded by the state. Examples of this are present in the tax breaks given to straight couples who have children, but were denied to gay and lesbian couples with children. In the court system, child custody invariably favors the heterosexual partner and by default, inheritance only recognizes biological and matrimonial relationships.,,

[12] Some of the foundational texts of queer theory include: Michel Foucault, *The History of Sexuality: An Introduction, Vol. 1*, trans. by Robert Hurley (New York: Vintage Books, 1990) and Judith Butler, *Gender Trouble*, New York: Routledge, 1990.

[13] For examples of this look to Kathrine M. Franke, "The Domesticated Liberty of *Lawrence v. Texas*," *Columbia Law Review* 104 (2004), 1399-1426; Marc Spindelman, "Surviving *Lawrence v. Texas*," *Michigan Law Review* 102 (2003-2004), 1615-215; Teemu Ruskola, "Gay Rights Versus Queer Theory: What is Left of Sodomy after *Lawrence v. Texas*?" *Social Text* 23, no. 3-4 (Fall-Winter 2005): 235-249; Thomas M. Keck, "Queering the Rehnquist Court," *Political Research Quarterly* 59 (2006): 417-419; Susan Burgess, "Queer (Theory) Eye for the Straight (Legal) Guy: *Lawrence v. Texas'* Makeover of *Bowers v. Hardwick*," *Political Research Quarterly* 59 (2006): 401-414; Unkown, "Unfixing *Lawrence*," *Harvard Law Review* 118 (2005): 2858-2881; Janet Halley, "Reasoning About Sodomy: Act and Identity in and After *Bowers v. Hardwick*," *Virginia Law Review* 79 (1993): 1721-1780; Janet Halley, "*Romer* v. *Hardwick*," *University of Colorado Law Review* 68 (1997): 429-452.

Queer theory has several important claims that are essential to it as a theoretical paradigm.[14] First, sexuality is central to the construction of political meaning and power.[15] Burgess notes that political meaning is invested in the categorization of things and people that are often thought of in terms of oppositional binary social categories, "e.g., gay/straight; reason/desire; white/black; man/woman.".[16] Each term in the pair is defined in relation to its opposite and therefore their meaning are intertwined – their existence is dependent on the other.[17] At the same time an unequal power relationship exists between these binaries with the minority being accorded "various forms of material inequalities such as unequal rights and liberties."[18]

Second, Burgess argues that identity is performative in the sense that identities, including sexual orientation and gender, are created and perpetuated through acting them out rather than a natural phenomenon that exist *a priori* within a person. Queer theorists argue that these binary social categories are not natural but are, in fact, produced within specific communities in specific historical contexts.[19] For Burgess the "ubiquity of how-to books for heterosexual dating and mating, as well as the painful adolescent memories that most people have of inadvertently breaking one of the unspoken rules of gender and sexuality, suggest that such norms are learned rather than given."[20] Third, political liberation can be best understood as a parody of existing social relations and identities instead of an escape from power relations. This is because of the performative nature of identity. No self or identity

[14] Burgess, 403.
[15] Ibid.
[16] Ibid.
[17] Ibid.
[18] Ibid.
[19] Ibid.
[20] Ibid.

exists abstractly in nature, so the struggle to find and maintain an identity on the basis that it is natural presents itself as either naïve or potentially dangerous.[21] Instead of a sincere struggle to discover hidden natural identities, queer theorists seek to employ parody that seeks to "dislodge seemingly natural assumptions about sexuality and gender be revealing the shaky grounds upon which firmly enshrined discourse rests."[22] Burgess, drawing on the example given by Judith Butler, points to the example of the drag queen who offers theatrical and often highly exaggerated performances of gender and sexual roles which reveals the constructed and performed nature of the roles.[23] There are many sites of contestations of political power, and popular culture can provide insights into the everyday operation of political power that has the potential to transform it rather than merely mirror it.[24]

Queer theory legal scholarship has been focused on "how" questions.[25] This calling into question of how the governing of the "conduct of conduct" has been termed "problemitization" by Foucault scholars.[26] However, these scholars have mostly focused on the macro-level cultural trends taking place in the Western world. They have mostly ignored specific institutions and how they have played a role in shaping views on sexuality. They have also placed less emphasis on why things occur the way they do.[27] Instead they look to how each individual part of an institution works to create the practice at hand: from unemployment benefits to advertising. Dean contrasts this approach with other schools of

[21] This shows up in many of the categorizations that humans have created but it often is most plainly visible in the category of race and the supposed differences that exist between the races and the inherent abilities, attributes, and defects that supposedly exist between different races.
[22] Ibid., 404.
[23] Ibid.
[24] Ibid.
[25] Dean, 28. For examples of this in the form of individual articles see Burgess, supra note 11; Teemu Ruskola supra note 11; Kathrine Franke supra note 11.
[26] Ibid., 27.
[27] Ibid., 28.

thought that ask: Who rules? What is the source of that rule? What is the basis of its legitimacy?"[28] Unfortunately, scholars relying on the works of Foucault do not fully acknowledge the disproportionate power that institutions hold in comparison to individuals. They get lost in the world of micro-forces that shaped our lives. It makes sense to employ a broader analysis that focuses on a realistic appraisal of the place of institutions and their effect on the lives of individuals. Michel Foucault's theory of governmentality helps to resolve this issue by providing a framework that can be used to analyze these institutions and their behaviors both on a micro and a macro-scale. Burgess's analysis focuses on the specific actions of the justices. The biggest weakness of this argument, however, is that it actually takes the actions of the Court at face value. It does not try interpreting the reasons why the Court has had a reversal of thought from *Bowers* to *Lawrence*. This analysis doesn't fully utilize Foucault's later theorizing and consequently misses the point that the Court is not merely acting out of ideological preferences. Instead, it is acting on the logic of governmentality and developing governing practices that attempt to govern society in the most efficient manner possible.

Second, I will discuss scholarship from the law and literature movement. Scholars from the law and literature movement have also looked at the way in which the Supreme Court has affected the lives of Lesbian, Gay, Bisexual, and Transgender (LGBT) people. These scholars have focused mostly on the narratives of LGBT people and legal history as constructed in the Court's opinions. As James Boyd White argues:

[28] Ibid., 29.

> The judicial opinion is a claim of meaning: it describes the case, telling its story in a particular way; it explains or justifies the result; and in the process it connects the case with earlier cases, the particular facts with more general concerns. It translates the experience of the parties, and the languages in which they naturally speak of it, into the language of the law, which connects cases across time and space; and it translates the texts of the law…into the terms defined by the present case.[29]

It is these factors that make it important to study the way in which the Court tells the story of the participants of cases. The way in which the Court characterizes these individuals can reveal the explicit and implicit feelings of the Court towards these actors.

Law and literature scholars, such as Glenda Conway and Timothy Lin, have focused on voice and narratives in judicial decisions.[30] Likewise, Karen Tracey's work has looked at the way that judges in the New York legal system treated LGBT people as actors before the courts.[31] Tracey shows that the way in which judges have positively or negatively perceived LGBT plaintiffs and defendants, plays a role in how judicial outcomes are decided. This literary scholarship has drawn on the work of linguists such as Jorg Bergman to better understand the structure of arguments within legal texts. [32] Bergmann argues that modern institutions such as the courts have more and more been called on to resolve issues that are of

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[29] James Boyd White, 1367.
[30] Glenda Conway, "Judging the Voices of Judicial Law," *Angelaki: Journal of the Theoretical Humanities* 4, no. 1 (1999): 159-172; Glenda Conway, "Inevitable Reconstructions: Voice and Ideology in Two Landmark U.S. Supreme Court Opinions," *Rhetoric & Public Affairs* 6, no. 3 (Fall 2003): 487-508; Timothy E. Lin, "Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases," *Columbia Law Review* 99 (1999): 739-794; Daniel A. Farber & Suzanna Sherry, "Telling Stories Out of School: An Essay on Legal Narratives," *Stanford Law Review* 45 (1993): 807-809.
[31] Karen Tracy, "How Questioning Constructs Judge Identities: Oral Argument about Same-Sex Marriage," *Discourse* Studies 11, no. 2 (2009): 199-221.
[32] Jorg R. Bergman, "Introduction: Morality in Discourse," *Research on Language and Social Interaction* 31, no. 3&4 (1998): 279-294.

a moral nature. Bergman states that they "work within institutions that function according to 'rational' models and criteria, and they therefore are officially constrained to 'demoralize' issues couching them in terms of scientific or bureaucratic rationality. Professionals are trained to take a 'neutralistic' stance with respect to the problems they deal with."[33] In contrast to this supposed objective analysis, Bergman argues that the actual activities of these institutions are grounded in strong moralizing frameworks due to the modern bureaucratic necessity of assessing people and determining their relation to bureaucratic norms and standards.[34]

The professionals that comprise the legal system realize that this occurs in their discipline. Specifically, Judge Patricia Wald writes, "the conventional wisdom is that the 'Facts' portion of an appellate opinion merely recites neutral, predetermined 'facts' found by the lower court…Yet nothing could be farther from the truth. When an appellate judge sits down to write up a case, she knows how the case will come out and she consciously relates a 'story' that will convince the reader it has come out right. In the last century, the fact-'spinning' function of opinions has become much more important…[Because] there is only one account of the 'facts.'"[35] This is a departure from how 19th century Court opinions were structured. During the 1800s both parties' arguments were laid out in detail.[36] It shows the historically specific nature of institutional norms and their openness to change. Judge Wald continues:

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[33] Bergman, 291.
[34] Ibid.
[35] Patricia M. Wald, "The Rhetoric of Results and the Results of Rhetoric: Judicial Writing," *University of Chicago Law Review*, vol. 6 (1995): 1367-1368.
[36] Ibid., 1386.

> This is not just a matter of being selective about which facts to emphasize (or even to mention), but also a matter of characterization; the facts can—and indeed must—be retold to cast a party as an innocent victim or an undeserving malefactor, to tow the storyline into the safe harbor of whatever principles of law the author thinks should control the case.[37]

Conway connects with this view; arguing that the justices' reconstruction of individuals and events, in cases presented to them, reflect the author's view of them.[38] The entire legal system is then influenced by a particular justice's, or group of justices', view because of the binding and far reaching nature of precedents.[39] Through the lens of the majority opinion in *Bowers*, authored by Justice White, the petitioner Michael Hardwick becomes unsympathetic, threatening, and undeserving of constitutional protections because his lifestyle threatens American traditions and values.[40] This brings to light another insight of literary studies: the study of the importance of extreme case formations.[41] Extreme case formations are those utterances that an author uses to convey the reasonableness of their argument in adversarial situations.[42] Extreme case formations are those sentence constructions used to maximize the legitimacy of a claim being made. Pomerantz points to a number of examples of this such as, "'brand new'; 'completely innocent'; 'he was driving perfectly'…"[43] These are words added to a description that go above and beyond what is needed to be said in order to remove all doubt about the argument or point that the speaker is

[37] Ibid., 1386.
[38] Conway, "Judging," 166; Conway, ""Reconstructions," 488.
[39] Conway, "Reconstructions," 489.
[40] Ibid., 489-490.
[41] Tracy, 214; Pomerantz, 219-220.
[42] Pomerantz, 222.
[43] Ibid., 219.

trying to make. There are many examples of state courts, appellate courts, and the Supreme Court using extreme case formations when arguing against gay rights.[44] An example of this can be seen in Justice White's argument that only those rights "deeply rooted in this Nation's history and tradition" are eligible for heightened constitutional protections.[45] The key part of this construction is the phrase, "deeply rooted," because this reveals White's belief that sexual matters, outside of procreation and family rearing, are not a legitimate part of American culture or history and thus beyond any state protections. From this standpoint, White's denial of Hardwick's claims to the contrary can be seen as legitimate and reasonable.

While this literary take on Court scholarship is useful in understanding how the Court has constructed the narratives and voices of people within the legal system, there are still some gaps in this line of thinking. What this scholarship ignores is what has motivated the Court to reach the conclusions that it did. Conway claims that "arguments justifying Court decisions are not grounded exclusively in readings and interpretations of external 'facts' such as precedents and the Constitution, but also in internal fictionalizations of the involved principles."[46] What this paper provides is an alternative framework for explaining the logic of the Supreme Court, which in turn provides an explanation as to why the Court came to a particular conclusion in each case.

Third, I will review literature from scholars, mostly within the legal profession itself, that root their analyses in the specific legalistic mechanisms that operate within the Supreme Court's decisions. These scholars look at the specific interpretations of the Constitution and laws the Supreme Court has relied upon to make decisions. This sort of scholarship is most

[44] Tracy, 214; Conway, "Reconstructions," 501.
[45] *Bowers*, 191-192.
[46] Conway, "Reconstructions," 491-492.

heavily represented in law journals, but can also be found in social science journals. Authors such as Bluestone, et al., have focused on the specific legal mechanisms that have driven Supreme Court decision making in gay rights cases.[47] "Loving *Lawrence*" discusses the similarities and differences between *Loving v. Virginia* and *Lawrence v. Texas*, two landmark Supreme Court cases dealing with the state's recognition of various intimate partnerships. In *Loving*, the Supreme Court held that anti-miscegenation laws which were prevalent in the South and prevented mixed race couples from marrying were unconstitutional. The *Lawrence* Court provided some recognition of same-sex couples by holding that sodomy laws were likewise unconstitutional.[48] The main focus of this literature is how the Supreme Court comes to justify its decisions. The emphasis of this research understands the legal logic that underpins these decisions and what they mean for future legal cases. This involves examining the text of the Constitution, previous cases with similar circumstances and outcomes, and how the justices have previously viewed the legal mechanisms at play in a given case.

While I share much of the same concerns and concepts as scholars in legal research, such as Kathrine Franke and Teemu Ruskola, what differentiates their scholarship from mine is their focus. Legal scholars, including those coming from the school of queer theory, focus

[47] These authors come at the study of the Court from the traditions laid out in laws schools and study the Court in this fashion. Gloria Bluestone, "Going to the Chapel and We're Going to Get Married; But Will the State Recognize the Marriage? The Constitutionality of State Marriage Laws After *Lawrence v. Texas*," *Texas Journal on Civil Liberties & Civil Rights* 10, no. 2 (2005): 189-221; Pamela S. Karlan, "Foreword: Loving *Lawrence*," *Michigan Law Review* 102 (2003-2004): 1447-1463; Susan Ayres, "Coming Out: Decision-Making in State and Federal Sodomy Cases," *Albany Law Review* 62 (1998): 355-402; R. A. Lenhardt, "Beyond Analogy: *Perez v. Sharp*, Antimiscegenation Law, and the Fight for Same-Sex Marriage," *California Law Review* 96, no. 4 (August 2008): 839-900; Louis Michael Seidman, "*Romer*'s Radicalism: The Unexpected Revival of Warren Court Activism," *Supreme Court Review* 67 (1996): 67-121; Lisa K. Parshall, "Redefining Due Process Analysis: Justice Anthony M. Kennedy and the Concept of Emergent Rights," *Albany Law Review* 69 (2005): 237-298.

[48] By eliminating the ban on same-sex sodomy the Court helped to legitimize gays and lesbians by signaling the end of its previously hostile stance towards gay and lesbian sexuality. By ruling in Lawrence's favor the Court put the weight of the judiciary behind the gay rights movement, or at least, it could be read in this way. This is certainly the opinion of Justice Scalia in his *Lawrence* dissent.

on the specific legal mechanism at work within a text to try and understand their meaning. Franke, for example, examines what the concept of "liberty" and "freedom" mean to Justice Kennedy in *Lawrence*, and how those concepts are applied.[49] I, on the other hand, am not interested in the specific legal mechanism at work within these decisions. While I acknowledge that they play a part in constructing the narratives and choices laid in these decisions. The project that I am embarking on is an attempt to try to understand what motivates the Court to act in the broadest sense possible. To determine what logic lies at the heart of the Court as a state institution in the context of modern world. And pull back the curtain and look at the gear and cogs that moves the Court. This is where Foucault's concept of governmentality comes in. They are studying the mechanics of the law where as I am studying power and the Court. Therefore, governmentality lies at the heart of this study because it is the tool I use to understand the Court as a state power in modern society. The greatest weakness of this approach is that it fails to identify and examine the larger rationale that has driven the Court and that is expressed through its language. It is true that the Court's legal interpretations and arguments will have the most impact on the law and the nation as a whole. However, the Court's stance, tone, and rhetoric when dealing with an issue surely have a broader ideological impact as well. This is partly due to the perceived finality of the decisions made by the Supreme Court. The Court creates precedents that impact all lower courts and even lawmakers themselves. It often takes years or even decades for a decision to be overturned by a future Supreme Court. In the interim, the previous ruling of the Court has had a substantial legal, political, and social impact. The Court also possesses a great deal of moral authority. For example, Chief Justice Warren's psychological analysis of African-

[49] Franke, 1403.

American children in *Brown v. Board of Education* has had a lasting impact on the way in which race relations have been discussed over the last sixty years. Legal scholars continue to analyze his argument that the lack of access to equal education for African-Americans is detrimental to their mental and social development.[50] The great impact of Chief Justice Warren's reasoning here is important to study, because it goes beyond a mere legal explanation and shows how the Supreme Court views African-Americans as a group. The impact of the Court's decision is seen as having such a far reaching political, legal, and social impact that it is essential to study the whole of these Court documents and parse out their broader implications rather than a limited mechanistic analysis.

Uniquely, my approach will also utilize Foucault's theory of governmentality. A Foucauldian analysis consists of an examination of the three parts of an institution. The first and driving force of an institution is its rationality of government: the way an institution understands its tasks, its goals, and the things that it has set out to understand and manage.[51] Through this understanding, an institution develops knowledge and truth of its subjects and the subject's place within the workings of government. Second, institutions develop programs of government to carry out these rationalities and plans to carry out these tasks. Third, in carrying out these programs, institutions deploy mechanisms, instruments, procedures, and techniques used to achieve the desired results – what Foucault calls technologies of government.[52]

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[50] *Brown v. Board of Education*, 347 U.S. 483 (1954), 493-495; Michael J. Klarman, "How Brown Changed Race Relations: The Backlash Thesis," *The Journal of American History* 81, no. 1 (June 1994): 81-118, 81-82.
[51] Dean, 20-21.
[52] Ibid., 31.

Other groups of scholars, such as queer theorists, have consciously adopted a Foucauldian understanding while mainstream legal studies have unconsciously devoted their energies to understanding the technologies of government. Precisely, they have focused on the specific legal mechanisms at play within gay rights decisions and what the justices have had to say about these technologies these cases and past precedent. The aim of this paper is to study the rationalities of government that inform the decision making of the Supreme Court and the traces of these rationalities that remain hidden within their texts.[53] This is important because of the lack of scholarship devoted to governmentalization of the judicial system.[54] This study will focus on the components of this new rationality of government: security, territory, and population. It is these three components of modern government that guide government decision-making, although each institution has interpreted them differently. Consequently, the study of this underlying ideology is paramount to understanding the functioning of the modern societies.

Methodology: Governmentality as a Guiding Principle to Modern Government

Analytics of Government

In this next section, I chart out the framework for my thinking on the Supreme Court which is an analytics of government. My mode of analysis in answering these essential

[53] By "rationalities of government" I am referring to the myriad ways of thinking about proper governance that the institutions of the state have developed since the rise of the nation-state as a concept in the 18th century.
[54] For examples of work that has taken governmentalization of the legal system as a focus of their research see; Nikolas Rose and Mariana Valverde, "Governed By Law?", *Social Legal Studies* 7, no. 4 (December 1998): 541-551; Sean Eudaily, *The Present Politics of the Past: Indigenous Legal Activism and Resistance to (Neo)Liberal Governmentality*, New York: Routledge, 2004; Kerry Carrington and Paul Watson, "Policing Sexual Violence: Feminism, Criminal Justice and Governmentality," *International Journal of the Sociology of Law* 34, no. 3 (September 1996): 253-272; Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance*, London and Boulder: Pluto Press, 1994; Nikolas M. Rajkovic, "'Global law' and Governmentality: Reconceptualizing the 'Rule of Law' as Rule 'Through' Law," *European Journal of International Relations* 18, no. 1 (March 2012): 29-52.

questions relies on the work of French philosopher Michel Foucault and his concept of governmentality. Governmentality is the conduct of conduct. This means that governmentality is interested in molding the ways in which people conduct their lives: what they eat, what they think, how they perceive others, and how others perceive them. Directly, the government enforces this through law and the operation of government agencies. Indirectly, it disseminates its perception of various peoples through the enforcement of policy. Governmentality also involves the self-corrective behavior of individuals themselves and the people that they interact with through broader cultural trends. This is true of any division of government that governs what people do or how they identify themselves, such as a judicial body like the Supreme Court. This paper draws upon a Foucauldian analysis to understand the ways in which government institutions organize themselves, develop understandings of people, and go about operating on the larger society. At the center of the study of governmental practice is the need to analyze regimes of practices. Regimes of practices are historically constituted ways of doing things. Social, moral, cultural, political and economic practices operate based on the rules now in place, but they change over time as new ways of doing things are thought up and adopted by society at large.

Institutions study these regimes of practices to better understand what is going on around them as well as to better adapt their institution to the governance of the population and the state. They do this by collecting statistical data, reviewing scholarly studies, and looking back at historical examples. Gilles Deleuze tells us that there are four dimensions to the study of regimes of practices: the field of visibility, the technical aspect of government, the approach to government as a rational and thoughtful activity, and the formation of identities. The first aspect, the field of visibility, regards what is the object of study by the

particular institution. In these instances, the Supreme Court's object of study is sexual orientation, specifically gays as a group of people.[55]

The second aspect of regimes of practices is the technical aspect of government. This relates to what means, mechanisms, procedures, instruments, tactics, techniques, technologies, and vocabularies the Court uses to constitute it and how it accomplishes its goals. This is where a study of judicial mechanisms will come in. The way in which the Court interacts with lower courts and briefs and how their interpretation of these documents shapes their decisions. This deals with what aspects of these cases the lower courts have decided to pay attention to, what facts they look at and accept, and the way in which the Supreme Court has not challenged the lack of presentation of facts by lower courts. This also deals with which briefs the Supreme Court's decisions cite and how they interpret them and which briefs are left out of the Court's opinions.

The third aspect will be the approach to government as a rational and thoughtful activity. We will need to ask a series of questions about how the Court operates and what rationality guides its thinking: What knowledge, expertise, strategies, and means of calculation or rationality are employed in the practices of governing? How these areas seek to transform practices. How their logic gives rise to specific forms of truth. How these forms of thought seek to make specific objects governable. The next goal for government then becomes ensuring that these objects of study internalize the practices and forms of truth.

[55] In this instance I'm not saying that the Supreme Court preforms the same sort of scientific or medical study one would see a psychologist, doctor, or scientist perform. The Supreme Court does not use the scientific method, but the Court *does* study cases. It looks at the facts presented to it by the plaintiff, defendant, and amicus briefs to understand the facts of the case and both sides' arguments. Then they take that knowledge and apply precedent to determine an appropriate outcome. So in this sense they perform a study of a subject.

The final aspect of regimes of practices is the formation of identities. Government is concerned about the categories of people that exist and with the types of people they would like to create.[56] Institutions work to create environments, conditions, rules, and practices that foster specific ways of thinking about an object, subject, or action. This is not to say that these institutions can force people to self-identify with the personal and social traits that best suit the needs of good government. Instead, these institutions are "successful to the extent that these agents come to experience themselves through such capacities (e.g. of rational decision-making), qualities (e.g. as having a sexuality) and statuses (e.g. as being an active citizen)."[57] Institutions act through these everyday environments to promote regulatory norms that govern individuals' behavior both explicitly, through rules, directives, and the correction of others' behavior, as well as implicitly through self-governance, the acceptance of these ways of thinking and self-correction of thoughts and actions. In the end, I'm trying to show that the Supreme Court's underlying logic is the logic of governmentality, and thus understanding governmental rationality can explain the Court's decisions in *Bowers*, *Romer*, and *Lawrence*.

Discourse Analysis

Next, Foucault's notion of discourse analysis also plays a role in my thinking and this will be elaborated in this section. The analysis of discourse was important for Foucault because he understood "discourse as actively constituting or constructing society on various dimensions: discourse constitutes the objects of knowledge social subjects and forms of

[56] Dean, 32.
[57] Ibid.

'self', social relationships, and conceptual frameworks."[58] In order to understand how the world around us operates, it is necessary to delve into the texts that constitute institutions, places of power, and the elements of everyday life.

Foucault's insights into discourse are important for a number of reasons: discourse constitutes social objects, he brings to the fore the intertextuality of discourses, the discursive nature of biopower, the political nature of discourse through power struggles that occur through it, and the importance that discursive practices play in social change.[59] For Foucault, a discursive formation consists of "'rules of formation' for the particular set of statements which belong to it, and more specifically rules for the formation of objects…'enumerative modalities' and 'subject positions'…'concepts'…[and] strategies."[60] These elements of a discursive formation work together and form cohesive texts that layout ideas in the modern world.

The first element of a discursive formation is the object of the discourse. According to Foucault, "objects" of discourse means objects of knowledge, the component parts of various disciplines, sciences, or areas of interest that are taken as an object of study.[61] Foucault views "discourse as constitutive – as contributing to the production, transformation, and reproduction of the objects [and subjects]…of social life."[62] Discourse plays an active role in the construction of our reality; it helps to give meaning to the social and physical world around us and our daily interactions with each other as people. Discourse is not a

[58] Norman Fairclough, *Discourse and Social Change*, Cambridge: Polity Press, 1992, 39.
[59] Ibid., 55-56.
[60] Ibid., 40.
[61] Ibid., 41.
[62] Ibid.

passive reflection of reality that shines back at us.[63] Objects are constituted in reference to the text at hand and to outside texts. This means that objects of study have definitions inherent in a given text, but also possess other meanings and aspects that come from other texts that have described the object at hand. In the end, one cannot escape discourse of texts because language is bound up in them. The interplay between intra-discursive, inter-discursive, and non-discursive formations and practices all play a part in constraining and structuring arguments, what constitutes an object, and what can be said about an object.[64]

The second element of a discursive formation is its enumerative modalities. Norman Fairclough defines enumerative modalities as those "types of discursive activity such as describing, forming hypotheses, formulating regulations, teaching…each of which has its own associated subject positions."[65] These enumerative modalities are historically contingent and so the study of the social conditions from which they emerge is important.[66] This means that a judge "is constituted through a configuration of enunciative modalities and subject positions which is held in place by the current rules of [judicial] discourse."[67] By taking up Foucault's position, it is possible to see that discourse plays a pivotal role in the construction of social subjects. People do not merely use language that expresses elements of their social identity (gender, class, race, and sexual orientation); rather the language we use creates and reinforces the identities that we possess by perpetuating the elements of a social subject through discourse.

[63] Ibid., 42.
[64] Ibid., 42-43.
[65] Ibid., 43.
[66] Ibid., 44.
[67] Ibid.

The third element of discursive formations is the formation of concepts. Concepts are the "battery of categories, elements and types which a discipline uses as an apparatus for treating its field of interest."[68] These concepts help to form intra-discursive relationships within a text, the structural arrangement of arguments, descriptions, and evidence. In addition, they form the inter-discursive relationships between different texts, belonging to "'fields of presence,' 'concomitance,' or 'memory.'"[69] Foucault defines a field of presence as those statements that are taken from outside of the text, but incorporate into its discourse what are considered to be true, involve description, use sound reasoning, or have essential assumptions that are analyzed explicitly or implicitly.[70] Foucault places, "emphasis on the interdependency of the discourse practices of a society or institution: texts always draw upon and transform other contemporary and historically prior texts."[71] Texts play off one another both implicitly and explicitly as when an author argues a point. It is within this context that concepts and statements are shaped. The field of concomitance consists of statements that concern widely varying objects of study and belong to dissimilar types of discourse but are active in the statements being studied in the current text because they serve to illustrate a general principle, model, or serve as a higher authority on a relevant portion of the discourse. For example, one could bring a discourse on cooking into a discourse of computer science because of some relevant theoretical link between the two.[72] Finally, Foucault defines the field of memory as those "statements that are no longer accepted or discussed, and which consequently no longer define either a body of truth or a domain of validity, but in relation to

[68] Ibid., 46.
[69] Ibid.
[70] Ibid.
[71] Ibid., 39-40.
[72] Michel Foucault, *The Archeology of Knowledge*, New York: Pantheon Books, 1972, 58.

which relations of filiation, genesis, transformation, continuity, and historical discontinuity can be established."[73] These are memories of old theories and ways of doing things that are now considered wrong and outdated but still serve a useful purpose for making a point in the current discourse. In the context of the modern Supreme Court, for example, it would be appropriate in a discussion of *Plessy v. Furgesson* to make correlations to slavery, or other legal rulings, interpretations, or thinking that plays some illustrative role in the current discourse.

Foucault is interested in the contextual nature of texts. Likewise, Fairclough states that "discourse analysis is concerned…with specifying socio-historically variable 'discursive formations'…systems of rules which make it possible for certain statements but not others to occur at particular times, places and institutional locations."[74] For Foucault, there are two types of context that govern the specificity of statements and texts: situational context and verbal context. Situational context is the socio-historical situation or period that a text finds itself in.[75] Verbal context is a statement's position in relation to the other statements in a text that precedes it and follows it. The relationship between statements and their context is not transparent.[76] How it is interpreted varies from one discursive formation to another.

The final element of a discursive formation is the formation of strategies. Foucault defines strategies as theories, themes, and explanations that shape the argument of a discourse.[77] However, the world in which a discourse exists places constraints on the strategies that an author uses in any particular discourse. While there are certainly inter-

[73] Foucault, *Archeology*, 58.
[74] Fairclough, 40.
[75] Ibid., 47.
[76] Ibid.
[77] Ibid., 48.

discursive constraints on the formation of different lines of thought, here Foucault brings into the discussion non-discursive constraints for the first time. For an example of non-discursive constraints, Foucault points to the myriad array of non-discursive practices intrinsic to the workings of the economy that help mold the boundaries of what is conceivable within economic discourses.[78] These rules for the formation of strategies govern what action can and will be actualized.[79] At the same time, discourse continues to play a pivotal role in determining the constraints on non-discursive practices. Discourse, on the whole, is able to overcome these constraints to play a dominant role in determining the realm of possibility for both discursive and non-discursive practices.[80] To illustrate this point, Foucault first points to the function of discourse in a field of non-discursive practices.[81] He cites the function of economic discourse in the practices of emergent capitalism as an example of the power of discourse to shape the future discursive and non-discursive norms and practices. Secondly, Foucault points out the process of appropriation of discourse were the right to speak, ability to understand, the right to draw upon the corpus of already formulated statements, and to use these statements in decisions of institutions is unequally distributed between social groups.[82] This means that dominant forces within the social system are able to construct arguments and narratives that have a profound impact on everyday social practices and the realm of possible discourse on just about any topic. Finally, Foucault points out "the possible positions of

[78] Foucault, *Archeology*, 66-70.
[79] Fairclough, 48.
[80] Fairclough, 48; Derek Hook (2001), "Discourse, Knowledge, Materiality, History Foucault and Discourse Analysis [online]", *LSE Research Online*, http://eprints.lse.ac.uk/archive/953 (accessed September 15, 2014), 3.
[81] Foucault, *Archeology*, 69.
[82] Foucault, *Archeology*, 68; Hook, 5. This is clearly evident, at face value, in the practices of the judiciary were lawyers and judges, and sometimes scholars, hold onto these rights for themselves and wall off access from the layman. Even going so far as to say that ignorance of the law is no excuse and the fact that most people do not know their rights and the government has had to be forced to reveal those rights to people. Also it can be seen in how Justice White treats Hardwick's arguments. That Hardwick's views would have *forced* the Court to declare a constitutional right to sodomy.

desire in relation to discourse: discourse may in fact be the place for a phantasmatic representation, an element of symbolization, a form of the forbidden, an instrument of derived satisfaction."[83] All of these elements relate to the "materiality" of statements.[84] By this, Foucault means the status or weight of discourse in relation to a particular institution. All of this is relevant to actors who appear before the Supreme Court, the justices themselves, and the broader public who are all shaped by how discourses are produced and interpreted.

Explaining Governmentality More Broadly

Finally, in this section I give a brief overview of Foucault's concept of governmentality so that the reader will be familiar with some of the terms and ideas I use to develop my argument. The study of governmental rationality is important to the present study, because a thorough understanding of the government's reasoning process can illuminate why the state and its institutions adopt a policy. In his lectures, Foucault lays out the three fundamental components of this new mode of power: governmentality, the apparatus of security, and population. Governmentality produces knowledge through political, economic, and the societal forces behind the market and trade. Theoreticians of governmentality understood these social forces as the way in which people would act without social constraints placed on them by the state. They focused on how people interact with each other in their daily social and economic interactions.[85] The emphasis on the processes of civil society reduced the importance of judicial and disciplinary power, because both act upon the population in a heavy handed way. Disciplinarity and juridical mechanisms do not fully align

[83] Foucault, *Archeology*, 68.
[84] Fairclough, 49.
[85] Foucault, Security, 349.

with the social processes of human life as they consist of *a priori* rules and regulations imposed from outside on a population. They remain part of the modern state, however, because they served to control the population within their assigned spheres of influence and because they can be refined by applying the knowledge gained from studying the societal workings of a population. Foucault's concept of governmentality is an attempt to explain why the government operates the way it does in the modern era. What governmentality represents is the state's attempt to govern people's conduct both through direct interventions and through convincing people to govern themselves. Governmentality is about applying rationality and thought to the act of governing. The acts in this way because the state has a responsibility to foster and protect its society, therefore, the state must take an active role in managing a nation's population in ways that will best promote the wellbeing of society.[86] So the study of populations and how to manage them lies at the center of governmentality's reasoning because its end goal is the welfare of the population. Governmentality goes about this study of a population by both totalizing and individualizing its members.[87] The state must study the population as a whole through statics on a wide array of topics: birth rates, death rates, diseases, income, employment figures, and so forth. The state however, also analyses individuals through public education, census data, tax information, and any one of the hundreds of forms and exams present within the state bureaucracy. Foucault states that this is because "the means that the government uses to attain these ends are themselves *immanent in* the population."[88] Since governmentality is the "conduct of conduct" this means

[86] Ibid., 350.
[87] Collin Gordon, "Governmental Rationality: An Introduction," in *The Foucault Effect*, eds. Graham Burchell, Colin Gordon, and Peter Miller, Chicago: University Of Chicago Press, 1991, 36.
[88] Michel Foucault, *The Foucault Effect*, eds. Graham Burchell, Colin Gordon, and Peter Miller, Chicago: University Of Chicago Press, 1991, 100. Emphasis added.

that the best solutions to managing the interests of a population are through self-governance.[89] When people take it upon themselves to govern their own behavior it benefits the state. This is because it takes fewer resources to achieve desired results. This can lead to less resistance because the population takes it upon itself to abide by social norms. This means that the state will look at all forms of conduct in order to try to determine the best way of convincing people to manage their own behavior. This includes specific institutions, such as the law and the courts.

The law is created in order to control how people act. The Court explicitly controls people's behavior by deeming certain practices illegal, how the Court implicitly controls people's behavior through the way in which it frames its arguments in *Bowers*, *Romer*, and *Lawrence*. The goal will be to show how the Court has used the law to respond to challenges to accepted social behaviors over time.

Governmentality has a number of features that distinguish it from the concept of sovereign power which had been the dominant modality of power during the Middle Ages. Governmentality uses the techniques of security, statistics, to study and manipulate the development of society. The target of power is not a territory, which had been the target in the age of sovereignty; instead the target is the entire population of the state. Under governmentality strengthening the state has become an end unto itself. The goal of the state under this regime is to construct a government that can manage and produce a healthy and prosperous population.[90] People matter to the state in so much as the population is a reflection of the character of the state. If the population is plentiful and productive, it can be

[89] Michel Foucault, "The Subject and Power," in *Michel Foucault: Beyond Structuralism and Hermeneutics*, eds. Hubert Dreyfus and Paul Rabinow, Brighton: Harvester, 1982, 220-221.
[90] Foucault, *Security*, 105.

said that the state is strong; and if the population is small and unproductive, it can be said that the state is weak.[91] This is where the Foucault's notion of biopolitics emerges.[92] The state is interested in the population as "a set of coexisting living beings with particular biological and pathological features, and which as such falls under specific forms of knowledge and technique."[93] The state has a need to understand the population and how it self-organizes and so it fosters institutions designed to study the population. This includes institutions that study things such as public hygiene, sociology, criminology, and political science. The state then uses the knowledge gathered by these institutions to develop techniques for government to govern the population. This is the focus of biopolitics as the merger of natural biological processes with the political practices of the state.

Until the emergence of governmentality, how well a sovereign ruled was judged on how closely he managed the affairs of state – like that of the family with the sovereign as head of the household.[94] The family remains important in this scheme because it has long been associated with the relations of power and knowledge.[95] However, under governmentality, the family emerges as an instrument of government rather than a model of government.[96] Foucault makes this clear when he states that, "whenever information is required concerning the population (sexual behavior, demography, and consumption), it has to be obtained through the family."[97] How the law and the courts constrain or mold morality and sexuality, in terms of how it affects the family, emerges as an important field of study.

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[91] Ibid., 321-322.
[92] Ibid., 367.
[93] Ibid.
[94] Ibid., 104-105.
[95] Foucault, "Governmentality," 99-100.
[96] Ibid., 100.
[97] Ibid.

This is not because of the specific prohibitions laid out in the law, but because it serves as window into the broader message that the government is sending. The state's message being: who it favors, what practices it favors, and what ends the government is trying to promote.

The purpose of the present paper is to explore the emergence of governmentality and its features in more detail, because governmentality represents the ruling form of power and guiding ideology of governments in the modern era. The ideological emphasis on society as a whole and not interfering dramatically with the systems of civil society has even had, I will argue, an impact on the legal system and how courts function in the modern era. The differing outcomes of *Bowers*, *Romer*, and *Lawrence* can serve as a model for how judicial functions work in the modern state and what relationships it perceives as having a place in civil society.

The state's interest in examining and understanding all of the dimensions of a population points to the reason why the Supreme Court chose to take up these cases in the first place. Sexuality and the family remain important sites of contestation between the state and other social groups within society, because it represents the most basic social formation in modern society.[98] The family teaches new generations how to act as responsible, productive members of society, and passes on society's norms and ideals regarding topics such as religion, family matters, health, and morality.[99] The goal of governmentality is the stability of the system as a whole. As new problems emerge, the government responds by managing the challenge these problems pose. Acting from this logic, the Court acted to shape the perception of alternate sexualities and social groupings. Over time, the Court has

[98] Foucault, *Security*, 104.
[99] Ibid.

responded the LGBT community's demand for more rights in several different ways as the social terrain around them has changed.

The rationality of government does not respect the judicial system in the same way that sovereignty has.[100] Foucault gives the *coup d'état* as an example of a time which *raison d'état* ignores the law in order to preserve the state. The sacredness of the rule of law (God's laws, natural laws, and man's laws) can be shed in times of crisis.[101] This same disregard for law exists not only in the early modern police state, but is also a characteristic of the modern state. One only has to look at the working of the United States government in the post September 11th period where even American citizens have been targeted for assassination without any charges being brought against them.[102] This opens up the possibility that

[100] Ibid., 262.

[101] Ibid. Carl Schmitt has contributed to a discussion of the power, the law, and the state. For Schmitt the law, without enforcement or application is nothing but an abstraction. For further reading look to: Carl Schmitt, Dictatorship, Cambridge and Malden: Polity Press, 2014; Carl Schmitt, *Der Wert des Staates und die Bedeutung des Einzelnen* [*The value of the State and the Significance of the Individual*] (1914), Berlin: Duncker & Humblot, 2004; Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty* (1922), trans. by G. Schwab, Chicago: University of Chicago Press, 2005; Carl Schmitt, *The Crisis of Parliamentary Democracy* (1923), trans. by E. Kennedy, Cambridge: MIT Press, 1985; Carl Schmitt, *Constitutional Theory* (1928), trans. by J. Seitzer, Durham: Duke University Press, 2008; Carl Schmitt, *Legality and Legitimacy* (1932), trans. by J. Seitzer, Durham: Duke University Press, 2004; Carl Schmitt, *The Concept of the Political*. Expanded Edition (1932), trans. by G. Schwab, Chicago: University of Chicago Press, 2007; Dyzenhaus, D., ed., *Law as Politics. Carl Schmitt's Critique of Liberalism*, Durham: Duke University Press, 1998; Bendersky, J.W., *Carl Schmitt. Theorist for the Reich*, Princeton, NJ: Princeton University Press; Cristi R., 1998, *Carl Schmitt and Authoritarian Liberalism. Strong State, Free Economy,* Cardiff: University of Wales Press, 1983; Dyzenhaus, D., *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, Oxford: Oxford University Press, 1997; Gottfried, P.E., *Carl Schmitt. Politics and Theory*, Westport: Greenwood Press, 1990; Kalyvas, A., *Democracy and the Politics of the Extraordinary. Max Weber, Carl Schmitt, and Hannah Arendt*, Cambridge: Cambridge University Press, 2008; A. Norris, "Sovereignty, Exception, and Norm," *Journal of Law and Society* 34, no. 1 (2007): 31–45.

[102] Mark Mazzetti, Eric Schmitt, and Robert F. Worth, "Two-Year Manhunt Led to Killing of Awlaki in Yemen," *New York Times*, September 30, 2011 (Accessed January 25, 2012), http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html?_r=1&hp and Glenn Greenwald, "The Due-Process-Free Assassination of U.S. Citizens is now Reality," Salon, September 30, 2011 (Accessed January 25, 2012), http://www.salon.com/2011/09/30/awlaki_6/singleton/.

traditions, such as legal precedents and due process, hold less sway than is espoused by judges.

In an earlier epoch, under the rule of sovereignty, justice acted as a means of deterrence and punishment. Governmentality has altered the legal system so that its primary aim is no longer deterrence; instead it is meant to be a transformative institution that can remold individuals into productive members of society. One of the things that distinguish governmental rationality from other forms of social control, is its insistence that technologies of power be applied not according to some abstract model or formula, but according to the way that society really functions. The state possesses an incomplete knowledge of the subjects it tries to control and this exposes the potential weakness of the state.[103] Working from this mindset, the government tries to avoid endeavors that would radically alter the way in which society functions.[104] This leads to skepticism of attempts at reforming governmental or social relations.[105] Normalization is an important tool in governmentality's arsenal. It is through this mechanism that institutions try to mold individuals and populations. Normalization also works on people to get them to internalize sets of acceptable behavior that ensure the smoother functioning of the larger society. However, this does not mean that a concerted effort to resist power cannot change how institutions perceive social groups and act upon them.

[103] Gordon, "Governmental Rationality," 15.
[104] Michel Foucault, *The Foucault Reader*, edited by Paul Rabinow, Harmondsworth: Penguin, 1986, p. 46.
[105] Mitchell Dean, *Governmentality: Power and Rule in Modern Society*, London, Thousand Oaks, New Delhi: Sage Publications, 1999, p. 35.

Bowers v. Hardwick **– Gays and Lesbians as Criminal Others**

This section will track how the Court dealt with gay and lesbian identity in the *Bowers* decision. First, I will chart out the history behind the *Bowers* case to provide some context. Second, I will analyze the *Bowers* decision in order to survey governmental rationality's place in it. Finally, I'll discuss identity construction in *Bowers* and how the logic of governmentality worked to create a productive identity for gays and lesbians, paradoxically, as a "criminal other" in the eyes of the state.

The History of *Bowers*

First I will look at the history of *Bowers*. The history of *Bowers v. Hardwick* begins in July 1982.[106] Michael Hardwick was a twenty-eight year old bartender at a local gay bar in Atlanta. On the morning of July 5th Hardwick was issued a citation for carrying an open bottle in from a bar called the Cove. He was helping friends remodel the bar. However, Hardwick missed his Court date because the citing officer, Keith Torick, had written the wrong date on the top of the ticket.[107] When Hardwick appeared at the court house, on the day Officer Torick had written down, he found out that he had missed his real court day. Hardwick then paid the fine. In the meantime, a warrant for his arrest, stemming from his

[106] My recounting of the history leading up to *Bowers v. Hardwick* is collected from an amalgamation of four sources: *Bowers v. Hardwick*, 478 U.S. 186 (1986); David A. J. Richards, *The Sodomy Cases: Bowers v. Hardwick and Lawrence v. Texas*, Lawrence: University Press of Kansas, 2009; *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985); William N. Eskridge, Jr., *Dishonorable Passions: Sodomy Laws in America, 1861-2003*, New York: Viking, 2008.

[107] It is somewhat unclear, according to Eskridge, whether Torick acted with malicious intent when he wrote the wrong date down. Eskridge quotes Hardwick as saying that the officer, "was just busting my chops because he knew I was gay," Eskridge, 232. However, Eskridge notes that, although he is straight, Torick did have several gay friends and sometimes worked as a bouncer at another local gay bar, the Bulldog Lounge. Torick's actions upon arresting Hardwick and his companion, however, included taunting the two men and Torick later claimed that, "I would never have made [it] a case if [Hardwick] hadn't had an attitude problem," Eskridge, 233. So Officer Torick may have possessed some bias towards gays.

missed court date, had been issued to Officer Torick. On the morning of August 3, Officer Torick was let into Hardwick's apartment by a guest who had been asleep on the living room couch. Officer Torick then entered the apartment and went to Hardwick's bedroom and discovered Hardwick and another man engaged in mutual oral sex. At this point, Officer Torick announced himself and arrested both men for engaging in sodomy after Hardwick protested that the officer had no right to be in his home. Later, Officer Torick would discover that the warrant had expired three weeks before the time of the arrest because Hardwick had paid the fine. The expired warrant, the questionable manner in which Officer Torick entered the apartment, previous citizen complaints against Officer Torick, and his own views on the constitutionality of sodomy laws led District Attorney Lewis Slaton to throw out the sodomy charges.

Undeterred by this turn of events, Hardwick's lawyers pressed on with a complaint to the federal district court. Hardwick challenged the Georgia statute, on the grounds that it violated the Constitution's Due Process Clause. A married couple, friends of Hardwick, also joined the case as John and Mary Doe because they wished to remain anonymous. John and Mary Doe claimed that Hardwick's arrest had a chilling effect on their own private intimate life and that their fear of imminent arrest had prevented them from engaging in the proscribed acts because the Georgia statute made it a crime for any person to engage in sodomy.[108] However, the federal district court dismissed the case based on failure to state a claim.[109] Hardwick appealed the dismissal to the 11th Circuit Court of Appeals. The court agreed with Hardwick on the privacy issue. It also concluded that since Hardwick had been

[108] Fearing backlash from their participation in the case they were known as John and Mary Doe, Eskridge, 234; *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985).
[109] *Bowers*, 186.

arrested he had standing to bring the case. On the other hand, the court ruled that John and Mary Doe did not have standing. After the trial Georgia State Attorney General Michael Bowers appealed the decision to the Supreme Court.

According to internal Supreme Court documents the Court decided review the *Bowers* case for a number of reasons. First, there were discrepancies between the federal courts as to how they were ruling in these cases.[110] Secondly, both the liberal and conservative sides of the Court thought that they might be able to decide the sodomy issue in their favor.[111] However, when the liberal justices learned of Justice Powell's ambivalence on the issue they tried unsuccessfully to stop the Court from hearing the *Bowers* case, primarily due to Justice Powell being a key swing vote in the matter.[112] Oral arguments were heard March 31, 1986. In a five to four decision, the Court reversed the 11th Circuit Court of Appeals. The Court majority narrowed the question to whether homosexuals had a constitutional right to engage in sodomy.[113] They answered no. The Georgia statute criminalized all forms of sodomy between all persons, regardless of gender or sexual orientation. Justice White, writing for the majority, ruled that the appellate court had ruled incorrectly in finding a constitutional right to privacy in regards to gay conduct, because "no connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."[114] Justice White found no connection between Hardwick's actions and the Court's earlier cases that involved contraception, child care, marriage, and other family matters. Justice White failed to see that the Court's earlier

[110] In 1979 Fifth Circuit Court of Appeals in Texas had upheld the band on sodomy on the federal level and various state courts had ruled differently based on federal privacy rights cases; Eskridge, 235-236.
[111] Ibid., 236.
[112] Ibid., 237.
[113] *Bowers*, 190.
[114] Ibid., 191.

decisions granting heterosexuals more freedom to control their own intimate lives could also be applied to people with other sexual orientations as well. The Court's decision to uphold the Georgia statute meant that wherever sodomy laws existed, people would remain vulnerable to prosecution whether or not the sexual activity was between consenting adults. However, ten years after its decision in *Bowers,* the Court would begin to reconsider its stance on gay rights.

A Discussion of the Logic of Governmentality in the *Bowers* Decision

Next, I will discuss the logic of governmentality as it works in the *Bowers* decision. Followed by why the Court constructed gays a criminal other in the *Bowers* decision. Although the outcome of *Bowers v. Hardwick* was negative for the gay and lesbian community, the case remains important as the first time the Supreme Court had issued an opinion on the rights of gays and lesbians. The main theme of Justice White's majority opinion in *Bowers v. Hardwick* was that homosexuals are a criminal element within the United States and therefore deserve no right to practice private, consensual sodomy.[115] Through a review of local and state laws, going as far back as the pre-revolutionary colonial period, Justice White found that every state had an anti-sodomy statute until the 1960s. Furthermore, a strict reading of the Constitution found no mention of a right to engage in sodomy, so Justice White has no qualms with upholding the right of states to enact anti-

[115] Regardless of the fact that Georgia criminalized the practice of sodomy between any person, the Court's intent on criminalizing the behavior of gays and lesbians is clear for two reasons. First there is the fact that Justice White agreed with the lower court that John and Mary Doe should be excluded from case. This removes one half of the people intended to be policed from consideration by the Court. The second reason, and most important, is the fact that Justice White clearly states the question of the Bower's case is whether "the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy," *Bowers*, 190. So here we have the Court making it clear that this case is not about straight people. Bowers is explicitly a case about gay people and the state's stance towards them, regardless of broader application of sodomy laws.

sodomy statutes. Although Justice White's reasoning seems straightforward, we can ask why he did not use a more nuanced reading of the Constitution.[116] We can see more expansive readings of the Constitution in earlier cases that involve intimate relationships and medical procedures, such as *Griswold v. Connecticut* (1965), *Loving v. Texas* (1967), *Eisenstadt v. Baird* (1972), and *Roe v. Wade* (1973).[117] Why did the majority refused to look at the fact that the Georgia statue prohibited not just gay sodomy but straight sodomy as well? Why did Justice White's argument construct the identity of gays? These are important questions because their answers illuminate the way towards understanding the workings of governmental rationality within the Supreme Court.

The language in Supreme Court opinions plays a key role in determining how the Justices view an issue. Justice White's language in the opinion reveals how the Court viewed gays. Justice White identifies Hardwick by name in the first sentence of his opinion. However, White goes on to identify Hardwick as the "respondent" for the remainder of the opinion.[118] Judicial opinions often omit the name of the parties in cases.[119] This may stem from the Court's aim to articulate the broader principles at work within a case. Here the

[116] By narrow reading of the Constitution I mean one that emphasizes a limited and literal reading of the Constitution, one that looks to the text mostly as written and refuses to take a more expansive look at the text and to push the text to its logical conclusions in a modern context. By an expansive reading I mean, a willingness to look at the broader principles that can be derived from the text of the Constitution and taking the rights outlined in the Constitution to their logical conclusions based on applying those rights to the contemporary socio-political situation. Hence the different readings of the Constitution between cases such as *Bowers*, where the Court sticks to strictly a literalist readings of the Constitution, a document that does not mention of a right to sexual intimacy, let alone a right to engage in "homosexual sodomy", and cases such as *Lawrence* where the Court decided to take a more open view of the Constitution. In Lawrence we see a Court that is willing to expand upon what it sees as the core values of the Constitution and American society as a whole.

[117] These are cases that bestowed privacy rights on a wide array of sexual and medical matters: *Griswold* granted contraception rights to married couples; *Loving* outlawed anti-miscegenation statutes and allowed people to marry who they choose; *Eisenstadt* permitted unmarried people to purchase contraception; *Roe* granted the right to abortion.

[118] *Bowers*, 187.

[119] While it might be a long established practice for courts to omit the names of the parties of a case for most of an opinion I feel that this is an important factor in the narrative that courts establish in their opinions.

Court downplays the importance of the individuals in the case. Still, this practice plays an important role in how the case is constructed and subsequently read. This is an important choice by the Court, because it dehumanizes Hardwick, and by extension all other gay people, for the purpose of continuing to criminalize "homosexual" activity.

We can see that the Court has specific meanings for the words that it uses to describe heterosexuals, homosexuals, and the social relations that relate to them. Heterosexuals are people who come together with someone of the opposite sex, get bound up in marriage, start a family, and have children.[120] When Justice White compares these criteria to homosexuals and concludes that they are not like heterosexuals at all. Next, Justice White examines the precedents that have established privacy rights for contraception, interracial marriage, abortion, and family. He recounts a long list of precedents and once at the bottom of it he finds no connection between these topics and "homosexual sodomy."[121] Confirming this, Justice White states that, "No no connection between family, marriage, or procreation, on the one hand, and homosexual activity, on the other, has been demonstrated, either by the Court of Appeals or by respondent."[122] Here Justice White is setting up gays as a criminal other. They are an outsider from society because their lives do not resemble the expectations of the majority. Justice White's understanding seems to be that gays do not marry, have families, or raise children. They are also criminal because sodomy is a practice that the Court intends to outlaw. Based on Justice White's reading, it can be argued that gays are a group looking to obtain rights that they are not qualified to receive.[123] Justice White continues, "Moreover,

[120] *Bowers*, 190-191.
[121] *Bower*, p. 191.
[122] *Bowers*, p. 191
[123] *Bowers*, p. 191.

any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable."[124] Here Justice White is following the logic of *Carey v. Population Services* when the Court argued that the line established by *Griswold*, *Eisenstadt*, and *Roe* was about procreation and not a notion of expanded sexual freedom.[125] It is this group that practice sodomy which the Court finds lacking protections. For the majority, sodomy is the defining characteristic of homosexuality exemplified when White describes Hardwick as a "practicing homosexual."[126] This links sodomy to homosexuality by stating that those that are not practicing sodomy cannot actively identify as homosexuals. Heterosexuals represent the default societal norm.[127] The Court views heterosexual relationships as normal and so they have worked to protect this type of couple's place and privilege within the "the concept of ordered liberty" that is "deeply rooted in this Nation's history and tradition."[128] Justice White's concern for tradition has him turn to a historical overview of sodomy laws to determine the historical traditions of an ordered sexual liberty in the United States and whether homosexual sodomy conforms to these standards.[129] Upon a review, Justice White does not find this linkage and "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or implicit in the concept of ordered liberty,' is

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[124] *Bowers*, p. 191
[125] *Carey v. Population Services International*, 431 U.S. 678 (1977), 688-689.
[126] *Bowers*, 188.
[127] Janet Halley, "Reasoning About Sodomy: Act and Identity in and after *Bowers v. Hardwick*," *Virginia Law Review* 79 (1993): 1731; Rosemary Hennessy and Chrys Ingraham, "Putting the Heterosexual Order in Crisis," *Mediations: Journal of the Marxist Literary Group* 16, no.2 (May 1992), 18.
[128] *Bowers*, p. 191-192.
[129] Chief Justice Burger also makes continues the argument that anti-sodomy views are part in parcel to the history of Western civilization. The Chief Justice points to the prohibition of sodomy in Roman law, in English law after the Reformation, and finally in 1816 when Georgia passed its first sodomy statute as examples of the deep seated roots that proscriptions against sodomy have in the Western Christian moral tradition stating that, "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching," *Bowers*, Chief Justice Burger concurring, 196-197.

at best, facetious."[130] Justice White uses the following review of American sodomy laws to argue that "[p]roscriptions against that conduct have ancient roots" and because of this no rights should be extended to gays:

> [Sodomy] was a criminal offense at common law and was forbidden by laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy preformed in private between consenting adults.[131]

For the Court, the length of time a law has existed is important, because long held traditions reflect the most successful social practices. The state is concerned most with promoting those social practices which best benefit the social harmony and development of the population as a whole. Gays are seen by the majority as perverse individuals who break both traditional and natural laws that govern acceptable moral behavior since biblical times. In his concurrence, Chief Justice Burger echoes Justice White's concerns about traditional moral values stating that, "to hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."[132] From this perspective, "homosexuals were a bad type of person."[133] Hence, when the Court looks to prohibitions against sodomy, they look back at their ancient roots as a confirmation of those anti-sodomy attitudes, a social practice, and a part of the natural workings of the moral mindset of the

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[130] *Bowers*, 194.
[131] *Bowers*, 192-194.
[132] *Bowers*, Chief Justice Burger concurring, 197.
[133] Janet Halley, *Don't: A Reader's Guide to the Military's Anti-Gay Policy*, Durham: Duke University Press, 7.

population as a whole. Chief Justice Burger makes this case when he quotes the English legal theorist William Blackstone's description of sodomy as "'the infamous crime against nature' as an offense of 'deeper malignity' than rape, a heinous act 'the very mention of which is a disgrace to human nature…'"[134] The objective of the state is the ordered management of a country's population, as a group of people as well as a set of social and economic phenomena, for the betterment of the state.[135] We see the Court's governmental logic demonstrated by the majority's insistence that marriage, the family, and procreation are the defining characteristics of heterosexual life and that gays should be criminalized because they break the social fabric.

The *Bowers* decision set about to determine what sexual norms would be accepted by the state through the judicial mechanism. Foucault states that "it is the tactics of government that allows the continual definition of what should or should not fall within the state's domain, what is public and what private."[136] The state continued to hold a monopoly on the power to decide moral issues in the United States and the Supreme Court, as one element of the state, would make sure that the judiciary would continue to be relevant in deciding these issues. Drawing from the greater society's disapproval of alternate sexual orientations since the concept was developed in the late 19th century, as well as more ancient philosophical and religious considerations, Justice White's opinion demonstrates the thinking that there could

[134] *Bowers*, Chief Justice Burger concurring, 197.
[135] Foucault*, Security,* 352-356. For a clearer understanding of how sexuality and the family play a role in the state see: Wendy Brown, *States of Injury: Power and Freedom in Late* Modernity, Princeton and Oxford: Princeton University Press, 1995; Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America*, Princeton and Oxford: Princeton University Press, 2009; David Evans, *Sexual Citizenship: The Material Construction of Sexualities*, , London and New York: Routledge, 1993.
[136] Foucault, *Security,* 109.

be no constitutional right to engage in the practice because it goes against the social norm.[137] In this way, people will govern themselves by refraining from homosexual behavior or concealing it, because they fear the social and legal repercussions of publicly admitting their homosexual status. This is important for the state, because it promotes several perceived social benefits: ensuring that the population increases through the creation of children, ensuring less reliance on the state for social services through the institution of marriage, promotes social harmony through the suppression of differences within the population, and helps to promote public health through the suppression of more widespread sexual activity.[138] Social cohesion is something that the state wishes to promote and G. William Domhoff argues, "Social cohesion [also] aids in the development of policy cohesion."[139] When these social, economic, and political cleavages manifest themselves too sharply, governmental response can be slow or almost non-existent due to tensions within institutions themselves.[140] The state is also interested in the wellness of the public as a whole by tracking health trends of the component parts of the population.[141] Gorman-Murray and Waitt (2009) offer a deeper understanding of social cohesion by examining Forrest and Kearns's (2001) five factors that

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[137] *Bowers*, 196.

[138] For more on social cohesion see, William Easterly, Jozef Ritzan, and Michael Woolcock, "Social Cohesion, Institutions, and Growth," *Center for Global Development*, http://www.cgdev.org/files/9136_file_WP94.pdf, August 2006 (Accessed September 13, 2014); G. William Domhoff, "Social Cohesion & the Bohemian Grove: The Power Elite at Summer Camp," *Who Rules America*?, http://www2.ucsc.edu/whorulesamerica/power/bohemian_grove.html, April 2005 (Accessed September 13, 2014); Andrew W. Gorman-Murray and Gordon R. Waitt, "Queer-Friendly Neihbourhoods: Interrogating Social Cohesion Across Sexual Difference in two Australia Neihbourhoods," *Environment and Planning A* 41, no. 12 (2009), 2855-2873; Dick Stanley, "What Do We Know about Social Cohesion: The Research Perspective of the Federal Government's Social Cohesion Research Network," *The Canadian Journal of Sociology* 28, no. 1 (Winter 2003), 5-17.

[139] Domhoff, "Social Cohesion,".

[140] Easterly, p. 4.

[141] For an example of this institutional interest see, Thomas C. Mills, Ron Stall, Lance Pollack, and Joseph A. Catania, "Health-Related Characteristics of Men Who Have Sex With Men: A Comparison Of Those Living in "Gay Ghettos" With Those Living Elsewhere," *American Journal of Public Health* 91, no. 6 (June 2001), 980-983.

promote social cohesion, "(1) *common values and goals*, with shared morality and codes of behavior; (2) *social order*…cooperation, tolerance, respect for difference…absence of general conflict."[142] From this perspective, the *Bowers* Court seems to be abiding by these interests. It provides historical evidence that Western society at large has had animosity towards the act of sodomy. The Court provides for a strengthening of the social order by affirming the outlawing behavior that is at odds with the community. And the Court, from its perspective, promotes social solidarity with continued enforcement of sodomy statutes towards reforming people's behavior to conform to the standards of the heterosexual tradition.

Historian Margot Canaday's book, *The Straight State,* illustrates the state's interest in social cohesion and stability. In the book, Canaday studies the areas of immigration, military, and social welfare and argues that during the 20th century with the rise of modern bureaucratic governmental institutions that the state recognized homosexuality as a category of individual and developed means to deal with homosexuality.[143] In the area of immigration, for example, the state has been concerned with the economic and moral character of the people trying to immigrate to the United States.[144] In the early 20th century, these immigration policies served to promote heterosexual morality and gender norms by scrutinizing the poor who attempted to enter the country, because poverty was thought to promote perversion.[145] This search for homosexuality or at least the act of sodomy amongst the poor was also a way of preserving heterosexual gender norms, because homosexuality

[142] Gorman-Murray, et al, 2859; R. Forrest and A Kearns, "Social Cohesion, Social Capital and the Neighbourhood," *Urban Studies* 38 (2001), 2125-2143.
[143] Canaday, 13-14.
[144] Ibid., 22.
[145] Ibid.

and sodomy were thought of as feminine.[146] To exclude these people from the United States was to ensure that the men of the United States acted like men and the women acted like women. In the end, Canaday reveals how these interventions by state institutions have been able to shape the meaning of homosexuality and the dominant position of heterosexual norms in the United States.[147]

As the courts begin to take on cases that involve reproduction and intimate social relationships, the courts must determine for themselves what best constitutes appropriate and moral behaviors in these realms.[148] In the *Bowers* case, the Court intertwines definitions of family with heterosexuality.[149] Justice White's reading of precedents sees the family as the arena for procreation and the propagation of the population when he states that "no connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent."[150] Here Justice White is echoing Justice Joseph Bradley's sentiments about the family in *Maynard v. Hill* (1888). In *Maynard*, Justice Bradley states that "[the family] is an institution in the maintenance of which its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."[151] This illustrates that the composition and moral standing of the family has been a concern of the Supreme Court and government at large for a very long time. In addition, we

[146] Ibid., 40.
[147] Ibid., 255.
[148] Ibid., 3. Canaday points out that as the 20th century developed the bureaucratic state began to study, categorize, and regulate in earnest different sexual practices, Ibid., 3.
[149] Evans, 25-26. For David Evans (1993) this is important because of the role that the family plays in the social development of individuals within a country.
[150] *Bowers*, 191.
[151] *Maynard v. Hill*, 125 U.S. 190 (1888), 211.

see that the state sees those that would advocate or practice another way of life as outside the bounds of civilization as criminal others.

Justice White argues that these precedents did not layout a broader right to private sexual conduct, stating that "the Court's opinion in *Carey* twice asserted that the privacy right, which the *Griswold* line of cases found to be one of the protections, provided by the Due Process Clause, did not reach so far."[152] One can see Justice White's line of thinking by looking to the sections of *Carey* that he argues refutes a more open interpretation of the privacy right granted by the Due Process Clause. In the *Carey* decision, the Court finds fault with Justice Powell's concurrence in *Carey* -- that restrictions on sexual freedom are only justified if they can demonstrate a compelling state interest, but stops short of answering the "difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults."[153] Here Justice White has room to argue that the Court's previous precedents don't state whether the Court should or should not proscribe certain forms of sexual behavior.

Because gays and lesbians are unable to conceive and raise children, they cannot form the basic social unit: the family. In his brief to the Court, Attorney General Bowers takes up this sentiment when he argues that "the [Georgia sodomy] statute most certainly does not interfere with personal decisions concerning marriage or family life, the raising of children or their education, or which members of a family will be permitted to live together."[154] This is because straight couples, even though they are included under the Georgia statute, are not

[152] *Bowers*, 191.
[153] *Roe*, 155; *Carey*, 688, note 5, *infra* note 17.
[154] Michael J. Bowers, *Petition for a Writ of Certiorari to the United States Supreme Court*, 32.

under the same sort of threat of prosecution as gays.[155] In all actuality, the law is aimed at curbing those elements that pose a threat to the social norms that have governed society. From this reasoning, they are not entitled to constitutional protections whose aims are to benefit solely families. We can see this explicitly in the brief of Attorney General Bowers when he states that:

> The common principles of this Court's privacy decisions have revolved around marriage, the family, the home and decisions as to whether through procreation the ancient cycles will begin again and, if so, in what manner the new generation will be brought up. These rights have always been with us, and are part of us. Sodomy is not now and has never been a right, fundamental or statutory…[156]

Justice White uses the Attorney General's thoughts as the basis for his argument.[157] Two important points about the *Bowers* decision need to be examined. First, the majority reading of Georgia's sodomy law ignores the statute's categorically neutral language and instead finds it to be a homosexual sodomy statue.[158] Justice White makes the point of the *Bowers* case clear when he states, "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[159] This new understanding made it possible for the Court to ignore questions about straight sexual activities and to re-inscribe

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[155] It has always been far easier for straight people to meet one another and find some place to, mostly the home, to engage in private intimate conduct. The situation for gays, however, has not been as fortunate. A lot of gay intimate contact has taken place between strangers in public areas know for "cruising". The public nature of these encounters exposes gays to a greater chance of being caught and prosecuted. This is especially the case with widespread public disapproval of gays who are far more likely to be arrested than say a teenage straight couple caught in their car.
[156] Ibid., 25.
[157] This can clearly be seen in the quote above with Justice White's linking of family, marriage, and childrearing, supra note 176, *Bowers*, 191.
[158] *Bowers*, 188, note 1.
[159] *Bowers*, 188.

the Constitution with a “not like-straight” meaning. The Court deploys this “not like-straight” thinking in its evaluation of gays as a class. This means that it views gays as different from and not at all like straights. This leaves gays outside the bounds of the law and acceptable society and therefore a criminal other. This lays out the governing principles of the Court in regards to sexual relations. Positive sexual relationships are those that are vested between a man and a woman for the purpose of procreation and the development of a family according to governmental rationality.[160] This is because the family betters the state as an economic and social unit that it beneficial to the state. As Justice Powell argues, the moral fabric of the family must be protected “precisely because the institution of the family is deeply rooted in this nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”[161] This is so for many reasons: the family provides a system of social support in tough economic times, it educates children in the values and social norms of a given society, and the family provides a site for the state to learn about the population.[162] Lawmakers are concerned with "promoting healthy marriage" as a "very important Government interest."[163] Within government, politicians argue about how to best tackle the economic conditions of women and families. Both conservative and liberal law makers have tackled the issue of poverty, women, and their correlation to the family:

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[160] Brown, 147.
[161] *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977), 503-504.
[162] On the familitization of social welfare see: Linda Gordon, *Pitied But Not Entitled: Single Mothers and the History of Welfare, 1890-1935*, Cambridge: Harvard University Press, 1994; Alice Kessler-Harris, *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th Century America*, Oxford: Oxford University Press, 2001;
[163] *Personal Responsibility, Work, and Family Promotion Act of 2002*, H.R. 4737, 107th Cong. §§ 4(4), 103(b)(2)(C) (2002); See also: Robin Toner, "Welfare Chief Is Hoping to Promote Marriage," *New York Times*, February 19, 2002 (Accessed October 10, 2014), http://www.nytimes.com/2002/02/19/us/welfare-chief-is-hoping-to-promote-marriage.html,.

> [Conservatives lament] if only more women could be brought within marriage's protective domain…both by getting more women to marry, and also by strengthening the core meaning of marriage as a life-long social and, especially, economic commitment –fewer women would live in poverty…[Meanwhile liberal critics] posit, [governmental policies] must tackle directly the crisis of female poverty, locating both its causes and its potential solutions in, for example, education and labor policies, rather than deflecting discussions of women's financial needs into the private family.[164]

What this demonstrates is policymakers' interest in women and the family as the most important economic site in American society. State institutions are also supremely interested in the education of citizens, as the Court in *Wisconsin v. Yoder* (1972) states, "There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education... Providing public schools ranks at the very apex of the function of a State."[165] Yet in *Yoder*, the paramount place of the family is secured by ensuring that parents have the right to educate their children with the beliefs of their cultural and religious identity.[166] The state is interested in the overall development of its citizens and as such takes great lengths to ensure that this development is carried out.

Second, the Court rejects its own ability to challenge normative sexuality. Instead, it buttresses the norm when it states that the case "does not require a judgment on whether laws

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[164] Ariela R. Dubler, "In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State," *The Yale Law Journal* 112, no. 7 (May 2003): 1641-1715, 1643.
[165] *Wisconsin v. Yoder*, 406 U.S. 205 (1972), 213. For more on the state's interest in ensuring that family's educate their children see also *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), 543.
[166] *Yonder*, 213-214.

against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable."[167] However, by narrowing Hardwick's question to just whether a fundamental constitutional right to homosexual sodomy exists, the Court has already made a moralizing decision. The Court's attitude is further reinforced later in the decision when it states that it:

> [Strives] to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection.[168]

Yet it seems that the assertion that the Court remains objectively neutral in cases that involve heated moral questions remains a dubious claim. *Bowers* is clearly a reflection of the Court's governmental thought process that privileges heterosexual relationships. The Court has found that gay and lesbian behavior contradicts longstanding historical social norms and because of this, it does not serve the state's interest to extend Constitutional protections to said behavior.[169] Instead, the criminalization of "homosexual sodomy" continues to serve legitimate and useful state interests because the statute adheres to the moral sentiments of the majority of people.

The Court's decision to overturn the Federal Appeals Court's ruling was firmly cemented in the rationale of government and the accompanying "not like straight" logic that

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[167] *Bowers*, 190.
[168] Ibid., 188, note 2.
[169] The *Bowers* decision osculates back and forth on the question of the homosexual act/identity distinction. Basically the Court uses either interchangeably whenever it suites its' argument in the opinion. For a detailed explanation of this see: Janet Halley, "Reasoning About Sodomy: Act and Identity In and After *Bowers v. Hardwick*," *Virginia Law Review* 79 (1993): 1722-17.

defined homosexuality as a criminal other. The first instance of this "not like straight" thinking can be seen in Justice White's agreement with the Eleventh Circuit Court that the straight couple, who were also a party to the case, did not possess standing before the Court.[170] Justice White makes the claim that because no heterosexuals are legitimately part of the suit and Hardwick is a "practicing" homosexual, his challenge to the Georgia sodomy statue must be read in terms of how it applies solely to homosexual sodomy.[171] The decision, "says to [heterosexuals]: if your acts of sodomy are heterosexual acts of sodomy, they can be forgotten, omitted, erased-not only not prosecuted but not remembered," holding up heterosexuality as the social norm and reaffirms heterosexuality's unquestionable nature.[172] The second instance of this "not like straight" and criminalizing logic lies in the Court's inability to find any resemblance between the expansion of sexual privacy rights granted to heterosexuals in previous cases and the sexual privacy claims made by Hardwick. Justice White quotes a long list of precedents but in the end concludes "that none…bears any resemblance… [:] [N]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."[173] As Conway pointed out earlier, this is an example of the Court's deliberate not understanding.[174] In refusing to acknowledge the logically broader implications of these precedents, and taking them to their logical conclusion, this line of thinking produces a regulatory mechanism of sexuality based on the heterosexual social norm by the Court. This is an example of the socialization and scientification of sexual behavior that Foucault describes as a mechanism of knowledge and

[170] *Bowers*, 188, note 2.
[171] Ibid.
[172] Janet Halley, "*Romer* v. *Hardwick*," *University of Colorado Law Review* 68 (1997), 439.
[173] *Bowers*, 190-191
[174] Conway, 493.

power in regards to sexuality.[175] Canaday points out that "after the Second World War, an increasingly powerful state wrote [its new] knowledge [of homosexuality] into federal policy, helping to produce the category of homosexuality through regulation."[176] The juridical apparatus functions to "screen the sexuality of couples, parents and children" and determine right, natural, and permissible sexual behavior.[177] This is exactly what the Court has done in its analysis of precedent when it dichotomizes straight sexual behavior and gay sexual behavior. Anchoring his opinion on a comparison between the Court's decisions on family's inherent duty to procreate for the state, Justice White concluded, "No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated…any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable."[178] For the Court, the driving social unit of society has been the heterosexual couple which comes together, in the end, to procreate and form a family, anyone else is outside the bounds of society as a criminal other. Here we see that previous precedents have supported this line of thinking in which the rights of couples has been expanded to include access to contraception, the choice of spouse through the elimination of anti-miscegenation laws, and the legalization of abortions. These cases have, in the end, involved the state stepping in to support a broader range of family planning choices for couples, which allows the population as a whole to make decisions about how to run a family and how large a family should be up.[179] Justice White supports this

[175] Foucault, *History of Sexuality, vol. 1*, 30-31.
[176] Canaday, 3.
[177] Foucault, *History of Sexuality, vol. 1*, 30.
[178] *Bowers*, 186.
[179] This isn't to say that family planning, especially the choice of abortion, hasn't been a contentious social issue. But, in the end, expanding access to family planning services works from a conservative standpoint as

interpretation when he points out that precedent has set by *Carey v. Population Services International* did not extend Constitutional protections to all forms of sexual behavior.[180] Moreover, Justice White goes on to make the claim that the Court "[strives] to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values…"[181] Justice White reveals a twofold line of reasoning. First, it shows that the Court is aware that the public watches its decision-making, and because of this the Court must respond in a way that is viewed as legitimate by the public. Second, it shows that the Court itself functions with a governmental rationality, independent, or at least above, the ideologies of the individual justices. Socialization plays a key role in perpetuating social, economic, and political institutions. The justices, as members of society, have been socialized and those base beliefs and ideas promoted by the state such as nationalism, religion, capitalism, respect for authority and the rule of law surely plays a role in how they decide cases. On a conscious level, the justices are keenly aware of their position in society and within their institution which creates a belief that the state and its institutions that they serve should be safeguarded and maintained. This is an important factor because many scholars have argued that the Supreme Court operates, fundamentally, according to the justices' ideological leanings.[182]

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well. Conservatives argue against access to abortions, and to a certain extent even birth control, but at the same time they argue that couples should take financial consideration into the decision to have children. They argue that the poor should make the decision to not have children, because they oppose the welfare system that might be needed to support them, because the poor may not be in a financial situation to be able to afford children. So in the end, social conservatives might argue against abortion but the prospect of not having to support the children of the poor, the cost saving benefit, plays into their economic calculus too well to absolutely destroy it as a family planning option.

[180] *Bowers*, 186.

[181] Ibid.

[182] For an overview of scholars that adhere to this model see: Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, Cambridge: Cambridge University Press, 2002; Christopher Zorn and Gregory A. Caldeira, "Measuring Supreme Court Ideology", February 5, 2008 (Accessed September 13, 2014), http://www.adm.wustl.edu/media/courses/supct/ZC2.pdf; Jeffrey A. Segal and Albert D.

However, what seems more important to the work of the Supreme Court is the project of governmentality that the state has undertaken.

Productive Identity Construction in *Bowers*

The penultimate question is: why was it seen as productive for the state to criminalize homosexuality? This has to do with shaping identities that the state finds acceptable. It also has to do with what makes a productive citizen and the state's vital interest in producing productive citizens.[183] The Court, in the case of homosexuality, played a big role in shaping gay identity through the *Bowers* decision. As Conway notes, narrative in judicial opinions is important because the Justices speak on behalf of the parties to a case and are, therefore, responsible for crafting the image presented to the reader.[184] As I have argued earlier in this paper, the goal of the Supreme Court, as well as all institutions of the state, is the production of productive citizens to build a stronger population and a stronger state. Thus, sexual intimacy is important to the state due to the social ties that bind a family.[185] In *Bowers*, the Court came to the conclusion that that best way to produce productive citizens, in terms of how sexual practices shape them, was to continue the criminalization and stigmatization of sexual acts carried out by a minority of the population.

Cover, "Ideological Values and the Votes of U.S. Supreme Court Justices," *American Political Science Review* 83, no. 2 (June 1989): 557–565; Lee Epstein Andrew D. Martin, Kevin M. Quinn, and Jeffery A. Segal, "Ideological Drift among Supreme Court Justices: Who, When, and How Important?" *Northwestern University Law Review* 101, no. 4: 1483–1503.

[183] In sections that follow a dissection of each case I have a discussion about what sort of gay identity the Court has shaped and/or constructed. Part of this argument deals with citizenship, not only in the basic legal sense, but also in the sense that citizens are part of a unified social community. I want to make it clear that I am not conflating citizenship to identity here. These are two separate concepts that serve as several of the elements that construct people. They are, however, closely intertwined with one another and I feel that it is the states' interest in good productive citizens that has pushed it to tackle the problem of gay identity.

[184] Conway, "Judging," 166-167; James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism*, Chicago and London: University of Chicago Press, 1994, ix-x.

[185] Brown, 136-137.

From the perspective of an analytics of government, we come to the field of visibility. In this instance, the Court's object of study is gay and lesbian subjects. For the *Bowers* Court, productive citizens come down to those that conform to the standards of traditional heterosexual family. This means that a productive citizen is a heterosexual that marries, starts a stable family, has children, is economically independent of the state, conforms to the moral traditions of majority, and follows the rules and obligations that the state sets out. Non-productive citizens are those people that don't follow these economic, moral, social, and political conventions. This puts these people in a strained relationship to the state and calls into question their place within society and whether they might even be considered citizens of the community at all, even if they still possess citizenship in the most technical sense. According to the *Bowers* Court, gays are not productive citizens and the Court sees gays as primarily a group of people who are defined by their engagement with the sexual act of sodomy.[186] Because gays exist outside the realm of the productive citizen, the Court acts to penalize their behavior and brands them a criminal other. The Court constructs a "practicing homosexual" as a man who engages in a sex act that has been antithetical to the traditional moral teachings of Western civilization for millennia and is counterproductive to the state because he has chosen not to participate in a relationship with a woman under the institution of marriage.[187]

The Court's choice to define gays as criminal others raises a number of interesting questions. Why does the Court, in this instance, choose to criminalize this behavior? Why then construct a narrative that portrays gays as criminal others? Ultimately, what the justices

[186] Justice White calls Hardwick a "practicing homosexual", *Bowers*, 188.
[187] *Bowers*, 197.

are hoping for by criminalizing sodomy is the correction of said behavior through societal norms and self-government which represents the most effective tool of governmentality. The state has an interest in ensuring that the family structure remains intact. As Canaday puts it, "the state [is] concerned with using is resources to settle men… (think marriage, home, and reproduction)."[188] The logic of governmentality relies on the society to establish and enforce norms. In the context of sodomy, the majority of people have, at least when *Bowers* was decided, a negative view towards sodomy and homosexuality.

This brings us to the importance of social norms. Societal norms help shape the world in which we live. They guide the way we do things and the way we interact with people on a day to day basis. Why then are norms good in the eyes of the state? What purpose do they serve? Why is it productive to pursue normative policies? As both Justice White and Burger point out, norms that govern moral behavior have existed unchallenged for a long time.[189] David Evans argues, the state must pursue policies that "do not subvert the absolute moral sexual standards" of the community because otherwise the state might lose legitimacy.[190] The majority also favor these values because they have been long ingrained in the social structure of society in one form or another. Traditional norms also exist because they have been perpetuated through history. Therefore, these behavioral norms have mostly worked within society, otherwise they would be discarded and as such, the majority of people tend to favor them as ways of doing things.

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[188] Canaday, 15.
[189] *Bowers*, 192; *Bowers*, Chief Justice Burger, concurring, 197.
[190] David T. Evans, *Sexual Citizenship: The Material Construction of Sexualities*, London and New York: Routledge, 1993, 52.

In the context of homosexuality, Justice White and Chief Justice Burger argue that sodomy is outside the moral teachings that have shaped Western civilization and the United States.[191] Justice Harlan's dissent in *Poe* offers a glimpse of how the Court sees itself and how it sees its role in maintaining the morals of society:

> The inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical wellbeing of the community, but has traditionally concerned itself with the moral soundness of its people as well… Adultery, homosexuality, and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which, always and in every age, it has fostered and protected. It is one thing when the State exerts its power either to forbid extramarital sexuality altogether, or to say who may marry, but it is quite another when…it undertakes to regulate by means of the criminal law the details of that intimacy.[192]

The Court clearly lays out the state's interest in perpetuating its own moral agenda. The Court acknowledges the role that law plays and the role the Court plays in determining not only who can marry, but also what the content of that marriage will look like. The Court refrains from tampering with straight couples relationships on the one hand and forbids same-sex relationships on the other. The criminalization of alternative social and sexual relationships attempts to foreclose other possible kinship relations.[193] The practice of sodomy breaks social and moral traditions and must be opposed on these grounds. The state

[191] *Bowers*, 190; *Bowers*, Chief Justice Burger, concurring, 197.
[192] *Poe*, Justice Harland dissenting, 546-553.
[193] Canaday, 103-104.

accomplishes the introduction of norms and normalization through both a direct pronouncement of what is and is not permissible through the law and through disseminating these norms by way of the people themselves.[194] The state is most successful when people internalize these norms, correct their own behavior, and chastise the incorrect behavior of others. From this line of thinking, it can be inferred that the Court believes that legal prohibition of sodomy will drive people away from the practice.

Another example of the state's interest in making homosexuals a criminal other can be seen in government policies during the Great Depression when the state began to study the social situation of American families. The state found that many couples were forced to live with parents, communally with other couples, or to put off marriage all together due to their inability to support themselves in these harsh economic conditions.[195] The government became concerned due to the overwhelming number transient men who, after failing to provide for themselves and their families felt a certain feminization, were imbued with a sexually charged wanderlust.[196] The supposed promiscuity of men, coupled with their identification as the household's bread winner, becomes the primary factors that drive welfare policies towards families. This concern for the economic wellbeing of the family drove the state to pursue policies that pushed unemployed men out of the street and back into the home and institutionalized those that could not be reformed.[197] We can see that in social

[194] Margaret A. Paternek, "Norms and Normalization: Michel Foucault's Overextended Panoptic Machine," *Human Studies* 10 (1987): 97-121, 97-99.
[195] Ibid., 95.
[196] Ibid., 96-99.
[197] Ibid.

welfare and the courts, the maintenance of traditional family structures remains an important goal for the state.[198]

The Court also plays a role in reinforcing the social norms that already exist. Public disapproval of gays means that people from an early age will be socialized to disapprove of homosexuality. This puts a lot of social pressure on gay people to conform to heterosexual norms or be cast out of mainstream society and labeled a criminal. These social fears of discrimination, in turn, act on gay people to self-govern and conform to the heterosexual norm by marrying and beginning families with people of the opposite sex. The intention is to reintegrate those individuals who might stray from social norms back into the heteronormative family-oriented fold.[199] The goals of these sorts of social programs are not merely punish someone, but to reform them into a productive, 'normal' member of society, often through the use of incentives.[200]

Another question emerges: does the limited judicial enforcement of sodomy laws matter? No, enough enforcement of sodomy laws by the police keeps homosexual activity at bay. The state, at one time or another, also enforced removal of gays from military, immigration, federal jobs, and welfare ensuring that discouragement was felt.[201] This worked to keep gays in the closet or at the margins of American society. This also set the example for society at large who perpetuated animosity towards gays, further ensuring their status as

[198] While the Court did not create these laws it plays a vital role in their maintenance through their enforcement and promotion within the judiciary.
[199] Ibid. 109 and 116.
[200] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, New York: Vintage Books, 1995, 180.
[201] See Margot Canaday, who covers how the state discriminated against gays in most of these areas, during the 20th century, in her book *the Straight State*.

criminal others. Even if they are gay, the stigma will encourage them to remain closeted and follow the productive heterosexual paradigm.

The modern reasoning of government is based on a rational and scientific understanding of the nation and its population.[202] By examining non-normative sexualities, the Court codifies and strengthens them even in its attempts to curtail and control them. The Court can give existence to sexualities by acknowledging their existence within the framework of the state and by codifying definitions of sexualities in legal opinions. The Court is able to mold interpretations and explanations in the way that it sees fit. In the context of the 1980s, the *Bowers* decision makes logical sense according to governmental rationality. What the Court is faced with, in its view, is a social group that evokes intense animosity from the broader society. Gays and lesbians, especially in the context of the emerging AIDS epidemic and the American Psychological Association's delisting of homosexuality as a mental illness barely 10 years prior, could be seen as individuals who cause a lot of social upheaval by breakings traditional gender roles and sexual stereotypes and by being perceived as potentially sick individuals, either mentally or physically. From a public health and safety standpoint, it might be viewed as better to criminalize and marginalize this community, so that real or imagined social and health ills are not spread into the straight community. Both the possibility of disease and the breakdown of the traditional family represent a challenge to the functioning of modern society which relies upon, more and more, the family to take on the economic and social aspects of life that are being removed from the social welfare state. *Bowers* represents the Court's attempt to mitigate these negative trends by identifying gays

[202] Foucault, *Security*, 287.

as criminal others. In the next section, we will examine how *Romer v. Evans* focuses on how Court's amended governmental rationality would shape a new gay identity.

Romer v. Evans **– Gays and Lesbians as Just Like Everyone Else**

This section will track how the Court dealt with homosexual identity in the *Romer* decision. First, I will chart out the history behind the *Romer* case. Then, I will analyze the *Romer* decision and examine governmentality's place in it. Finally, I'll discuss identity construction in Romer and how the logical of governmentality would respond by creating a productive identity for gays and lesbians as a "just like everyone else" in the eyes of the state.

The History of *Romer*

Romer v. Evans emerged out of a 1992 amendment to the Colorado State Constitution.[203] Over the previous few years, a number of Colorado's urban centers, Denver (1991), Aspen (1977), and Boulder (1987) had extended protection from discrimination in employment and housing to their LGBT populations.[204] In 1990, Governor Roy Romer issued an executive order barring discrimination based on sexual orientation in state employment.[205] This extension of rights to gay and lesbian individuals triggered a backlash from conservative activists within Colorado. Colorado for Family Values then started a petition campaign and placed a constitutional amendment, called Amendment 2, on the 1992 ballot which stated that the local or state government:

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[203] My summation of the history of *Romer v. Evans* is derived from David A. J. Richards, *The Sodomy Cases: Bowers v. Hardwick and Lawrence v. Texas*, Lawrence: University Press of Kansas, 2009, 112-121 and Eskridge, 278-289.
[204] Eskridge, 279-280.
[205] Ibid., 280.

> Shall not 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.[206]

At the polls, a majority of Colorado voters voted in favor of Amendment 2.[207] A coalition of citizens, unions, and local governments filed a suit in Denver District Court to enjoin the implementation of Amendment 2 on the grounds that it was unconstitutional.[208] After reviewing the evidence, the trial court found that the plaintiffs' case had merit and issued a restraining order against the amendment.[209] The defendant then appealed the case to the Colorado Supreme Court.[210] The Colorado Supreme Court took up the case and agreed with the ACLU's argument that the law created a barrier to the LBGT community's "fundamental right to participate in the political process."[211] The infringement of a fundamental right caused the court to use strict scrutiny, meaning that the state would have to provide a compelling interest to sustain the law. The court remanded the case back to the original trial court where the challenge to the validity of the law would be heard. Colorado's legal defense of Amendment 2 consisted of four points. First, they made it clear that Colorado voters had wanted to make a statement about the morality of homosexuality without resorting to the criminalization of the intimate practices of gays and lesbians.[212] Second, the state argued that

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[206] Ibid., 280.
[207] Ibid., 280.
[208] *Evans v. Romer*, 854 P. 2d 1270)Colo. 1993) (*Evans I*), 4.
[209] Ibid., 8-9.
[210] Ibid., 10,
[211] Eskridge, 281.
[212] Ibid., 281.

gay rights should not be conflated with civil rights because the gay lifestyle was a choice whereas a person's skin color or sex was an innate characteristic of a person that could not be changed.[213] Third, the state argued that Amendment 2 protected the religious rights of Coloradans by allowing them to exercise their religious beliefs through the people that they hired for their businesses or who they provided services to.[214] Finally, the state argued that Amendment 2 deterred factionalism within the state due to the "deeply divisive issue of homosexuality."[215] The state put forth the claim that issues of sexual orientation and protections for people of different sexual orientations led to adverse political polarization in the state and that upholding Amendment 2 would bring back social harmony by suppressing the issues surrounding sexual orientation. The trial court judge found that the state of Colorado did have a compelling interest in Amendment 2. However, he noted that these interests were too disparately connected to Amendment 2 to survive strict scrutiny.[216] Therefore, Amendment 2 was ruled unconstitutional and the Colorado Supreme Court then affirmed the injunction that blocked Amendment 2's implementation. From there, the decision was appealed to the United States Supreme Court. Surprisingly, the Supreme Court agreed and stuck down Amendment 2.

[213] Ibid., 282.
[214] Ibid.
[215] Here Eskridge quotes the *Romer* Petitioner's Brief to the Supreme Court. Ibid., 282.
[216] Ibid. Eskridge draws on several sources: Timothy M. Tymkovich, et al., "A Tale of Three Theories: Reason and Prejudice in the Battle over Amendment 2," *University of Colorado Law Review* 68 (1997): 287-333; Lisa Melinda Keen and Suzanne Beth Goldberg, *Strangers to the Law: Gay People on Trial*, Ann Arbor: University of Michigan Press, 1998, 133-157; Richard F. Duncan, "Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom," *Notre Dame Law Review* 69 (1994), 393-445.

A Discussion of the Logic of Governmentality in the *Romer* Decision

Next, I will discuss governmental reasoning as it works in the *Romer* decision. Then I will discuss why the Court, in the *Romer* decision, constructed a gay identity that saw them as just like everyone else. The negative or absent place that gays and lesbians occupy within the law demonstrates the privileged position of straight people in the United States.[217] The state made it clear that it regarded heterosexuals as productive citizens, as opposed to gays. The state preferred to extend to heterosexuals social, political, and economic opportunities and advantages through mechanisms such as taxes breaks for married couples, protection for parental rights, Medicare and social security benefits for widowed spouses, and a whole host of other benefits. That was, and in many instances still is, the case.[218] One has to ask what the possible outcome of such an understanding is? Most heterosexuals had concluded that the government was correct in this decision to treat them favorably, since it is in their best interests.[219] What is important here is that the Court has been in line with the general attitudes of the population at large as well as the other way around. In contrast, gay rights activists are trying to be granted these rights and so they must petition the state for them. As a result, the gay rights movement must present itself in the most acceptable manner possible

[217] Not all laws have a heteronormative slant; clearly things like the rules of the road, housing construction codes, and financial market regulations have little or nothing to do with sexual orientation. But there is a whole class of laws that deal specifically with the regulation of familial relations (taxes, marriage licenses, and inheritance law). These areas, as well as others, continue to have a heteronormative bias that disadvantages gays and lesbians through outright prohibition or omission.

[218] Even though the federal government has recognized same-sex marriages, after the *Windsor* decision, many states still bar same-sex marriages and have not extended discrimination protections to gays.

[219] Gallup, "Gay and Lesbian Rights," *Gallup*, (Accessed September 22, 2014), http://www.gallup.com/poll/1651/Gay-Lesbian-Rights.aspx. If you look at the data for the time period in discussion here, any time before the mid-1990s, a significant anti-gay bias can be observed. Nathaniel Persily's data shows an 11 percent increase for support of the criminalization of sodomy in the wake of the *Bowers* decision and an 8 percent drop in support for decriminalization after *Lawrence*. Nathaniel Persily, "Gay Marriage, Public Opinion and the Courts," *Penn Law: Legal Scholarship Repository*, Faculty Scholarship, Paper 91 (2006): 9 & 17 (Accessed November 9, 2014), scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1090&context=faculty_.

in order to have the best chance for success.[220] They can appeal to the sympathy of the majority in this fashion. This is to the Court's benefit too because, as Justice White pointed out earlier, the Court is constantly afraid of losing legitimacy in the eyes of the public.[221] The attitude of the population at large represents the success of institutions in shaping the attitudes towards gays and lesbians.

Change in the social conditions of the 1990s, however, would pose a challenge to the reasoning of the Court's previous decision. Justice Kennedy's majority decision in *Romer* straddles a line between *Bowers'* "not like straight" logic and *Lawrence*'s "like straight" logic. The *Romer* majority continues *Bowers'* "not like straight" logic for more benevolent ends by seeking to remove the gay's status as criminals, at least partly, that the *Bower*s decision lay upon them. It accomplishes this through its departure from *Bower*s' essentialist view of gay behavior and identity. Instead, they rely on a nominalist view that gays and lesbians are merely a named class who are not intrinsically imbued with defining characteristics.[222] For Justice Kennedy, gays and lesbians take on traits as they are actively engaged with society and the law.[223] As with straight people, Justice Kennedy views the sexual orientation of gays and lesbians as merely one trait that they possess among many.[224]

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[220] Franke, 1419. Craig A. Rimmerman, *The Lesbian and Gay Movements: Assimilation or Liberation?* Boulder: Westview Press, 2008, 133.

[221] Justice White states that the Court strives "to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of Justices' own choice of values…The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution," *Bowers*, 191 & 194.

[222] Halley, *Romer* v. *Hardwick*, 439-440.

[223] Ibid. For Halley the *Bowers* decision focuses solely on sodomy as the defining characteristic of "homosexuals". Halley argues that, For the *Bowers* Court, this is all that is needed to be known about a gay person, from this view they are too enthralled by the act of sodomy to consider the other dimensions that construct a well-rounded view of an individual as a person: life experiences, culture, language, occupation, and

What we see in *Romer* is the beginning of a "like straight" logic emerging in Court discourse. This differs from the logic of *Bower*s which set people apart according to sexual orientation and gender. For the *Romer* majority, "the *real* content of the class is quite beside the point: if the same discrimination were inflicted on blondes or burglars, the same conclusion would follow."[225] From this quote, we see that the Court feels that gays should be treated like any other group, the most obvious equivalent being heterosexuals, within society. The State of Colorado made the claim that Amendment 2's purpose was to merely to prevent gays from obtaining special rights. However, the Court majority did not find this line of reasoning compelling.[226] The Court finds that even if Amendment 2 were to simply repeal the existing protections for sexual orientation, it would not be a legitimate state interest.[227] The *Romer* Court, however, notes that the scope was far larger than merely removing existing protections. Instead, gays would be singled out and afforded no protections as a group of people based on their sexual orientation, thus opening up the possibility of widespread discrimination and no recourse to resolve it.[228]

The Court begins to reconsider the governmental relationship between the state, the law, and sexual minorities. The Court interest in this is in biopower: the attempt by the state to understand, influence, and control the biological world, especially human biology.[229] Foucault states that biopolitics "aims to treat the 'population' as a set of coexisting living

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hobbies. This s contrasted by the *Romer* decision where gays and lesbians might have a homosexual sexual orientation but that is merely one aspect of an individual and does not constitute their whole being.

[224] Justice Kennedy states that Amendment 2 "identifies persons by a single trait and then denies them protection across the board." *Romer*, 233. It can be inferred from this that Justice Kennedy believes that people possess more than one trait.

[225] Emphasis in the original. Halley, *Romer* v. *Hardwick*, 440-441.

[226] *Romer*, p. 626.

[227] Ibid., 626-627.

[228] Ibid., 627.

[229] Foucault, Michel, *Society Must Be Defended: Lectures at the Collège de France, 1975-1976*, New York: St. Martin's Press, 1997, 239-240.

beings with particular biological and pathological features, and which as such falls under specific forms of" knowledges and techniques such as public health and hygiene, medicine, sociology, psychology.[230] Changing social attitudes over the preceding decade likely played a role in how the Court viewed gays and lesbians in the *Romer* decision, including the increasingly accepted notion that there is a biological link to sexual orientation.[231] Governmental rationality is predicated on a number of distinct features: the tripartite social order; the existence of rights, equality and liberty; and the state as the guarantor and protector of citizens and rights, as well as constituting the domain of the political.[232] The most important of these, the tripartite social order is comprised of three components that make up modern society: the private sphere of the family, the public sphere of the economy and civil society, and the state itself.[233] These facets of society are all interconnected but, at the same time, distinct from one another. It is the task of the state to manage all three component parts. The Court plays a role in this as the distinction between all three parts is clear, within the law, and they are each treated differently by the law. As Foucault puts it, governing these components of society is a matter of:

> Ensuring that the state only intervenes to regulate, or rather allow the [natural] well-being, the interest of each to adjust itself in such a way that it can actually serve all... [in a manner that ensures the] processes of a naturalness specific to relations between

[230] Foucault*, Security,* 367.
[231] For polling of public attitudes towards gays and lesbians see the Gallup poll supra note 219.
[232] Brown, 145-146.
[233] Ibid., 144-148.

men, to what happens spontaneously when they cohabit, come together, exchange, work, and produce…the naturalness of society."234

The point for the state, then, is to guide society in a way that ensures the continued functioning of society but not in a way that overbearingly regulates the bounds of liberty of the individual and population at large. This emphasis on the naturalness of society and the need to work within the bounds of it differs from; say the regime of feudalism and the logic of sovereignty which placed subjects at the mercy of the goals of the sovereign and their obedience to the law. This new governmental reasoning, imbued with the understanding of the economy, has transformed the institutions of the state into agents of surveillance and regulation of society and not merely the agent of sovereign juridical power. As Foucault asserts, "a condition of governing well is that freedom, or certain forms of freedom, are really respected. Failing to respect freedom is not only an abuse of rights with regard to the law; it is above all ignorance of how to govern properly."[235] What, then, does this mean for the Court? It means that the Court serves the interests of society and the population, in the most efficient and productive way possible, when it constructs a constitutional framework that emphasizes personal freedoms and participation in the society and the political system. To do otherwise discourages people from being active in society and creates any number of economic, social, and public health ills.[236]

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[234] Foucault*, Security,* 346.
[235] Foucault*, Security,* 353.
[236] This line of thinking can be seen in Canaday's work, *the Straight State*, and her examination of welfare policies during the Great Depression. She shows how this economic turmoil, and the lack of adequate government response during the early parts of the crisis, pushed men and boys towards a life of vagrancy and, from a contemporary point of view, into the arms of debaucherous and perverse behavior amongst themselves.

According to the logic of Amendment 2, the essential characteristic of homosexuality cannot be ignored and consequently gays are denied special protections and must rely on general legal principles to protect themselves as individual subjects before the law. With *Bowers* remaining law, if it is rational to criminalize gay conduct, it is also rational to discriminate the people most likely to engage in said conduct.[237] Justice Kennedy, on the other hand, moves past these issues by finding means to view the discrimination not through the lens of any sexual orientation and by constructing sexual orientation as merely a "legal personal relationship" and not a form of personhood.[238] Justice Kennedy holds that even if general laws might protect gays from discrimination, a claim he doubts, the injury that Amendment 2 inflicts on gays is far broader than what the state claims it is.[239] Halley points out that Justice Kennedy's concern about sexual orientation and sexual status "runs not to the nature of the group but to the inferences about particularized conduct that an allegation of group membership could sustain."[240] The mere mentioning or inferring that a person might be gay can lead to discrimination for which no remedy might exist. This creates a slippery slope that can lead to real discrimination and so the Court finds "nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them."[241] Justice Kennedy realizes that

[237] Halley, *Romer* v. *Hardwick*, 443.
[238] Ibid., 445. Again Justice Kennedy here is fighting the notion in *Bowers* that sexual orientation is all that constitutes gays and lesbians as people, that their sexual orientation is the whole of their personhood and that if you were to remove their sexual orientation that they would seemingly cease to be people at all.
[239] *Romer*, 631.
[240] Halley, *Romer* v. *Hardwick*, 443.
[241] *Romer*, 631.

in order to put gays on an equal footing as straights, to make them "just like straights", then Amendment 2 cannot withstand constitutional scrutiny even a mere rational basis.[242]

The *Romer* Court comes to these conclusions because of governmentality's interest in preserving the rights of individuals in relation to each other and the state.[243] The state protects and influences these interests by being the site of contestation for arguments regarding the nature of rights, equality, and liberty in the political system. The major theme in *Romer*, equality before the law, is also a major theme in governmental discourse. The naturalness of society is taken for granted by the institutions of the state, including the Court. By this logic, all member of a society, the population, are presumed to be equal to one another before the law by virtue of being members of the state.[244] The Court is well aware of the principle that all citizens are equal before the law and acted in *Romer* to defend that principle. As Justice Kennedy states, "homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and if forbids reinstatement of these laws and policies."[245] The Court actually promotes social cohesion by removing a law that clearly targeted one group and attempted to strip them of legal recourse from discrimination.

By coming down against Amendment 2, the Court also acted to further the governmental goal of protecting liberty. Liberty, the ability to do what one pleases without governmental interference, is seen as a social good by the rationality of government because

[242] Ibid., 632.
[243] Brown, 145.
[244] Ibid., 145-146.
[245] *Romer*, 627.

it allows the population of society to work out amongst them the best ways for conducting their lives and their interactions with one another. In this way, Amendment 2 interferes with the governmental interests. According to Justice Kennedy, Amendment 2 strips gays and lesbians from protections in public accommodations, housing sales, insurance, social welfare and health services, private education, and employment.[246] It also blocks any level of government within Colorado from extending protections to gays and lesbians from discrimination.[247] Amendment 2's intent was to block the state from putting in place regulations that would prevent discrimination based on sexual orientation. However, what the wording of the amendment actually lays out is a framework that does not block anti-discrimination legislation in all cases but merely those that involve people who are defined as gays, lesbians, and bisexuals.[248] General legal safeguards are denied gays by Amendment 2 and because of this a specific burden is placed upon them that no other group must endure, this is regardless of "how local or discreet the harm" or "how public and widespread the injury."[249] Halley provides a mundane, but salient example of how this injury could occur in even the most innocuous of settings.[250] Halley provides the example of a lesbian patron trying to obtain a library card from her local library: with Amendment 2 in force the librarian could deny the patron a library card on the grounds that "lesbians have no place in a public library," but at the same time, the librarian could issue the card anyway for fear that the

[246] Ibid., 629.
[247] Ibid.
[248] Halley, *Romer* v. *Hardwick*, 448. The text of Amendment 2 makes clear that the state may not enact protections based upon, "homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships," Colorado Constitution, Art. II, §30b. From this perspective Amendment 2 does not really cover the whole wide array of sexual orientations, conducts, practices, and relationships, merely the narrowly defined categories as mentioned in the text. Thus it leaves open the possibility of the state offering protections to straight people or categories of people not defined by concepts of the gay, lesbian, or bisexual.
[249] *Romer*, 631-634.
[250] Halley, *Romer* v. *Hardwick*, 450.

patron may have legal remedies available in general law.[251] Yet the library management would be unable to form any coherent and generalized policy regarding the issuance of library cards because they would be forbidden from addressing discrimination based on homosexual status.[252] Thus discriminatory policies that target gays make social interaction within society arbitrary and difficult for the state to control. The state would become awash in a sea of litigation from public and private parties which is something that the state wishes to avoid. Foucault points to this when he notes that power "must be understood…as the multiplicity of force relations…whose general design or institutional crystallization is embodied in the state apparatus, in the formation of the law."[253] What Foucault points out here is that the law represents the crystallization of power and force relations within society thus enables us to see that the Court plays a vital role in shaping the bounds of the law. The Court decision in *Romer* can be seen as one institution's attempt to reclaim a bit of its ability to govern which might be lost if Amendment 2 remained valid law. The law remains a useful tool for the state to govern and shape the population and territory it controls accordingly the law remains a vital tool in this endeavor.[254] This being the case, the Court cannot validate the constitutionality of Amendment 2 because it does not conform to its ideals of rational government. Amendment 2 works against governmentality's logic by eliminating the ability of people to determine for themselves how best to interact with gays and lesbians. It would restrict the ability of the government, individuals, and businesses to work out their own policies towards gays and lesbians. Instead, the law works to decide for the population as a

[251] Ibid.
[252] Ibid.
[253] Foucault, *History of Sexuality, vol. 1*, 92-93.
[254] The state represents the sphere in which the "rationality of an art of government" is realized. The library example show the irrationality of reality and thus the state and its institutions are forced to intervene in order to try and mold reality in the image of its own rationality. See Foucault*, Security,* 262 and 286-287.

whole that gays and lesbians are undeserving of protections from those who would discriminate against them. While the decision in *Romer* does not explicitly argue against the Court's earlier reasoning in *Bowers*, in regards to sexual liberty, it does spell the end for *Bowers*'s narrow, anti-liberty sentiment with the Court. Logically, the law must be overturned because it represents, in one sense, a return to the juridical sovereign interpretation of law that narrows the law to a mere list of things that are prohibited, instead of the productive force that the law is imbued with under the logic of governmentality. The voters of Colorado had overstepped their rightful boundary in passing such a sweeping piece of legislation, putting themselves into the position of the sovereign of old and using the law as a tool of mere subjugation.

Governmentality sets its task as the ordered management of society. To ensure this, Foucault states that "the basic principle of the state's role…[is] respect [for] these natural processes…take them into account, get them to work, or to work with them…The fundamental objective of governmentality…will be state intervention with the essential function of ensuring the security of the natural phenomena…"[255] The way that society works can be studied and what the state learns about society can be applied towards creating systems that better manage it.[256] What we can see in the *Romer* case is the glimpse of an acknowledgement that the Court may be wrong in the way that it has treated gays and lesbians. Justice Kennedy opens the opinion by stating that the state has a commitment to the law's neutrality where the rights of people are at stake.[257] This can be read as an

[255] Foucault*, Security,* p. 353.
[256] In regards to the notion of nature this refers to the way in which people interact with each other and the generalizable patterns of behavior that have been observed by biologists, sociologists, psychologists, doctors, and political scientists.
[257] *Romer*, 623.

acknowledgement that there is room for expanding the rights of gays and lesbians. Justice Kennedy goes on to argue that gays and lesbians are unfairly put in a "solitary class" that easily curtails their private relations and public dealings.[258] From this perspective "a condition of governing well is that freedom…is really respected. Failing to respect freedom is not only an abuse of rights with regard to the law; it is above all ignorance of how to govern properly."[259] This opens up the opportunity to grant gays and lesbians more rights than had previously been accorded them. We see the Court realigning the way it views gays so that they *can* come back into the law and society.

Productive Identity Construction in *Romer*

Romer marks a turning point in the Court's understanding and opinion of gay identity. In *Romer*, the Court begins to see gays not as criminal others needing to be driven underground or from the community, but as an equal member of American society. The heart of the *Romer* case is about gays' access to public accommodations. Colorado's Amendment 2 holds to the standards set in *Bowers* and aimed to make it acceptable for the state and the public to shun gays and lesbians. The law would have continued that practice of treating gays and lesbians as criminal others. In this case, the Court takes up the mantle of acceptance of gays and pushes the public towards this end through its authority.

The Court reconsiders the gay identity of *Bowers*, even if it does not address *Bowers* specifically. The *Romer* decision is about strengthening the productive forces of the state. The focus of the state is in strengthening itself and its population.[260] Foucault states that those

[258] Ibid., 627.
[259] Foucault, *Security*, 353.
[260] Ibid., 295.

"who govern must know the elements that enable the state to be preserved in its strength or in the necessary development of its strength..."[261] Consequently when the *Romer* Court looks to gays, it realizes that there is no need to define gays as a criminal other any longer. This is a realization that the logic of governmentality, through the tool of normalization, can modify gay identity. In the end, gays can become like everyone else. From the rationality of government, this is a useful end, because the Court can alter gay identity, taking unproductive citizens and making them productive members of society.

One motivation for this is an economic component to the normalization of gay identity. As David Evans states, "the legalization of previously illegal and thus non-consuming sexual status groups, for example, most spectacularly, male homosexuals…[releases] considerable consumer power and [enables] the development of considerable specific minority commodity markets."[262] To accomplish this end, however, the Court must return gays to an equal footing within society by prohibiting outright discrimination.[263] This is evident by Justice Kennedy's concern over gays and public accommodation.[264]

Justice Kennedy continues his "just like everyone else" logic in his reading of Amendment 2. Justice Kennedy states that "we find nothing special in the protections Amendment 2 withholds. There are protections taken for granted by most people either because they already have them or do not need them. These are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civil

[261] Ibid., 274.
[262] David T. Evans, *Sexual Citizenship: The Material Construction of Sexualities*, London and New York: Routledge, 1993, 51.
[263] *Romer*, 630-631.
[264] Ibid., 629.

life in a free society."[265] This demonstrates Justice Kennedy's intent to put gays on an equal footing with the rest of society and make gays just like everyone else. By transforming gay identity into a parallel of the majority is to extend not only the rights, but also the obligations of productive citizenship to gays. That is to say, if gays want to be treated equally, they must not be "a stranger to the law," but instead they must conform their behavior to the majority.[266] Accepting gays back into the arms of society is productive, because it sets up gays to want to bargain for more rights from the Court. For example, the right to not be discriminated against, for their intimate private lives to be decriminalized, and the state to recognize their relationships. However, these rights will come with the price of molding their image according to the dictates of the Court. We will see this strategy come to fruition when we next examine the Court's decision in *Lawrence*.

Lawrence v. Texas **– Gays and Lesbians as Just Like Straights**

This section will track how the Court dealt with gay and lesbian identity in the *Lawrence* decision. First, I will chart out the history behind the Lawrence case to provide some context. Second, I will analyze the Lawrence decision in order to inspect governmentality's place in the decision. Finally, I'll discuss identity construction in *Lawrence,* and how the logic of governmentality worked to create a productive identity for gays and lesbians as "just like straights" in the eyes of the state.

[265] Ibid., 631.
[266] Ibid., 635.

The History of *Lawrence*

First, I will look at the history of *Lawrence*. In 2003, the Supreme Court significantly altered the legal status of gays in the United States. This reflected a larger cultural change that had occurred over the previous 17 years which made gays a more visible and stronger force within American culture. The courts too, have had an impact on how gays and lesbians have been perceived and how they have perceived themselves through language used in decisions pertaining to them.

The specific circumstances that surround the history of *Lawrence v. Texas* are less clear and straight forward than the events of *Bowers v. Hardwick*.[267] On the night of September 17, 1998, Harris County sheriff's deputies responded to a call that a man was going wild with a gun in an apartment. When the officers arrived at that apartment they entered and found John Lawrence and Tyron Garner engaging in consensual sodomy. After they were detained, it became apparent that the man who had led the officers to the apartment, Robert Eubanks, had phoned in a false police report. All three men were then arrested; Eubanks for filing the false report and Lawrence and Garner for violating Texas's homosexual conduct law.[268] However, all of the arresting officers each gave slightly different accounts of the events and John Lawrence, Tyron Garner, and Robert Eubanks have never given any public interview that detailed the events of that night. A full history is also unlikely to emerge with the death of Eubanks in 2000 and Garner in 2006. This reveals one of the

[267] My recounting of the history leading up to *Lawrence v. Texas* is collected from an amalgamation of four sources: Dale Carpenter, "The Unknown Past of Lawrence v. Texas," *Michigan Law Review* 102 (2004): 1464-1572; *Lawrence v. Texas*, 539 U.S. 558 (2003); David A. J. Richards, *The Sodomy Cases*; William N. Eskridge, Jr. *Dishonorable Passions*.

[268] *Lawrence*, 562-63.

most interesting aspects of the case: the fact that it isn't known whether any of the sheriff's deputies actually witnessed Lawrence or Garner performing a sex act.[269] Although two of the sheriff's deputies, Joseph Quinn and William Lilly, still claim that they did witness the acts.[270] Regardless, Officer Carpenter contended that it was only when Lawrence began using obscenities toward the officers and became uncooperative that they decided to enforce the sodomy statute.[271]

After the arrest, Garner and Lawrence came into contact with the ACLU and they agreed to turn their arrest into a test case before the Supreme Court. They pled not guilty and were convicted by a Justice of the Peace. They were then granted a new trial before the Harris County Criminal Court. They contended that the homosexual conduct statute was unconstitutional. Their claims were rejected by the trial court. Upon appeal, their case traveled to the Court of Appeals for the Texas Fourteenth District so that Lawrence and Garner's constitutional claims could be heard. The Court of Appeals again rejected their claims that the law violated the Due Process and Equal Protection Clauses. The court held that *Bowers* held precedent over the matter.[272] The case was then appealed to the Supreme Court. The Court considered three questions: First, whether the Texas statute that singled out gays violated the Fourteenth Amendment's Equal Protection Clause. Second, whether the statute violated the petitioner's right to liberty and privacy under the Fourteenth Amendment. Third, whether *Bowers* should be overturned. In the end, in a five to four decision authored

[269] Carpenter, 1465. Another version of events, as told to Carpenter by Lane Lewis who was Lawrence and Garner's would-be PR manager, Lawrence and Garner were in separate rooms when the police arrived.
[270] Ibid, 1482 & 1485. Interestingly in the police report filed by Quinn he lists Lilly as the only person to witness the crime. However, in the interview Deputy Quinn gave to Carpenter he claims to have watched the two men for over a minute before interrupting them.
[271] Carpenter, 1511. Eskridge makes a similar claim in *Dishonorable Passions*, 312.
[272] *Lawrence*, 563.

by Justice Anthony Kennedy, the Court ruled the law did violate the Due Process Clause and the Equal Protection Clause, as well as violated Lawrence and Garner's right to privacy. The Court ruled that *Bowers*, having been too narrow in its analysis, should be overturned. With this decision the Court struck down the remaining sodomy laws in the United States.[273]

A Discussion of the Logic of Governmentality in the *Lawrence* Decision

Second, I will discuss the logic of governmentality as it works in the *Lawrence* decision. The Court and its perspective may have a greater impact on the thinking of gay rights activists than the other way around. This can be seen, in part, through the utilization of the legal system by gay rights activists as the primary vehicle for advancing gay rights. Resistance to power plays a large role in determining how power acts upon the social body, because resistance is constitutive of power.[274] This interconnectedness between power and resistance becomes evident by examining the arguments for gay rights articulated by gay rights activists in the *Lawrence* case. Golder states that the law changes as parties interpret and challenge the law, and novel concepts and understandings can emerge from interpretation. This is accomplished through briefs and oral arguments. All sides of a case develop their arguments, present their facts, and share ideas. The Court must then respond to these parties and their arguments by adopting some, rejecting others, and developing their own arguments. Further, both the courts and those who challenge the law respond to one another and shape each other's arguments and perceptions.[275] Because of the interplay between courts and respondents, the Court plays a role in determining what gay private life looks like, in the form of adopting the "like straight" language of gay rights activists. In so

[273] Eskridge, 368.
[274] Golder, "Foucault and the Incompletion of Law," 760.
[275] Golder, 760.

doing, the Court realized that they had been too heavy-handed in dealing with gays.[276] Justice Kennedy takes issue with the *Bowers* decision stating that "to say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[277] Here the "like straight" logic goes to work by comparing gay sex to straight sex, in the context of a marriage, and finds that, because gays are like straights, that gays are entitled to the same rights as straights. Gay relationships might not be a marriage but they are similar enough to warrant some protections, from Justice Kennedy's standpoint. What we see with *Lawrence* is an attempt by the Court to address some of the limitations of both the earlier *Bowers* and *Romer* decisions. The logic of governmentality, which guides the Court and state institutions, must take into account how it manages society because "it is always necessary to suspect that one is governing too much… [The] imperatives of bio-political norms…lead to the creation of a coordinated and centralized administration of life [and] need to be weighed against the norms of economic processes and the norms derived from the democratization of sovereign subject of right."[278] Mismanagement of society such as being too restrictive can lead to harm for the population, the economy, and the state. In this context, the Court has come to realize, starting with the *Romer* and continuing with *Lawrence*, that it has mismanaged the Court's relationship with gays. Turning them into criminals and ostracizing them from the large community harmed society as a whole and that "when homosexual conduct is made criminal by the law of the State, that declaration in and of itself in an invitation to subject homosexual persons to

[276] *Lawrence*, 567.
[277] *Ibid.*
[278] Dean, 101.

discrimination both in the public and private spheres," which is something that the *Lawrence* Court is not willing to allow.[279] Biopower is the composition of forces exerted by an individual or institution on themselves or another that governs the biological facets of our lives, including public hygiene, medicine, psychology, sexuality.[280] This interest in the biological functioning of the human species is found in institutions such as hospitals, schools, in the social services, and in more abstract form, ideas such as sexuality. The state must weigh the benefits of intervening in the daily lives of citizens with the need to control these issues on the scale of the population as a whole. In the modern era, the biological becomes one more realm of study for the state in its quest to address all problems affecting the wellbeing of the population. When the state deals with problems such as sickness, disease, natural disasters, displacements, and changes in the environment, it must collect and analyze information to develop policies that address these problems, but do not unduly burden the prosperity of the population at large. The governing rationality of the modern state rests on the notion that social and economic practices must be allowed to develop without the overbearing influence of government and state intervention, because people will naturally come to the best solutions to their own problems. This notion comes out of the development of capitalism and subsequent economization of the functions of the state, imbuing them with the logic, reasoning, and analytical tools of capitalism which pushes the conclusion that the more freedom that the state allows to exist, democracy being just one element, the better the population flourishes and evolves along its own course. All of these factors being the case, too much direct intervention by the state could lead to a decline in the productivity, wealth, and security of the state. These sorts of bio-political issues are also best left for individuals to

[279] *Lawrence*, 575.
[280] Foucault, *History of Sexuality, vol. 1,* 140.

decide with the government intervening later and at the margins as to not upset their smooth functioning.

From here we get to the juridical apparatus's intervention into the sexual sphere of life. For our purposes, an examination of how the Supreme Court has treated and shaped gay identity, we begin with a look back at the *Bowers* decision. "All instances of governance contain elements of attempt and elements of incompleteness which at times may be seen as failure."[281] *Bowers* might be seen in this light and *Lawrence* is its correction. *Bowers* did not stop gays, or straights for that matter, from continuing to engage in acts of sodomy. For the majority of people committing these proscribed acts, the legal penalties associated with them don't cross their mind. Thus, the law fails to regulate and control what it had intended to and in turn fails to govern. Justice Kennedy, in *Lawrence*, finds the narrow focus of the *Bowers* Court on sex acts unappealing.[282] So Justice Kennedy identifies other aspects of proscribed relationships, stating that "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."[283] This immediately set the bounds for the sexual liberty at question in the case. This will not be a case that lifts up every individual's right to sexual freedom, nor will it comment on many forms of relationship or sexual behavior. Instead, Justice Kennedy notes that *Lawrence* involved the transcendent dimensions of personal liberty for him meanings, notions of love, fidelity, and family.[284] Bluestone states that "in proclaiming that the liberty in this case

[281] Hunt, 79.
[282] *Lawrence*, 567.
[283] Ibid., 578.
[284] *Lawrence*, 562.

extends to more transcendent dimensions, Justice Kennedy, in effect, announced that the issue presented goes beyond the issue of homosexuality."[285] Instead, it focuses on the real purpose of all sexual and romantic relationships whichfor Justice Kennedy is coupledom.[286]

Couples represent a social good in the eyes of the state and so Justice Kennedy is structuring his argument and language to emphasize that sexuality is not about sexual gratification, but is merely one part of building a long lasting relationship between two people.[287] His end goal is the reconceptualization of gay identity, not as a criminal other that exists outside of society, but as people who are like everyone else or just like their straight counterparts.[288] Having people enter into long lasting relationships represents a more productive end and means of control than criminal penalty. Justice Kennedy argues that the *Bowers* decision demeans the issue that it was presented with by unfairly narrowing the scope of the case as to whether the Constitution protected a right to engage in homosexual sodomy.[289] Justice Kennedy notes that, "After *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship… [Yet] to say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim…just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[290] On the one hand, Justice Kennedy claims that *Griswold* sets the precedent for sexual freedom beyond marriage, and on the

[285] Bluestone, 208.

[286] These authors do not use the word "coupledom" but do point to the fact that Justice Kennedy is reinforcing rights for couples. Franke, 1409; Ruskola, 241.
[287] *Lawrence*, 567.
[288] Ibid., 573-574
[289] Ibid., 567.
[290] Ibid., 565 & 567.

other, he claims that sexual freedom, in and of itself, is possibly demeaning.[291] While this claim might seem perplexing, within the productive logic of governmentality, it makes sense. Justice Kennedy is building a case for coupledom by tying sexual activity with relationships "when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."[292] Given that Lawrence and Garner were not a couple and were engaged in casual sex makes this linkage between sex and marriage technically disingenuous. For Justice Kennedy, the Court is not illegitimate in its aims or methods when it strives to expand this coupled sexual liberty to gays and lesbians.

In addition, the question of a right to privacy in intimate matters is a major theme found in Justice Kennedy's opinion. Kennedy affirms that couples share a right to a private intimate life without the interference of the government. He demonstrates the influence of governmentality's belief in allowing social interactions between people to happen naturally, that is to say, at the discretion of the parties involved, instead of being directly controlled by government.[293] Relying on a number of historical studies on the origin of homosexuality as a scientific and medical term, Justice Kennedy argues that no longstanding tradition of prohibiting homosexual activity existed in the United States, because the term "homosexual" did not exist until the late 19th century.[294] Foucault, himself, confirms that homosexuality emerged as a medical term and an identity in the 19th century.[295] After making the argument that laws specifically targeting homosexual behavior are an invention of the mid-20th century, Justice Kennedy lays out the Court's belief that gay and lesbian couples should have the

[291] Ibid., 567.
[292] Ibid.
[293] Foucault*, Security,* 346-349.
[294] *Lawrence*, 568.
[295] Foucault, *History of Sexuality, vol. 1*, 43.

same right to an intimate private life as heterosexual couples.[296] Through this argument, he constructs an acceptable gay identity. Justice Kennedy states gay couples exist and in the same way as straight couples. Consequently, it would be unfair to criminalize gay behavior, because in some instances straight behavior is not criminalized.[297] Even if sodomy was banned in all cases, the possibility of stigmatization and discrimination still remain for gays because that is the act that gays are linked to in the broader culture.[298] Here we see the importance of normalization. What Justice Kennedy has done in his opinion is to create an acceptable norm for gay behavior. This standard happens to be the same one placed on straight couples. So if gays want legitimacy and recognition from the state, they need to conform to norms of the heterosexual couple.

Productive Identity Construction in *Lawrence*

By the time that *Lawrence* was decided, acceptance and visibility of gays and lesbians in the United States had increased.[299] Likewise, they had become a far more active and vocal group within American society. Given the increasingly pluralistic culture, driven by individual wants and desires, morals can now begin to be driven like market forces. Not by direct economic means, though that is present, but in the sense that there is a "market place of ideas" where people are more and freer to choose what moral foundations they shall ascribe too. Justice Kennedy writes, "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[300] By this point in

[296] *Lawrence*, 567.
[297] *Ibid.,* 574-575.
[298] *Ibid.,* 575.
[299] See note 219.
[300] *Bowers*, 562.

time, it could be argued that gays deserve rights because they represent one lifestyle among many.

At the same time, the Court still defines a normal life in relation to a heterosexual standard. However, because *Romer* established that gays were, in fact, just like everyone else, this opened space for the Court to manipulate gay identity. Homosexuality, then, becomes just one facet of a person and they can still conform to the heterosexual norm, even if their partner is of the same sex. Because of this, the possibility emerged to grant gays the same right to form a couple that had been granted to straights.[301] In response, a growing number of gay rights organizations, attempting to win rights such as marriage from the Courts, began to adopt an argument that gays were just like straights.[302] Instead of pursuing alternatives to marriage, gays shore up the heterosexual institution of marriage.[303] From here, we can see that Justice Kennedy latches onto the just like straights logic, and elaborates on what he sees as the heart of the *Lawrence* case: "To say the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said that marriage is simply the right to have sexual intercourse."[304] Kennedy's like-straight analogy kicks into full gear later in the opinion. Justice Kennedy states that, "when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the

[301] *Lawrence*, 574.
[302] Rimmerman, 99.
[303] Jonathan Rauch, *Gay Marriage: Why it is Good for Gays, Good for Straights, and Good for America*, New York: Times Books, 2004, 5-6.
[304] *Lawrence*, 567.

right to make this choice."[305] Justice Kennedy conceptualizes gay relationships along the same lines as straight relationships.[306] What Kennedy has attempted to do, through this "like-straight" analogy, is reign in any possible conception of gay relationships that take place outside of committed, monogamous relationships. He makes the comparison between straight and gay couples here. This is the beginning of his "like-straight" analogy. Justice Kennedy props up the right to engage in sodomy with the plank of marriage. What was once morally unacceptable becomes acceptable by close association with coupledom. This coupling of gays is beneficial to the state because it puts them in the same sort of social arrangements as heterosexuals. Justice Kennedy realizes that coupledom can and does exist among gays and lesbians and accordingly they can also form a family.[307] Justice Kennedy states explicitly that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education…Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."[308] To reiterate, the family is important to the state because it is a site of childrearing, passing on the standards of conduct of society, a place of social support in hard economic times and old age, and provides stability in the lives of individuals. Carol Pateman makes the case that the intertwined nature of conjugal and paternal rights of fathers forms the basis of the social contract, and that it is the division of labor between men and

[305] Ibid.
[306] In the end, clearly human relationships are more complex than the courts have envisioned them to be. Work done in the social sciences, as well as lived experience, seems to show that sexuality takes many forms alone or with a partner or partners and the same can be said of other forms of relationships as well.
[307] *Lawrence*, 573-574.
[308] Ibid., 574. This is not signaling that the state will recognize same-sex marriages, a point Justice Kennedy explicitly makes, but it does push the direction of the state towards recognizing gay families as legitimate. And, as history points out, it actually does push the state towards recognizing same-sex unions as happened in 2013.

women that allows men to enter the productive realm of the economy and civil society.[309] It is because of the development of capitalism and its destruction of the economically productive nature of the family that the state is cautious about directly interfering with the nature of family life. These social and economic factors make the family a desirable institution for the state to promote, and if gays and lesbians would like to mimic this straight institution, Justice Kennedy will provide them with the opportunity to do so.

Governmentality attempts to create social conditions where values and goals can be determined by individuals. The social and sexual practices of the family, the most important social unit, and the site for the daily renewal of the individual for the perpetuation of the capitalist system are left to the individuals who comprise the family.[310] Foucault writes that, "the game of liberalism-no interfering, allowing free movement, letting things follow their course, *laisse faire*, *passer et aller*-basically and fundamentally means acting so that reality develops, goes its way, and follows its own course according to the laws, principles, and mechanisms of reality itself."[311] However, this supposed freedom is tempered by the social norms that exist within society. Using *Lawrence*, the state granted recognition to the private intimate lives of gay people, but only if they conformed to social norms. When gays self-govern and conform to the norms of heterosexuality, the state benefits because the gay couple will take on all of the obligations and responsibilities of a heteronormative relationship: the long lasting bond, the family, child rearing, economic self-reliance, and other stabilizing traits. In some sense, coupledom can be seen as a way of rehabilitating gays and molding them into productive citizens – just like straights.

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[309] Carole Pateman, *the Sexual Contract*, Cambridge: Polity Press, 2003, 116-120.
[310] Brown, 146.
[311] Foucault, *Security*, 48, emphasis in the original.

Conclusion

Throughout this paper, I have made the assertion and supported with evidence that the Supreme Court relies on the logic of governmentality in its decision-making process. The Court's understanding of governmental logic explains the differing decisions in *Bowers*, *Romer*, and *Lawrence*. This is an important area of study, because the Supreme Court is one of only three branches of the United States government and an important arbiter in the American political system through its power to interpret the law. It is important to study the language the Court uses in its decisions, because the "social world is experienced through language and through the ways in which people label and value the context or environment in which lives are lived. Language plays a major part in constituting social subjects, the subjectivities and identities of persons, their relations and the field in which they exist"[312] LGBT activists and nongovernmental organizations have also favored the legal system as one of, if not the most, important site for obtaining recognition of the rights of LGBT people in the United States. Thus, these groups have portrayed LGBT people in a particular light that appeals to their judicial audience. This has lead to a narrowing of the acceptable bounds of the sexual liberty due to the preferences of the judicio-political apparatus. A Foucauldian analysis is important to the study of the courts because as a "methodology [it] sees economic, social and historical phenomena in ceaseless change produced by complexly interwoven contradictions arising from conflicting forces affecting the phenomena under

[312] Hunt, *Foucault and Law*, 7.

consideration."[313] As a method of analysis, it is attuned to studying how institutions change overtime, what opportunities are left unexplored, and what forces of power are being exerted.

Before continuing with a final overview of my argument, it would be appropriate here to discuss a number of issues that this study does not consider, as well as possible limitations that must be taken into consideration. First, this paper has not addressed the two most recent Supreme Court decisions to deal with LGBT people. During the 2012 term, the Court decided *United States v. Windsor,* which declared that the Defense of Marriage Act, passed in 1996, was unconstitutional, and required federal recognition of same-sex marriages from states that offer them. In *Hollingsworth v. Perry*, also decided in the 2012 term, the majority denied standing to the appellants in the case; this allowed the California district court's ruling to stand and for California same-sex marriages to resume. The present study cannot provide an explanation of these decisions because it has not analyzed them and because it is not necessary in order to establish the general trend of Court decision making in gay rights. I believe that an examination of these cases would reveal the "like straight" analogy used in *Lawrence*, and the state would seem to have adopted a strategy of assimilating gays into society, and thus making them productive citizens, but due to the time constraints I was unable to widen the scope of this paper to examine the cases. The analysis present in this paper is also *not necessarily* applicable to other types of cases that come before the Supreme Court. The subject of study in this paper was gay identity as defined by the Supreme Court. This subject has little to do with many other issues that the Court considers such as torts and economic issues. However, Foucault's theory of governmentality could still be a useful tool

[313] Ahmet Kara, "Book Review", *Journal of Economic and Social Research* 5, no. 2 (2003), 73-74.

for political science scholars, as well as scholars from other fields, in studying the decision habits of the Supreme Court.

Foucault's notion of governmentality as a mode of analysis focuses on the government's concern with knowledge of objects of study, their mechanisms of control, and the state's rationality of government offers a useful tool for the study of the Supreme Court. Governmentality provides a useful and novel approach in determining the Court's thinking in its decisions regarding gays. In the *Bowers* case, the Court held that the state had the right to criminalize "homosexual sodomy." The logic behind this decision was that gays, in no way, resembled straights. Heterosexuals are important to the state and by extension the Court, in this case, because the heterosexual couple represents the basic social building block of American society. The family is a vital structure of the population because it is this institution that provides the primary point for socialization of individuals within the society and the most important productive and consumptive economic element. For this reason, it was acceptable to treat gays as criminals because their behavior in no way resembled the nuclear family. Gay intimate relations do not produce offspring, provide a space for child rearing, or lead to long lasting bonds and so the Court could find it acceptable to effectively criminalize homosexuality as a means of promoting, in their view, the heterosexual family as a superior social structure for the development of society.

Romer, on the other hand, begins a reconsideration of the Court's earlier thinking on homosexuality in *Bowers*. The *Romer* majority comes to the conclusion that gays are like any other group of people within the United States and, as such, should not be excluded from participating in the political process as well as denied a place in the public and private spheres due to their status as gay or lesbian. This can be seen as the Court considering the

incompleteness of the previous decision to consider a more productive end in dealing with the question of homosexuality.

The *Lawrence* decision expands on the direction that earlier *Romer* decision began. The Court embraces the conclusion of *Romer* and takes it a step further with a reversal of the *Bowers* decision. The Court finds that gays *are* just like straight people, because it serves to reinforce the logic of governmentality. The Court's logic changed when gays began to assimilate into the broader society and gay rights organizations took as their primary task obtaining same-sex marriage. As part of their strategy to obtain same-sex marriage, these organizations promoted the idea that gays were "just like straights." This was a notion that the Court was more than willing to take up and reinforce, because of the all the benefits that that state would receive by having gays take on the same obligations and responsibilities as straight couples. Therefore, all the previous decisions regarding *straight families* also apply to the *gay families*. This is the case even if none of the parties to either case were a couple. In the end, the Court finds it acceptable, and most importantly productive, for the state to define a normalized identity for gay and lesbian people.

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