2002

The Rhetorics of Legal Authority Constructing Authoritativeness, the “Ellen Effect,” and the Example of Sodomy Law.

Kris Franklin
New York Law School, kris.franklin@nyls.edu

Follow this and additional works at: http://digitalcommons.nyls.edu/fac_articles_chapters

Part of the Legal Education Commons, Legal Writing and Research Commons, and the Sexuality and the Law Commons

Recommended Citation
33 Rutgers L.J. 49 (2001-2002)
THE RHETORICS OF LEGAL AUTHORITY
CONSTRUCTING AUTHORITATIVENESS, THE “ELLEN EFFECT,” AND THE EXAMPLE OF SODOMY LAW

Kris Franklin*

“‘Respect Ma Authoritah!’”1

I. INTRODUCTION

When The New York Times lead story is a discussion of controversies over whether legal citation in judicial opinions belongs in text or in footnotes,2 something must be up. Mention legal citation to most lawyers, judges, law professors and even the law review editors—to whom it can seem like a life’s work—and their eyes rapidly choose one of two strategies: rolling upwards or glazing over. But if the subject is so tedious or irrelevant to the intellectual work of law that even those most involved in the process cannot maintain interest in it, why do Times editors assume the topic cannot only captivate a general audience, but is of such significance that it deserves attention before any other national or international news?

Perhaps the answer lies less in the issue of citation style, as the Times article framed the question,3 and more in what is at stake in the matter. Legal citations construct legal authority. Legal authority, in turn, constructs law. Thus, the question of what is cited in a judicial opinion, and where and how it is cited, is not merely picayune or pedantic. Rather, it fundamentally shapes what we understand to be American law. This Article seeks to model a process of critically analyzing the rhetorical uses of authorities in judicial decisionmaking, and to introduce a framework through which that model might be expanded.

* Acting Assistant Professor of Law, New York University School of Law. The author wishes to thank Sarah E. Chinn, without whom this article could not have been written, the members of the N.Y.U. Lawyering faculty, whose comments on early versions of this work tightened its analysis immeasurably, and Stephanie Toti and April Lambert for early research assistance.

1. South Park: Chickenlover (Comedy Central television broadcast, May 27, 1998) (paraphrasing COOL HAND LUKE (Warner Bros. 1967)).
3. Id.
It should be noted at the outset that the term “authorities” is used rather specifically in this article. I could, of course, just talk about “cases” or “statutes,” or, to be broader and consequently more generic, I could use analogous terms like “sources.” But the word “authority” has appropriate connotations for the ways in which sources are used in legal argument. This is not just a difference of vocabulary—legal writing expects sources to do a certain kind of work that other disciplines do not necessarily require. “Authority” itself means more than just a source: at its root it suggests not just a point of origin, but a compelling cause. Similarly, legal authorities must be constructed as generating the arguments they support. Precedent is binding not because it has already happened—in which case it would simply be the past—but because (extending again the metaphor of genealogy) its function is to reproduce itself in new decisions.

Despite the common high school civics lesson that the legislature “makes” laws and courts “interpret” them, any first-year law student can complicate that picture by pointing out that the common-law system means that in large part American law is made by judges as much as by legislators. First, statutes are inevitably interpreted by courts and take on new meanings.

Second, many interpretations of legal doctrine are wholly generated by courts as they perform their function of resolving legal controversies. Moreover, the line between interpretation and origination is, both conceptually and actually, unpredictably porous. The common law that

4. The Latin root word auctor has as an implicit meaning “progenitor” or “ancestor.” See WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 117 (1989) [hereinafter WEBSTER’S DICTIONARY] (indicating that the English word stems from the Latin terms auctoritas); CASSELL’S LATIN DICTIONARY 66 (1977).

5. There has been an enormous amount of debate on this point in legal scholarship. For but one germane example, see H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 HARV. L. REV. 593 (1958), and Lon Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 HARV. L. REV. 630 (1958).

6. See, e.g., EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING 1 (1949).

7. A familiar example of this ambiguity can be found in the privacy protections established by the Supreme Court in Griswold v. Connecticut, 381 U.S. 479 (1965), and Roe v. Wade, 410 U.S. 113 (1973). The question of whether the privacy doctrine was judge-made or was generated by Fourteenth Amendment constitutional protections has never been fully settled, and served as an underpinning for the continued debates over the constitutionality of abortion-related statutes throughout the 1980s and early 1990s. See, e.g., ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); Paul Wm. Bridenhagen, Abortion: From Roe to Akron, Changing Standards of Analysis, 82 CATH. U. L. REV. 393 (1984); Walter Dellinger & Gene B. Sperling, Abortion and the Supreme Court; The Retreat from Roe v. Wade, 138 U. PA. L. REV. 83 (1989); Bruce Fein, Griswold v. Connecticut: Wayward Decision-Making in the Supreme Court, 16 OHIO N.U. L. REV. 551
emerges from judicial decisions often solidifies into what becomes accepted legal doctrine, but can also move in new directions, and can, wholly or in part, introduce new concepts, change older constructions or gradually alter the way that law is understood. This shifting border between genesis and exegesis of law presents a challenge for the courts, since they must always adopt the stance of being purely interpretive bodies.

The expectation of the division of powers among branches of government has a sufficiently forceful rhetorical and practical charge—


For further discussion of indeterminate nature of judicial decisionmaking, see BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); Learned Hand, How Far Is a Judge Free in Rendering a Decision, in THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 108 (Irving Dillard ed., 1952); Oliver Wendell Holmes, The Path of Law, 10 HARV. L. REV. 457 (1897).

8. There are, obviously, countless examples of this. The “separate but equal” concept developed in Plessy v. Ferguson, 163 U.S. 537 (1896), is a good one, in that the Plessy Court enunciated a particular way of understanding, explaining, and justifying the racial politics of its time, attributed that understanding to constitutional principles, and created a legal justification for a new state of segregationist laws that would not have been possible in the absence of this decision. What was, at its time, a relatively new concept in jurisprudence—separate but equal—became, over time, the terra firma upon which more than fifty years of legal decisions and social policies could be built.

9. For example, Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938), modified Plessy’s separate but equal formulation by requiring the State of Missouri admit an African-American to its state law school, since no separate facilities offered legal education for black state residents.

10. In Korematsu v. United States, 323 U.S. 214 (1944), for example, the Supreme Court developed a notion of strict scrutiny for governmental classifications based on race.

11. The most emblematic example of this is undoubtedly Brown v. Board of Education, 347 U.S. 483 (1954), wherein the Supreme Court concluded that separate educational facilities were inherently unequal and consequently unconstitutional.

12. As in the changing meaning of appropriate remedies for historic segregation in the shift from Brown v. Board of Education, 349 U.S. 294 (1955) (ordering integration of segregated public school districts “with all deliberate speed” and directing trial courts to retain jurisdiction during desegregation), to Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) (authorizing remedial efforts such as busing and realignment of school attendance zones as corrective measures for previously segregated public schools), to Keyes v. School District, 413 U.S. 189 (1973) (permitting court-ordered district-wide anti-segregation remedies even where there was evidence of intentional segregation in only part of the district), to Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (rejecting racially-based admissions quotas in public universities, but permitting race to be a factor considered in admissions).
accusations of courts “overstepping their bounds” or “activist judges” do hit the judiciary hard—that most courts would rather avoid the appearance of expanding the reach of the judicial branch. Thus, in order to maintain the legitimacy of their interpretations, courts address the conundrum by grounding their opinions in pre-existing doctrines. After all, law is an inherently conservative discipline. It is cautious: it seeks to preserve that which already exists, and it resists radical change. Successful interpretations of law, perhaps especially those that seek to make the most radical changes in existing law, usually attempt to bind themselves as tightly as possible to that which already exists. These “accepted ideas” could take the form of binding or analogizable statutes or regulations; common law doctrine; or proven—or at least demonstrable—facts.

Decisions about how authority can be used to support a particular position are not made lightly. But they are not inevitable either: legal arguments are constructed on a foundation of supporting authorities, and, like any construction, they can fail if their foundation is not secure (or, at the very least, not perceived to be secure). From the earliest days of law school, attorneys are advised to “support every assertion of law or fact.”\textsuperscript{13} But this maxim raises the tautological questions: what qualifies as an assertion that requires support? And what constitutes support itself?

Within the world of legal authority, the commandment is to provide material proof—that is, evidence that can and should be duplicable in another piece of writing about the same topic (for example, previous judicial decisions, or codified legislative enactments). As in written reports on scientific experiments and data, a piece of legal writing implies that the reader could go to the same authorities and come to the same conclusions—that is, repeat the results of the experiment. Indeed the analogy between scientific and legal proof can be extended even further to explain which kinds of evidence seem most compelling and irrefutable. As a culture, we accept “science” as true—as a matter of fact rather than of interpretation.\textsuperscript{14}

\textsuperscript{13} THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 1.3, at 4 (Columbia Law Review Ass’n et al. eds., 17th ed. 2000) [hereinafter THE BLUEBOOK]; see also LINDA HOLDEMAN EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS AND ORGANIZATION 93 (2d ed. 1999) (explaining legal writers must cite to relevant authorities when they “make a point about the law, the reasoning behind the law, or the facts of a particular case”); Richard Delgado, How to Write a Law Review Article, 20 U.S.F. L. REV. 445, 451 (1986) (similarly advising legal scholars that “each assertion of law or fact... will require a footnote”).

\textsuperscript{14} This hierarchy, however, is under scrutiny both within and outside the natural and social sciences and the humanities. Questions of “truth” and “objectivity” have been under serious (and furious) debate for decades. Given increased interest and publicity focusing on genetics and neuroscience, however, U.S. culture has hardly abandoned its desire for and
The social sciences are often considered to be on shakier ground. Human interactions are too changeable and various to be pinned down in the way that molecules and chemical reactions can be. While social sciences use experimental processes, their results are thought of as more contingent and subjective than those of the "hard" sciences. And, the theoretical work of the humanities, which in many ways shapes public understanding of the world, is treated with respect as academic inquiry, but is hardly imagined to constitute demonstrable fact.

Similarly, legal decisions construct an implicit hierarchy of evidence. On the top rung are statutes and binding common law, which are often treated as physical facts (a human law imagined as a positive law of nature). Explicit interpretation, or evidence garnered from social scientific sources is viewed with skepticism and even distrust. Finally, observations about the meaning of human interactions and social structures can only be introduced as acceptable pieces of evidence if they are thoroughly grounded in evidentiary forms that are higher on the legal totem pole.

However, legal facts and doctrines are not indisputable in the iconic and seemingly incontrovertible way that physical, chemical, or biological facts are, for the very reason that law operates through principles of interpretation, not scientific experimentation. Moreover, this urging towards "proof" operates quite differently in many other disciplines. For example, the Modern Language Association's *Handbook for Writers of Research Papers*, the definitive English-language guide to citation for literature scholars, assures its readers that a variety of facts considered to be in public domain need not be cited. But in legal scholarship, these same assertions require detailed and specific citation to an authority.

heroizing of "real" and "objective" information. New examples of the use of genetics and neuroscience are reported daily. For one comprehensive example, see Michael D. Lemonick, *Smart Genes?, TIME*, Sept. 13, 1999, at 53 (describing scientific efforts to determine how memory works, and to understand the genetic basis of recall and intelligence).

15. In some instances those differentiations are explicit, such as the distinction between primary and secondary authority. Even within and between those categories, however, there are unexplored divisions and assumptions about what constitutes "good" proof.

16. Even those "facts" are often both disputable and controvertible.

17. For a thorough discussion of judicial use of observed fact, see Peggy C. Davis, "There is a Book Out . . .": An Analysis of Judicial Absorption of Legislative Facts, 100 Harv. L. Rev. 1539 (1987).

18. JOSEPH GIBALDI, MLA HANDBOOK FOR WRITERS OF RESEARCH PAPERS (5th ed. 1999) [hereinafter MLA HANDBOOK].

19. The MLA HANDBOOK assures its readers that "you rarely need to find sources for familiar proverbs ('You can't judge a book by its cover'), well-known quotations ('We shall
This raises the larger question of the use of authorities in legal writing. What is it that authorities are offering as "assertions of law and fact" that the assertions themselves are incapable of doing on their own? Moreover, what implicit information—what assurances—does legal scholarship expect authorities to provide? The MLA Handbook is clear about the purpose of citation in literary studies: scholars must show they have not stolen ideas from their predecessors or colleagues by citing sources they do use. By implication, then, all other theories and arguments can be assumed to be their own. In this way the highest value is accorded to originality and newness—truly new ideas can be identified by their lack of citation to other scholars.

In legal writing in general, and judicial decisions in particular, originality and newness are simply not at a premium. They defeat the implicit argument of common law: that the judiciary builds upon and interprets the past rather than devising original law. Therefore, the purpose of citation is to prove a pedigree or genealogy, of which the new decision is simply the offspring, looking like itself, but sharing the genetic material of its progenitors. Authorities are, in a way, guarantees of lack of originality, of an ironclad link to the past, not a break from it.

Thus, the answer to the question "what qualifies as an assertion that requires support?" could very well be "everything," since genealogy is by definition a science of obsessive detail. But this is a dead end. If all assertions must be supported, then footnotes require footnotes, which need their own citations. In reality, then, writers have to choose. This means that virtually every moment in legal writing can be characterized as replete with decisions about what to support, and how to support it. Most legal writing assumes a skeptical reader, and its purpose is to persuade the reader to see
things the writer's way. Since authorities are seen as confirming the legitimacy of an approach, then any issue that is a possible point of controversy, however minute, needs authority to bolster it. Thus, supporting an assertion is a two-stage process. First, writers must identify those issues that might raise questions in the minds of their readers. Then they must locate authorities that most effectively address such questions. Ultimately, the assertions most likely to be supported are the ones readers might question.

The ways in which legal writers\textsuperscript{24} use and think about authority are tremendously complex, even if they do not realize it (or perhaps especially then). But legal writers are often under scrutinized. Developing support for a proposition involves constant investigation, choice, and reflection. When drafting an argument, a legal writer chooses, at the very least, which propositions need support; where to look for authority; which of the authorities found should be used; how to interpret the authorities to be used; and how to refer to and cite the authorities in the context of the argument. Consequently, an examination of how authorities are deployed in legal writing—where they come from, how they are used, when they are not used—can be enormously revealing of the assumptions behind any legal argument or decision, beyond the explicit rhetoric of the piece itself.

The goal of this Article is to engage in a critical analysis of the use of authority in legal writing, taking as a starting point the assumption laid out so far: that authorities are crucial rhetorical elements of legal argumentation. Under this rubric, analysis of authorities' usage \textit{must} be contextual. That is, a critical exploration of the use of authority cannot be merely mechanical, but rather must be situated squarely within a simultaneous examination of the tensions, logics and competing interpretations that might bear on the question, and that might shape (or be shaped by) the authority that is ultimately used. This entails a consideration of a great deal of legal, social, and political thought on a given point, all of which contribute to a richer understanding of the invisible choices being made within each citation.

\textsuperscript{24} By "legal writers" I mean all those who write in a legal context, most obviously (but not exclusively) judges and advocates. This article primarily examines authorities in judicial opinions. Since the projects of advocacy and decision-making are both predicated on interpretation of law, many of the same inquiries about authority are relevant in both contexts. But lawyers must ask courts to see things their way, while judges decide how things will be seen. Necessarily, then, the divide in function, position and, power between advocates and judges means there are significant differences in the ways each tend to characterize and use authority.
To begin, I offer as an example an analysis of the authorities used in one case situated within an area of law fraught with conflict—the criminalization of same-gender sexual contact. Why sodomy law? On the one hand, there is no real answer to this question. After all, I am arguing that examining the use of authorities in any decision will reveal an implicit but central rhetoric that informs the text of the decision itself. To that extent, the selection of cases to exemplify this thesis is essentially arbitrary. Nonetheless, sodomy is an area of law that leaps out in any investigation of legal authority. Most notably, the Supreme Court’s decision in *Bowers v. Hardwick*, in which the majority’s scant deployment of meaningful authority in the opinion has been soundly criticized. Moreover, as both *Hardwick* and its commentary demonstrate, sodomy decisions, which implicate a host of social and political impulses regarding the control of sexuality in general and homosexuality in particular, require courts to struggle with not only legal principles, but also a panoply of cultural and historical forces.

Thus, this Article first looks at the use (and nonuse) of some authorities in judicial decisions on sodomy cases, specifically the Texas Court of Appeals’s recent decision in *Lawrence v. State*. In order to critically examine how the majority and the dissent in *Lawrence* use authority, I take several steps back from the contemporary case to examine the foundational ideological split between conceptions of sodomy laws as regulating proscribed conduct versus marginalizing a particular social status. I discuss some of the central United States constitutional decisions that the *Lawrence* court had at its disposal, the different meanings ascribed to the majority and dissent’s framing, the use or non-use of these opinions, by giving similar consideration to less obviously crucial precedent, and to the introduction of non-legal sources in the *Lawrence* opinion.

The second part of the Article uses the foregoing examination to theorize about possible classifications of the authorities used, noting in particular a distinction between those that appear to loom over an issue, and those that somehow lurk around its borders. Since the rhetorical meaning of authority is an immense topic that requires in-depth and sustained analysis,

this discussion is very much the beginning of an investigation into the ways authority, and authoritativeness, can be understood.

II. READING AUTHORITIES IN SODOMY CASES

Sodomy decisions are fascinating because they broadcast not only legal theorizing, but also a political stance. Sodomy has come to mean much more than just a specific sexual act, and consequently decisions about the constitutionality of sodomy laws that invoke prohibitions against "homosexual conduct" are by definition speaking about more than the misdemeanor. For these reasons, it is possible for judicial decisions regarding sodomy laws to diverge from the usual legal writing practices and to depend more heavily on political conviction than legal authority. Lawrence is a particularly compelling case because it avoids that trap. Both the majority and the dissent work through their analyses by expertly explaining their reasoning and precisely marshaling support for their positions. Thus, Lawrence can provide insight into the variety of decisions on sodomy, while acting as both illustrations of, and counterpoints to, the tensions between legal authority and ideological position in these decisions.

In order to understand Lawrence, the complex forces that created the cultural tensions and the political impulses the majority and dissent represent must first be unpacked.

A. Culture Wars: Sodomy, Homosexuality, and Change

The so-called "culture wars" that emerged in the 1980s were sparked by several different forces, but they exploded most often around the representation of sexuality in art and popular culture. While the concept of

29. See infra notes 35-49 and accompanying text.
31. This may be due in part to both opinions' history as substantial revisions of their initial formulation, prior to the Texas Court of Appeals rehearing of the case en banc. For further discussion of the history of decisions rendered by the court of appeals, see infra note 67.
the "culture wars" may seem passé in the twenty-first century, the conflicts this polarization embodied and were heir to had an irreversible effect on contemporary cultural notions of sexuality and, accordingly, legal decisions about sodomy. Moreover, the legal arena was not untouched by these changes, particularly since many of the flashpoints of this conflict involved both legislatures and courts, in efforts that ranged from attempts to pass municipal ordinances to limit the sale of sexually explicit materials, to the Supreme Court's decision regarding the "NEA Four." As struggles over sexuality and sexual representation came to the forefront at the end of the twentieth century, homosexuality concomitantly became more visible and more explicitly verbalized. Faced with the alliances and disputes in anti-porn regulation efforts); Richard Harrington, The Capitol Hill Rock War: Emotions Run High as Musicians Confront Parents' Group at Hearing, WASH. POST, Sept. 20, 1985, at B1 (discussing movement to put warning labels on offensive record albums); Jon Pareles, In Rap Music, the Beat and the Lawsuits Go On, N.Y. TIMES, Oct. 23, 1990, at C13 (describing obscenity trials over "2 Live Crew" performances and albums); Richard Stengel, Sex Busters: A Meese Commission and the Supreme Court Echo a New Moral Militancy, TIME, July 21, 1986, at 12 (examining tensions in the morality movement of the mid-1980s).

33. Legal scholar Francisco Valdes, for example, has recently reiterated the culture war metaphor in analyzing sexual orientation law and lawmaking. See Francisco Valdes, Afterword, Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship or Legal Scholars as Cultural Warriors, 75 DENV. U. L. REV. 1409, 1426-34 (1998). Additionally, Nancy J. Knauer argues quite eloquently that contemporary legal struggles over homosexuality constitute a cultural war in Homosexuality as Contagion: From The Well of Loneliness to the Boy Scouts, 29 Hofstra L. REV. 401, 493-94 (2000). Moreover, even Supreme Court Justice Anthony Scalia agrees with this characterization. In his dissent in Romer v. Evans, 517 U.S. 620 (1996), Justice Scalia characterized the "Kulturkampf," or "culture struggle" as a "politically powerful minority" of lesbian women and gay men and the "seemingly tolerant Coloradans" who were attempting to strip homosexuals of their right to be free from discrimination. Id. at 635 (Scalia, J., dissenting).

34. See Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998) (upholding the National Endowment for the Arts' decision to rescind merit-based grants awarded to four artists whose work was deemed obscene).

35. In fact, the cause and effect here is hard to pin down. The visibility of activism around AIDS and HIV challenged the silencing of gay men and lesbian women of the post-gay liberation era. A strategy of AIDS activism was to bring sexuality into the forefront and to talk explicitly about safer sex and sexual desire. See AIDS: CULTURAL ANALYSIS, CULTURAL ACTIVISM (Douglas Crimp ed., 1988); see also Brian Baehr, In Search of the Pleasure Principle: Articulating Homosexual Identity in Post-Soviet Russia, in THE POWER OF PLEASURE: PLEASURE AS A SOCIAL ANALYTIC (Laurie Essig & Sarah E. Chinn, eds.) (forthcoming) (making a link between sexual openness generally and the visibility of homosexuality).
decimation of AIDS, and the homophobia accompanying the epidemic, gay
men and lesbian women pushed the boundaries of acceptability in art
galleries, on the street, in local legislatures, in religious institutions, and in
the courts.

Needless to say, these changes did not fully form out of the political and
cultural conditions of the 1980s, nor were they simply the inevitable
aftermath of the massive social and cultural shifts of the 1960s and 1970s.
They were the culmination of decades of change in sexual practices and
attitudes throughout the twentieth century.36 Seemingly unrelated
technological advances, such as the invention and popularization of the
automobile,37 the growth of a mass culture beyond the local popular cultures
of the pre-televisio era,38 the growth of cities and various sexual
subcultures within them, as well as developments more specific to sexuality,
such as the introduction of birth control pills, irrevocably altered the sexual
landscape of the United States.39

While the connections between these cultural developments may seem
attenuated in a discussion of sodomy law decisions and the rhetorics of legal
authority, these phenomena intertwine narratives of social and legal change.
Ultimately, they reveal the osmotic relationships cultural critics have
observed between individual experience, historical analysis, and legal
structures.40 By unraveling these connections and tracing these narratives,
scholars can more clearly recognize the ways seemingly unrelated social
forces are in continual conversation with each other (and perhaps even
change the shape and tenor of those conversations).

36. For a thorough historical discussion of changes in sexual practices and attitudes in
the United States in the past century, see John D’Emilio & Estelle B. Freedman, Intimate
37. Beth L. Bailey, From Front Porch to Back Seat: Courtship in Twentieth-
Century America (1988) (arguing that the popularization of automobiles in the 1920s
shifted courtship patterns and, consequently, sexual mores).
38. Michael G. Kammen, American Culture, American Tastes: Social Change
examples of this scholarship, see Derrick Bell, Faces at the Bottom of the Well: The
Permanence of Racism (1992); Sarah E. Chinn, Technology and the Logic of American
Racism: A Cultural History of the Body as Evidence (2000); Peggy Cooper Davis,
Neglected Stories: The Constitution and Family Values (1997); Gerald P. Lopez,
Rebellious Lawyering: One Chicano’s Vision of Progressive Law Practice (1992);
Ruthann Robson, Sappho Goes to Law School: Fragments in Lesbian Legal Theory
While these changes have hardly been positive, particularly given the rise in social conservatism during the Reagan-Bush years, the last decade has seen major increases in openness about homosexuality and in the willingness (even eagerness) of the mainstream to imagine gay and lesbian people as quite like themselves: what I term the “Ellen effect.” Nonetheless, Ellen DeGeneres’s public coming-out seems to have marked a watershed in the way the straight mainstream media conceived of lesbians and gay men as simultaneously culturally meaningful and not intimidating (that is, “just like everyone else”).

As historians of gay and lesbian communities in the United States have shown, the phenomenon of gay “identity” developed in large part over the twentieth century, particularly in the post-WWII period.

41. For example, a recent report by the National Gay and Lesbian Task Force concludes that the lives of lesbians and gay men in the United States have significantly improved in the 1990s. See Alan S. Yang, From Wrongs to Rights: Public Opinion on Gay and Lesbian Americans Moves Toward Equality (1999). What the writer neglects to acknowledge, however, is that most of the statistics he cites, positive and negative attitudes towards gay people are virtually the same as they were in the early 1970s, and the dramatic improvement has been in comparison to the appalling national homophobia and AIDSphobia of the mid-1980s. Id. at 21, 23-25

42. See Bruce Handy, Roll Over, Ward Cleaver: And Tell Ozzie Nelson the News, Time, April 14, 1997, at 78 (announcing Ellen Degeneres’s decision to come out of the closet, and the decision to have her television character do the same); see also Caryn Jones, Does the Nation Care About “Ellen” Coming Out?, The Palm Beach Post, Apr. 16, 1997, at 4D (analyzing the hype and fallout from the Time cover story). Moreover, DeGeneres’s public pronouncement was part of a larger wave of celebrity acknowledgment of homosexuality: Elton John, Melissa Etheridge, k.d. lang, George Michael (although not altogether willingly), Rupert Everett, and more recently, Rosie O’Donnell, to name the most notable.


This nomenclature necessarily oversimplifies a complex and long-lasting process, and may give credit to a celebrity that is more properly reserved for the millions of anonymous lesbians, gays and bisexuals whose refusal to hide their sexuality brought about this cultural shift.

identity represented a major shift from previous attitudes towards same-sex sexuality, which was seen as a set of behaviors (defined as "sinful," "hateful," or "abnormal") rather than an element of a larger cultural entity, "the homosexual."\textsuperscript{44} Sodomy laws, which were initially enacted to punish non-normative sexual acts between people of either sex, were defined as sanctions against certain behaviors performed by certain kinds of people.\textsuperscript{45} At the same time, the opprobrium that was accorded to the acts carried over onto the people identified with them (as well as accusations of gender nonconformity)—gay and lesbian people may have constituted a population in the twentieth century, but a scorned, and often violently suppressed one.\textsuperscript{46}

Lesbian and gay political activism has made enormous strides in altering the sense of gay people as a subterranean subculture, and creating instead a notion of gay people as a recognized social group for whom civil rights provisions could be made. The fact that so many states and municipalities have enacted legislation to protect lesbian women and gay men from

\begin{quote}

\textsuperscript{45} This is particularly relevant to \textit{Lawrence}. Texas’s sodomy law had originally covered various kinds of sexual acts performed by members of either sex. \textit{See supra Lawrence v. State, Nos. 14-99-00109 & 14-99-00111, 2000 Tex. App. LEXIS 3760, at n.5 (Tex. App. 2000)} [hereinafter \textit{Lawrence I}]. In 1974, Texas enacted a new penal code in which sodomy between members of different sexes was decriminalized, and only the prohibition on anal and oral sex between members of the same sex was retained. \textit{Id.}; \textit{TEx. PENAL CODE ANN. § 21.06 (Version 1974)}. This change suggests that sodomy was no longer about sexual acts, but about the meaning of sex between two people of the same gender, that is, about homosexuality rather than "sodomy" per se.

discrimination demonstrates this quite concretely. What started off in the 1970s as a marginal proposition—that "the gay and lesbian community" is a political entity (a segment of civil society, a voting bloc, a "demographic," a definable group whose rights must be attended to, if not protected)—became the cornerstone of the liberal gay rights movement and, over the course of the 1980s and 1990s, part of the larger political environment. In effect, this is how America went from gay liberation to "Ellen." As a consequence of these shifting cultural notions and the linguistic changes that have accompanied them, the "Ellen effect" guarantees that the images of gay people are never truly absent from conversation about homosexual sex.

Courts have hardly been untouched by the culture wars, as clearly seen in decisions about sodomy. The court's decisions are indisputably shaped by

47. By July 12, 2001, twelve states, the District of Columbia, and dozens of cities had banned sexual orientation discrimination. For an up-to-date listing of non-discrimination ordinances, see NGLTF Maps & Charts, at http://www.ngltf.org/issues/maps. Of course, this does not mean these ordinances have been uncontested: several anti-discrimination ordinances were enacted only to be repealed later. See Tom Scherberger & Paul de la Garza, Gay Rights Law is Repealed, ST. PETERSBURG TIMES, Nov. 4, 1992, at 1A (discussing Tampa's repeal by popular referendum of sexual orientation anti-discrimination legislation enacted a year earlier); Richard Steele, A "No" to the Gays, NEWSWEEK, June 20, 1977, at 27 (describing Miami's repeal of gay civil-rights legislation by a two to one popular vote). In recent years there have been attempts, mostly by popular referenda, to prevent the enactment or enforcement of nondiscrimination legislation benefiting lesbians and gays (most notoriously in Colorado, but also in Oregon, Maine, Vermont, and elsewhere). See, e.g., Christopher Heredia, Gay Rights Measures Get Mixed Reactions, S.F. CHRON., Nov. 9, 2000, at A17. At the same time, the rhetoric of these measures, while certainly homophobic, has not managed to roll back the larger sense of gay people as a political entity—indeed, it may have intensified this assumption.

48. Again, this is not universally accepted. Hence, the conservative right's resort to the rhetoric of "special rights" in their support of the legal permissibility of discrimination against lesbians and gay men.

49. This shift has not been without problems for queer people. The emergence of the "Ellen effect" echoes various claims of the affluence of gay people (particularly gay men) by pro-gay pollsters and homophobes alike. The public representations of lesbian women and gay men as white, class-privileged, and socially and politically powerful, and the embrace of these images by much of the leadership of the "gay lobby," have had quite deleterious effects on progressive queer politics. The 1998 endorsement by the Human Rights Campaign of conservative Republican Al D'Amato in his Senate race against Charles Schumer is perhaps the most remarkable example of this. See Rick & William Douglas, Campaign 98: Gays Endorse D'Amato—National Group Says Incumbency Gives Him the Edge, NEWSDAY, Oct. 21, 1998, at A7; L.A. Johnson, Differing Agendas Divide Activists, PITTSBURGH POST-GAZETTE, Nov. 14, 1998, at B-1. Moreover, lesbian and gay rights organizations have been slow to acknowledge, or enthusiastically fight for, more marginal elements of the queer community or to link issues of social and racial justice to issues of sexual orientation.
ideological stance. Since sodomy as a behavior has come to be coterminous with homosexuality as an identity, rulings on sodomy cases necessarily inhabit and exhibit a position on an ideological continuum. This development has not been linear or monolithic, however, and despite the immense cultural, political, and legal changes of the past half-century, these meanings of sodomy are still contested.

B. Speaking Sodomy

The problem with prosecuting sodomy is that it is hard to know exactly what "sodomy" means. The centuries-old undefinability and unspeakability of sodomy has resulted in an unfixed conception of sodomy. Consequently, the meanings of sodomy laws themselves have shifted over the course of American law, in both colonial and post-independence eras. Initially, prohibitions against sodomy in the English colonies were borrowed from British law. The earliest prosecutions of sodomy embraced a range of nonprocreative behaviors: sex between members of the same sex, nonreproductive sex between a woman and a man (including married couples), or bestiality. These acts were defined as "unnatural" because, as John Winthrop, one of the founders of the Massachusetts Bay Colony argued, they "tended to the frustrating of the ordinance of marriage and the hindering [of] the generation of mankind." Since human nature was determined by divine will, to abrogate the dictates of procreation was to challenge God: a sin as much as a crime. In fact,

50. Hence the common description of the crime as one which was fit only to be described as the "infamous crime against nature... not fit to be named." 4 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 242 (William D. Lewis ed., Reas Welch & Co. 1897) (1769) (describing the offense as "peccatum illud horrible, inter christianos non nominandum," that is, as "that horrible sin not to be named among Christians"), excerpted in WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS 13-14 (Mark Blasius & Shane Phelan eds., 1997) (translation supplied by the editors).

51. This is not to say that cultural definitions of sodomy have necessarily been vague. While sodomy may have been unspeakable, it has hardly been unrecognizable, echoing Justice Stewart's dictum on obscenity, "I know it when I see it." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).


sodomy was a crime because it was a sin, and those who committed it were sinners, punishable by anything from flogging and banishment to death.54

Given the expandability of the term “sodomy” (unlike “bestiality” or “buggery,” which were more clearly defined), and the cultural consensus of what constituted acceptable sexual behavior (procreative, within the bounds of marriage), for sodomy as a category, although condemned and often harshly punished, “the details of its horror,” as Jeffrey Weeks observed, “remained decently vague.”55 The unspeakability of the specifics of sodomy meant that communities had a great deal of leeway in deciding which acts should be punished and how, and which, in turn, implicitly discouraged a more limited or clearly demarcated definition of what sodomy entailed.

These attitudes towards the prosecution of sodomy endured in some form through the mid-nineteenth century. Although the enforcement of non-procreative sexuality dwindled over the course of the eighteenth century, largely due to the waning influence of Puritanism in the North and the economic expansions in the South,56 the meaning of sodomy as the “crime against nature” remained stable. Sexual culture in the United States changed considerably in the nineteenth century, however. Birth rates among white couples where both parents were born in the United States declined steeply, mainly because married couples consciously decided to limit conception.57 Contraceptives and abortifacients were advertised in women’s magazines, although in code, and women shared information about family limitation methods through letters and conversations.58 Self-help guides and sexological studies also began to appear, codifying and medicalizing sexual behavior.

This medicalization of marital sexuality also affected definitions of sodomy. As historians John D’Emilio and Estelle B. Freedman observed, sodomy was decreasingly imagined as sinful and increasingly imagined as diseased, “a manifestation of a bodily or mental condition.”59 Rather than sin, sodomy was a “perversion”—a reversal of the natural biological (rather

54. D’EMILIO & FREEDMAN, supra note 36, at 31 (“Like other sinners, women or men who were punished for unnatural sexual acts did not acquire a lifetime identity as ‘homosexuals’ and they could be reintegrated into the fold.”).


56. D’EMILIO & FREEDMAN, supra note 36, at 38.

57. Id. at 58.


59. D’EMILIO & FREEDMAN, supra note 36, at 122; see also Knauer, supra note 33, at 410-23.
than divine) order. Part and parcel of the triumph of scientism over religion in understandings of sexuality was the emerging conception that specific sexual behaviors lined up with recognizable types of people: a notion that flourished in the early twentieth century with the invention of the category of "the invert," and later "the homosexual."

In some ways, the meaning of sodomy remained the same. It was defined as those acts that were irredeemably deviant and dangerous to the social order. With such radical alterations in the social meanings of sexuality, however, the opprobrium of sodomy moved away from the possibility of anyone engaging in nonreproductive sexuality. What began to be proscribed as "sodomy" narrowed and as a result divided. On the one hand, sodomy as nonprocreative heterosexual sex became more acceptable and hence more speakable, the array of acts that remained outside the pale shrank to the category of the truly ineffable. On the other hand, with the development and description of categories of sexual personae, sodomy was ascribed as a set of behaviors increasingly identified with "inverts," whose sexual identities were legible through a variety of extrasexual signs. Thus, conceptions of sodomy became bifurcated along two separate lines of concern: act-specific prohibitions (generally oral and anal sex) and gender-specific prohibitions (sexual contact between people of the same gender).

Cultural notions of sodomy rarely took into account this split and the tension it created, in large part because the overlap between them (men engaging in certain prohibited behaviors) was at the heart of informal definitions of sodomy. As these informal definitions became codified into law and other formal structures of understanding (such as dictionaries or medical textbooks) the division over what sodomy meant continued over, creating new laws and more specific meanings. At the same time, the inability to recognize the multiplicities inherent in what "sodomy" now meant was exacerbated by the assumption, both formally and informally,

60. D'Emilio & Freedman, supra note 36, at 122.
61. Eskridge, Jr., supra note 52, at 1011.
62. Id. at 1053-54.
63. See generally id. at 1014-16, 1022-31.
64. Although sodomy prohibitions can govern sexual contact between women or between men, most prohibitions of sodomy have focused primarily on male-only behavior. Sex between women has been punished both informally and by law, but more often as a contravention of appropriate feminine behavior than as an explicit sex crime. Indeed, lesbianism has more often been rendered invisible, most famously in Queen Victoria's legendary refusal to criminalize lesbianism because she refused to believe women would do such things. See Clarice B. Rabinowitz, Proposals for Progress: Sodomy Laws and the European Convention on Human Rights, 21 BROOK. J. INT'L L. 425, 430 n.25 (1995).
that whatever the definition, institutions and individuals knew unerringly what this thing called sodomy was.

From these nineteenth century roots, the same problems around what sodomy is and means still exist, as well as varying levels of acknowledgment that there is a problem at all. This is apparent in how the majority conceptualizes the legal issue in the initial, now supplanted, opinion of the Texas Court of Appeals in Lawrence. In this case, John Lawrence and Tyron Garner were convicted after pleading no contest to the charge of violating section 21.06 of the Texas Penal Code, which prohibits "homosexual conduct." Lawrence and Garner were arrested after having been discovered by police in a private home, engaging in consensual sexual relations with each other. The first opinion of the Texas Court of Appeals ("Lawrence I"), rendered by a three-judge panel, was issued on June 8, 2000, and found for Lawrence and Garner. This initial opinion was subsequently retracted by the full court of appeals, which on March 15, 2001 issued an en banc decision finding for the State.

In Lawrence I, the contemporary confusion over the meaning of the word "sodomy" allows the majority's conclusion that section 21.06 violated the Texas Equal Rights Amendment to seem obvious and inevitable. In

65. Specifically, Tex. Penal Code Ann. § 21.06 (Vernon 1994) states, "(a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex . . . ." Deviate sexual intercourse is defined as "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object." Id.

Tensions about the desirability and constitutionality of the statute may be seen in the fact that section 21.06 had twice previously been overturned on other grounds by Texas courts, but that subsequent interpretations of the Texas Constitution resurrected the provision. See City of Dallas v. England, 846 S.W.2d 957 (Tex. App. 1993); State v. Morales, 826 S.W.2d 201 (Tex. App. 1992), rev'd on other grounds, 869 S.W.2d 941 (Tex. 1994) (finding that section 21.06 violated the right to privacy under the Texas constitution). But see Henry v. City of Sherman, 928 S.W.2d 464 (Tex. 1996) (denying that privacy protections prohibited the enforcement of section 21.06).


67. As a consequence, the first decision no longer has the power of law or precedential value. Indeed, technically it no longer exists. Although this Article focuses in most detail on the final decision by the whole court, the initial opinion is fascinating in its own right. Moreover, some of the tone and much of the content of the ultimate decision, and the dissent to it, are clearly formulated in response to the opinion initially rendered, and may, in part, account for the fact that, this is one of the few recent sodomy law decisions in which both positions seem thoughtfully constructed and argued.

68. Tex Const. art. I, § 3a.
order to address the constitutionality of the Texas prohibition against "homosexual conduct," the majority found itself needing to examine precisely what was prohibited, which is "deviate sexual intercourse" between members of the same sex. Thus, immediately on the heels of quoting from section 21.06 of the Texas Penal Code, the court turns to section 21.01:

"Deviate sexual intercourse" is defined as: (A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object.69

From there what the majority does is very interesting. The footnote the opinion appends to this definition, note 2, observes:

In this opinion, we refer to "deviate sexual intercourse" as sodomy. "Sodomy," while variously defined in state criminal statutes, is generally oral or anal copulation between humans. See BLACK'S LAW DICTIONARY 1391 (6th ed. 1990).

What is most striking here is the equation of the legal category of "deviate sexual intercourse" with the more common term "sodomy." By defining "deviate sexual intercourse" as sodomy, and then citing a non-gender specific definition for sodomy (making sodomy act-specific), the majority insists that singling out "homosexual conduct" creates a gendered meaning for a term that is outside gender. Therefore, the Texas Penal Code, by prohibiting same-sex "sodomy" and allowing different-sex "sodomy," clearly violates the state's Equal Rights Amendment, since it "proscribes otherwise lawful behavior solely on the basis of the sex of the participants."70

What the majority does not acknowledge is that nowhere in this Texas statutory scheme does the word "sodomy" appear. Indeed, the statute is scrupulous in its avoidance of the term.71 This raises the question of why the opinion introjected the notion of "sodomy" into its analysis. Perhaps the Court wanted to acknowledge what the Texas legislature clearly desired to avoid: the fact that Section 21.06 is in fact a sodomy law. In contemporary United States culture, the word "sodomy" suggests same-sex (particularly male) sexual behavior in a way that the much more neutral "deviate sexual

70. Id. at *6.
71. This was, perhaps, a deliberate strategy of the drafters.
intercourse" does not. By raising the specter of sodomy, the majority implicitly engages in current debates around homosexuality and the law.

More important, though, is the majority's choice of definitions of sodomy. On the one hand, *Black's Law Dictionary* is an acceptable authority as the dictionary of record regarding legal terminology. It may, in fact, be the best source. *Black's Law Dictionary*, however, is hardly a barometer of cultural meanings—indeed it is questionable as such. This is borne out by the fact that neither of the two definitive nonlegal dictionaries, the *Oxford English Dictionary* and the *Webster's Dictionary*, agrees with *Black's* in its primary definition of sodomy. For the *Oxford English Dictionary*, sodomy is "an unnatural form of sexual intercourse, [especially] that of one male with another"; for *Webster's*, it is "copulation with a member of the same sex or with an animal." While *Webster's* does gives a secondary definition "noncoital and [especially] anal or oral copulation with a member of the opposite sex," this is clearly a supplement to the central meaning of the word, and a vestige of the older definition rooted in pre-modern prohibitions against nonprocreative sex.

Thus, the majority's choice of *Black's* takes on a larger significance. By invoking sodomy and then defining it as act-specific rather than gender-specific, the court answers its own question about the constitutionality of the statute through its own process of definition. The majority's use of authority presupposes its conclusion: after all, it would have had a much harder time coming to the same decision had it relied upon the *Oxford English Dictionary*, because with that gender-specific understanding of the term the court's neat reasoning would have been tautological, rather than determinative. Through this rhetorical slight of hand, the majority defines out of relevance the competing (and, as the dictionaries indicate, and cultural experience bears out, dominant) meaning of sodomy as sexual relations between members of the same sex, particularly men.

This is confounding to the *Lawrence I* dissent, whose conception of the unlawful behaviors outlined in section 21.06 is that they are wholly in line with the history of prohibition of same-sex sexuality. The dissent is mystified by the majority's assertion that the Texas Equal Rights Amendment has anything to say about "homosexual conduct," let alone provides protection for it. In fact, the dissenting opinion opens with this observation: "[b]ecause I do not believe the people of this state intended to decriminalize homosexual conduct when they approved the Texas Equal Rights Amendment, I respectfully dissent." *Lawrence I*, 2000 Tex.
abhorrence of homosexual conduct,” tracing a centuries-long trajectory of condemnation of “the infamous crime against nature.”75 In other words, the dissent employs precisely the meaning of sodomy that the majority studiously avoids: sexual contact between men that must be condemned.

These two opinions are not just disagreeing with each other; they are speaking at cross purposes. Neither acknowledges the central assumptions behind the other’s argument. In fact, they cannot, since they are arguing for mutually exclusive definitions of the role and meaning of same-sex sexuality in contemporary American culture. The increasing “speakability” of sodomy has not led to sodomy being spoken in a single voice. What started off in the nineteenth century as diverging but overlapping definitions of sodomy have, at the beginning of the twenty-first, become almost antithetical understandings of what it is that sodomy statutes are designed to prevent and prohibit. This calcification of these distinctions has intensified because of the cultural changes around sexuality and homosexuality, so that an act-specific definition of sodomy self-consciously denies the relevance to the law of a culturally extant homosexual identity.76

All this begs a central question: what is the purpose of sodomy laws? Do they regulate certain behaviors, or regulate and control certain kinds of people? Very often, as seen in Lawrence I, this question is never explicitly asked or answered, but the implicit answer serves as the backdrop for the consequent decision. And the current enforcement of sodomy laws may or may not be consonant with the motivations behind a given statute’s initial creation.77

More importantly, the act-specific/gender-specific divide in interpretations of sodomy laws maps almost directly onto a larger ideological split between sexual conduct and sexual status. The Texas statute straddles this split. On the one hand it prohibits “homosexual conduct.” On the other, the invocation of the word “homosexual,” as opposed to, for example, “same sex,” raises the image of the homosexual

App. LEXIS 3760, at *16 (Hudson, J., dissenting).
75. Id. at 25-31.
76. Knave, supra note 33, at 464-65.
77. Lawrence I, 2000 Tex. App. LEXIS 3760. This is not the case with the Texas law, which was drafted in the early 1970s. The new law was part of a push for “liberalization” of sex-related codes, and erased the criminalization of consensual sexual activities between members of different sexes, retaining only same-sex prohibitions in relation to sodomy. Id. at *6. So the exclusive prosecution of same-sex couples is exactly in line with the law as written. The Georgia sodomy law, however, regulates certain acts performed by people of either sex in any combination, but was (until overturned in Powell v. State, 510 S.E.2d 18 (Ga. 1995)), as discussed below, interpreted as enforceable exclusively against same-sex participants.
people who would engage in such conduct. This leaves plenty of space for the majority in Lawrence I to interpret section 21.06 as affecting people; at the same time it also allows the dissent to focus on conduct.

This is not a new conundrum. Its most forceful articulation is in Bowers v. Hardwick.78 As many commentators have observed, the majority and the vigorous dissent in Hardwick neatly re-enact the status/conduct differentiation.79 Since the Georgia statute at issue in Harwick was act-specific and gender neutral, upholding the letter of the law might have had serious consequences for the constitutional protections afforded marital privacy.80 The Court defined itself as never having to deal with that issue, since it supported the decision of a lower court to exclude the married, heterosexual co-appellants who joined Michael Hardwick in his challenge to Georgia's sodomy law.81 The Court reasoned that Mary and John Doe, who claimed the statute prohibiting consensual sodomy had an unconstitutional chilling effect on their sexual lives, were in no "immediate danger of sustaining any direct injury from the enforcement of the statute,"82 even though the language of the law prohibited "any sexual act involving the sex organs of one person and the mouth and anus of another."83

The Supreme Court's finding that "there is no constitutional right to privacy for homosexual sodomy,"84 allows the Court to conflate conduct with status.85 The Court's logic begins with the implication that

78. 478 U.S. 186 (1986).
79. See, e.g., Andrew M. Jacobs, Romer Wasn't Built in a Day: The Subtle Transformation in Judicial Argument over Gay Rights, 1996 Wis. L. Rev. 893 (arguing that all gay rights arguments fall into one of two types, which essentially break down into the more anti-gay Track 1, based on behavior, and the more pro-gay Track 2, based on gays as a recognizable class); see also Janet E. Halley, Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick, 79 Va. L. Rev. 1721, 1752-67 (1993).
80. Particularly, in 1986, such a decision would have had an enormous effect on the fraught body of law around abortion, which was originally grounded in the principle of marital privacy first established by the Supreme Court in Griswold v. Connecticut, 381 U.S. 479 (1965).
84. Hardwick, 478 U.S. at 191.
85. This interpretation of the Court's equation that sodomy equals homosexuality, and, by the transitive property of equality, homosexuality equals sodomy, has been discussed at length in the scholarly literature surrounding the Hardwick decision, to the point that it has become commonplace, and rises almost to the level of generally accepted, even if not entirely uncontroversial, wisdom. For further development of the status/conduct conflation by the Hardwick Court, see Halley, supra note 79, and the responsive papers, Anna B. Goldstein,
“homosexual sodomy” is purely a behavior that could be engaged in by anyone. However, this unspoken focus is undone by the Court’s later assertion that “[i]t is obvious to us that [no aspect of the Constitution] would extend a fundamental right to homosexuals to engage in acts of consensual sodomy.”\textsuperscript{86} As noted in previous articles, “the Court is playing both sides—the legal discourse of ‘sodomy’ and the political discourse of lesbians and gay men”—off against the middle by using an amorphous language of ‘homosexuals.’” In this way, the Court can maintain that its subject is conduct, while the very fact that it essentially equates conduct with status . . . is a conceptual dishonesty as well as a legal fallacy.\textsuperscript{87}

The status/conduct division, and the confusion between the two, endures in legal decisions, in large part due to the pattern set by the Court in \textit{Hardwick}. The major difference, though, between the late twentieth century and the early twenty-first is the “Ellen effect;” that is, the mainstream cultural recognition of identity based around sexuality. As a result, it has become significantly harder to elide the category of “lesbian and gay” into the slippery language of “homosexual conduct.” In recent years, then, the untroubled differentiation between status and conduct has been increasingly hard to find, as courts have had to operate within the shadow of the public existence of a lesbian and gay body politic. Lawrence and Garner exemplify this: on the surface it seems as though the status/conduct issue barely appears and that the court is simply analyzing from different perspectives the merits of an equal protection argument. However, upon a closer examination of the building blocks of the majority’s and the dissent’s reasonings—the authorities and absence of authorities on which their arguments rest—the status/conduct debate reappears.

C. Authorities in \textit{Lawrence}

The majority and the dissent in \textit{Lawrence} base their opinions on opposite sets of assumptions. As the majority and the dissent in \textit{Lawrence I}, the two sides are speaking past each other. One side is reasoning from the belief that condemnation of, and hence discrimination against, a certain


\textsuperscript{86} \textit{Hardwick}, 478 U.S. at 192.

group of people or set of behaviors is historically rooted and culturally defensible. The other side assumes that sodomy prohibition has a disparate impact on people on the basis of sexual orientation, a practice that runs counter to the Texas Constitution.

These opposite positions are embodied in the differing Supreme Court authorities that each side takes as foundational to its stance. The majority’s federal touchstone is *Bowers v. Hardwick*, which it places at the center of its analysis. In many ways, this choice is obvious. *Hardwick*, in which the Supreme Court directly addressed the constitutionality of the Georgia sodomy law and determined that the statute did not infringe on any fundamental right, directly addresses the constitutional protections of same-sex sodomy in a case very similar to *Lawrence*.

The dissent comes at the case from a different angle, focusing its attention on federal precedent on the U.S. Supreme Court’s decision in *Romer v. Evans*. While *Romer* does not deal with sodomy, it is on point for a different reason. In striking down Colorado’s “Amendment 2” prohibiting any state and municipal anti-discrimination laws based on sexual orientation, *Romer* deals with questions of equal protection for gay people, and forbids legislation that would specifically deny civil rights protections for gays, lesbians and bisexuals. For the dissent, then, the choice of *Romer* is equally obvious.

The different questions each side asks gets them to these varying precedents, and neatly embodies the status versus conduct divide.

1. *Hardwick* in the majority opinion

Ironically, the majority cites *Hardwick* only twice directly: once in denying equal protection for “homosexual sodomy” and once to deny that federal constitutional privacy protection covers Lawrence and Garner's sex lives. It cites other cases more often, and, given how long the decision is, *Hardwick* seems, on first examination, swamped by other authorities. But the majority opinion in *Hardwick* echoes through the *Lawrence* decision, at
times so powerfully that it appears to be throwing its voice into the Texas court's mouth. The spirit of *Hardwick* haunts almost every rhetorical move the Texas majority makes, particularly in its choice, use, and disregard of other authorities.

The majority opinion in *Hardwick* is quite sparse. Once the reader gets beyond the facts of the case and the various issues involved, the decision itself is just under six printed pages.\(^{93}\) Although the Court invokes dozens of precedential decisions, it discusses almost none of them in any depth. Moreover, it barely supports its central argument, that there is no "fundamental right to engage in homosexual sodomy."\(^{94}\) The Court invokes authorities in large part to deem them irrelevant.

The Court's first significant use of authority occurs in its initial analysis of the privacy issue. It notes its disagreement with the Court of Appeals's reference to the central precedents in the development of the privacy doctrine and lists at length the etiology of the lower court's argument, a string cite of ten cases, accompanied by brief explanatory phrases.\(^{95}\) After this catalogue of precedents for a privacy argument, the majority announces: "we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy."\(^{96}\) But despite (or perhaps because of) how evident the Court believes its opinion to be, this statement remains free of any reference to supporting authority.

This pattern is repeated three more times: once when a slightly more detailed analysis of *Griswold* and *Carey* precedes the unsupported statement that the Court is "quite unwilling [to announce] . . . a fundamental right to engage in homosexual sodomy;"\(^{97}\) once when a similar string of citations and brief descriptions deems irrelevant the issue of fundamental liberties, followed by the unsupported declaration that "[i]t is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy;"\(^{98}\) and once after a

\(^{93}\) In the U.S. Reporter, Justice White's opinion begins at the end of page 187 and ends in the middle of page 196. The first two and a half pages, however, are taken up with procedural history, leaving only six pages of analysis. *See Hardwick*, 478 U.S. at 187-96.

\(^{94}\) *See id.* at 191.


\(^{96}\) *Harwick*, 478 U.S. at 190-91.

\(^{97}\) *Id.* at 191.

\(^{98}\) *Id.* at 192.
catalogue of the sodomy laws of other states (even those that had been overturned or repealed), followed a few paragraphs later by the authority-free assertion that the legitimacy of Georgia’s sodomy law rests upon “the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable,” and that “[t]he law . . . is constantly based on notions of morality.”

Indeed, the only affirmative contention the court provides for the constitutionality of the Georgia sodomy law is that all the states at some point had laws forbidding sodomy in some form. It achieves this in exactly the same way: through a lengthy list of sodomy laws enacted in various state, beginning in the years just after independence and reaching into the 1970s. However, no meaningful authority attaches to the Court’s central thesis, which is that the justices of the majority “are unwilling” to decide that “homosexual sodomy” should not be punishable by law, because it always has been and hence always should be. At bottom, the Court’s stance is comparable to the exasperated parent’s resort to “because I say so.”

Chief Justice Burger’s concurrence picks up the issue of the morality of law, as well as the assumption that the “ancient roots” of sodomy law invoked by the majority constitute a legitimate basis for continued enforcement. To his credit, Burger cites a variety of sources to support his contention that sodomy has been considered so appalling throughout Western history that overturning sodomy laws is culturally unthinkable. Burger traces a trajectory of prohibitions on sodomy “without specifying what those prohibitions embraced” from “Judaeo-Christian moral and ethical standards” to “Roman law” to the statutes of Henry VIII and the commentaries of Blackstone, which excoriated the “infamous crime against nature.” Citing no recent precedent, or any other meaningful legal basis.

99. Id. at 196.
100. See id. at 193. Although the Court acknowledged that by 1986 fewer than half the states had such laws on the books.
101. See id. at 191-94.
102. Id. at 196-97 (Burger, C.J., concurring). Justice Powell’s separate concurrence does not analyze the constitutionality of the sodomy statute, except with respect to the Eighth Amendment issue of whether or not the punishment Georgia metes out for sodomy constitutes cruel and unusual punishment, and accordingly is not discussed here.
103. Id. at 192.
for his conclusions, Burger's position can be reduced to "God said it, we've always believed it, that settles it."

These intertwined rhetorical strategies in the deployment of authority saturate Lawrence. Unlike Hardwick, the majority in Lawrence goes into significant detail in its use of authorities, but the structural role of authority is strikingly similar. The foundation for the court's dismissing the appellants' claim of equal protection is an analysis of race-based application of the Fourteenth Amendment, analogous to the Supreme Court's dismissal of Michael Hardwick's claim of a right to privacy. However, rather than just citing a list of cases, the Lawrence decision first affirms the centrality of equal protection principles to American law, asserting that "[t]he universal application of law to all citizens has been a tenet of English common law since at least the Magna Carta, and our whole system of law is predicated upon this fundamental principle,"106 and citing to Truax v. Corrigan.107 The majority then traces the development of equal protection law from the Amistad case of 1841,108 through the Emancipation Proclamation, the passage of the Thirteenth Amendment and the struggles against legalized segregation.109 This tour of historical authority leads the majority to conclude that "the central purpose of the Equal Protection Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race."

By constructing its equal protection authorities solely through the lens of race, the majority can affirm that the Texas Constitution serves to "prevent any person, or class of persons, from being singled out as a special subject for discriminating or hostile legislation,"110 a mandate that matches the federal guarantee of equal protection, while simultaneously maintaining that sexual orientation is not a suspect classification that might be covered by

107. 257 U.S. 312 (1921).
109. Lawrence, 41 S.W.3d at 351.
110. Id. (quoting Shaw v. Reno, 509 U.S. 630, 642 (1993)). It is worth noting that nowhere does the majority reflect upon the United States's shameful judicial history of allowing and even approving discrimination on the basis of race, most notoriously in Plessy v. Ferguson, 163 U.S. 537 (1896). This selective narration allows the court to ignore possible analogies between the legacy of race-based discrimination (and the eventual repudiation of segregation in Brown v. Board of Education, 349 U.S. 294 (1955)) and the recent history of judicial decisions implicating sexual orientation, and to limit the reach of equal protection to race.
111. Lawrence, 41 S.W.3d at 352 (citing Burroughs v. Lyles, 181 S.W.2d 570, 574 (Tex. 1944)).
this protection. The court quite directly observes that "neither the United States Supreme Court, the Texas Supreme Court, nor the Texas Court of Criminal Appeals has found sexual orientation to be a 'suspect class.'"1 Given the indisputable truth of this assertion, one might ask why the majority needed two full pages of narrative and citation to get to this point. Like the Hardwick Court, the Lawrence majority rehearses the central authorities in equal protection doctrine only to deem them irrelevant to the case at hand.

As in the Hardwick decision, the Lawrence majority marshals considerable authority to disregard the appellants' arguments and follows this with an unsupported assertion that lies at the foundation of the court's opinion. The Texas judges get there quite differently, however. Thanks to the "Ellen effect," they cannot ignore the possibility that sodomy laws disproportionately affect a certain segment of the population, "those possessing a homosexual 'orientation.'"1 But they counter this acknowledgment with the assertion that the possibility of disparate enforcement of the statute can be permissible "if it is rationally related to a legitimate state interest."1 The state interest that the majority posits as upholding this statute is "preserving public morals."1 This statement is followed by a substantial list of footnoted examples of cases in which courts from around the country have placed the preservation of morality above personal liberty, and capped off by an in-text reference to the Hardwick Court's belief that "[m]ost, if not all, of our law is 'based on notions of morality.'"1 However, nowhere in this discussion does the Lawrence majority prove that free exercise of sodomy by homosexuals is deleterious to public morality nor does it define what morality is, or what it is that needs to be protected. Once again, the court provides the most extensive authority for side points and minor illustrations, which serves to camouflage the absence of authority for its central argument.

112. Id. at 353-54.
113. Id. at 354. This discussion falls under a section titled "Sexual Orientation," which is proof of how much judicial understandings of the issues at stake in sodomy law cases have changed since the days of the Hardwick decision, when the concept of sexual orientation would have been unthinkable. Nonetheless, the court is chaffing somewhat under the new regime, evident in its use of quotation marks. Note, in contrast, the lack of quotation marks in the majority's discussion of "deviate sexual intercourse." Id. at 350; see also id. at 367 (Anderson, J., dissenting).
114. Id. at 354.
115. Id.
116. Id. (citing Bowers v. Hardwick, 478 U.S. 186 196 (1986)).
The specter of *Hardwick* is most plainly present at the end of the *Lawrence* decision, in its analysis of the appellants' claim to protection under the right to privacy. Here, the majority takes the skeleton argument in *Hardwick* and puts a substantial amount of flesh on its bones. Starting, as the *Hardwick* majority did, with the history of federal privacy decisions, focused on *Griswold*, the court moves quickly into a discussion of the historical authorities at the core of the Burger concurrence. But rather than spending only a few sentences on this, the decision lingers over several paragraphs, citing not only Blackstone, but also Francis Whatnot's 1885 *A Treatise on Criminal Law*, the *Institutes of Justinian*, Montesquieu's *The Spirit of the Law*, as well as *Hardwick* itself. At the same time, the majority refuses to see the actions of other states in repealing or overturning their sodomy statutes as relevant precedent, aligning such changes with "cultural trends and political movements," and not as worthy of consideration as the centuries—or even millennia—old authorities used to defend Texas's sodomy statute. In fact, the only current case that the majority sees as applicable in its privacy discussions is *Bowers v. Hardwick*.

2. *Romer* in the dissenting opinion

Just as *Hardwick* acts as the template for the majority opinion in *Lawrence*, *Romer v. Evans* is foundational for the dissent. In many ways, the dissent's use of *Romer* is structurally similar to the majority's deployment of *Hardwick*. While the dissenting opinion spends most of its time on other issues and other precedents, and *Romer* is discussed only in one section about half way through the opinion, the influence of *Romer* is everywhere, and underlies the logic of the entire dissent. This is particularly noticeable in the dissent's quick dispensing with *Hardwick*. The opinion acknowledges that *Hardwick* is controlling on the question of the appellants' federal right

---

117. Of course, what is absent in this survey is an acknowledgment that the acts referred to as the "crime against nature" and cited by Blackstone, Montesquieu, Justinian, and others in the premodern era were not the same as the conduct prohibited by Texas statute. See *Tex. Pen. Code Ann.* § 21.06 (Vernon 1994).

118. *Lawrence*, 41 S.W.3d at 362. An additional irony is that the majority is more than willing to look to recent decisions other states in their discussion of the legislation of public morality: the opinion cites cases upholding diverse morality statutes decided between 1985 and 2000 from Pennsylvania, Kansas, Tennessee, and Rhode Island, mentioning only one Texas case. *Id.* at 354 nn.9-14.

119. *Id.*
to privacy, but having acceded that point, no longer finds Hardwick a relevant authority for the equal protection issues before the court.

From the very beginning of its opinion, the dissent uses a notion of equal protection to assume that laws cannot treat distinct groups disparately, and does so primarily through its discussion of gender. Citing In re McLean, the leading case interpreting the Texas Equal Rights Amendment, the dissent immediately brings up the issue of gender as a suspect classification, something that the majority, in its initial dependence on authorities around race-based discrimination, defers to a separate analysis outside its larger equal protection discussion. The dissent’s goal in this analysis is to show that “[s]ection 21.06 is not gender neutral,” opposing the majority’s assertion that “it does not impose burdens on one gender not shared by the other.”

In order to support this argument, the dissent imagines a scenario with three actors: Bob, Alice and Cathy:

Bob approaches Alice, and with her consent, engages with her in several varieties of “deviate sexual intercourse,” the conduct at issue here. Bob then leaves the room. Cathy approaches Alice, and with her consent, engages with her in several kinds of “deviate sexual intercourse.” Cathy is promptly arrested for violating section 21.06.

The dissent uses this scenario to show that the gender distinction is relevant to the statute. Bob is not arrested “because he is a man . . . but because she is a woman, Cathy is a criminal.” The only difference between Bob and Cathy is their gender, since conceivably they could have been engaging in precisely the same behaviors with Alice. What is striking here is the dissent’s assertion that “Cathy is a criminal.” After all, is Alice not equally culpable in the performance of “deviate sexual intercourse” with Cathy? And given the parameters of the statute, should she not also have been arrested (particularly since both Lawrence and Garner were named in this case, implying that both partners are equally responsible)?

120. Id. at 366 (Anderson, J., dissenting).
121. 725 SW.2d 696 (Tex. 1987) (construing the Texas Equal Rights Amendment as elevating sex to a suspect classification).
122. Lawrence, 41 S.W.3d at 368 (Anderson, J., dissenting).
123. Id.
124. Id.
125. Id. (emphasis added).
The implication of the dissent's structuring of this story is that Cathy's engaging in sexual activity with Alice is shaped by her identity as a lesbian. Here, "Cathy" appears to stand in for the identity of "lesbian," and hence liable to prosecution in ways not applicable to "Alice," who thus constitutes little more than the ground upon which Bob and Cathy exercise, not just sexual behaviors, but their social identities as "straight man" or "gay woman." 126 Ironically, the dissent is implicitly agreeing with the majority's position that not only lesbian and gay people participate in the prohibited behavior. This story suggests, however, that homosexuals are differently treated under the statute: Cathy gets arrested, Alice does not. Underlying the dissent's analysis of the difference between Cathy and Alice is its reliance on Romer. Romer took as central to its opinion that gay men and lesbian women constituted an identifiable group separate from the majority, discriminated against, and deserving of protection as such.

The dissent "indulge[s] in this tableau"127 in order to set up its consequent contention that the "equal discrimination argument [is] not a cure" for the statute's unconstitutionality under the Texas ERA.128 That is to say, although the statute makes no distinction between acts performed between women and those performed between men, the very fact that lesbians such as "Cathy" and gay men such as Lawrence and Garner are disproportionately affected by it is an abrogation of the equal protection rights laid out in Romer. More importantly, the historical animus towards homosexuality that the majority uses as one of its central authorities in upholding section 21.06 is for the dissent, following Romer, one of the main reasons the statute should be overturned. As the opinion asserts, "[b]ecause [Colorado's] Amendment 2 drew such a classification, and then proceeded to disadvantage homosexuals because of their membership in the class, the amendment violated the equal protection of the law guaranteed by the Fourteenth Amendment."129

As Justice Anderson maintains, section 21.06 follows a similar pattern to Amendment 2 in "draw[ing] a classification for the purpose of

126. An alternative reading might posit Alice as bisexual. Indeed, Colorado's Amendment 2 included bisexual people as outside the pale of protection from discrimination, along with lesbian women and gay men. But whether she is being treated as bisexual or simply a stand-in for the open sexual possibility disconnected from identity, it is clear that the dissent is using Alice differently from the way it uses Cathy, the metaphorical lesbian.

127. Lawrence, 41 S.W.3d at 368.
128. Id. at 369.
129. Id. at 377-78.
disadvantaging the group burdened by the law.” 130 In fact, the dissent notes, Justice Scalia, in his dissent to Romer, readily agreed that, “there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.” 131 The ironies here are abundant. On the one hand, the Lawrence dissent invokes Romer to oppose the classification of a group for the sole purpose of discriminating against them. On the other, it appropriates the language of Supreme Court Justice Scalia, a vocal opponent of Romer, to support its use of the very opinion from which he was dissenting. In the context of his Romer dissent, Justice Scalia was implicitly supporting Hardwick’s upholding of sodomy laws, and explicitly arguing that since such laws already criminalize “homosexuals,” a de facto act of discrimination, the Romer majority’s ruling that Amendment 2 unfairly denied antidiscrimination protection could not be sustained for a group that the Supreme Court itself had already deemed liable to criminalization. 132 In other words, Romer’s invocation of sexual orientation as an identifiable legal category has such a powerful effect that it transforms the meaning of all other (even opposite) analyses of the meanings of sexuality.

This is the “Ellen effect” in action. In using Romer in this way, the dissent cannot help but construct lesbian women and gay men as a group and as individual people. Using such a conception of identity as a given, the dissent inevitably interprets section 21.06 as treating people unequally based on categories of identity and hence as unconstitutionally denying those people their right to equal protection under the law. Thus, the Lawrence dissent re-engages with the status/conduct debate so as to affirm the centrality of status and dispute the majority’s focus on gender- and sexuality-neutral conduct.

D. The Rhetoric of Authority

1. Using Hardwick versus Romer

So far this Article has discussed what it means to organize a decision around certain cases in terms of content. Just as Hardwick invokes certain

130. Id. at 378.
131. Id. at 378 (quoting Romer v. Evans, 517 U.S. 620, 641 (1996) (Scalia, J., dissenting)).
132. See Romer, 517 U.S. at 641. For a much more thorough discussion of the “criminalizing effect” sodomy statutes have on certain classes of people, see Christopher R. Leslie, Creating Criminals: The Injuries Inflicted by “Unenforced” Sodomy Laws, 35 Harv. C.R.-C.L. L. Rev. 103 (2000).
authorities and uses certain strategies around its deployment of authority, the majority in *Lawrence* borrows those same sources and those same strategies to lay out the content of its decision. Or, just as *Romer*’s attitude towards the meaning of sexual orientation shapes the majority’s opinion in that case, the *Lawrence* dissent’s reliance upon *Romer* implies a similar sense of the political shape of sexuality in relation to the state.

Authority does not simply affect the content of a decision or a dissent—its resonance is much deeper. The deployment of an authority is, in and of itself, a rhetorical move.\textsuperscript{133} That is to say, the very appearance of a case like *Hardwick* as an affirmative authority (rather than as something to dispose of before moving onto the “real” argument) sends a message to the reader about the intentions of the decision. The use of the phrase “as the Supreme Court held in *Bowers v. Hardwick*” in a sodomy case immediately signals to the reader that the opinion will support not only the constitutionality of sodomy statutes but an entire worldview about the relevance (or, rather, irrelevance) of sexual orientation.

The same holds for *Romer*. In order to cite *Romer* as a meaningful authority at all, judges must subscribe to the *Romer* majority’s view of sexual orientation and its relation to constitutional standards of equal protection. One might even argue that without this understanding of the role of sexuality, *Romer* makes no sense—which is borne out by the inability of the *Lawrence* majority and dissent to speak to each other.\textsuperscript{134} *Hardwick* and


\textsuperscript{134} The issue here is one of belief system, and therefore, effectively, one of faith. As my late colleague Peter Cicchino observed, these arguments encapsulate St. Augustine’s axiom that “For those who believe, no argument is necessary. For those who do not believe,
Rutgers Law Journal

Romer carry such intense, and opposite, ideological charges that the invocation of one or the other by name alone attracts or repels an array of related stances.135 Conversely, if a court wants to support a given position on sexual orientation, bringing in Romer or Hardwick does a significant amount of rhetorical work aside from the specifics of the opinion itself. Each case provides a frame within which judges can then plumb in reasoning that is directly on point.

At the same time, although Romer and Hardwick seem immovable in relation to their given ideological positions, the rhetoric of authority is not inflexible. Courts can, in fact, alter the charge around cases by resituating them outside their customary use. This can sometimes seem quite shocking. If readers assume that the appearance of a specific case signals the deployment of an attendant set of beliefs, the recontextualization of that case as a rhetorical tool can, ironically, lend additional power to the previously “opposite” side. A striking example of this is the Lawrence dissent’s use and appropriation of Loving v. Virginia.136

2. Using Loving

For the dissent in Lawrence, Loving is crucial in terms of both content and rhetoric. The U.S. Supreme Court’s ruling in Loving that Virginia’s antimiscegenation law was unconstitutional under the Equal Protection and Due Process Clauses of the Fourteenth Amendment explicitly called upon the mandate established by Korematsu v. United States that legal distinctions based on race should be subjected to the “most rigid scrutiny”137 and that if such distinctions are to be upheld “they must be shown to be necessary to the accomplishment of some permissible state object, independent of... racial discrimination.”138 As well as invoking the language of heightened scrutiny, the Loving majority also took a firm stand against Virginia’s...
contention that its anti-miscegenation law did not violate equal protection, since it affected white people desiring to marry blacks to the same extent that it prevented black people from marrying whites. The Court held that “Virginia’s miscegenation statutes rest solely upon distinctions drawn according to race.” According to the concurrence “[t]he fact that Virginia prohibits only interracial marriages involving white persons [for example marriages between American Indians and blacks were not criminalized] demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.”

The Lawrence dissent calls upon Loving by analogy. While the State of Texas argued that section 21.06 punished men equally to women, the dissent maintained that, as in the Virginia miscegenation statute, the Texas law prohibited same-sex “deviate sexual intercourse” in such a way as to discriminate against an identifiable class of people: lesbian women and gay men. By raising Loving as precedent, the dissent implicitly but powerfully analogized racial identity with sexual orientation. Loving’s insistence on miscegenation laws as discriminating according to social category (in this case race) lends force to the Lawrence dissent’s assertion that sexual orientation constitutes a classification that demands equal protection under the law on the same terms.

Loving’s rhetorical import is a little more difficult to tease out, but no less palpable. Certainly, the dissent in Lawrence can point to Loving as direct legal precedent. But it is also summoning Loving as moral or ethical precedent. Anti-miscegenation laws were among the most deeply rooted forces of white supremacy, and one of the last to disappear from the books (after all, Loving was decided thirteen years after Brown and three years after the passage of the Civil Rights Act of 1964). The fear among segregationists of “social equality” was at bottom a horror of sexual equality between black and white, particularly black men and white women.

139. Id. at 8.
140. Id. at 11.
141. Id.
142. Lawrence, 41 S.W.3d at 70.
144. A fact that makes the name of the case all the more ironic.
145. A fascinating example of this can be found in W.T. Couch’s introduction to Rayford Logan’s What the Negro Wants. Writing in the 1940s, Couch, a gradualist who
Loving repudiated this last bastion of legalized white rule, and thereby claimed a moral high ground based in the principles of equal protection under the law.

For the dissent in Lawrence, then, Loving embodies the power of the courts to rise above prejudice, and represents the possibility of a social justice that places lesbian and gay civil rights on the same level as racial equality. Moreover, the very phrase “Loving v. Virginia” represents something larger than the decision itself. It epitomizes an opposition to bigotry, to entrenched systems of discrimination, and to invidious distinctions rooted in the fear of sexual freedom. The rhetorical analogy, therefore, becomes self-evident. Just as Loving condemned segregationists’ racist obsession with black sexuality, the dissent in Lawrence shines a light on the Texas statute’s homophobic preoccupation with the sexual lives of lesbian women and gay men.

If the dissent is right that agreeing with Loving puts it on the side of the angels, where does that put the majority? According to the court’s legal analysis of section 21.06, Loving seems irrelevant, because the central issue for the court is whether or not the legislature is permitted to make and enforce moral judgments regarding same-sex sexual conduct. The rhetorical implications of Loving, however—that to have Loving on your side is a sign of the justice of your position—overwhelm the majority’s resistance to using the case.

assumes that pushing too hard for integration and equal civil rights for African-Americans will arouse his readers’ terror of miscegination, is astonishing in his attempts to reassure the reader that civil rights would not require racial intermixing. W.T. Couch, Introduction to Rayford W. Logan, What the Negro Wants ix, xv n.4 (Rayford W. Logan ed., The University of North Carolina Press 1944).

The mythic justification for lynching was the rape of white women by black men. Terance Finnegan, Lynching and Political Power in Mississippi and South Carolina, in Under Sentence of Death: Lynching in the South 189-218 (W. Fitzhugh Brundage ed., 1997). In fact, as Finnegan has proven through meticulous research, the majority of lynchings from the 1880’s onward were due to the victim’s assault or murder of a white person.

146. Lawrence, 41 S.W.3d at 352.

147. It is important to note, though, that there is a history to this relationship to Loving. The majority in Lawrence I relied heavily upon Loving to make its equal protection argument. After introducing Loving as precedent, the majority states that “[m]erely punishing men who engage in sodomy with other men and women who engage in sodomy with other women equally, does not salvage the discriminatory classification contained in this statute.” Lawrence I, Nos. 14-99-00109 & 14-99-00111, 2000 Tex. App. LEXIS 3760, at *13 (Tex. App. 2000). Moreover, the majority explicitly used the language of “strict scrutiny” in terms of “sex-based classification,” aligning its decision with that of the majority in Loving. Id. Therefore, this strong use of Loving may account for the majority in Lawrence’s focus on the
Like the dissent, the majority couches its analysis of *Loving* in the context of the civil rights struggle. But the court brings up *Loving* only after having gone through a fairly extensive catalogue of African Americans’ fight for equal protection under law, and its dismissal of sexual orientation as an analogous classification. By disarticulating the linkage between race and sexuality that informs both the majority in *Lawrence I* and the dissent in *Lawrence*, the majority in *Lawrence I* can corral *Loving* into its stable of cases without acknowledging the rhetorical meanings the dissent attaches to it.

In fact, by literalizing *Loving*, the majority deploys the case to delegitimate the claim of equal protection for sexual orientation. Moreover, the majority’s appropriation of *Loving* provided space for the court to assert the absolute difference between race and sexual orientation without having to cite any additional authority. Utterly without support, the court maintains “that while the purpose of Virginia’s miscegenation statute was to segregate the races and perpetuate the notion that blacks are inferior to whites, no such sinister motive can be ascribed to the criminalization of homosexual conduct.” This conclusion comes at the tail end of multiparagraph analysis of *Loving*, which serves precisely to obscure the fact that this final statement is supported only by its own logic, not by authority.

In this way, the majority can seemingly participate in the rhetorical meanings of *Loving* while rejecting the case as a template for other forms of social justice. Focusing exclusively on racial discrimination, the court can, in response to the dissent’s rhetorical positioning, also side with the angels (segregation was bad!) and deny the legitimacy of the appellants’ case by minimizing the effects of homophobic law. More remarkably, the majority denies that *Loving* has anything to say about homosexuality at all.

---

148. In his concurrence, Justice Fowler makes a similar move. *Lawrence*, 41 S.W.3d at 365 (Fowler, J., concurring).
149. *Id.* at 357. Of course, Justice Scalia’s dissent in *Romer* belies this assumption, since, as noted in footnote 32, he cites sodomy laws as the justification for measures like Colorado’s Amendment 2, that is, a population defined by criminal behavior cannot be protected from discrimination, since criminalization constitutes discrimination rooted in legitimate law. *Romer v. Evans*, 517 U.S. 620, 644 (1996).
150. This is similar to the tendency of conservatives to appropriate the message of Martin Luther King, Jr., particularly the “I Have a Dream” speech, and to use King’s very words to oppose the kind of racial and economic justice (such as affirmative action) that he himself clearly supported. See MICHAEL ERIC DYSON, I MAY NOT GET THERE WITH YOU: THE TRUE MARTIN LUTHER KING, JR. 11-29 (2000).
Instead, it couches its analysis of the decision in a section on gender discrimination, and concludes that no "sinister motive can be ascribed to the criminalization of homosexual conduct" and "the appellants' reliance on Loving [is] unpersuasive" because the court found "nothing in the history of Section 21.06 to suggest it was intended to promote any hostility between the sexes, preserve any unequal treatment as between men and women, or perpetuate any societal or cultural bias with regard to gender." Magically, sexual orientation disappeared as a concern that Loving might have raised, because the only meaningful classifications are race and, as a close second, gender.

This use of Loving defangs it rhetorically, which raises the question of why the case is in the majority decision at all, since the point of using Loving is to trade on its power. One easy answer is that Loving is used so extensively in the dissent and, more importantly, in the majority in Lawrence I. But that is not all. Rather, because of the "Ellen effect," the analogy between race and sexual orientation has common currency. This makes it much harder for the Lawrence majority to do what the Hardwick majority did with ease: ignore the potential civil rights issues that sodomy laws may entail. The combination of the "Ellen effect" and the vigorous dissent makes it more politically complicated for the court to appear to align itself with bigotry. Therefore, the court invokes Loving in order rhetorically to acknowledge the cultural power of civil rights claims, and then to define this issue as distinct from them.

3. Introducing further support

Thus far, we have moved from the contrasting federal authorities that provide the philosophical center for the opinions in Lawrence to Loving, which is so crucial in one opinion that it must be explicitly defined as irrelevant in the other. The next step of the analysis is to examine authorities about which the parties must make more self-conscious choices to introduce and rely upon.

Unlike the rhetorically determinative authorities such as Hardwick and Romer, some authorities are more rhetorically up for grabs. They do not bear heavy ideological weight, and can be marshaled for any number of purposes. For example, both the majority and the dissent in Lawrence use City of
Cleburne v. Cleburne Living Center\textsuperscript{153} as defining the contemporary meaning of constitutional analysis of appropriate levels of scrutiny under equal protection.\textsuperscript{154} But the majority passes through it quickly, pausing only to note that the case stands as an indicator that the rational basis test is the correct one in a case not dealing with classifications of persons by "race, alienage, or national origin."\textsuperscript{155} The dissent, on the other hand, develops a much more complicated reading of the rational basis test, to come to a conclusion that a statute making some group's difference in a markedly negative way fails this test.\textsuperscript{156}

Since Cleburne is a fairly flexible authority here, the two opinions simply enlist it to support their core arguments: that gay people are or are not a group, and as a group are or are not worthy of equal protection. The majority has already established, through its dependence upon Hardwick and its adaptation of Loving, that sexual orientation is not a meaningful classification. Cleburne is then just a side point, a base that needs covering in order to decide that minimal scrutiny is the appropriate standard to apply in evaluating section 21.06. In contrast, the dissent establishes early on that lesbian women and gay men are comparable as a group to those included in racial classifications, even if not covered by the heightened scrutiny accorded to race.\textsuperscript{157} Moreover, the dissent picks up on the majority's chronicling of the historical condemnation of same sex sodomy, a narrative the court borrows from Hardwick, and turns it to its own purpose.\textsuperscript{158} Using the logic of Cleburne, the dissent asserts that the very reason the majority believed that homosexuality should be condemned (people have always opposed it), should lead the court to the "unavoidable conclusion . . . that the statute was merely a continuation of the stereotyped reaction to a traditionally disfavored group."\textsuperscript{159} Hence, under the dissent's Cleburne analysis, even the rational basis test must find that section 21.06 violates the Texas Constitution.\textsuperscript{160}

Thus, for the majority and dissent, historical narrative can function as authority underpinning legal reasoning. In fact, the dissent co-opts the

\begin{itemize}
  \item \textsuperscript{153} 473 U.S. 432 (1995) (holding that a group home for mentally retarded adults could not be prohibited by local zoning ordinance without a rational basis for such exclusion).
  \item \textsuperscript{154} Lawrence, 41 S.W.3d at 353, 378-80 (Anderson, J., dissenting).
  \item \textsuperscript{155} \textit{Id.} at 352.
  \item \textsuperscript{156} \textit{See id.} at 380.
  \item \textsuperscript{157} \textit{See id.} (noting that "homosexuals have been subject to a tradition of disfavor").
  \item \textsuperscript{158} \textit{Id.}
  \item \textsuperscript{159} \textit{Id.} at 380.
  \item \textsuperscript{160} \textit{Id.}
\end{itemize}
majority's argument from history by explicitly referring to it and then applying it to the opposite rationale. Used this way, history can be a convincing authority for a particular position, although the historical narrative itself does not determine what kind of reasoning it will be used to support.

This raises a larger question: when and how do courts rely on social, political, and historical data and/or take notice of contemporary social reality beyond the strictures of legal precedent? And what are the rhetorical meanings of such information? Often it may be that judges are borrowing this material from advocates who are seeking to change the status quo. It stands to reason that such advocates are themselves most likely to use this kind of authority, since relying on legal precedent supposes a certain conventionality and satisfaction with current legal standards. Judges then have the option of folding non-precedential sources into decisions, transforming them into important sites of authority.

One of the most obvious and memorable examples of this phenomenon is the Supreme Court's use of the so-called doll studies in Brown.\(^1\) Since the binding legal authority before the Brown Court was the odious Plessy v. Ferguson,\(^2\) the only way to counter this precedent was to render authoritative a competing set of concepts. In Brown, then, the Court defined as a central issue the social science data that was not available at the time Plessy was rendered, creating an avenue for the Court to address the simple fact that the social climate in 1954 was very different from that of the 1890s.

The Brown Court used the doll studies in the spirit in which they were designed—to show that segregation created a sense of inequality and worthlessness in the minds of African-Americans, particularly children.\(^3\)


\(^2\) 163 U.S. 537, 537 (1986).

However, the seeming intentions of a historical or social authority do not need to jibe with the needs of an opinion in order to be called into use. In addition, a history of use of a certain authority to support one argument does not preclude the deployment of the same material to support the opposite position. Just as the *Lawrence* court does with *Loving*, the majority imports the findings of Dr. Alfred Kinsey's sexuality studies in order to support its contention that section 21.06 does not on its face discriminate against an identifiable class of people.

Leaning on Kinsey's findings, the majority reasons that since "[p]ersons having a predominantly heterosexual inclination may sometimes engage in homosexual conduct . . . [section 21.06's] proscription applies . . . without respect to a defendant's sexual orientation."164 Therefore, for the majority, Kinsey's study can support the conclusion that the statute in question does not discriminate against gay people. This runs directly counter to the ways in which Kinsey's work has for years been used to support the civil rights of lesbians and gay men. Kinsey's conclusion that a variety of sexual behaviors are spread across the spectrum of sexual identities helped to normalize homosexuality and grant equal human dignity to gay people and same-sex sexual practice.165 To supporters of gay rights, the majority's appropriation of Kinsey might seem shocking, but it serves as a sign of the flexibility of social observations as legal authority.

Accordingly, when judges use such material, regardless of whether or not they are depending upon what advocates have argued, they are recognizing law as a social and political force, and acknowledging the influence of social and political forces on the law.166 Sometimes this takes the form of carefully documented references to historical and social scientific texts.167 Other times it is mentioned only in passing168 or as a

---

164. *Lawrence*, 41 S.W.3d at 353.
165. Examples of this application of Kinsey's work are abound. For one early and influential such use, see COMMITTEE ON HOMOSEXUALITY AND PROSTITUTION, THE WOLFENDEN REPORT 27-36 (Am. ed. 1963) (1957).
166. As E.F. Roberts wryly observed: "Judicial notice is the art of thinking as practiced within the legal system." E.F. Roberts, Preliminary Notes Toward a Study of Judicial Notice, 52 CORNELL L.Q. 210, 236 (1967).
167. See for example, the *Lawrence* court's extensive discussion of statutory proscription of same-sex sodomy. *Lawrence*, 41 S.W.3d at 361.
168. See the *Lawrence* dissent's brief mention of the debate over the State's interest in the "promotion of family values." *Id.* at 373 (Anderson, J., dissenting).
given. But the function is the same: to turn an observation of how the world works into a source of law. The content of that observation, or its genesis in social analysis, may be merely a helpful addendum to the court's legal reasoning or may, as we have seen, predetermine it.

4. Omitting support

Although it is the style of legal writing to cite authorities to the point of obsession, occasionally legal writers will just come out and say what they think. Courts will offer what they see as a common sense, or at least commonly accepted, view of the world without citation. Needless to say, what courts assume to be that uncontroversial or incontrovertible itself reveals a great deal about judges' ideological orientations.

Often courts make sweeping conclusions without authority because, rhetorically, they see themselves as simply summarizing the precedent-based interpretations that they have already laid out. For example, the Lawrence majority concludes that "the legislature could have concluded that deviant sexual intercourse, when performed by members of the same sex, is an act different from or more offensive than any such conduct performed by members of the opposite sex," and impliedly asserts that such a determination would be unequivocally permissible in a regulatory scheme. While this statement is itself unsupported, it follows a paragraph of analysis of differential treatments of variations on the same offense: some homicides are judged capital offenses, some as first degree felonies, some second degree, and so on, with each example supported with individual footnotes linked to relevant clauses in the Texas Penal Code. The court's positioning of its assertion, thus, indicates that it sees the differential treatment of sexual behaviors as directly analogous to these other differentiations in criminal law, and therefore this unsupported assertion is offered merely to summarize the court's interpretation, not to introduce a new idea.

169. See, for example, the reference in the Lawrence I dissent to the "divinely instituted principles" upon which laws rest. Lawrence I, 200 Tex. App. LEXIS 3760, at *32-*33.
170. Lawrence, 41 S.W.3d at 356.
171. Id.
172. One might quibble with the court's contention that a change in gender of sex partner is analogous to the difference between murder for hire and negligent homicide, but it is unfair to attack the court's lack of citation for this assertion since it sees itself as having built the interpretation upon a solid foundation in law.
But when courts employ unsupported assertions to define the paradigm that determines (or even predetermines) their position, their lack of authority is more questionable. Rather than coming to conclusions based on precedential material, courts’ unsupported observations often reveal the assumptions that create their interpretations of law. The Lawrence majority’s assertion that Loving is irrelevant in analyzing section 21.06, because “while the purpose of Virginia’s miscegenation statute was to segregate the races and perpetuate the notion that blacks are inferior to whites, no such sinister motive can be ascribed to the criminalization of homosexual conduct”173 seems to depend upon the court’s lengthy discussion of equal protection legislation, but is, in fact, wholly unsupported. Similarly, the legal conclusions that the dissent draws from to create its “Cathy and Bob and Alice” scenario are nearly devoid of authority.174

These assertions lie at the core of the majority’s and dissent’s positions, which raises the question why in the conservative discipline of judicial decision-making, such a central analysis is not connected in any meaningful way to binding statutory or common law authority. There are at least two possible explanations for this. Either the writers believe their conclusions are so self-evident and true they do not require citation, or they recognize that their interpretations are sufficiently original that they need to claim sole ownership of them.175 The example from the dissent appears to have more of the flavor of the latter strategy, since the dissent openly acknowledges that it has constructed this narrative to make a larger point about the effects of the statute. But the majority’s bald conclusions from its discussion of Loving are as unconnected to inherited law as the legal conclusions that the dissent takes from this scenario.

What these opinions rhetorically claim to be doing is building an argument and then extracting the inevitable conclusions offered up by their evidence. Thus, the opinions’ unsupported conclusions are offered in the same spirit as interpretations that more convincingly issue from statutory authority or legal precedent, such as the example given above of the majority’s determination that distinctions between different kinds of sodomy

---

173. Lawrence, 41 S.W.3d at 356.
174. The dissent makes reference to the Fourteenth Amendment, but these are offered only to mention that the appellants base their equal protection arguments on the U.S. Constitution. Id. at 370 (Anderson, J., dissenting).
175. Ironically, this is the model for citation determined by the MLA HANDBOOK—that an idea need not be cited if it belongs to the culture at large, or it can be claimed only by its writer. See supra text accompanying notes 18-21.
are no more invidious than distinctions between different degrees of homicide.

However, the cause and effect relationship is in fact reversed. The majority's belief that gay men and lesbian women do not constitute a meaningful class and do not deserve the same protections as minorities shapes its analysis of Loving and its determination that anti-gay sodomy laws have no "sinister motives." Similarly, the dissent's conception of lesbian and gay identity predetermines its deployment of the Fourteenth Amendments in telling the story of Cathy, Alice and Bob, and undergirds its conclusion that section 21.06 cannot withstand constitutional scrutiny. The rhetorical effect of both conclusions, then, is to place the majority's and the dissent's interpretations firmly within the first explanation, that is, having simply observed the indisputable truth. Counterintuitively, the effect of offering an unsupported assertion can be to cast it as more authoritative, that is, as constituting its own authority.

III. CLASSIFYING AUTHORITIES

As should be clear by now, not all authorities do the same work. For example, Hardwick functions very differently in Lawrence from Cleburne, and Cleburne operates differently in the Lawrence majority from the work it does in the dissent. In order to tease out these differences in meaning, it is helpful to organize authorities into different analytical categories. At least two overarching categories of authority emerge from the analysis of Lawrence: what I will define as "looming authority," and "lurking authority." Not all authorities fit neatly within these categories however, and I briefly comment on a possible third classification, "methodological authority." While there can be a fair amount of interplay between these categories, this structure of analysis can help scholars gain a clearer understanding of the rhetorical stakes in the deployment of authorities in legal writing.

176. Indeed, even between the two categories there might be considerable debate as to which authorities belong in which group. In the discussion that follows, I offer my observations about how the primary authorities in Lawrence might be taxonomized, but I do not intend to suggest that these interpretations are definitive, only that they can illustrate how the proposed categories can help deepen an understanding of the meanings implicit in a court's use of authority.
A. Looming Authorities

Looming authorities loom. That is, they weigh heavily over an issue being decided by a court; they appear immense and inescapable. Webster's Dictionary encapsulates the implications of "looming" authorities perfectly: to loom is "to come into sight in enlarged or distorted and indistinct form... to appear in an impressively great or exaggerated form...; to take shape as an impending occurrence."\(^{177}\) Looming authorities feel "impressively great" to legal writers, or are constructed to feel that way to the reader, because they are seen, or can be seen, to determine the outcome of a particular controversy.

Though overlapping, looming authorities do not map precisely onto the traditional category of "binding authorities," because the two conceptions come from quite different analytical frameworks. Binding authority operates within a strict hierarchy of legal decision-making tools: once a case has been determined to constitute binding precedent it necessarily controls the outcome of future decisions on point. Looming authorities might be determined to be binding in a given case,\(^{178}\) but the category emerges from an acknowledgment of the interpretive work engage in by courts. Binding cases are those that must be dealt with as a technical matter: on point decisions by the same or higher court. Looming authorities, by contrast, are those that must be dealt with as a matter of perception: binding or not, they might shape the theoretical orientation of the court’s analysis, and thus must be addressed to maintain consensus about a decision’s legitimacy, even if they are raised only to be interpreted as not dispositive of the question before the court.

Described this way, it is clear that Hardwick looms heavily in Lawrence. For the majority this is an obvious analysis: after all, Hardwick provides the blueprint for the majority’s reasoning. What is more striking is how much Hardwick looms over the dissent. In large part this is because any discussion of sodomy law cannot help but look towards Hardwick as an authority beyond its status as legal precedent. The case is not simply part of the legal record: it is woven into legal culture, and juridical understandings of regulation of homosexual conduct and, by extension, of lesbian women and gay men. Hardwick is a touchstone of how our society, through the legal

\(^{177}\) Webster’s Dictionary, supra note 4, at 704-05.

\(^{178}\) But non-binding cases can certainly loom largely. As discussed infra, Hardwick is not binding on a state’s interpretation of the privacy protections afforded under its state constitution, but this does not mean that the Supreme Court’s sodomy analysis does not loom significantly when state courts address such questions.
system, controls the lives of individuals whose sexual expression is with others of the same gender, as well as a symbol of the contested landscape of American sexual life. The dissent dispenses with Hardwick by relegating its relevance to the issue of federal privacy,¹⁷⁹ but the case lingers over the dissent’s opinion, and infiltrates the remainder of its analysis.¹⁸⁰

The power of Hardwick as a looming authority is that its use in discussions of sodomy law is automatic, not autonomic. It looms no matter what arguments are proffered by appellants or the state, no matter what position a court takes, and no matter what other decisions the Supreme Court makes on lesbian and gay issues, short of overturning it. Not all looming authorities are this primordial, however. Since what is looming is in part determined by interpretations of preceding case law and existing statutes, and in part a cultural construction, it necessarily follows that the sensation of “loomingness” can itself be created, either by the parties or by alternative interpretations on the bench.

Romer, for example, quite apparently looms as large for the dissent as Hardwick does for the majority, because, similarly, the dissent sees it a model for judicial analysis of the question before the court. The inverse is not true, however. In a sodomy law context, Romer simply does not have the iconic value that Hardwick does,¹⁸¹ particularly since the majority in Romer went out of its way to disconnect its decision from Hardwick. Romer does have iconic value, though, in relation to the constitutionality of discriminating against lesbian women and gay men, an issue that the dissent brings to the fore, and hence which the majority must address.

Since the question of how much Romer informs an interpretation of the Texas Equal Rights Amendment is at the core of the dissent’s approach, the majority has to engage the issue of civil rights in some way before moving beyond Romer. Thus, the majority appears to dispense with Romer in a couple of short paragraphs, by observing that it does not overrule Hardwick, and does not directly address the regulation of “homosexual conduct.”¹⁸²

¹⁷⁹. Lawrence, 41 S.W.3d at 366-67 (Anderson, J., dissenting).
¹⁸⁰. This can be seen, for example, in the dissent’s negative characterization of the “contention that the same conduct is moral for some but not for others,” a central component of Hardwick’s analysis, and its later repudiation of any assertion that “a valid state interest . . . is rationally served by proscribing sodomy only when performed by homosexuals.” Id. at 367, 380.
¹⁸¹. I am not certain that anything in American sodomy law jurisprudence could possibly have the same iconic value as Hardwick. It seems quite simply impossible to think about sodomy law without immediately conjuring an image of Hardwick, regardless of whether that image is salutary or rife with condemnation.
¹⁸². Lawrence, 41 S.W.3d at 355.
But the specter of discrimination against gay people that Romer raises cannot be easily erased from the majority's consciousness. It is not difficult to imagine that the majority's zealous retelling of the fight for African-American civil rights in the courts is a way of absolving itself from an implicit self-criticism of having failed to afford legal protection to a minority group in need. If this is true, the dissent has succeeded in at least one of its efforts—it has transformed Romer into a palpable and inescapable forerunner, that is, it has made the case loom.

The Lawrence majority and dissent both try to work through looming authorities that are ideologically counter to their positions, and they choose similar methods to do this: defining the authority as irrelevant. There are other options, however, depending upon the case and the status of the court. One possibility is simply to overturn an unfavorable but compelling decision, or to define as unconstitutional an unfavorable but looming statutory provision. Courts are traditionally loath to redact established legal doctrines, but have done so on rare occasions, albeit sometimes indirectly. The Supreme Court most famously adopted this strategy in Brown. Despite the various desegregation cases that had been decided by the Court between 1896 and 1954, no case loomed larger for the Brown court than Plessy. Brown dealt with the "loomingness" of Plessy by facing it head-on and explicitly overruling it. Since the Texas Court of Appeals is in no position to overturn the U.S. Supreme Court, it must wrestle with the looming decisions from that Court. Thus, both opinions deal, however tangentially, directly with looming Supreme Court decisions that work against their positions, as well as those which support them.

Alternatively, the Supreme Court in Romer took the opposite tack, totally ignoring the Hardwick decision. Reading only the Romer decision, one would not know that the Supreme Court had only ten years earlier defined sex between members of the same gender as criminally prosecutable. Though the Court's narrow interpretation of the question before it did serve to define Hardwick out of relevance, the problem with

---

183. See id. at 351-52.

184. An example of this is the Supreme Court's ultimate rejection of its Lochner-era substantive due process analysis began in Lochner v. New York, 198 U.S. 45 (1905), and its progeny, and in later decisions such as Nebbia v. New York, 291 U.S. 501 (1934).

185. For example, in Sweatt v. Painter, 339 U.S. 629 (1950), the Supreme Court determined that a segregated law school functionally failed to provide equal facilities to white and black students, but stopped short of determining that separate could never mean equal.


this strategy is that it opens a court up to considerable criticism and can delegitimate its decision.\textsuperscript{188} Since it was the only significant Supreme Court decision before \textit{Romer} to address homosexuality, thereby looming large on the topic, \textit{Hardwick}'s absence is not merely noticeable, it challenges for future courts and advocates the credibility of \textit{Romer} as a potential looming authority itself. Conventional wisdom holds that the \textit{Romer} Court wanted neither to overrule \textit{Hardwick} nor to follow it,\textsuperscript{189} but this might not have been an easy trick to accomplish. For the \textit{Romer} Court, \textit{Hardwick} loomed so large that the strategies of adopting it as determinative or casting it as unmentionably irrelevant may have been easier than pursuing the \textit{Lawrence} opinions' strategies.

Ignoring looming authority does not make it go away, however. \textit{Romer}'s omission of \textit{Hardwick} is, in some ways, as significant to the decision as the majority's opinion itself, and certainly as striking to a reader.\textsuperscript{190} Thus, looming authority is not necessarily central to a decision, occasionally it is represented as marginal, and sometimes is not even addressed. But it never disappears from the court's (or the reader's) imagination—it inevitably comes into view, and, as \textit{Webster}'s reminds us, can seem massive and impending, even when indistinct or distorted.

\textbf{B. Lurking Authorities}

Lurking authorities\textsuperscript{191} are also significant to judicial decisions, but they occupy a different conceptual space. Unlike looming authorities, which hover inescapably over courts as they are considering an issue, lurking authorities "move . . . inconspicuously"; they are "concealed but capable of being discovered," even as they "persist in staying."\textsuperscript{192} Lurking authorities are those that legal writers do not feel compelled to address. That is, these authorities can feel as if they have been discovered or marshaled for a certain point rather than as if they were so omnipresent their introduction into an analysis was inevitable.

\textsuperscript{188} In fact, it serves as a center of Justice Scalia's scathing critique of the \textit{Romer} opinion. See \textit{Romer v. Evans}, 517 U.S. 620, 635, 640-42 (1996) (Scalia J., dissenting).


\textsuperscript{191} I am indebted to Peggy Cooper Davis for this nomenclature.

\textsuperscript{192} \textit{WEBSTER'S DICTIONARY}, supra note 4, at 710.
Under this description, lurking authorities could be those that are introduced to support a peripheral point, or could be central to the analysis. The distinction between looming and lurking, then, is not necessarily one of importance; it is one of palpability. While the weight of looming authorities hangs over legal writers, lurking authorities feel to both writers and readers more as if they were waiting around to be used, and their relevance is more actively constructed by interpretive work. As such, lurking authorities are not equally pressing for both sides of an argument, and may have little effect on the opinion that does not deploy them. They might be technically binding and on point for the side that uses them, but they do not bring with them the level of cultural and perceptual power inherent to looming authorities.

The example of Brown is instructive here. The doll studies cited by the Brown Court are classic lurking authorities. Unlike the precedent of Plessy, they did not infuse the Court's consciousness. Rather, the studies existed outside the legal environment, and the Court picked up on them (obviously based on the arguments of the plaintiff and amici).\textsuperscript{193} This example is useful, too, in showing that lurking authorities can trump looming authorities in forming a court's opinion, as the doll studies did in providing an avenue for repudiating Plessy. Moreover, it points to a functional difference between legal and nonlegal authorities. While legal authorities—statutes and cases—can either loom or lurk, nonlegal authorities—historical background, social science research, political analysis—are almost always lurking.

The Brown Court's use of the doll studies suggests that scholars might differentiate between the role an issue plays in the popular imagination and the way in which it is received into the body of jurisprudence. That is, the issue of the relationship between racial separation and white supremacy might have loomed culturally before the 1954 Supreme Court, but was not part of the legal vocabulary of the authorities that loomed over the Brown Court.\textsuperscript{194} The Court had to call upon lurking authorities to put the effect of white supremacist segregation on the table to explicitly oppose it.

\textsuperscript{193} Moreover, had the Brown Court found for the Topeka Board of Education, it is unlikely that the doll studies would even have made an appearance.

\textsuperscript{194} Sweatt v. Painter, 339 U.S. 629 (1950). In Sweatt, the Court, while using the rubric of Plessy, acknowledged that the petitioner, as a black man, had no access to a law school of equal quality to the University of Texas Law School, which had denied him admission on the basis of race. \textit{Id.} at 634. In its decision, the Sweatt Court detailed the clear inferiority of the all-black law school without positing a cause and effect relationship between the quality of education available to black law students in Texas and the practice of segregation of educational institutions. \textit{Id.} at 632-34. Moreover, it did not observe, as the Brown Court did only four years later, that the reason for this disparity was the cultural and legal institution of white supremacy. \textit{Id.; cf.} Brown v. Bd. of Ed., 347 U.S. 483, 494 (1954).
The introduction of the doll studies in Brown, then, gave a clear indication of what direction the Court was planning to take in its decision. Here lies a crucial distinction between looming and lurking authorities. The mention of a looming authority provides no information about a Court’s orientation: readers must pay attention to the interpretive work a court does in using the authority, since the authority will show up no matter what the court’s decision. Since the introduction of a lurking authority feels so much more optional than the invocation of looming authority, it can in itself suggest the position a court will take, even before it analyzes the authority. An obvious example of this in the Lawrence majority is the invocation of religious and historical sources: the mere appearance of Leviticus, Blackstone’s, and Montesquieu’s prohibitions on same-sex sexuality\textsuperscript{195} sends a clear message of the court’s intentions. Since these sources are invariably (and only) cited, both in law and in the larger culture, by parties desiring stricter regulation and suppression of gay sex and gay people, the court’s decision to pick up on them makes a political statement beyond the applicability of the authorities themselves.

No wonder, then, that it is so startling to see the Lawrence majority cite Kinsey’s human sexuality studies to bolster its claim that sodomy laws do not unfairly discriminate against gay people as a class, rather than seeing the dissent use it to show homosexual orientation as a common and natural part of human sexual structures.\textsuperscript{196} If lurking authorities convey an ideological message through their deployment, what does it mean when they are read against the grain?

This question applies even more directly to the majority’s use of Loving. Loving is not a looming authority in the context of sodomy law, particularly in cases that support the constitutionality of same-sex specific sodomy statutes. The customary deployment of Loving in such cases is by advocates and courts wishing to challenge the legitimacy of legal distinctions between same- and opposite-sex sodomy laws. But Loving is in a liminal position: pro-gay legal writers have been attempting to edge it up to the level of looming authority, even as anti-gay proponents of sodomy law have both taken it up for their own uses and kept it firmly in the category of lurking authority. The ideological struggle here is clear. To position Loving as looming in sodomy law consideration would, in this context, mean, both to

\textsuperscript{196} See id. at 353 n.6.
fix it interpretively\textsuperscript{197} and to force supporters of discriminatory sodomy laws to grapple with the case on a predetermined set of terms.

The stakes in this struggle are high for both sides. At issue is the meaning of group classification: for \textit{Loving} to be a looming authority would mean that courts would have to accept that race and sexual orientation were functionally analogous as social and legal classifications. More importantly, \textit{Loving}'s cultural significance as the final nail in the coffin of legal segregation could lend greater legitimacy to the struggle for lesbian and gay civil rights in general.

But the stakes may be no less great within the narrower context of strictly legal doctrinal interpretation. Just as pro-gay advocates have tried to import \textit{Loving}'s analysis of equal protection into sodomy statutes, they have also attempted to interpret \textit{Cleburne} as a looming authority for any interpretation of the rational basis test. The strength of \textit{Cleburne} for opponents of same-sex specific sodomy statutes is that it provides a close and clear test of the obligations of even minimal scrutiny. \textit{Cleburne} makes an explicit distinction between minimal scrutiny and the constitutionality of laws that trade on prejudice for their legitimacy.\textsuperscript{198} Flying in the face of a vast body of law that deals with non-suspect legal classifications, \textit{Cleburne} challenges the enormous latitude that minimal scrutiny often allows to legislative action.\textsuperscript{199} The power of \textit{Cleburne}, then, is to provide guidelines that prevent explicit discrimination without raising the specter of suspect classification.

For \textit{Cleburne} to qualify as a looming authority in same-sex sodomy cases, courts would have to acknowledge that not only does longstanding animus towards a group does not legitimate discriminatory treatment, and that such dislike in fact renders discrimination suspect. The implications for same-sex sodomy are obvious and far-reaching. It is not surprising, therefore, that the \textit{Lawrence} majority is quick to relegate \textit{Cleburne} to purely procedural analysis: to examine whether a rational basis for different treatment is achieved, to maintain that it is, and then quickly to move on.\textsuperscript{200}

\textsuperscript{197} That does not mean to say that all looming authorities are fixed in the same way in every context. Simply, it means that there is only one understanding of \textit{Loving} that could make it loom in a same-sex sodomy context: that discriminating between same- and opposite-sex sodomy is analogous to discriminating between same- and cross-race marriage.


\textsuperscript{200} \textit{Lawrence}, 41 S.W.3d at 352.
Lawrence, Cleburne, Loving, and even Kinsey demonstrate that authorities do not necessarily fall into rigid, clear, or easily definable categories, nor are they static over time. Although many, or even most, authorities are evidently looming or lurking, there is an enormous amount of tension at the margins, and for good reason. What advocacy in a social context is about is transforming lurking authorities into looming ones (and vice versa) in order to shift a social paradigm into a legal one. The very ambiguity of classifying looming versus lurking authorities is due less to the fragility of the categories than to the fierceness of the battles that these taxonomies inform and by which they are structured. Equally important, it is on the margins that the rhetorical power of looming and lurking authorities becomes most distinct. The push-pull between factions reveals what exactly is at stake in conceiving of an authority as looming: the demand that an authority be dealt with in a certain way in a given context.

C. A Word About Methodological Authorities

Thus far I have dealt with the authorities that define the doctrinal analysis of judicial decisions. But there are other ways that authorities can be used outside doctrinal issues. One of these might be methodological—authorities which are deployed so that courts can rehearse for themselves what their judicial role is. Often courts use methodological authorities to do more than define their role. These authorities are also called in to support a court’s definition of how its role should be implemented, for example the way in which the Lawrence majority cites Cleburne as guidance in interpreting the constitutionality of non-suspect legal classifications.

A clear example of this occurs in the Lawrence court’s initial discussion of the morality of same-sex specific sodomy laws. While the majority acknowledges that the appellants deem the statute to be based on prejudice, rather than moral insight, it maintains that its power to make value judgments about the “moral justification for a legislative act is extremely limited.” The authority cited on this point is, according to the court, purely methodological: it indicates that it is not the job of the judiciary to make laws, and since laws make moral decisions, it is not the role of the court to second-guess the legislature. Citing several cases in which courts determined that it was up to the “democratic process” to correct

201. Id.
202. Id. at 355.
203. Id.
"improvident decisions" by the legislature, the Lawrence majority asserted that "the people have granted the legislature the exclusive right to determine issues of public morality." By looking to methodological authority to address the appellants' claim of prejudice, the majority can wash its hands of the question—deciding the morality of laws is not its job.

The court's framing of an authority as methodological might have an ancillary rhetorical purpose: the opinion can then imply that authority, and hence the issues it might embody are not necessarily useful substantively. This is the effect of the Lawrence majority's treatment of Cleburne. By invoking Cleburne solely to describe a standard of analysis, and suggesting through a direct citation that this is the proposition for which the case stands, the majority defangs it as guidance into the meanings and implications of historically based prejudice.

If the study of rhetoric teaches us anything, it is that even that which appears to be solely a signpost can in fact be part of the road on which an argument is traveling. Just as looming and lurking authorities can reveal a court's ideological stance, recourse to the language of methodological authority often defines the parameters of what a court believes an issue is about (or wants to insist it is about). The Hardwick majority's implicit use of Lochner, and its ultimate rejection, to define its authority in relation to the rights entailed by the due process clause, and the limits on that authority, is more than just an acknowledgment of the power of the Constitution and a repudiation of "judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." Rather, it is the Court's first step in its substantive decision to refuse to overturn Georgia's sodomy law, and a not-so-subtle reinforcement of the Court's contention that any other result would constitute bad jurisprudence.

The argument that only the legislature makes law, and that the judiciary should distance itself from even the appearance of shaping law, is a major element in the deployment of methodological authorities; and often serves to

205. Lawrence, 41 S.W.3d at 355.
206. Of course, this does not explain the court's later ease in affirming the morality of same-sex sodomy laws.
207. That is, one unmodified by any weakening or explanatory signal.
208. Lawrence, 41 S.W.3d at 352.
camouflage the judgments courts do make about the legitimacy of legislative action. The Lawrence majority inserts such a use of authority into its rationale for diverging from the decision of other states to legalize same-sex sodomy. Aligning the actions of other states with "cultural trends and political movements,"211 the majority quotes Justice Noggle of the Idaho Supreme Court in his assertion that "[t]he court is not expected to make or change the law, but to construe it, and determine the power of the law and the power the legislature had to pass such a law; whether that power was wisely or unwisely exercised, can be of no consequence."212

By defining its defense of same-sex sodomy laws as part of the role of the court, while condemning overturning such laws as judicial meddling, the Texas Court of Appeals uses methodological authority to make a rhetorical argument about the legitimacy of sodomy statutes more generally. The Lawrence court's disregard of the long history of judicially constructed common law is striking. Although the majority's invocation of the legislature's power to craft law may be technically accurate, the opinion's use of methodological authority to disassociate itself from the actual work that courts do213—and that, in its own opinion, it does—is a powerful rhetorical move. In this way, a legal writer's introduction of some methodological authorities may do more significant rhetorical work than the use of either looming or lurking authorities, since so often part of the effect of methodological citation is to obscure the connections between method and substance.

IV. CONCLUSION: THE WORK AUTHORITIES DO

Certainly, this analysis of authorities only brushes the surface of the possible investigation of a much-neglected area of legal writing. The classifications laid out represent just one way of understanding what authorities do. There are more categories than I have named, and more subsections to each of the categories I identify. Nonetheless, classifying and naming different uses of authorities makes an important point: that authorities do fall into categories, even though legal writers are only rarely conscious about their rhetorical choices of authority, and, even if conscious, almost never explicit.

211. Lawrence, 41 S.W.3d at 362.
212. Id. (quoting People v. Griffin, 1 Idaho 476, 479 (1873)).
213. And which commentators are willing to acknowledge openly. See, e.g., CARDOZO, supra note 7, at 98-167; Patricia Wald, The Rhetoric of Results and the Results of Rhetoric: Judicial Writings, 62 U. CHI. L. REV. 1371, 1394-1400 (1995).
Conscious or not, legal writers invisibly construct interpretive frameworks through their choices in introduction and positioning of authorities. For example, acknowledging an authority's "loomingness," or even just treating an authority as though it were looming is a decision that has roots and consequences in rhetoric that both embraces and transcends a specific piece of writing. Reproducing an authority as looming posits the writer as not simply taking a side in a larger set of debates on an issue, but as arguing who gets to speak about the issue, which voices will have power and which will be consigned to the incidental or merely procedural.

But understanding that some authorities that legal writers use are lurking, whether the writers acknowledge that or not, opens up a much broader field of vision for analysis. By relying upon an authority that is valuable but not obligatory, writers can expand the range of sources that count as meaningful authorities, or attempt to knock an apparently looming authority down into an optional resource (although not always successfully). In fact, often the central struggles in litigation lie in advocates' efforts to transform lurking authorities into those that loom, and vice versa. Finally, the rhetorical power of representing an authority as methodological is clear: the distinction creates a *cordón sanitario* between a court and issues it might see as too hot to handle. Transforming an authority from lurking to methodological can shift the balance of an argument subtly but powerfully.

If we recognize what authorities do rhetorically, we can embark on a serious interpretive project that reaches beyond the manifest arguments of a legal text. Examining the explicit arguments of a legal text on the one hand, and the implicit arguments of the authorities on the other, readers can construct a parallax view of a legal decision that is complex and multidimensional. Canny legal writers, once they recognize the power of unspoken categories of authority, can consciously manipulate them, constructing their own classifications, and challenging assumptions that underlie and are undergirded by the seemingly effortless connection of, say, same-sex sexual activity and late medieval legal tracts.

In many ways this article is itself a piece of advocacy for a different kind of reading and a more conscious kind of writing. Legal writers are often inclined to view the use of authority as at best, neutral, and at worst, a chore. Usually citation is taught as a kind of punctuation to an argument, rather than an element of it. Like punctuation, we tend to see the use of authority as characterless within itself—as reflecting reality. Just as punctuation simply shows us where we would pause and breathe if we were reading a text out loud, indicates where ideas begin and end, legal writers imagine citation as purely mimetic, tracing the path an idea has followed to reach the page.
However, I would argue that the deployment of authority is more like a syntax. That is, it creates meaning through a process of defining order. I mean order here in two senses: on the one hand the arrangement of things (the order of service), and on the other the hierarchy of that arrangement (put your affairs in order, first things first). The classification of authorities is syntactic and hierarchical. It tells the reader how important a piece of information is, and where it belongs in relation to all the other pieces of information. Like syntax, in which word order both reflects and constructs meaning, the use of authority supports and builds an argument, prescribing a certain kind of analysis in relation to specific ways of thinking about law.

When we truly understand the work that authorities do, we will have a much clearer sense of how law is developed and shaped, and what legal decisions mean in a holistic way. Assumptions underlying judicial decisions, both conscious and unconscious, become clear in ways that would not have been fully possible before. Most importantly, when readers and writers—as advocates, scholars, and decision makers—critically examine the building blocks of legal writing, we can understand more deeply the jurisprudence that structures our work, our society and our lives.

214. This is even more true when one begins to look at the different signals that show the relationship between the authorities and the propositions for which they are cited (see; see, e.g.; and so on), which construct a hierarchy of information within the categories of looming, lurking and methodological authorities.