SEX AND CITIZENSHIP:
CONTESTING THE LIMITS OF DEMOCRATIC
RIGHTS-BASED DISCOURSE

A Thesis in
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by
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ABSTRACT

Historically, democratic citizenship in the United States has been underwritten by the freedoms and protections guaranteed by the juridical discourse of rights. These rights have increasingly become a marker of an individual or group’s inclusion in civil society and, by extension, equal standing as a citizen. However, access to or exclusion from juridical rights is contingent upon individual and collective identities, with supposed “deviant” identities suffering the effects of marginalization and subjugation at the fringes of society. Consequently, American history has seen numerous identity-based movements struggle for inclusion by appealing to the legal system for full coverage under the protective umbrella of rights. Those with “deviant” sexual identities have been no exception to this history. Because battles for sexual rights have taken place primarily in the courtroom, often with contradictory and paradoxical results, this project critically examines the juridical regulation of sexuality through the deployment of a rights-based discourse.

I explore the limitations of rights-based juridical discourse in establishing the conditions for a truly egalitarian and democratic politics, especially pertaining to issues of sexuality and citizenship. These limitations often manifest in the forms of regulatory and normalizing practices, which I contend are facilitated by adherence to the belief in a “true,” natural, and essential conception of identity. In order to contest these limits, I employ a three-part analysis. I begin with a theoretical overview aimed at contesting the essentiality and immutability of sexual identity. I illustrate how (homo)sexuality is the product of numerous discursive techniques, and that these techniques result in both the production and regulation of (homo)sexual identities. Building off of these discussions, I conduct two case-specific analyses examining the ways in which homosexuality is circumscribed by a discourse of rights that, paradoxically, both enables
and limits the expression and practices of sexual freedoms. These examinations focus on appeals made for the right to privacy in opposition to anti-sodomy laws and the struggle for same-sex marriage. Finally, I attempt to articulate a conception of a democratic and pluralistic ethos that is better able to productively engage the paradoxes and limitations endemic to a politics structured by juridical rights and composed of citizens with conflicting senses of identity.
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PREFACE

In many ways, throughout the course of researching, writing, and conversing about this project, I have done more work on myself than I have done on the actual dissertation. It has been the kind of work that has forced me to think about how I relate to myself and to others, and to reflect upon where I stand regarding certain social and personal issues. Through this “self-work,” I have been compelled to closely examine my political and ethical commitments, and, in some cases, I have renegotiated a few of those commitments. In my reflections, I was surprised to discover that much of this “self-work” had already been in progress well before I even committed to a dissertation topic. It was an odd, if not a somewhat disquieting feeling to realize that, for a fair amount of time, these processes had been operating somewhere beneath my immediate conscience. After all, wouldn’t we all like to think that we are cognizant of our thoughts and feelings – that we rationally think through and decide upon our beliefs? But, perhaps this isn’t always the case.

As difficult as it might be to search for the singular origin of any phenomenon (and I recognize that even the notion of a “singular origin” is highly contentious and problematic), I can trace the roots of this “self-work” back to one specific night during my senior year in college. It was during this night that my best friend of four years, and roommate of two years, told me that he was gay. This came as quite a shock, and I wondered why he hadn’t told me sooner. However, from our ensuing conversation, it was clear to me that this was something he had been struggling with for some time and that he hadn’t even been fully aware of his sexuality until fairly recently. He also made it known to me that I was one of the very few people in his life he had told so far. Before that moment, I had never given issues of sexuality much consideration. I was glad to find that my first reaction to this news was concern for my friend over the struggles
through which he had gone. Yet, at the same time, I couldn’t help but to reflect upon my own feelings. I certainly never considered myself to be homophobic, but this news was a surprise and, in a certain sense, it posed a challenge to some previously unexamined assumptions I held about my beliefs and feelings on sexuality, not to mention the nature of our friendship. The first questions that came into my mind dealt with our immediate situation: Did this change my feelings for him as a friend in any way? How did I feel about being privy to this knowledge while many of our mutual friends were not, and would that make for some awkward situations in the future?

I quickly found that my friend’s being gay didn’t change my feelings towards him or our friendship, and we have stayed close to this day. Through our friendship, I have become more attentive to issues concerning sexuality; I have developed a heightened awareness of when people use homophobic rhetoric around me, and I definitely have taken a greater interest in those political matters concerning sexuality. Yet, until recently, I was never quite aware of the extent that my friend’s coming out impacted me. Underlying those initial questions regarding my immediate friendship was a deeper set of questions that challenged me in ways of which I was not fully cognizant: How do issues of sexuality affect the ways in which I understand and relate to myself? How do they affect the ways that I relate to others? What kind of importance do I peg on sex and sexuality? For that matter, what kind of importance does society attribute to sexuality, and why? In many ways, I have grappled with these questions to this day, and I expect that I will continue to do so for some time.

I do not mention this story in order to establish some kind of credibility as a straight male writing on issues of gay and lesbian experience; doing so would merely be succumbing to the “I have a (insert marginalized identity) friend, so it’s okay” mentality that is sometimes invoked as
a superficial justification for one’s commentaries on issues of race, ethnicity, sexuality, etc. However, I do believe that this story grants me some authority to speak of how personal encounters, which range from the banal to the profound (often in the same encounter), can have transformative impacts on an individual in politically relevant ways. These impacts are often experienced intuitively, outside the scope of rational thought. Rather than being convinced of something, like the fact that heterosexuality has maintained a privileged position in society at the expense of other forms of sexuality, people can experience it personally through encounters with individuals who have suffered because of their sexuality. The emotions elicited in these instances can deeply affect one’s social and political beliefs, and they may cause one to question his or her ethical system; but, above all, they may also inspire self-reflection, thereby creating possibilities for self-transformation (which might also translate into transformative political action).

Little did I realize, at the time of my friend’s coming out or throughout the following years, that I was commencing with what Michel Foucault and William Connolly refer to as “arts of the self.” These arts, undertaken by the individual in ways that sometimes operate below the level of consciousness, are intent on refashioning one’s conception of her self and her relations with others. In many ways, this experience with my friend has been a motivation for my writing in a profound way, which has only become evident to me while I have worked through my arguments in this project. In fact, I view the work I have performed here as part of that self-artistry; it has been a means of working through tensions in my own political thinking. Connolly invokes the arts of the self as part of a micropolitics that sustains deep pluralism, and it is this pluralistic vision that has resonated with my concerns over my own limitations as a straight, white male in dealing with issues of difference. As a consequence, I have taken up the demands
of a pluralistic ethos as a challenge to resist adopting and projecting a universalizing perspective through my writing and my personal conduct. This project is an articulation of those very arts of the self that have shaped so many of my personal and political beliefs, and, as such, it serves as an intervention in current trends in American politics that would otherwise limit our collective imaginations for a more democratic future.
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A few words of thanks as I reflect upon the significance of this accomplishment, although there certainly is not room enough here to thank everyone who has had a positive impact on me over the last few years. I will always be indebted to my advisor at the College of Wooster, Dr. Mark Weaver. He first introduced me to the field of Political Theory, and it was with his encouragement that I began this long journey culminating with the project at hand.

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I owe an immeasurable amount of gratitude to my committee members – Drs. John Christman, Errol Henderson, and Jeff Nealon. Their knowledge and guidance have been invaluable throughout my time at Penn State. Thanks especially to my advisor and committee chair, Dr. Nancy Love, whose remarkable knack for insight into my work never ceased to amaze and inspire me over the last four years. I consider myself very fortunate to have worked with her, as well as the rest of my committee, on this project.

Finally, my deepest gratitude goes to my parents, David and Kathy Egan, and my wife, Kathy Egan. My parents have provided every opportunity for me to succeed in life, and my wife has been a constant source of strength. Words cannot express how important my family has been throughout this process, except to say that without their love and support I would not be where I am today.
Chapter 1

Introduction:
Limitations and Possibilities

Transgression, then, is not related to the limit as black to white, the prohibited to the lawful, the outside to the inside, or as the open area of a building to its enclosed spaces. Rather, their relationship takes the form of a spiral that no simple infraction can exhaust. Perhaps it is like a flash of lightning in the night which, from the beginning of time, gives a dense and black intensity to the night it denies; which lights up the night from the inside, from top to bottom, and yet owes to the dark the stark clarity of its manifestation, its harrowing and poised singularity. The flash loses itself in this space it marks with its sovereignty and becomes silent now that it has given a name to obscurity.

– Michel Foucault,
“A Preface to Transgression”

The Priority and Problematics of Rights in Democratic Politics

This work deals with the limits of contemporary American understandings of democratic citizenship and the privileges and protections that come with it. In the United States, today, we are faced with a political landscape in which citizenship is increasingly defined through a juridical discourse of individual rights, where these rights become a marker of how fully integrated a social group is in terms of its political membership and acceptance in society at large. The freedoms and opportunities afforded to those with citizenship status are underwritten by the rights guaranteed through this juridical discourse and the governmental authority that enforces them. These rights include, but are not limited to, privacy, speech, press, due process, religion, suffrage, and property; furthermore, there are a number of socio-economic benefits, which are not so constituted as rights, but nevertheless are attached to those institutions protected by the state, like marriage. Members of social groups who do not have access to the full range of freedoms associated with these rights can, at best, be considered as only second-class citizens.
Accordingly, this work is also about the ways that certain people are included or excluded from various aspects of citizenship based on a particular aspect of identity with which they either self-identify or have had imposed upon them by external societal forces. Yet, while an entire lineage of Western political thought claims that many of these rights are natural – either commanded by divine law or derived by reason from natural law – and inalienable, the acquisition of particular rights by particular groups is often dictated by the state. Moreover, rights are not simply conferred by the state out of the blue; nor are they won through arduous social, political, and legal struggles without possible costs incurred by those very groups seeking them or by other groups suffering at the margins of society. Essentially, I want to investigate what are these costs that are built into the modern American democratic conception of citizenship, and how this conception of citizenship and political membership is limited by focusing on individual rights.

Certainly there are many competing conceptions of what democracy and democratic citizenship actually are or what they should be. I contend that, in contemporary American democratic politics, there is an increasing reliance on juridical rights to demarcate citizenship. In her work Sexual Strangers: Gays, Lesbians, and Dilemmas of Citizenship, Shane Phelan identifies two conceptions of citizenship at work in democratic theory. Of these two, it is the liberal conception, which she defines as “the legal protection of civil rights” (which can be traced back to modern liberal theorists such as Locke, Mill, etc.), that dominates in American politics (2001, 12-13). Similarly, Young’s (2000) discussion of two models of democracy points to the dominance of what she calls the aggregative model in American democracy. Young argues that, “The operation of liberal democratic politics corresponds to [the aggregative model’s] assumptions” (2000, 22). These assumptions hold that: citizenship is basically a private matter
consisting of individuals with private, competing interests; politics is essentially a competition among these interests; and the outcomes of these competitions (elections and legislation) are the aggregated results of the “most widely held preferences in the population” (Young, 2000, 19-22). By this account, citizenship is relegated almost entirely to the private sphere: “Citizens never need to leave the private realm of their own interests and preferences to interact with others whose preferences differ” (Young, 2000, 20). Furthermore, “[t]his model lacks any distinct idea of a public formed from the interaction of democratic citizens and their motivation to reach some decision” (Young, 2000, 20). Of course, in the real world of politics there does exist a public that undertakes such interaction, and there are definitely efforts to coordinate political action. Nevertheless, Young’s discussion is instructive insofar as its points out the ways in which modern conceptions of democratic citizenship are relegated primarily to the private sphere and articulated in terms of possessive individualism and personal preferences (which, in turn, are structured by the negative liberties guaranteed by juridical discourse).

I argue that the liberal (aggregative) model of democratic politics and citizenship, with its emphasis on juridical rights, dominates contemporary American civil society. These rights not only ensure personal protections and access to civil liberties, but they also offer a framework through which individuals may be recognized as legitimate members of political society. Such recognition allows individuals to express their interests publicly and participate fully as democratic citizens. Phelan argues that:

Whether we view citizenship as legal status or practice, we might understand it as affording individuals a certain protection for their interests. The particular articulation of which interests count as public varies across place and time, but the capacity to articulate one’s interests as a matter for public concern is a defining mark of citizenship (2001, 13).
Accordingly, citizenship is not limited to legal protection or civic participation; it is also determined by recognition and inclusion in the society and culture at large:

Political membership is a matter of both civil and political rights, but it extends beyond those rights to inclusion in public culture. To capture the dilemma of stigmatized and marginalized persons within a society with few legal barriers to equality, we must examine rights, offices, and duties as aspects of a larger phenomenon of political membership (Phelan, 2001, 14).

However, I contend that inclusion in public culture is in many ways predicated (and sometimes mandated) by the extension of civil and political rights to marginalized peoples. Gay marriage offers a prime example. Without legal, and therefore public, recognition of the legitimacy of same-sex marriages, gay couples face an additional obstacle to their acceptance in public culture. I agree with Phelan that rights are an integral aspect of political membership, but I would go further and argue that they are a definitive aspect of citizenship that (ideally) facilitates recognition and inclusion in society – a claim that I will problematize below.

Many theorists recognize the importance of rights as a necessary precursor to membership in political society. For one, Habermas argues that in constitutional democracies, civil society itself presupposes a community of rights-bearing individuals:

Modern constitutions owe their existence to a conception found in modern natural law according to which citizens come together voluntarily to form a legal community of free and equal consociates. The constitution puts into effect precisely those rights that those individuals must grant one another if they want to order their life together legitimately by means of positive law. This conception presupposes the notion of individual [subjektive] rights and individual legal persons as the bearers of rights (1994, 107).

Vogel also contends that when we speak of citizenship, we are already thinking in terms of political membership – a membership structured by rights to political participation, the distribution of which depends on certain requisite attributes that the individual must possess:

In its most general meaning ‘citizenship’ refers to an individual’s status as a full member of a particular political community. The status itself has several
dimensions. We tend to associate the idea of citizenship with access to the rights of political participation. However, in order to claim such rights the individual must already possess certain primary attributes of membership, such as nationality, age of majority, full legal agency (1991, 62).

To be a “full member” of a political community, to be able to express one’s interests publicly and actively participate in the political process, to gain recognition as a legitimate and equal participant in political society, all of these facets of democratic citizenship, among others, are structured by the juridical discourse of rights.

However, as I have already alluded, I do not believe that rights operate without problems in contemporary democratic politics. Michel Foucault once famously said that things are not necessarily of the order of good or bad, but that everything is potentially dangerous. How, in Foucault’s terms, is it possible that rights may be considered dangerous? That is, what are the tradeoffs, the perpetuated exclusions, and potential threats that come along with this discourse of individual rights? This may seem to be an odd, if not counterintuitive, question to ask; after all, rights are supposed to be the means by which individuals achieve equality and personal liberties as juridical subjects. Furthermore, social groups often seek out rights as a means of achieving recognition and inclusion (that is, full membership in civil society) in a political system that presupposes its citizenry as endowed with certain inalienable rights. Yet, building off of Marx’s critique of political emancipation in “On the Jewish Question” and Foucault’s analyses of disciplinary power and bio-power, Wendy Brown (1995) contends that rights are a means of further legitimating and extending the regulatory powers of the state. I agree with Brown’s assessment, and throughout the course of this work, I will elaborate on the ways in which the discourse of rights, to which certain disenfranchised identities appeal, operates to further regulate those identities and entrench the norms that bring those exact identities into existence.
To be more precise, we must come to terms with the dangers posed by the limitedness of rights as a means of guaranteeing full political membership through the legal protections that they promise. These potential dangers are associated with the limitedness of rights on two general fronts. For one, and this is probably the most readily apparent limitation, rights are limited in their supposed universality, thereby creating exclusions by delineating between those who fit into the particular conception of universality and those who do not. Historically, many marginalized and disenfranchised groups have had to fight for inclusion in civil society and full legal protections under the rubric of rights. With every advance for a particular social group, there are still those individuals and groups who are excluded from such rights, and, as such, they are confronted on an everyday basis with the dangers of not having a right to privacy, not having a right to due process, etc. Again, this problem lies in the seeming universality of rights, which are always conditioned by the immediate and historical circumstances in which they are granted/attained/claimed. Wendy Brown highlights this problem:

The question of the liberatory or egalitarian force of rights is always historically and culturally circumscribed; rights have no inherent political semiotic, no innate capacity either to advance or impede radical democratic ideals. Yet rights necessarily operate in and as an ahistorical, acultural, acontextual idiom: they claim distance from specific political contexts and historical vicissitudes, and they necessarily participate in a discourse of enduring universality rather than provisionality or partiality (1995, 97).

Ultimately, this limitation comes down to those who have rights and those who do not based on the particular historical context of the conferral of those rights; it is remedied (partially) with time and the slow, steady, and painful progress of rights-based movements.

However, even this progress is limited in its ability to respect the integrity of identities and their political demands in a truly democratic fashion. This brings us to a second set of limitations and dangers surrounding the struggle for rights. Even when marginalized groups win
rights, there are a number of ways in which those very rights may have a limiting effect on
democratic politics and may, paradoxically, constrain the domain of democratic citizenship. If
the pursuit of legal and civil rights becomes the primary, if not only, means of seeking greater
public recognition and inclusion, then the political is reduced from a sphere of democratic
participation to a predominately juridical entity. Certainly the engines of change can be slow in
a democratic polity, and often the Supreme Court acts as a corrective to the power of majority
rule, especially insofar as it is seen as the best means of recourse for many minority groups. But,
the establishment of legal and civil rights can only go so far in changing the socio-political
landscape so that a truly democratic politics may emerge in which identity-based claims for
inclusion and recognition need not rely so heavily on juridical authority and citizens need not
understand themselves and encounter one another merely as juridical subjects. Part of this
problem may arise from the tendency to view rights as an end in themselves rather than as a
means, that is, as a necessary but not sufficient basis for democratic citizenship and participation.
In this way, reliance on juridical rights has had a limiting effect on the way that we understand
ourselves as democratic citizens.

Furthermore, rights themselves pose a potential danger in the ways that they may extend
state power and certain regulatory functions throughout society. As Marx argues, appeals to the
state for rights serve to reinforce the authority of the state to adjudicate such matters. This
perpetuates a system of politics in which the state is the locus of public legitimation; it
determines who and what merits recognition and inclusion in the public sphere and on what
terms. Rights, then, become a means of extending the power of the state to the level of the
individual as a juridical subject. Rights secure formal equality in the public sphere through static
categories of the juridical subject, thereby imposing these categories of existence on citizens at
the expense of excluded others. Thus, marginalized groups who struggle for and attain rights further substantiate the division between those who have rights and those who do not. What is more, rights may have unintended limiting effects on those very groups who have struggled for their realization. Because rights help to determine and protect those modes of conduct and speech that are permissible across the public/private divide, individuals must conform to the dictates of the Supreme Court and the Constitution or risk exclusion from the full benefits of citizenship.

In effect, rights act as a means of regulation and normalization, as Brown argues:

> While rights may operate as an indisputable force of emancipation at one moment in history – the American Civil Rights movement, or the struggle for rights by subjects of colonial domination such as black South Africans or Palestinians – they may become at another time a regulatory discourse, a means of obstructing or coopting more radical political demands, or simply the most hollow of empty promises. This paradox is captured in part by Nietzsche’s insistence that liberal institutions cease to be liberal as soon as they are attained (1995, 98).

This is especially true as issues of identity become more and more pertinent to the distribution of rights. When certain behaviors, systems of belief, and even individual desires become attached to a “core” sense of identity (and these attachments could form in a number of ways), then the more susceptible to public regulation are individual and group identities that either deviate from or must conform to the acceptable codes of conduct protected by rights. The issue of sodomy, homosexuality, and privacy laws, which I explore in Chapter 3, offers a perfect example: as juridical discourse pegs homosexual identity on the act of sodomy, and sodomy is not protected under the right to privacy, homosexuals are not afforded the same privacy rights as are heterosexuals. Yet, even if the right to privacy is extended to gay men and lesbians, it may serve to further substantiate the public nature of heterosexuality while forcing homosexuality into the privacy of the bedroom. Consequently, normalizing forces operate through rights to regulate the
behavior of individuals protected by those rights. In other words, one’s behavior and, in some cases, identity must conform to the norm prescribed by the juridical discourse of rights or he or she must suffer the deprivations of exclusion.

Finally, this formulation of the ways in which identities come into being and become the target/recipient of juridical rights speaks to problematics associated with rights and issues of recognition. The distribution of rights depends on the notion of the (relatively) static identity of the universal juridical subject. For a long time, this universal subject was the white, male property owner, and, as we have seen throughout history, such “universals” are slow to change. Rights embody these universal norms of citizenship, and, in doing so, they become a means of recognizing those who do or do not fit the mold. This is problematic (and possibly dangerous) because the misrecognition or nonrecognition of an identity would deny an individual access to rights. Also, the desire to hold on to such supposedly static categories of universality and subjection presents a significant obstacle to the development and recognition of future identities. Such identities may never achieve public expression or even the requisite protections to lead a private, albeit subordinated, existence. Thus, I wish to examine how rights are both an integral aspect of democratic citizenship and an obstacle to inclusion in public culture, the underlying theme of which is a concern for the ways in which rights operate as a regulatory apparatus to produce, normalize, and manage identities.

Sex and Citizenship

To undertake this investigation of the limitations of rights, I focus on the struggles of gay men and lesbians for inclusion and recognition in contemporary American politics. More specifically, I am interested in the production of sexuality as a field of possible subjectivities –
heterosexuality, homosexuality, bi-sexuality, trans-sexuality – that are subject to particular regimes of power that govern their inclusion, exclusion, and expression in contemporary politics and society. I believe that these regimes are best understood through Foucault’s analyses of subjectivity, power, and freedom. In particular, I will focus on juridical discourse, as a mechanism of regulatory power, and the ways in which it situates sexuality in contemporary American society. Yet, we should be aware that juridical discourse is not the so-called “only game in town.” According to Foucault’s analyses, it is evident that power flows through multiple, and often disassociated, institutions and discourses. For example, juridical power draws upon various medical, religious, and political discourses in determining the nature of sexuality in relation to legal rights. Thus, this discussion will, implicitly, illustrate how sexuality has been produced and contested by an array of modes of power attached to economic, political, juridical, and medical institutions and discourses. Furthermore, it will expose what is at stake politically within these discourses through examinations of the ways in which sexual “deviance” has been defined and incorporated into modern social frameworks, as well as recent struggles in gay and lesbian communities over specific issues like anti-sodomy laws and gay marriage.

These things that we call sex and sexuality seem to be given, natural entities – anatomical traits that we are born with, as well as innate drives, desires, and attractions upon which we act in accordance with those traits. However, a vast body of literature from feminist and queer theory has challenged our collective notions of what is natural, essential, and true about our existence as sexual beings. Part of this project is to explore how the “truth” of our sexuality is produced and how it is attached to a notion of identity that facilitates our governance as juridical subjects. Before embarking on that project and problematizing the intersection of sexuality and rights, it should be made clear what sex and sexuality refer to in the context of my argument.
Drawing from Foucault’s analyses in *The History of Sexuality* and Butler’s readings of Foucault, primarily in *Gender Trouble* and *Undoing Gender*, I take sexuality to be a construct that is historically variable; it is not constant or natural. Sexuality is not simply the collection of drives, attractions, and practices that surround and emanate from sex. In fact, according to Foucault and Butler, this conception of causation – that sexuality derives from sex – is backwards. Foucault (1978) contends that the deployment of sexuality actually produced the notion of “sex.” He goes on to argue that, “the notion of ‘sex’ made it possible to group together, in an artificial unity, anatomical elements, biological functions, conducts, sensations, and pleasures, and it enabled one to make use of this fictitious unity as a causal principle” (Foucault, 1978, 154). Thus, “Foucault’s genealogical inquiry exposes this ostensible ‘cause’ as ‘an effect,’ the production of a given regime of sexuality that seeks to regulate sexual experience by instating the discrete categories of sex as foundational and causal functions within any discursive account of sexuality” (Butler, 1999, 31). Sex, then, is the product of discursive interventions that operate at the site of the body, which is similar to the way that feminist critique has conceptualized gender as a social construct imposed upon the supposed natural dichotomy of sexual difference.

That sex is a discursive fiction does not mean that certain anatomical differences do not exist; however, the artificial and often arbitrary groupings of these anatomical differences, along with physiological attributes, behaviors, and meanings – all of which constitute the category of sex and legitimate sexual dichotomies that have very real and material implications – are the effects of the discourse of sexuality. Yet, if we are to understand sex as the discursive product of the “deployment of sexuality,” how are we to understand sexuality? In the context of this project, sexuality refers to the historical discursive formation that Foucault identifies as having
come into being (at least as a matter of terminology) in the early 19th century (1985, 3). The use of the term “sexuality,” Foucault argues, coincided with the emergence of a number of disparate power relations, including:

[T]he development of diverse fields of knowledge (embracing the biological mechanisms of reproduction as well as the individual or social variants of behavior); the establishment of a set of rules and norms – in part traditional, in part new – which found support in religious, judicial, pedagogical, and medical institutions; and changes in the way individuals were led to assign meaning and value to their conduct, their duties, their pleasures, their feelings and sensations, their dreams” (1985, 4-5).

Sexuality was deployed along these axes of power, targeting the individual and marking it as the subject of sexual desire. As a result, even sexual desire does not inhabit some secret part of ourselves, hiding the truth of our being all the while creating urges and dictating our behavior in ways of which we are only barely cognizant; instead, such a belief is dictated to us through numerous discursive interventions. Again, this does not mean that sexual desire does not exist, per se, but that our experience of it is managed through the interdictions of a number of interlocutors.

Sexuality is, then, the collection of these conducts, duties, pleasures, feelings, and sensations, imbued with meaning and deployed as an intelligible and recognizable category of existence through the production of the sexual subject. This is accomplished through the amalgamation of those “diverse fields of knowledge,” regulatory rules and norms, and institutional sites of power identified by Foucault, all of which contribute to the discourse of sexuality – a discourse that assigns sexuality a name and a meaning, and, beyond that, gives it a purchase on reality by inscribing it upon our bodies and in our psyches. Yet, even in such attempts to define sexuality (my own attempts included), the meaning of sexuality is not exhausted. In spite of the discursive production, administration, and regulation of sexuality,
there is always a remainder or a site of pure possibility inherent in power relations that allows for new forms and expressions of sexual subjectivity.

Consequently, one of the primary problematics I would like to explore is how the positioning of sexuality in a field of power relations produces, on the one hand, identities and the means by which to manage them and, on the other, the possibilities for practices of freedom within those very strictures. In other words, I want to explore the ways in which power operates through identities, rather than how it stands in opposition to identities in attempts to negate them.

Connolly’s (1999) discussion of “the politics of becoming” captures the paradox with which I am working. He defines the politics of becoming as “that paradoxical politics by which new cultural identities are formed out of unexpected energies and institutionally congealed injuries” (Connolly, 1999, 57). He continues: “The politics of becoming emerges out of the energies, suffering, and lines of flights available to culturally defined differences in a particular institutional constellation” (1999, 57). Cultural identities come to be through the apparatuses of power that regulate social space; difference is proliferated by the norms operating within the hegemonic discourses of cultural identity. Within American culture, Connolly argues, “entrenched codes of morality and normality weigh in heavily on the side of being, stasis, and stability without even acknowledging that the scales are tipped that way” (1999, 57). I argue that rights are a set of these entrenched codes operating to regulate and normalize sexual identities in relation to the heterosexual norm underlying juridical discourse.

Yet, the way in which these entrenched codes operate is paradoxical. In terms of a moral code, Connolly argues that, “While [it] is indispensable to social regulation, judgment, and coordination, it is also too crude, blunt, and blind an authority to carry out these functions sensitively and automatically, particularly when new and surprising modes of suffering are
encountered” (1999, 59). He also contends that, “a congealed code also poses dumb, arbitrary barriers to the politics of becoming” (1999, 59). One could make a similar argument in terms of the legal code of individual rights. In fact, it appears that the legal code, in many ways, is the articulation of the moral code in contemporary American society. It is this code – articulated by the juridical discourse of rights – that facilitates “social regulation, judgment, and coordination,” but it is also congealed into a seemingly universal form that presents itself as both a means and an obstacle to inclusion and recognition.

A specific approach in addressing this paradox might be to examine how public regulation of sexuality (through the law) creates private spaces for personal practices of freedom and becoming. This would entail an analysis of the ways in which juridical discourse constructs sexual identities, as well as the ways in which legal decisions manage sexuality (both to include and exclude particular identities from the public sphere). As such, my analysis in Chapter 2 interrogates how sexuality, a seemingly private matter of an individual’s identity, is anything but a private matter. Furthermore, if sexuality is not strictly a matter of the private sphere or merely a preconceived component of an individual’s given identity, and it is instead a product of public discourses and power relations that govern, administer, and control it, then it seems that these power relations ultimately determine the individual’s subject position, as well as a whole constellation of concerns related to the subject (particularly, in this case, issues pertaining to citizenship). However, it is precisely because the right to privacy establishes a zone of personal freedom in which the individual is protected to explore sexual acts, preferences, pleasures, and desires, that it is essential to the becoming of sexual identities.

Connolly offers an excellent articulation of the paradox central to my analysis, a paradox that illuminates the limitations of a conception of democratic citizenship that is largely defined
by rights: “The element of paradox in the politics of becoming is that before success a new movement is typically judged by the terms through which it is currently depreciated, and after success a new identity emerges that exceeds the energies and identifications that called it into being” (1999, 62). When certain rights are at last extended to marginalized groups, these identities are subject to the normalizing forces of the dominant juridical discourse. Subsequently, differing identities emerge as a product of the categorizations generated by these normalizing forces, and, as Connolly notes, these identities will exceed the juridical discourse that made their existence possible. As a consequence, these identities do not fit into the discourse of rights and are excluded from the privileges and freedoms associated with them. Finally, the paradox reaches its absolute because the marginalized identities seeking inclusion under the law actually reinforce the very norms that would exclude future differing identities, that is, the appeal to a rights-based discourse both facilitates and inhibits the politics of becoming.

I presume, as a point of reference, two trends in contemporary American politics that run throughout society and help to frame the problematics associated with the politics of becoming; specifically, these are the problematical relations among identity, power, freedom, and rights (exemplified, in this case, by the juridical discourse that targets sexuality as a field of intervention), and the power of the norm to structure social relations and regulate identity. I have already discussed the first trend: I assume that democratic citizenship is more a matter of access to certain liberties and opportunities (again guaranteed through individual rights) than it is about active public participation and civic engagement. This is especially true when we consider such participation in terms of the subjects’ ability to shape the discourses and cultures that produce them (Connolly, 1995, 179). Citizenship is passive in that individuals are recipients of rights,
and, subsequently, these rights enable citizens to access and enjoy the freedoms (increasingly economic) guaranteed by the government.

Furthermore, the distribution of these rights is contingent upon the particular identities of the individuals seeking them; inclusion and exclusion can be legitimated along a number of axes of traits that an individual may “possess” as a matter of her identity. Yet, and this dovetails with the second trend, these traits – in fact, identities themselves – are produced by the very discourses (in this case, juridical discourse) that regulate them. This second trend, then, is that American democratic politics take place in what Connolly (1995) refers to as the normalizing society. This notion of society builds off of Foucault’s analyses of the power of the norm. In the normalizing society, power operates through the proliferation and regulation of identities rather than the suppression and negation of them. I argue that the juridical discourse of rights is an avenue through which power operates to produce and regulate identities. With that in mind, I know turn our attention to the role that rights play in a normalizing society.

Regulatory Rights in a Normalizing Society

We might consider a number of labels to describe Western societies of late modernity: industrial, post-industrial, late-capitalist, postmodern (Lyotard, 1984), and even “risk” societies (Beck, 1992). By drawing on Foucault and William Connolly, I want to conduct my analysis of the limitations of rights-based discourse in contemporary American politics through the notion of the “normalizing” society. Such a society operates through the proliferation of identities not as “affirmative individualities” or “positive associational styles,” but as “perversified diversities” (Connolly, 1995, 90). As Foucault famously argues in Discipline and Punish, a whole spectrum of deviance is produced in relation to institutionalized norms; in fact, deviant identities are
contingent upon the norm. Thus, instead of suppressing difference, the normalizing society multiplies it in the forms of deviance, perversion, and abnormality (Connolly, 1995, 90).

It is apparent that politics, generally, are normalizing in terms of the effect they have on identities by governing and regulating them in relation to a given model of personhood and citizenship. Politics operate off the basis of very specific conceptions of human nature; these conceptions determine what it means to be a person and what characteristics merit inclusion in the body politic, thereby establishing the categories of existence that come to constitute socio-political norms. Through juridical definition and regulation, politics inevitably create “others” who fall outside the bounds of these pre-existing categories of “acceptable” identities, and, consequently, political membership becomes a function of the forces of normalization. Democratic politics are certainly no exception; the power of majority rule exerts a normalizing effect on those who deviate from that majority. In fact, it is the concept of the majority that establishes the norm in the form of the rule of law, which, in turn, delineates between those who conform to that rule and those who do not. The codification of the norm through the law produces “perversified diversities” in the form of illegalities and delinquencies attached to certain subjectivities. The juridical production of these illegalities and delinquencies render subjects outside the realm of citizenship and expose them to a number of regulations ranging from fines/imprisonment to outright exclusion from the benefits of membership in civil society.

While Foucault mapped the ways in which sovereign power has given way to disciplinary regimes that demarcate between the norm and the deviant, and then traced the forces of normalization through bio-political mechanisms of governance, administration, and regulation, he did not explicitly pinpoint democratic politics as a realm of normalization. However, by channeling his work on normalization through Connolly, we can see how democratic politics
works in tandem with the normalizing society. In fact, as identities become increasingly politicized, and therefore more open to public regulation through particular acts of legislation (I am thinking specifically of the 11 state anti-gay marriage ballots in 2004, for example), democratic politics will increasingly operate to reinforce the norm and subjugate deviant identities through majority rule. The administration, governance, regulation, and punishment of deviance need no longer work primarily through such institutions as the penitentiary, school, or hospital (although such institutions are certainly still prominent); societal pressure and the vote now operate to normalize deviant identities or banish them to the fringes of society by depriving them of recognition and inclusion in society.

The normalizing society relies on an institutional framework that produces the norm as natural and essential:

To say that late-modern societies are, among other things, normalizing societies is not simply to say that they bestow institutional privilege on a restrictive set of identities and apply intensive institutional pressure to secure those identities as norms against which a variety of modes of otherness are defined and excluded. It is also to say that those who endorse these norms tout them as natural or intrinsically true standards (Connolly, 1995, 88-9).

Furthermore, the norm is propagated by multiple interventions and regulations that both produce and target difference as a field of abnormalities that needs to be controlled, as Connolly continues on to argue: “A normalizing society treats the small set of identities it endorses as if they were intrinsically true; this puts it under tremendous pressure to treat everything that differs from those intrinsic truths to be fundamental threats, deviations, or failures in need of correction, reform, punishment, silencing, or liquidation” (1995, 89). When these identities become politicized, and differences are viewed as threats to a particular way of life or moral system that dominates the political culture, public regulation becomes the means by which they are managed,
punished, silenced, etc. The power of the norm, in democratic societies, is a mechanism of majority rule that regulates politicized, deviant identities.

Another way to think about the power of the norm in liberal democratic societies is through Thomas Dumm’s (2002) analysis of Isaiah Berlin’s essay “Two Concepts of Liberty.” In his essay, Berlin delineates between two types of freedom: positive freedom, which we might associate with the civic-republican conception of citizenship, and negative freedom, which we might associate with the liberal conception. Furthermore, we might most readily identify negative freedom as the kind of freedom predominant in American society. The juridical discourse of individual rights establishes the parameters of negative liberty by carving out a space in which the individual is free from external interference. Dumm focuses on this notion of space and its relationship with freedom that is at work in Berlin’s work. He argues that, for Berlin, space is neutral: “It is worth noting…that in all cases the space he designates as a site of freedom is natural, not constructed…Berlin’s epistemological assumption concerning space is that it is of itself” (Dumm, 2002, 47). He continues: “In presenting space as neutral, Berlin makes it the ground of freedom” (2002, 48). However, Dumm goes on to argue that this space is neither natural nor neutral; instead, space is the product of various interventions.

Space is constructed through highly political motivations and practices, but by ignoring these interventions, Dumm argues that Berlin dehistoricizes the meaning of space and, consequently freedom:

By displacing questions concerning how space is established through processes that are intrinsically political, by burying them in the foundation, so to speak, Berlin is able to achieve definitional clarity in the Nietzschean sense of denying its definition any history. The meaning of freedom is minimized, as reflection of the desire of those who seek to make freedom a controllable entity, who seek to make freedom synonymous with control (2002, 48-9).
This does not mean that freedom is an illusion, but that control is a condition for the very 
existence of freedom. At first glance, this may seem like a paradox, and to an extent it is. Yet, it 
is a paradox that we are confronted with on a daily basis in American politics. In fact, it is this 
paradox that secures negative liberty through the juridical discourse of individual rights. 
Although Berlin neglects the way in which space, and consequently freedom, is constructed, 
Dumm illustrates how the law plays a fundamental role in the construction of the “natural” and 
“value-free” space of negative freedom: “The boundaries of politics are established as the lines 
drawn by law: they allow interventions into neutral space only to protect the ground of freedom 
and usually protect the exercise of freedom simply by prohibiting interventions, as a great no” 
(2002, 49). Thus, rights operate as the mechanism of control that demarcates the bounds of 
freedom, and, in doing so, they order identities in respect to the norm by protecting those who 
conform while excluding those who do not.

Dumm points out that the power of the norm is at the center of Berlin’s conception of the 
liberal society. As one of the principles of liberal society, Berlin argues “‘that there should be 
frontiers, not artificially drawn, within which men should be inviolable, these frontiers being 
defined in terms of rules so long and so widely accepted that their observance has entered into 
the very conception of what it means to be a normal human being, and therefore, also of what it 
is to act inhumanly or insanely’” (qtd. in Dumm, 2002, 54). Dumm argues that Berlin constructs 
a conception of a normal human being who, by the nature of its inviolability, is the site of 
negative freedom. Yet, Dumm also argues that Berlin pulls another slight of hand by 
naturalizing this inviolability when, in fact, it is the product of normalcy. The power of the norm 
not only operates through the regulation of identities, but it also facilitates agency:

The work of the normal gives a solidity to agents that they otherwise would not have by distributing them in space around a predefined norm. The ideal of the
normal enables its agents not to question the ground of their self-existence as political beings. Normalcy, coupled with the wall of privacy secured by the practices establishing the neutral space of negative liberty, enables all sorts of practices of power that will shape and discipline selves into inviolable beings (Dumm, 2002, 55-6).

Thus, Dumm concludes that there is an element of positive freedom that cements the possibility for negative freedom at the heart of Berlin’s work. This positive freedom manifests in the form of the ability of subjects to act in relation to and because of the power of the norm, which, again, is dispersed through the juridical discourse of rights.

Finally, the normalizing society can operate through a variety of co-existing and interlaced regimes of power: sovereign, juridical, disciplinary, pastoral, etc. Foucault’s genealogical analyses of power help to trace the emergence of each one of these forms, yet we must also be clear that Foucault’s work does not imply that one form necessarily follows and then replaces another. While a particular form of power may come to dominate a society, it does so in conjunction with the existing apparatuses of the other forms of power intact and operative. The normalizing society functions through each regime of power and in a multiplicity of ways. In contemporary American society, juridical power has increasingly taken on disciplinary and bio-political functions in the administration and regulation of identities throughout the body politic.

The problems posed by normalization in democratic politics are compounded, ironically, when marginalized identities seek recourse through the judicial system and the protections of negative liberty. As I argue, the juridical power that pervades contemporary American politics exerts a normalizing effect, even as it promises to counter the marginalizing forces inherent to the power of majority rule. In a normalizing society, individual rights become a means of normalization and regulation, and this regulation is possible precisely because identities are
produced as a matter of juridical power (that is, as recipients of negative freedom) – a power that
confers rights or deprives individuals of them based upon their identification with a particular
identity. This is especially true when appeals to juridical power often trump democratic means
of political transformation. Connolly argues that, “A normalizing society politicizes difference
by converting it into neediness or otherness; it then demoralizes and depoliticizes those
constituted as abnormal and those who would call this conversion process into question” (1995,
91). A rights-based discourse politicizes deviant identities, in this case “homosexuals,” by
excluding them from the benefits of full citizenship, thereby converting difference into
neediness.

The paradox is that while identity groups may act upon this politicization and struggle for
inclusion and recognition, these identity-based movements may risk the depoliticization of the
very group struggling for equality. In fact, I believe that the normalizing power of the juridical
discourse of rights presents itself as an obstacle to the possibilities of transgression and
transformation that are still latent in democratic politics. It is evident, then, that juridical power
and the institutionalization of the norm through the law operate to exclude difference from full
political membership. This is particularly true as identity becomes more salient to politics, or, in
Connolly’s terms, the more that deviant identities become politicized as others in need of
protection, inclusion, and recognition. Specifically, by drawing upon Foucault, Brown, and
Connolly’s work, I argue that juridical rights increasingly regulate individual behavior, manage
identities, and circumscribe the realm of legitimate desires with respect to issues of sexuality and
citizenship in contemporary American politics.

Although democratic politics may work in tandem with the dictates of the normalizing
society, this does not mean that the possibilities for resistance to the powers of the norm are
exhausted. As I argue below, there is always the potential for productive contestation in
democratic politics that would allow for acts of transgression and transformation. This is what
makes a democratic and pluralistic ethos a worthwhile project to pursue. However, when the
security afforded by individual rights is pursued at the expense of true democratic change, the
power of the norm is reinforced through the mandates handed down by the Supreme Court.

The Potentiality of Critical Responsiveness
in a Democratic and Pluralistic Ethos

At the end of the expanded edition of his Politics and Vision, Sheldon Wolin states: “The
fact that democracy continues to be invoked in American political rhetoric and the popular media
may be a tribute, not to its vibrancy, but to its utility in supporting a myth that legitimizes the
very formations of power which have enfeebled it” (2004, 601). For Wolin, these formations of
power come in the shape of the administrative functions that the government has increasingly
performed and the economic rationale by which these functions are increasingly legitimated.
While he does not explicitly include the discourse of rights that permeates the democratic
citizenry, which, I argue, increasingly regulates identities as a matter of inclusion/exclusion and
recognition/misrecognition, we could imagine that it too enfeebles the very democratic
tendencies it is purported to support. In other words, democracy seems to endorse a rights-based
discourse at the expense of proliferating regulation, marginalization, and depoliticization in the
form of that very discourse. Consequently, one might ask, “Why maintain a focus on democracy
at all?”

In response to this question, I contend that a democratic politics still holds the greatest
promise for negotiating the problematics associated with politicized identities and the limitations
of a rights-based discourse. While in many ways contemporary understandings of democratic citizenship actually produce politicized identities and generate the means by which these identities are regulated, misrecognized, and marginalized, I contend that, insofar as democracy is grounds for contestation and negotiation of not just politics but identities themselves, it is the best way to constructively engage the paradoxes of identity formation and regulation in a normalizing society. A conception of democratic politics that is less enamored with individual rights that act as the basic marker of citizenship would provide a framework for the articulation of Connolly’s notions of the politics of becoming and critical responsiveness. What is needed, then, is to critically examine the ways that the discursive production and regulation of sexual identities, particularly through the juridical discourse of rights, inhibits a democratic politics that supports and is informed by the notion of becoming and a pluralistic ethos. Once we explore the problematics and paradoxes of this discourse, we can then begin to reconceptualize what a democratic politics would entail for it to be more attentive to the problematics of identity and difference. I take such a political project to be akin to Connolly’s conception of critical responsiveness, which is constitutive of a democratic and pluralistic ethos.

We must not forget that, without rights, marginalized identities are not afforded the protection to articulate their interests publicly, and in many cases these identities cannot even exist, either privately or publicly, as such without certain rights. However, it is not enough to say that we must merely be more inclusive and extend all the rights associated with full citizenship to those who have been traditionally marginalized and excluded; nor is it enough to say that we must be patient with the legal system because the extension of rights is a process that takes time to fully unfold. These “solutions” are unsatisfactory because they envision a sort of dialectic in the development of rights and, consequently, a more inclusive democratic politics.
Yet, as I illustrate in the following chapters, rights do not necessarily emerge in such an unproblematic manner. The teleological belief that the conferral of full rights is a historical process – even a dialectical one - does not account for the fact that rights do not necessarily guarantee civic freedoms and inclusion in society. This, in part, is the problematic that Marx addresses in “On the Jewish Question.” Moreover, these arguments, including Marx’s, do not account for the ways in which rights themselves may act as obstacles to inclusion and recognition. Being cognizant of these possible obstructions goes beyond a sort of false consciousness in which rights are seen as purely emancipative – this is the limitation of Marx’s contribution. It requires an understanding of the paradoxes of a rights-based discourse as well as an awareness of the non-teleological nature of the historical conditions in which the discourse is situated.

This is why Foucault and Brown are so critical to the critique I levy against essential and naturalized conceptions of identity, as well as my critiques of identity-based political movements and the juridical discourse to which they appeal. By employing these analyses in this project, I am able to expose the ways in which rights do not necessarily develop in a “linear” manner; consequently, I am more attentive to the contingencies, costs, and exclusions that are built into the discourse of individual rights. Furthermore, Judith Butler’s work helps to uncover how juridical power, in which individual rights are enmeshed, discursively produces and regulates identities (especially, in this case, sexual identities). Overall, these authors help to engage the paradoxes of identity and the politics of becoming (including the juridical discourse that both enables and inhibits these politics) rather than avoiding them or necessarily trying to solve them.

Building off of my critique, I find Connolly’s work to be particularly helpful when it comes to constructing a vision of democratic politics that is more pluralistic. His conception of
critical responsiveness (embedded in ethos of pluralization and active engagement with otherness) moves beyond the strictures of the rights-based juridical discourse that delimits democratic citizenship. By critical responsiveness, Connolly is referring to “an ethos that opens up cultural space through which new possibilities of being might be enacted” (1995, 180). Such an ethos is critical to a model of democratic rule where “those affected have their hands and voices in modeling the multiple cultures that constitute them” (Connolly, 1995, 179). This differs from the rather one-dimensional conception of democracy as rule by the people; instead, it posits democratic rule as a matter of active participation. This is not just active participation in civic matters or the wedding of civic republicanism to liberalism – what Dagger (1997) calls republican liberalism; instead, it encourages active engagement with otherness and in the making of the self. In other words, it requires an awareness of and involvement in the discourses that produce and regulate identity, including the kind of productive contestation that can alter those discourses and the democratic processes that they imbue. In Foucauldian terms, this would represent a shift from relations of pure force or domination to reciprocal relations of power.

This process, which Connolly refers to as the “politics of enactment,” is constrained by the hegemonic discursive regimes that try to fix identities and further entrench the regulatory norms operating at their centers. We can place the juridical discourse of rights into this category of hegemony; such a discourse seeks to establish the parameters of inclusion and exclusion, legitimacy and illegitimacy, just and unjust. Therefore, while rights may be part of a juridical discourse that produces identities, they can also effectively fix the meanings of those identities and exclude them from participation in their own formation and governance. Even appeals by marginalized identities to this discourse may only further entrench the normalizing tendencies of rights and perpetuate future exclusions:
The politics of enactment, therefore, is not sufficiently represented through the language of overcoming prejudice, promoting tolerance, extending diversity, or following a settled code of justice among preexisting subjects. Such portrayals not only underplay the constructed, relational character of what we are, they also conceal the precarious political process by which a new claim to identity is drawn onto the register of justice from a nether region residing below it (Connolly, 1995, 181).

While the juridical discourse of individual rights may attempt to “overcome prejudice, promote tolerance, and extend diversity,” it is also instrumental in the production of identities along the spectrum ranging from hegemonic and dominant to subaltern and marginalized. It cannot, on its own, provide the necessary framework for a more pluralistic democratic ethos since it contributes to the means of normalizing and regulating identities.

Critical responsiveness must supplement the juridical discourse of individual rights to realize a more pluralistic society. Rights are crucial in establishing some fundamentals in terms of equality and personal security, but cultivating an ethos of critical responsiveness would help to constructively engage the paradox of the politics of becoming and the tensions endemic to the discourse of rights. Where rights promote tolerance and equality in spite of difference, thereby further entrenching static conceptions of differing identities, “critical responsiveness involves active work on our current identities in order to modify the terms of relation between us and them” (Connolly 1999, 62). In other words, a democratic politics based in critical responsiveness is more attentive to the politics of becoming and capable of negotiating the tensions between the continual production and contestation of identities.

**Structure of the Work**

In Chapter 2, I problematize the relationship among sexuality, identity, and politics. Connolly argues that, “The cultivation of critical responsiveness grows above all out of the
appreciation that no culturally constituted constellation of identities ever deserves to define itself simply as natural, complete, or inclusive” (1995, 188). This is precisely the objective of this chapter: to disrupt the “naturalness” of identity as a foundation for identity politics. Connolly continues: “For it is this fugitive, always underdeveloped, experience of contingency in what you are that taps into the ethical capacity to respond to injuries shuffled under justice by the practice of justice” (1995, 188). Accordingly, this chapter also serves as a prelude to the critiques I levy against the legal and political practices that establish the parameters of democratic citizenship and justice in the following chapters. It helps to expose the contingent and constructed nature of sexual identity that, at one and the same time, is product of juridical discourse and escapes the grasp this very discourse.

I begin with a discussion of the problematic, and sometimes paradoxical, role that identity plays in political movements struggling for recognition and inclusion by appealing to a juridical discourse of individual rights. This examination exposes identity as a site produced by the very regulatory power that it tries to resist; identity is both the basis for social movements seeking recognition and inclusion and the product of various regulatory discourses that make misrecognition and exclusion possible. I then move on to a more specific discussion of the problematics of sexual identity and the positioning of sexuality in a field of discursive interventions seeking to stabilize its meanings as essential and immutable. Again, this discursive production of sexuality illuminates how sexual identity occupies a paradoxical site of simultaneous regulation and resistance. While my emphasis is on the discursive production of sexuality, I also draw upon the works of David Halperin, David Evans, and Jeffrey Weeks to highlight the contested nature of sexual identity. By invoking an array of queer, postmodern, and even Marxist thinkers, I am able to more fully unsettle the foundations of “truth” upon which
sexuality has been built. The goal, then, of this chapter is to disrupt the belief that a natural, universal, and immutable conception of sexuality underlies our identities, and, in so doing, to illuminate how such a conception may operate both as a catalyst and as an obstacle for political action demanding greater recognition and inclusion.

Chapter 3 explores juridical discourses that have brought supposedly private sexual acts into the realm of public regulation. Specifically, I focus on gay and lesbian struggles for the right to privacy and the recent developments in contesting anti-sodomy laws, primarily Bowers v. Hardwick and Lawrence v. Texas. I trace how a right to privacy has been constructed around issues of sexuality, followed by how this right has been construed first as a means of exclusion and then as a means of normalization and further regulation. I argue that while the right to privacy may help to provide a basis for bodily security and freedom from police intervention, it also runs the risk of functioning as a means of regulation and exclusion, which could also have the unintended effect of depoliticizing gay men and lesbians. Through this analysis, I examine the ways in which the Supreme Court conceptualized “the nature” of homosexuality, as well as same-sex sodomy, and how these conceptualizations were brought into discursive existence through juridical power. It is, I contend, these very conceptualizations – the juridical production of “the homosexual” – that make it possible for sexuality to be regulated. Thus, the discourse of rights presents itself in a paradoxical form: as the guarantor of certain individual freedoms and as an enabler for a regime of regulatory power. Ultimately, within our constrained field of democratic citizenship, wherein a juridical discourse of individual rights is the primary (if not only) means of achieving recognition and inclusion, marginalized sexual identities are left with only an option to appeal to a system that regulates and normalizes their very existence.
Chapter 4 continues this examination of the limitations and paradoxes of a rights-based discourse with a focus on the issue of gay marriage. The debates over gay marriage highlight the struggles of a portion of the citizenry that is afforded only partial rights. Thus, I begin with a brief historical account of the struggle for same-sex marriage and attend to some of the conflicts internal to the gay rights movement over the issue of marriage. These internal conflicts speak to the problematic legacy of marriage as an institution of social power and privilege. That is, underlying the juridical discourse that circumscribes the right to marry is a grid of power relations in which the citizen is defined, produced, and reproduced. Accordingly, in this chapter I explore the central role that the institution of marriage has played in democratic theory, as well as some of the critiques of the patriarchal power relations perpetuated by the marital framework and how they apply to the debate over same-sex marriage. Finally, I undertake a more explicit discussion of the problematics and paradoxes of the right to marry. These issues not only cover the exclusion and inclusion of certain political, civil, and social rights based on sexuality, but they also speak more subtly to the discursive regimes that produce sexual subjects. In essence, one finds that the very mechanisms of power that bring subjects into existence are also the means by which subjects are governed, identities regulated, and exclusions perpetuated. Exploring the intersection of politics and sexuality through the issue of marriage exposes rights as both a site of regulatory power and possible freedoms.

In Chapter 5, I draw from Foucault, Connolly, and Butler to discuss issues of identity, citizenship, and democratic politics in my attempt to envision a politics that is more pluralistic and cognizant of polyvalent subjectivities. Throughout the course of the chapter, I ask whether there is a way to reconceptualize democratic politics so that sites of freedom are more readily accessible to those who have been subjugated and marginalized based on their sexuality. In
doing so, I explore the limitations of tolerance and recognition in contemporary democratic politics. Thus, I do not believe that cultivating a democratic and pluralistic ethos is simply a matter of greater inclusion or extending equal rights to marginalized sexualities; instead, I believe that Foucault’s notion of “care of the self” (or what we might also call “self-artistry” and/or “technologies of the self”) and Connolly’s notion of critical responsiveness offer more promise for a dynamic conception of democratic politics and individual practices of freedom. Furthermore, I believe that this project rests upon recasting identity as something that is fluid and dynamic, that is, as something that is perpetually reasserted and continually brought into discursive existence. A democratic and pluralistic ethos encourages the recognition of this mode of becoming; it also fosters an agonistic and active engagement with difference by unsettling the naturalness and universality of one’s own identity. The cultivation of such an ethos, I believe, can translate into forms of political participation that are not predicated on claims of universality, which, subsequently, may lead to the transformation of democratic institutions.

Ultimately, the goal is not only to create greater means of inclusion in existing institutions, but also to unsettle the norms operating at the center of those institutions so that they are constantly open to re-articulation. In this sense, the limits of democratic citizenship and juridical discourse will cease to act as limits to freedom, inclusion, and recognition. Instead, these limits will become what Foucault recognizes them to be: the very conditions for practices of freedom and ethical relations with oneself and others. The possibilities for a democratic and pluralistic ethos lie in the perpetual transgression of these limits. This transgression does not equate to a move beyond limits, but a kind of overcoming perhaps best understood through Foucault’s reading of Nietzsche. It is in this moment that I find Foucault to be a subtle champion of democracy, for it is through democratic contestation and negotiation that such individual acts
of transgression and practices of freedom are encouraged and transformed into political energies. From these energies are born new forms of political participation and institutions of governance.
Chapter 2
Sexuality Undone?
Dilemmas of Sexual Identity in Democratic Politics

And this critique will be genealogical in the sense that it will not deduce from the form of what we are what it is impossible for us to do and to know; but it will separate out, from the contingency that has made us what we are, the possibility of no longer being, doing, or thinking what we are, do, or think. It is not seeking to make possible a metaphysics that has finally become a science; it is seeking to give new impetus, as far and wide as possible, to the undefined work of freedom.

– Michel Foucault,
“What is Enlightenment?”

Contesting the Essentiality of Sexual Identity

Sexuality is seemingly the most private, essential, and immutable aspect of an individual’s identity, and, as such, many people seek the truth about their being by exploring their sexuality. We see therapists to understand our sexual desires and uncover those supposedly repressed sexual urges and feelings that haunt our subconscious. We confess to our priests and to each other in order to unburden ourselves of shameful sexual acts and thoughts. We are taught about proper and safe sex from our families, schools, and the medical community. We write to Dr. Ruth for advice. We often define ourselves in terms of our sexual preferences (and sometimes by our practices), either voluntarily or as a consequence of social imposition. Yet, what do we expect to be revealed by these explorations? What truth is concealed in sexuality? What can sexologists, psychoanalysts, psychologists, clergy, and advice columnists tell us about our sexual drives, preferences, and activities, and how can they help us to decipher them so that we know who we really are?

If we have learned anything from Foucault on the subject of sexuality, it is that these are precisely the wrong questions to ask. Instead, we should wonder why sexuality and truth have
developed such an intimate relationship – why do we believe that the two are necessarily connected? Foucault contends that a dual process is at work in the investigations of our sexuality; while we seek the truth about ourselves through explorations of our sexuality, we also bring the truth to these explorations in the forms of the very discourses and practices we undertake to interrogate sexuality:

And so, in this “question” of sex (in both senses: as interrogation and problemization, and as the need for confession and integration into a field of rationality), two processes emerge, the one always conditioning the other: we demand that sex speak the truth (but, since it is the secret and is oblivious to its own nature, we reserve for ourselves the function of telling the truth of its truth, revealed and deciphered at last), and we demand that it tell us our truth, or rather, the deeply buried truth of that truth about ourselves which we think we possess in our immediate consciousness. We tell it its truth by deciphering what it tells us about that truth; it tells us our own by delivering up that part of it that escaped us (1978, 69-70).

From this, Foucault argues, knowledge of the subject as a sexual being has developed and has been deployed through the “discourse of sex” (1978, 70). This renders the subject as knowable, classifiable, and open to a range of regulatory interventions.

Yet, this knowledge of the subject – the truth about ourselves that we seek through so many interlocutors and moments of introspection – is not due to any secret aspect of our identity buried away in our sexuality. Foucault argues that the belief that sexuality somehow contains the truth of ourselves is the product of discursive formations brought about by religious, medical, and psychiatric institutions: “Causality in the subject, the unconsciousness of the subject, the truth of the subject in the other who knows, the knowledge he holds unbeknown to him” do not manifest “by reason of some natural property inherent in sex itself, but by virtue of the tactics of power immanent in this discourse” (1978, 70). The association of sexuality with truth is the historical product of such disparate sites of power as church confessionals and psychiatric
examinations not because they unveil the hidden truths about us, but because of the regime of power relations that shape the discourse of sexuality itself.

This is not to say that the pursuit of self-knowledge through the study of sexuality is an entirely mythic enterprise; sex can still speak the truth to many people, and in many ways individuals define their identity, to varying degrees, in terms of their sexual desires, pleasures, and activities. Nor should we suspect that “sexuality,” as a category of understanding, is the product of unseen forces seeking to impose a predetermined norm of sexual behavior on us. However, because these conceptions seem so essential and often go unquestioned, it is important to recognize that our contemporary understandings of sexuality, as well as how we conceptualize sexuality’s relationship with the self and identity, have been discursively produced and historically conditioned.

This is no less true when it comes to homosexuality. Jeffrey Weeks argues that, “Of all the ‘variations’ of sexual behavior, homosexuality has had the most vivid social pressure, and has evoked the most lively (if usually grossly misleading) historical accounts” (1981, 96). Weeks continues to argue that, “A study of homosexuality is therefore essential, both because of its own intrinsic interest and because of the light it throws on the wider regulation of sexuality, the development of sexual categorization, and the range of possible sexual identities” (1981, 96). Such studies have become more important in recent years as the regulation of homosexuality has become a point of leverage and contestation in popular politics. Assumptions regarding the categorization of sexuality, which are widely accepted as unproblematic, have increasingly informed modern liberal democratic processes, including (but certainly not limited to) the deprivation of civil and economic rights, exclusion from legal protection, and general social and political stigmatization.
For this reason alone it would be important to come to an understanding of the discursive production of sexuality and its association with exclusionary political practices; yet, this importance is magnified when we consider the possibility for a more progressive political project. To be able to account for the demands of identity politics and theorize a more pluralistic democratic politics, we must contend with the ways in which these identities are produced. Wendy Brown argues that to realize the transformative capacities of identity-based political movements, we must understand the construction of identities in terms of their specific historical lineages: “And if we are interested in developing the politically subversive or transformative elements of identity-based claims, we need to know the implications of the particular genealogy and production conditions of identity’s desire for recognition” (1995, 62). Or, as Brown puts it more simply, “We need to be able to ask: Given what produced it, given what shapes and suffuses it, what does politicized identity want” (1995, 62)? In order to ask this question, let alone answer it, we must be able to discern what produces, shapes, and suffuses identity. This is why it is necessary to problematize the categorization and ensuing regulation of sexuality as a matter of an essential aspect of identity; that is, we need to be aware of sexuality’s discursive production throughout history and, in Foucault’s words, the power relations immanent to such discourse in order to create a more transformative politics of inclusion and recognition.

In this chapter, I would like to problematize the relationship among sexuality, identity, truth, and politics. I argue that the association of identity – particularly sexual identity – with the truth of our being both enables and inhibits inclusion and recognition as a democratic subject. Specifically, I contend that, in contemporary American society, juridical power regulates identities via the creation and distribution of rights. These rights are predicated upon a notion of universal personhood, and in their articulation, rights establish a norm around which deviant
identities proliferate and are moderated. In doing so, this discourse of rights contributes to the production of truths attached to various identities. In the rulings of the Supreme Court, one can find the discursive production of these truths in the ways that various aspects of identity are essentialized and naturalized so that they are either included under or excluded from the protections afforded by rights. These rulings substantiate what Taylor (1994) might call the “authentic” expression of the self, which plays a foundational role in the politics of recognition and inclusion; however, to assume that there is anything necessarily authentic about ones’ identity is problematic. To make such an assumption is to ignore the many ways that the self is socially constructed, contingent, and open to future articulations.

I begin this chapter with an examination of the ways in which identity has become the foundation for a politics seeking recognition and inclusion – a politics that has increasingly relied on the juridical rights-based discourse characteristic of American politics. It is necessary to problematize the conception of identity in such a politics because it serves as both the basis for the formation of collective social movements and the very categorization of social difference that enables the exclusion and disenfranchisement of certain groups. Foucault echoes these concerns in an interview that originally appeared in The Advocate. During the interview, Foucault is asked about the role that identities play in the exploration of new sexual practices. Foucault responds that identity becomes problematic “if people think that they have to ‘uncover’ their ‘own identity,’ and that their own identity has to become the law, the principle, the code of their existence” (1997a, 166). The interviewer continues to examine the issue of identity, contending that, nevertheless, “sexual identity has been politically very useful” (Foucault, 1997a, 166). Again, Foucault responds: “Yes, it has been very useful, but it limits us, and I think we have – and can have – a right to be free” (1997a, 166).
It is in the spirit of Foucault’s remarks that I undertake the investigation of this chapter: to be cognizant that sexual identity can be politically enabling, while exploring the limitations of an essential conception of identity that becomes codified in the politics of recognition and discourse of rights. I believe that standing in stark contrast to a democratic and pluralistic ethos is the notion that identity, as the law of one’s existence, may be universalized and codified into a law that governs the existence of others. Accordingly, I examine, from a number of theoretical perspectives, the ways in which sexual identities form and how these formations serve as the basis for and limitation of political movements seeking greater inclusion and recognition. In mapping out the lineage of the production and regulation of (homo)sexual identity, I utilize the works of such disparate thinkers as Michel Foucault, Jeffrey Weeks, David Halperin, David Evans, and Judith Butler as a means of providing a general overview of how sexuality has come to be understood as a truth effect produced by certain social, cultural, and political forces.

Ultimately, I employ these various thinkers to interrogate and disrupt the essentialism underlying sexual identities, that is, I want to expose the contingency of sexuality that is otherwise produced as essential, immutable, and true. Although I subscribe to Foucault’s conceptions of the discursive production of sexual identities and the interplay among power, truth, and sexuality, I include other theoretical perspectives to accentuate the contingencies of sexual identity. In some ways these authors compliment and even channel Foucault’s work, and in other ways they stand in stark opposition. I am not necessarily interested in tracing the lines of convergence and divergence among these thinkers (although I do perform a few of these explorations); instead, I am more concerned with exposing, from multiple vantage points, much of what is left unquestioned in our assumptions regarding sexuality and how our preoccupations
with these truths limit our thinking on the possibilities of political membership and participation. My readings of these authors are meant to contribute to such a critical examination.

Furthermore, I will couple these readings with an investigation of the apparatuses of power that not only coalesce to bring (homo)sexual identity into an essentialized existence, but also politicize this identity. How is homosexuality rendered knowable, and how does this knowledge allow for public intervention and regulation? But also, how does this system of production and regulation point to possibilities for individual and collective action in the hopes of resisting and even changing the hegemonic discourse? In contemporary American politics, when identity-based movements appeal to the legal system to be included and recognized as legitimate members of civil society, wherein inclusion and recognition are extended through the protections of juridical rights, they limit the productive possibilities of the paradoxes that operate at the center of processes of normalization, regulation, and identity formation. In a democratic and pluralistic politics, where the essentiality/truth of identities is unsettled, these paradoxes may be more fully explored as a means of transgression and transformation. In other words, while these paradoxes currently ossify extant hegemonic power relations, thereby marginalizing deviant identities, a democratic and pluralistic ethos will productively engage those paradoxes and use them as a basis for transformative political projects. The work of unsettling the truths of sexual identity that I perform in this chapter is a first step in realizing such an ethos.

Finally, I critique the more specific role that juridical rights play in regulating identities and limiting their expression in public. By drawing upon Wendy Brown’s invocations of Marx and Foucault, I illustrate the paradoxical limitations posed by juridical rights that confront identity-based movements seeking greater inclusion and recognition. In doing so, I discuss how rights-based discourse regulates sexual identities through attempts to naturalize and fix the
meanings of sexual difference. Compulsory heterosexuality, operating as the norm at the center of this discourse, demarcates and subordinates deviant forms of sexuality, even as these marginalized identities seek refuge from overt state and public regulation via appeals to juridical rights. I conclude this section with a few words gesturing towards the ways in which these critiques can help inform a democratic and pluralistic politics that is cognizant of these contingencies.

*The Trouble with Identity Politics*

It is clear that, in the last half-century, identity politics have become prominent as both a field of study among academic circles and as a rallying point for various social groups seeking recognition. The broad category of “identity politics” has taken on many forms and has drawn from various intellectual histories in order to acknowledge the claims of recognition and inclusion made by historically marginalized groups. Wendy Brown (1995) argues that identity politics is, in a sense, a symptom of and a reaction to the fragmentation brought about by the postmodern world. She contends that, “Drawing upon the historically eclipsed meaning of disrupted and fragmented narratives of ethnicity, race, gender, sexuality, region, continent, or nation, identity politics permits a sense of situation – and often a sense of filiation or community – without a profound comprehension of the world in which one is situated” (1995, 35). Yet, in addition to this symptomatic aspect of identity politics, it also “emerges partly as a reaction…to an ensemble of distinctly postmodern assaults upon the integrity of modernist communities producing collective identity” (Brown, 1995, 35). In this way, one can understand identity politics as an attempt to reconsolidate both an individual and a communal sense of self – based
upon any one of a number of individual and social characteristics – in the face of proliferating modes of division, repression, and domination.

Nevertheless, this reliance on an essential and socially unifying sense of identity as the basis for a libratory political project is troublesome. It is the false belief that somehow we can uncover a true self that misleads us to search for an emancipative politics capable of freeing us from repression and domination. In actuality, the very apparatuses of governance and control that are viewed as repressive and/or exclusionary are the means by which selves are produced and socially constituted. Thus, the object of identity politics’ dissatisfaction is the very thing that makes identity possible; as Butler argues, there is no subject prior to its regulation (2004, 41). This echoes Brown’s belief that identity politics are both postmodernity’s symptom and reaction. There is a certain sense of irony at work here in such a Foucauldian conceptualization of the power relations immanent to the formation of identity and the development of identity politics: as a matter of power’s productive capacities, identity politics emerge as the product of the individuating effects of regulatory power (symptom), and then resist these modes of individuation in an attempt to surpass them and act on behalf of an authentic self worthy of recognition and inclusion (reaction).

Charles Taylor’s work on identity and recognition helps to expose the problematic, if not paradoxical, relationship between the two. In his essay, “The Politics of Recognition,” Taylor argues that, “the demand for recognition” on the part of many marginalized groups “is given urgency by the supposed links between recognition and identity, where this latter term designates something like a person’s understanding of who they are, of their fundamental defining characteristics as a human being” (1994, 25). Yet, it is precisely the supposed fundamentality of identity that I call into question here. Taylor goes some way in troubling what identity exactly
means and to what it refers, but I would like to take this analysis further and more radically problematize the constitution of identity and its relationship to political projects struggling for recognition and inclusion.

That identity is historically and socially conditioned should come as no surprise to many; certainly numerous thinkers have treaded similar paths in critiquing the essentiality of identity. Still, the belief that a core identity is the basis for progressive politics has a strong purchase in a great deal of contemporary political thought. This has surely been the case throughout history when it comes to the emergence of what Taylor calls “authenticity.” The “authentic self,” as Taylor argues, developed as “an offshoot of the decline of hierarchical society” (1994, 31). Where a pre-modern sense of “identity” once depended on a person’s social standing, the development of democratic, egalitarian societies ushered in the belief of a true and original subject that is independent of externalities. The ideal of authenticity became couched in terms of “self-fulfillment” and “self-realization” (Taylor, 1994, 31). Emphases on the subject and its moral center gave birth to “a new form of inwardness, in which we come to think of ourselves as beings with inner depths” (Taylor, 1991, 26). Accordingly, identity is defined as “‘who’ we are, ‘where we’re coming from’” (Taylor, 1991, 34). Taylor refers to this as the monological ideal.

Foucault, for one, is clearly critical of any account of the subject that is akin to this monological ideal; an “inner self,” according to Foucault, is the product of various power relations that operate at the site of the individual. The innermost self is a discursive formation – a product of the internalization of power. This is not to say that the self or a sense of inner being is an illusion – it is not a matter of false consciousness. However, the self does not preexist power relations; it comes into being through them. If anything, power relations and the self are (necessarily) contemporaneous. Taylor himself goes some way in critiquing the monological
ideal, contending that this ideal ignores the dialogical character of identity formation, that is, the ways in which language constitutes who we are and how we understand ourselves (1994, 32). This is vaguely reminiscent of accounts provided by the likes of Foucault and Butler, who are also attentive to how subjects are constituted linguistically; however, Taylor’s discussion stops short since it focuses only on the ways that dialogue helps to cultivate an authentic self and a sense of identity. Consequently, the discursive accounts of Foucault and Butler offer a more radical conception of the linguistic production of identity than Taylor’s dialogical negotiations of identity. I elaborate on some of these alternative conceptions below through my analysis of sexuality and identity.

Still, we can glean from Taylor’s work an important insight into the importance of recognition in contemporary politics. If we were to hold on to this account of identity that mandates an essential conception of one’s true self – a self that is cultivated and negotiated through dialogue with others – then recognition is absolutely necessary for that identity to fully come into being and express itself:

Thus my discovering my own identity doesn’t mean that I work it out in isolation, but that I negotiate it through dialogue, partly overt, partly internal, with others. That is why the development of an ideal of inwardly generated identity gives a new importance to recognition. My own identity crucially depends on my dialogical relations with others (1994, 34).

Thus, Taylor makes a significant move away from a strictly monological conception of the authentic self to one that depends on public acknowledgement and needs recognition (1991). Without recognition, by this account, identities cannot fully come into being – they cannot express themselves, nor can they develop through ongoing interpersonal interaction if they are deprived of legitimacy in the public sphere and isolated from various social institutions. Certainly this is one of the concerns that shape a politics of identity. The ability to fully express
one’s identity, to have this identity protected, and to take active part in public life on the basis of this identity are all essential elements of a democratic politics.

Unfortunately, pegging a democratic political project on a unified and essential sense of identity, whether it is monological or dialogical, can be problematic. As I have already alluded, such identity-based claims for recognition can be inherently exclusionary. This is particularly true when it comes to concerns with pluralism and a respect for difference. In *Identity/Difference*, William Connolly addresses this very tension between identity and difference. Connolly questions whether there is “a practice of democracy – or a strain of politics within democracy broadly defined – that responds to the problematic relation between identity and difference” (1991, x)? The problematic bind between identity and difference, which Connolly identifies, is that, “[one needs] identity to act and to be ethical, but there is a drive to diminish difference to complete itself inside the pursuit of identity” (2002, xv). Connolly refers to this bind as a social paradox, which “operates as pressure to make space for the fullness of self-identity for one constituency by marginalizing, demeaning, or excluding the differences on which it depends to specify itself” (2002, xv). Identity depends on difference in order to define and consolidate itself, that is, difference produces identity. Yet, when identity tries to express itself and carve out a space in politics for recognition, it excludes difference. Competing claims to differing identities are pushed to the periphery, rendering them abnormal, marginal, and in need of regulation.

Wendy Brown elaborates on this paradox, arguing that, “politcized identity emerges and obtains its unifying coherence through the politicization of exclusion from an ostensible universal, as a protest against exclusion” (1995, 65). The basis for exclusion from liberal democratic processes is differentiation from the universal “ideals” of white, masculine, and
heterosexual upon which those very processes are based. Yet, the existence of differentiated and marginalized identities, and therefore identity politics, depends on the politicization of this ideal, as Brown continues: “Put the other way around, politicized identities generated out of liberal, disciplinary societies, insofar as they are premised on exclusion from a universal ideal, require that ideal, as well as their exclusion from it, for their own continuing existence as identities” (1995, 65). Thus, identity\difference is not just a social paradox; it is a political problem as well. This paradox holds true for any aspect of identity, not just sexuality, and we could examine how the existence of a marginalized identity, as well as its political mobilization, depends on the hegemony of the universal ideal.

Historically, juridical power has subjected various aspects of identity to the forces of normalization – fixing as deviant and regulating those identities that differ from the norm. In the West, that norm has usually been the white, property-owning, heterosexual male, and any aspect of identity that has deviated from that set of norms has been the subject of regulatory powers that naturalize and essentialize differences in order to legitimate subordination and subjugation. Any number of these aspects of identity – race, gender, class, etc. – could undergo similar analyses in terms of how they have been produced and regulated via certain historical discourses. The institutionalization of the power of the norm, which operates at the center of these regulatory discourses, sustains exclusionary political practices at the expense of stigmatized aspects of identity. In turn, the forces of normalization that marginalize subjects also produce the very political identities and collective movements that contest those practices.

However, sexual identity is particularly problematic in its relation to the regulatory techniques of juridical power and the supposedly repressive effects of such power relations. As Foucault and Butler, among others, illustrate, the very existence of sexuality depends on those
mechanisms of supposed repression, as well as the institutions of regulatory power that bring forth what Foucault refers to as the incitement to discourse. As a matter of this power relation, Foucault argues, we expect that sexuality tell us the secret truth of our being; even in those moments of supposed repression we are compelled to partake in the discourse of sexuality and explore that believed truth buried within us. This dynamic between truth and power, self and subjugation, echoes Foucault’s challenge to the repressive hypothesis. In fact, Foucault’s challenge to the repressive hypothesis rests upon the interplay between truth and power, as well as power’s ability to produce and operate through identity rather than in opposition to it. What makes this relationship among sexual identity, power, and repression problematic is this way in which sexuality is attached to a notion of an essential and secretive truth, and that this truth becomes a basis for both self-discovery and a whole range of regulatory techniques. Often times, those regulatory techniques facilitate investigations into self-discovery and create the basis for individual practices of freedom and collective political movements.

Sexuality’s subjectification at the hands of the regulatory discourse of juridical rights compounds this problematic relationship among sexual identity, power, and repression. Along with sexuality, other aspects of identity may share similar paradoxical limits in terms of their production, regulation, and normalization by way of the juridical discourse of rights; however, because of sexuality’s supposed connection with the hidden truth of our being, it is produced as an essentially private matter that is supposed to be outside the scope of public and political regulation. This purportedly private character of sexuality is itself a social and regulatory construct, which is also tied into the seeming essentiality and immutability of sexual identity. In fact, this notion of the private character of sexuality both results from and masks the regulatory powers that produce sexuality. Juridical rights play a significant role in regulating sexuality as a
private matter, and, in doing so, these rights obfuscate their own regulatory effects. In this case, the repression of sexuality, through juridical power, manifests in the construction of sexuality as a necessarily secretive and private aspect of identity. Yet, even this form of repression calls sexuality into the realm of public expression and regulation, again reflecting Foucault’s notion of the incitement to discourse. Sexual identity is in a uniquely problematic position because the regulatory functions of juridical rights both repress sexuality and draw it out into the open.

Through the notion of the incitement to discourse, we must be aware of how sexual identities are compelled to bring themselves into discursive existence by appealing to the very legal system that normalizes and regulates that existence. Foucault exposes how the church and medical and psychiatric communities were not the repressive mechanisms of sexuality that many thought them to be; instead they compelled the proliferation of sexual discourse (confessions, diagnoses, etc.) around them. Similarly, the law does not only privatize sexuality and suppress supposedly deviant sexualities; it is also an arena for the discursive production of sexual identities, where these identities bring themselves into existence through appeals for recognition, inclusion, and legitimacy.

This conception of the incitement to discourse occupies a paradoxical position in the politics of recognition. Juridical appeals for recognition are akin to the incitement to discourse insofar as identities bring themselves into discursive existence by appealing for legal recognition and inclusion, and yet they are also normalized, regulated, and sometimes repressed by this very same system. Butler elaborates on this problematic in her discussion of sexual norms and the ways in which persons are “done by norms” (2004, 3). Butler identifies Hegel’s claim that “desire is always the desire for recognition” as the basis for the problematic of norms and recognition (2004, 31). Summarizing the contributions of Foucauldian scholarship to this
discussion, Butler notes two significant insights: “(1) regulatory power not only acts upon a preexisting subject but also shapes and forms that subject; moreover, every juridical form of power has its productive effect; and (2) to become subject to a regulation is also to become subjectivated by it, that is, to be brought into being as a subject precisely through being regulated” (2004, 41). A political project appealing for recognition and inclusion will therefore always be caught up in this paradox of the incitement to discourse: while such claims for recognition may contribute to bringing sexual identities into discursive existence, this existence is predicated by its regulation. Consequently, an identity politics of sexuality will always take place within and against the very norms and regimes of regulatory power that bring identities into existence.

Finally, let us consider another more general set of problematics confronting identity politics that arise from Nancy Fraser’s work in *Justice Interruptus*. These problematics come on two fronts. First, Fraser’s primary claim is that struggles for recognition and struggles for social/material equality should not ignore one another. Thus, identity politics must not focus predominately on issues concerning recognition, which Fraser contends has happened over the last couple of decades, at the expense of issues concerning socio-economic equality. It is not enough, by her account, to argue that socio-economic inequalities will be corrected once recognition is achieved. Fraser also argues that an affirmative identity politics that takes into account both redistribution and recognition is still unattractive because it only remedies “inequitable outcomes of social arrangements without disturbing the underlying framework that generates them” (1997, 23). Instead, Fraser argues for a coterminous project of transformative redistribution (socialism) and transformative recognition (deconstruction) that will completely restructure these “underlying generative framework[s]” (1997, 23).
Fraser uses the example of the “despised sexuality” to illustrate a transformative project of recognition in which deconstruction aims at “[destabilizing] all fixed sexual identities” and “[making] room for future regroupments” (1997, 24). She frames the “despised sexuality” as an ideal type to illustrate how a purely transformative project of recognition would operate: “Sexuality in this conception is a mode of social differentiation whose roots do not lie in the political economy because homosexuals are distributed throughout the entire class structure of capitalist society, occupy no distinctive position in the division of labor, and do not constitute an exploited class” (1997, 18). Fraser goes on to argue that a project of transformative redistribution must also be applied when we start to think of the multiple axes of class, race, etc. that intersect with sexuality and contribute to the disenfranchisement of particular identities. Thus, according to Fraser, “Overcoming homophobia and heterosexism requires changing the cultural valuations (as well as their legal and practical expressions) that privilege heterosexuality, deny equal respect to gays and lesbians, and refuse to recognize homosexuality as a legitimate way of being sexual” (1997, 18-9). Yet, what Fraser considers to be the deconstructive vein of antiessentialism is, by her account, insufficient to supply such a political project on its own.

This is where I disagree with Fraser. She argues that the antiessentialist view “sees all identities as inherently repressive and all differences as inherently exclusionary” (1997, 181). She then concludes that, “In this version, the only ‘innocent’ political practice is negative and deconstructive. It involves unmasking the repressive and exclusionary operation that enables every construction of identity” (1997, 183). Rather than relegate the deconstruction of identities to a strictly negative political practice, I believe that exposing the contingent, relational, and exclusionary constructions of identity can also be productive. By recognizing how power operates through the construction, proliferation, and regulation of identity, rather than solely in
opposition to it, allows us to be more cognizant of the ways that political projects seeking recognition may actually contribute to a system of further regulation and exclusion.

Specifically, such an approach contributes to the problematization of the discourse of individual rights that marginalized identities increasingly appeal to for inclusion and recognition. A focus on individual rights also speaks to the disparity between recognition and redistribution identified by Fraser. Individual rights deal in both legal recognition of different identities and access to a number of economic and social benefits that come along with these rights. Issues of sexual identity are especially pertinent to the intersection of recognition and redistribution at the site of individual rights. Certain economic benefits, including tax advantages and access to health, care hinge upon recognition of legitimate sexual relations; yet, these rights may simply push problems of social inequality into the private sphere of economic relations and away from public, political consideration. Moving beyond individual rights as a marker for recognition and equality may very well keep such issues of social inequality and redistribution in the light of public scrutiny and a matter of political redress.

By adopting an attitude similar to the deconstructive antiessentialist approach, we can examine how juridical discourse produces identities as a field of both regulation and possibility. This does, however, differ to a degree from deconstructive antiessentialism. Instead of understanding the construction of identity as something that is always repressive (and thus necessitating a purely negative politics of deconstruction), I want to take into account the negative and productive aspects of juridical discourse and the construction of identity. The key, then, for a transformative political project is to focus on the ways that juridical discourse, generally, and individual rights, more specifically, seek to fix and naturalize the meanings of identities, and use these meanings as the basis for subjugation and exclusion from legal rights
that confer social and economic benefits. Unsettling these identities, and the ways that they are produced and regulated by juridical power, will contribute to the formation of a democratic and pluralistic ethos that is better able to deal with the problems of social inequality and misrecognition of difference – the two impasses to democratic participation that Fraser identifies (1997, 173).

Ultimately, the trouble with identity politics is that the notion of “identity” is the basis for both struggles for inclusion/recognition and the regulation of social and individual bodies. Identity politics rely on this false assumption that truth stands in opposition to power and that a true self exists independently and in light of power relations (especially those that attempt to oppress and dominate). The adherence to an identity can be empowering, but it can also serve to categorize individuals for many nefarious purposes (both intentional and unintentional). Furthermore, identity depends upon a presupposed other that it defines itself against. As Butler illustrates, one is only recognizable in relation to a norm (2004, 31-2). The norm is necessary for recognition because of its capacity to differentiate among identities, and yet, expressing a “deviant” identity will reproduce the norm from which it seeks distance. Thus, identity politics will ultimately reinforce the norm by the very means of bringing itself into existence. Because of this, the notion of “identity” and the dual role that it plays in politics must be critically examined. It is my hope that by unsettling sexual identity’s meaning, as well as the ways in which (homo)sexuality is constituted as a true and essential aspect of identity, this analysis will also unsettle sexual identity’s foundational stake in the politics of recognition and inclusion, thereby opening up possibilities for new forms of democratic politics that are not so rigidly confined by the discourse of individual rights.
Historical Contingencies – Attending to the History of Sexuality’s Present

In his *How to do the History of Homosexuality*, David Halperin seeks to “think through specific theoretical issues connected with writing the history of homosexuality” (2002, 2). Part of the difficulty in this task, as I have discussed briefly above, is the persistent belief that sexuality contains the essential truth of our nature. This belief implies a timeless and universal quality to the meaning that is ascribed to sex and the categorization of sexuality. Yet, it is evident from various historical studies performed by Foucault, Halperin, and Jeffrey Weeks, among others, that the meaning attributed to sexuality and the modes of categorizing sexual behavior and identity have changed over time. Halperin is attentive to this problematic bind of studying the history of sexuality:

One of the most distinctive features of the current regime under which we live is the prominence of heterosexuality and homosexuality as central, organizing categories of thought, behavior, and erotic subjectivity. The rise to dominance of those categories represents a relatively recent and culturally specific development, yet it has left little trace in our consciousness of its novelty…We can’t figure out what it is about our own experiences of sexuality that are not universal, what it is about sexuality that could be cultural instead of natural, historical instead of biological. All our research into otherness, into cultural alterity, presents to us an endlessly perplexing spectacle of the exotic, which merely reinforces our attachment to our own categories of thought and experience (2002, 3).

We are limited, as sexual subjects, in our ability to imagine a realm of possibility outside of our immediate understandings and experiences, which we tend to universalize as the natural and true order of things. So, how do we move beyond these limitations in thinking about sexuality? In a sense, I want to bracket the problem of the history of sexuality by taking seriously Foucault’s assertion that the homosexual came into existence at the end of the 19th century (1978). In other words, while I do pay attention to the shift between pre-modern and modern understandings of sexuality, I do not want to solely focus on the historical disjunctures in the categorization and conceptualization of homosexuality. It is not my intent to retrace the varied meanings of
sexuality and same-sex relations throughout ancient Greece and pre-modern times. Still, an examination of how homosexuality has emerged as a problematic category in modernity must take into consideration Foucault’s claim as an initial reference point.

With this in mind, I recognize that same-sex relations in ancient Greece had an entirely different meaning than contemporary categorizations of homosexuality; similarly, historical accounts of sodomy and buggery cannot easily be translated into current definitions of homosexual conduct and/or identity (although there certainly are those who do call upon such historical accounts to legitimize present-day regulations of homosexuality, including some Justices of the Supreme Court in dealing with issues of anti-sodomy laws and the right to privacy). It is important to pay attention to this shift because of ongoing problematic conflations of activity and identity and the way that these conflations are read into historical accounts of same-sex relations and law regulating sexual conduct. I believe that Foucault’s work allows for such an analysis of the ways in which meanings seep across historical divides – there are no clean historical breaks especially by Foucault’s account. Yet, by setting aside strictly historical analyses or an in-depth genealogical account of sexuality, I am able to focus on how current and on-going constructions of homosexuality become politicized and impact individuals and social groups. I believe that this allows me to address Sedgwick’s fifth axiom from her *Epistemology of the Closet*: “The historical search for a Great Paradigm Shift may obscure the present conditions of sexual identity” (1990, 44). By taking any notion of “a Great Paradigm Shift” as my initial point of reference, I can examine the discourse of sexuality that produces, regulates, and manages sexual identities.

I also believe that this approach helps to avoid Sedgwick’s criticism of Foucault’s genealogical analysis: “One way, however, in which such an analysis is still incomplete…is in
counterposing against the alterity of the past a relatively unified homosexuality that “we” do “know today” (1990, 44-5). Sedgwick continues on to argue that, “an unfortunate side effect of this move has been implicitly to underwrite the notion that ‘homosexuality as we conceive of it today’ itself comprises a coherent definitional field rather than a space of overlapping, contradictory, and conflictual definitional forces” (1990, 45). The problem with Foucault’s analysis, along with that of Halperin (at least Halperin’s analysis in his One Hundred Years of Homosexuality), according to Sedgwick, is that both authors’ approaches present “one model of same-sex relations [as] superseded by another, which may again be superseded by another” (1990, 47).

Yet, I disagree with Sedgwick’s criticism. Both Foucault and Halperin are clearly aware that one model of understanding does not simply supersede another; this is evident in Foucault’s analyses of power relations where he recognizes that various forms of power will overlap, coexist, and integrate one another (thus, there are more than mere traces of disciplinary power in regimes of bio-power). Furthermore, Sedgwick seems to miss that genealogy is an ongoing process, and that Foucault’s work is a genealogical intervention at a certain moment of time. He does not posit a “unified homosexuality that we know today;” rather, Foucault engages in a practice of unsettling those elements that contribute to the sense of a unified present of sexuality. Genealogy is meant to be a tool picked up by others to continue such contestations.

It is through genealogy that it becomes evident that such clean historical “breaks” do not exist in the way that sexuality is perceived. Modern conceptions of homosexuality can be read into historical texts, while traces of pre-modern or “out-dated” discourses may seep into contemporary legal and political frameworks. Similarly, the politics of gay marriage are not reducible to one narrative, including those based on tradition, rights, or homophobia (Chambers
2003, 8). Instead, as Chambers argues, DOMA is a field of contestation between attempts to fix the terms of marriage and sexuality and those very movements working to refigure the meaning of marriage in response to institutionalized heterosexism. The investigations that I undertake here are meant to unsettle that belief in a “unified homosexuality that we know today.” Using Foucault, primarily, as a theoretical basis for these investigations, I want to expose the discursive forces that constitute sexual identity, generally, and the juridical discourse that produces and regulates homosexuality in the present, specifically. More specifically, the socio-political struggles over the status of homosexuality, which contribute to the juridical discourse framing the debates over anti-sodomy laws and gay marriage, reflect the “conflictual definitional forces” to which Sedgwick refers.

By exploring the historical contingencies of sexuality, it is evident how sexuality (particularly homosexuality) has become the site of a politicized identity in the present, and how this identity has been problematically constructed as essential and unitary. While this project is not necessarily historical or genealogical, it still draws significantly on Foucault’s work to expose the historical contingencies of sexuality. In doing so, I believe, as Weeks argues, that, “The aim is to understand ‘the present’ as a particular constellation of historical forces, to find out how our current political dilemmas have arisen, to see, in a word, the present as historical” (1991, 159). My focus in this chapter is to examine how sexuality has been theorized within the context of “a history of the historical present as a site of definition, regulation, and resistance” (Weeks, 1991, 159). With this in mind, I take Foucault as my starting point.
Foucault and the Discovery of Homosexuality

Among the many attempts to pinpoint the emergence of homosexuality as a category of understanding in the production of various subjectivities, Foucault’s passage in the first volume of *The History of Sexuality* is perhaps the most famous, and thus I quote it at length:

> As defined by the ancient civil or canonical codes, sodomy was a category of forbidden acts; their perpetrator was nothing more than the juridical subject of them. The nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and possibly a mysterious physiology…We must not forget that the psychological, psychiatric, medical category of homosexuality was constituted from the moment it was characterized – Westphal’s famous article of 1870 on “contrary sexual sensations” can stand as its date of birth – less by a type of sexual relations than by a certain quality of sexual sensibility, a certain way of inverting the masculine and the feminine in oneself. Homosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, a hermaphrodisim of the soul. The sodomite had been a temporary aberration; the homosexual was now a species (1978, 43).

With these words, Foucault exposed a paradigm shift in the way that same-sex relations were understood historically. Yet, this was not an uncontroversial claim for Foucault to make. Nor has its reception or the application of its implications been entirely clear in the scholarly community. For example, David Halperin (2002) argues that we must “forget Foucault,” insofar as we must forget our common misunderstandings of Foucault’s project. In fact, Halperin points to the passage cited above as having been forgotten due to its over-deployment and misinterpretation (like Halperin, I use the extensive quotation to remind ourselves of the true meaning and significance of Foucault’s original work) (2002, 26-7).

Halperin argues that Foucault’s passage regarding the emergence of homosexuality is commonly misunderstood as making a “distinction between sexual acts and sexual identities” (2002, 27). That is, the distinction between the pre-modern and modern conceptualizations of same-sex relations that Foucault identifies is “routinely taken to authorize the doctrine that
before the nineteenth century the categories or classifications typically employed by European cultures to articulate sexual difference did not distinguish among different kinds of sexual actors but only among different kinds of sexual acts” (Halperin, 2002, 28). Thus, according to Halperin, many researchers have inappropriately concluded that, “before the modern era sexual deviance could be predicated only of acts, not of persons or identities” (2002, 29).

Still, Foucault seems to belabor such a point in the second volume of *The History of Sexuality*:

One would have a difficult time finding among the Greeks (or the Romans either, for that matter) anything resembling the notion of “sexuality” or “flesh”…Of course the Greeks had a whole stock of words available for designating different actions or acts that we call “sexual.” They had a vocabulary for referring to specific practices…Our idea of “sexuality” does not just cover a wider area; it applies to a reality of another type, and it functions quite differently in our morals and knowledge (1985, 35).

The idea seems to persist that understandings of sexuality between the ancient era and the modern era are incommensurate. In fact, to remain true to Foucault’s characterization, one cannot even accurately use the term “sexuality” to capture the Greek conception of *ta aphrodisia*, which Foucault renders loosely as “things,” “pleasures of love,” “sexual relations,” “carnal acts,” and “sensual pleasures” (1985, 35). “Sexuality,” generally, cannot apply to pre-modern experiences and understandings of sexual pleasures (the differences between pleasure and desire is yet another theme that plays out in Foucault’s works).

At the offset of the second volume of *The History of Sexuality*, Foucault clarifies his project as an attempt to see “how an ‘experience’ came to be constituted in modern Western societies, an experience that caused individuals to recognize themselves as subjects of a “sexuality,” which was accessible to very diverse fields of knowledge and linked to a system of rules and constraints” (1985, 4). This is not to say that the “experience of sexuality” did not exist
in the pre-modern period. Certainly the ancient Greeks were the subjects of sexual relations and were subjected to various codifications structuring these relations. In this second volume Foucault attends to the ways in which ancient Greeks styled themselves as ethical subjects in relation to sexual experience (as such, sexual experience in ancient Greece was not just about acts; there were degrees of subjectivity that coalesced around these experiences). Halperin (1990) himself explores similar issues regarding the codes of conduct that governed sexual experience among the ancient Greeks, ranging from Greek citizenship to the place of prostitution in Greek society.

On the other hand, these examinations should not be confused for attempts to establish some continuity between ancient ethical systems and modern forms of moralization, both of which have developed as modes of subjectification in relation to sexual experience. For example, Foucault notes the distinction between the compulsory and universal moralization of modern Christian doctrine and the less organized and unequal moral system of the Greeks (1985, 21). Foucault’s attempt to trace the “experience of sexuality” and determine how “sexuality [was] constituted as a moral domain” is cognizant of the break between the ancient and modern systems in terms of how sexual experience has been conceptualized, and the different ways in which subjectivities form around such experiences (1985, 10). Yet, this break is not necessarily indicative of a gap between understanding sexual experience purely as a matter of acts and as a matter of identity.

The intersection of individual acts and the question of identity is an important area of investigation. However, and this brings us back to the first volume of *The History of Sexuality* more specifically, Foucault is not necessarily interested in the historical interrelationship (or lack thereof) between sexual acts and sexual identity. Foucault’s major point is, instead, to “highlight
what in particular was new and distinctive about the modern discursive practices that produced the category of ‘the homosexual’” (1978, 29). Thus, this discussion of the emergence of homosexuality is situated in Foucault’s larger argument regarding the discursive production of sexuality.

As a challenge to the repressive hypothesis, Foucault posits what he refers to as the “incitement to discourse.” Foucault questions the supposed repression of sexuality by 18th century bourgeois society, asking not “Why are we repressed?” but “Why do we say…that we are repressed” (1978, 8-9)? Thus, instead of finding religious, educational, and medical institutions to be the loci of repression, Foucault examines how the confessional, the classroom, and the scientific community brought sexuality into discursive existence: “The society that emerged in the nineteenth century…did not confront sex with a fundamental refusal of recognition” (1978, 69). Foucault continues: “On the contrary, it put into operation an entire machinery for producing true discourses concerning it” (1978, 69). In other words, those institutions that we generally believe repress sexuality are, in fact, the very means by which sexuality is produced through incitements to talk about it, to learn about it, to examine it and constantly reassert the connection between one’s sexuality and the hidden truth of his or her being.

Foucault focuses on the historical legacy of the incitement to discourse and the effects it has had on the production and regulation of sexual desire:

This is the essential thing: that Western man has been drawn for three centuries to the task of telling everything concerning his sex; that since the classical age there has been a constant optimization and an increasing valorization of the discourse on sex; and that this carefully analytical discourse was meant to yield multiple effects of displacement, intensification, reorientation, and modification of desire itself (1978, 23).
This discourse on sex – its production, examination, and administration – takes place primarily through what Foucault dubs “scientia sexualis.” Scientia sexualis is one of two “procedures for producing the truth of sex” that Foucault identifies (the other is “ars erotica,” which has been more prevalent in Eastern and ancient societies and deals with the notion of pleasure rather than desire) (1978, 57). Foucault refers to scientia sexualis as those “procedures for telling the truth of sex which are geared to a form of knowledge-power strictly opposed to the art of initiations and the masterful secret,” which he specifically identifies in the form of the confession (1978, 58). Thus, the confession became the archetype for the proliferation and accumulation of sexual knowledge and, in turn, for the very production of sexuality (including sexual deviance).

The need to talk about sex, to explore its meanings and bring its secrets out into the open via an interlocutor, translates into a number of other institutions beyond the church (medical, psychological, educational, etc.), all of which constitute what Foucault calls the incitement to discourse. The incitement to discourse, Foucault argues, has been a more effective means of managing sex than the mere repression of sexuality:

> [O]ne had to speak of [sex] as of a thing to be not simply condemned or tolerated but managed, inserted into systems of utility, regulated for the greater good of all, made to function according to an optimum. Sex was not something one simply judged; it was a thing one administered. It was in the nature of a public potential; it called for management procedures; it had to be taken charge of by analytical discourses. In the eighteenth century, sex became a “police” matter – in the full and strict sense of the term at the time: not repression of disorder, but an ordered maximization of collective and individual forces (1978, 24-5).

It is no accident that this discussion of the regulation of sexuality coincides with Foucault’s analyses of the discovery of society and bio-power. Much of the effectiveness of bio-power must be attributed to its ability to penetrate society at every level, and this includes the administration of life’s most basic functions and drives. According to Foucault, the management of individual and social bodies has been achieved, in part, through the constant reassertion of the
link between sexuality and truth, as well as the political economy of power that has coalesced around this sexuality/truth dynamic.

*The Materiality of Sexual Discourse*

Of course, there are many theorists who are critical of Foucault’s approach. Some find his discursive analysis to be problematic; in particular, those coming from the Marxist tradition find discourse to be too ephemeral, and, therefore, they find Foucault’s emphasis on discourse to lack a concern for the materiality of sexuality and to be absent of a driving force behind the biopolitical apparatuses of control. Because of this, I would like to briefly turn our attention to one of these critics, David Evans, and his work, *Sexual Citizenship: The Material Construction of Sexualities*. In this work, Evans explores the positioning of sexual citizenship within material parameters (1993, 8). He argues that by ignoring materialism, we miss a significant aspect in understanding how homosexuals, particularly gay males, fit into society as citizens:

Male homosexual citizenship is predicated on the conjunction of individual consenting adult freedoms including, indeed particularly, those of a consuming market, and the reinforced stigma of immorality which bans this citizen from the ‘moral community’ and polices him into privacy. As gay men claimed their leisure and lifestyle market, the market claimed them, colonised and exploited gay sexuality (1993, 100).

Although excluded from the public sphere to a large degree, gay males have seemingly become more fully immersed, and exploited, in the private sphere of the marketplace. The marketplace has co-opted homosexuality (again, primarily male homosexuality) and sold it back to the gay community, as well as the mass public in many veiled (and maybe some not-so-veiled) forms. The role that commodification plays in situating homosexuals in society as citizens is certainly an important avenue of investigation, as is a materialist account of sexual identity formation, yet neither is necessarily germane to my analysis of the ways in which homosexuality is juridically
and politically produced and regulated. Nor does such a materialist analysis elucidate the ways in which sexual identities are enmeshed in a rights-based discourse that is both politically enabling and limiting at the same time. In fact, such political and juridical regulation is integral to the privatization of homosexuality and its relegation to the private sphere of the marketplace.

I do not want to completely jettison Evans’ work, however. Because I undertake a discursive analysis of the production and regulation of homosexual identity, and Evans specifically engages Foucault’s work on the discursive production of the subject position, it is necessary to take seriously his criticism. He ultimately finds fault in Foucault’s “commitment to a postmodernist vision [that incorporates] a decentered subject as a mere switching center for immaterial networks of discursive influence” (Evans, 1993, 24). Foucault’s account fails, according to Evans, because it “does not recognise the latter as the ‘superstructure’ generated by the base of late capitalism” (1993, 24). Class identities are increasingly effaced with the accumulation of capital and rampant consumerism, while sexually differentiated identities (among other sources of identity) take their place (1993, 24). It seems that such affluence (the economic base) produces the immaterial discourses (the superstructure) that, in turn, produce and manage a variety of identities. These identities are plugged back into the machinery of the economic base as both producers and, perhaps more importantly, consumers. In this system, Evans argues that Foucault’s conception of bio-power is the means by which identities are micro-managed; however, bio-power would be meaningless without a purpose. This is often the central struggle that people have with Foucault’s work: there must be some doer behind the deed, or at least a reason behind the deployment of power. For Evans, it seems that this driving force is the advancement of late capitalism. To be fair, Foucault does not entirely neglect the
connection between capitalism and bio-power as he recognizes their mutual historical emergence in the first volume of *The History of Sexuality*.

Evans even provides an explanation for the privileged place of sexuality in modern capitalist society: “Only sexuality can serve as the link between private desire and its public expression in and through the market” (1993, 25). He contends that we must grapple with sexuality in terms of its material construction, which presents sexuality as a “personal mystery” capable of distracting us from the ways in which its very construction “tie[s] the individual to both state and market” (1993, 25). By his account, we cannot understand the production of sexual identities through the analysis of immaterial discursive networks. This plays into Evans’ three-part criticism of Foucault’s analysis: “his humans are devoid of agency; his social systems are immaterial, being lodged in discourse; nor do the latter have or require formal juridical monitoring and enforcement, populations being so effectively subjected to discourses that they have no active decisions to take” (1993, 27). For Evans, that Foucault’s subject is fully constituted by immaterial power relations is a problematic that deprives individuals of any sense of agency or any need of active juridical regulation.

While I agree with Evans that it is important to take into account the commodification of sexuality, I disagree with his assessment of Foucault’s work. Specifically, I believe that Foucault (and certain postmoderns like Butler who have drawn upon his work) has a conception of human agency that is derived from the very conditions of subjugation that seem to limit the possibilities of freedom. These conditions actually enable subject formation and the ability to act. Furthermore, the internalization of various regimes of power and the effectiveness of discourse are dependent upon formal modes of regulation and control. Better yet, formal models of juridical power often articulate the coalescence of seemingly disparate discourses (for
example, juridical regulation of sodomy and gay marriage relies on medical, religious, and political discourses of sexuality).

What is more, Evans ignores the materiality of Foucault’s discursive regimes. It is fallacious on his part to argue that immaterial discourses constitute Foucault’s social systems. Discourse, itself, can be material, and it certainly has material effects. While, at a superficial level, discourse may appear to be immaterial, it is comprised of an entire array of practices and relations that are grounded in the material world. With the advent of every regime of power that Foucault has analyzed (sovereign to juridical to disciplinary to bio-), power itself has been dispersed more widely and weighed less heavily on individuals as it has operated through discourse; however, this does not mean that discourse does not work upon and through bodies. In terms of sex, as Foucault argues, discourse has organized and given meaning to a number of physiological traits, practices, behaviors, etc. in order to create knowable and recognizable sexual subjects.

Subjects are sexed because of discourse; not only are meanings assigned to bodies, but the very physicality of those bodies is inscribed with the desires, behaviors, functions, and practices that are dictated by discourse. Discursive interventions take place at the site of the body in the form of a number of techniques ranging from those conducted via medical and psychiatric institutions to religious institutions. To be produced by discourse, then, is to have these techniques applied to one’s body. In doing so, one becomes the subject of sexuality: he or she has her body sexed through the organization and classification of certain anatomical traits and physiological attributes; desires are drawn out and elucidated; proper behaviors, practices, and modes of conduct are prescribed and, ultimately, internalized as a way of being. The sexing of the body also allows subjects to be managed and regulated as a matter of discourse. It is not
merely that discourse has come to these pre-existing entities and infused them with meaning; 
rather, these bodies, behaviors, desires, etc. constitute discourse itself. They are taken up as the 
subject matter of discourse, and they are deployed through a number of practices and techniques 
meant to target the individual. Material bodies and material relations are brought forth by 
discourse, but they also provide the basis for discourse to work upon and through.

The materiality of discourse is even more evident in terms of the effects that it produces. 
In the spirit of Evans’ Marxian analysis of sexual citizenship, it is clear that discourse has very 
material impacts on the socio-economic circumstances of the subjects that it regulates. Juridical 
discourse, in particular, has become a means of guaranteeing or depriving individuals of access 
to certain socio-economic benefits, including health care, tax advantages, and inheritance. 
Through the production and regulation of identities, juridical discourse has determined who is to 
be included under the umbrella of these socio-economic benefits and who is to be excluded. 
Thus, the more that certain juridical rights are articulated in terms of certain conceptions of 
legitimate personhood, that is, the more that they work to reinforce a norm of subjectivity that 
feeds into a dominate understanding of citizenship, then the more these rights will impact the 
socio-economic well-being of those who deviate from the norm. The material effects of juridical 
discourse are huge, then, in terms of issues concerning social justice and the distribution of 
economic goods/benefits.

An essential conception of sexual identity has played an increasingly important role in 
the distribution of juridical rights and socio-economic benefits. Because of this, it is important to 
contest the certainty with which sexuality has been treated as a natural, transhistorical, and 
immutable aspect of identity. To do so, I would like to address several authors who focus 
explicitly on the construction of sexuality as a means of understanding, categorizing, and
regulating certain identities. By working through these analyses we can grapple with how homosexuality has, historically, come to constitute a discernible identity in contemporary politics.

*Unsettling the Essential: Modern Homosexuality and Identity*

While his work does not constitute a theory of sexuality, per se, Foucault provides a framework by which to understand the seemingly disjunctive history of the modern study of homosexuality. It is the study of homosexuality through medical, psychiatric, and even religious discourses that has led to the deployment of an essential and true homosexual identity. These studies have been picked up by other discourses, especially juridical discourses, as a basis for regulating such supposedly deviant sexual identities. Yet, even with the “birth” of the homosexual in 1870, the meaning of homosexuality has not remained constant. This is the point that Sedgwick highlights with her fifth axiom. Jeffrey Weeks recognizes “[t]hree phases in the construction of a history of homosexuality”: the first phase is characterized by the work of sexologists such as Edward Carpenter, Havelock Ellis, and Iwan Bloch, who construed homosexuality as a “trans-historical” and a clearly-defined (albeit marginal) form of existence; the second phase, based on these early investigations, emerged during the 1950s and 1960s with a focus on understanding the place of homosexuality throughout history and “the forces that shaped public attitudes” about homosexuality; the third phase emerged in the 1960s and 1970s as a product of “radical gay movements” with an emphasis on “reasserting the values of a lost experience, stressing the positive value of homosexuality and locating the sources of its social oppression” (1991, 11-13). In light of these phases and their consequent competing and contrasting conceptualizations of homosexuality, we must ask along with Foucault why all of
this attention has been paid to studying sexuality, and how homosexuality has seemingly
emerged from these studies as a stable and comprehensible identity.

It is this question as to why such importance is attributed to sexuality that provides a
consistent framework for understanding the history of the study of homosexuality, as well as its
uptake in legal and political modes of regulation. As Foucault has illustrated and as I have
discussed above, it is the belief that “our truth” is somehow secretly embedded in sexuality that
drives us to seek for these hidden meanings. So, despite varying and competing scientific,
historical, and sociological investigations into homosexuality, the unifying theme behind these
systems in the modern era is the persistent belief that sexuality holds the key to the nature of our
being and that somehow an understanding of this nature will lead to self-realization. This belief,
itself, is the product of the intersection of multiple modern discourses that situate sexuality at the
center of identity. Medical, religious, psychological, legal, and political discourses help to drive
the construction of sexuality as essential to the self, and, in turn, these discourses also seek to
utilize this knowledge as a means of administering and regulating identities. Again, this is not to
say that sexuality does not have some real purchase on the identities of individuals and social
groups, but one must understand how the terms of this purchase on reality are constructed,
imposed, and regulated historically by various discourses.

Gayle Rubin is attentive to the historicity of sexuality’s production, and she is especially
cognizant of the heightened attention paid to sexuality during times of crisis:

Disputes over sexual behavior often become the vehicles for displacing social
anxieties, and discharging their attendant emotional intensity. Consequently,
sexuality should be treated with special respect in times of great social stress…As
with other aspects of human behavior, the concrete institutional forms of sexuality
at any given time and place are products of human activity. They are imbued with
conflicts of interest and political maneuvering, both deliberate and incidental. In
that sense, sex is always political. But there are also historical periods in which
sexuality is more sharply contested and more overtly politicized. In such periods, the domain of erotic life is, in effect, renegotiated (1984, 267).

Such renegotiations have taken place over the last half-century primarily in the courtroom over issues ranging from reproductive rights to pornography to sodomy laws. Increasingly, the law determines who is included and who is excluded from the rank and privilege of full citizenship and public life.

Rubin does much to characterize the oppressive relationship between the law and sexuality, as well as the necessary aspects of a radical theory of sex that “must identify, describe, explain, and denounce” legal persecution and political oppression:

Such a theory needs refined conceptual tools which can grasp the subject and hold it in view. It must build rich descriptions of sexuality as it exists in society and history. It requires a convincing critical language that can convey the barbarity of sexual persecution (1984, 275).

But, Rubin is quick to recognize that “sexual essentialism” has long been an impasse to such a critical engagement of sexuality. She defines sexual essentialism as the belief that sexuality is a natural, essential, and immutable feature of human existence. This belief, according to Rubin, has prevented homosexuality and its subjugation to legal and political administration from being rigorously questioned.

Rubin’s work, along with that of Foucault, Weeks, and Halperin, has helped to combat this essentialism. These works open up a space in which homosexuality is no longer understood simply as biologically predetermined; nor is homosexuality the outcome of various environmental factors such as familial and parental relations. Instead, sexuality is understood as the product of specific discourses, its existence imbued with no essential meaning beyond those ascribed by an array of medical, religious, and political institutions. Still, Rubin argues that, “This does not mean the biological capacities are not prerequisites for human sexuality” (1984,
“But,” as she continues, “they do not determine its content, its experiences, or its institutional forms” (1984, 276). Furthermore, the body and its sexual drives are always mediated by cultural meanings and institutional practices (Rubin, 1984, 276-7).

If we are to take Foucault’s genealogical work seriously, then we must go even a step further and understand the ways in which homosexuality itself is a product of discursive practices, that is, we must recognize that there would be no homosexuality, not just as a category of understanding but as a category of existence, in modernity. I believe that the shift between pre-modern and modern experiences of sexuality, which Foucault highlights, helps to expose the parameters of this sexual essentialism that constitutes what has come to be understood as the homosexual identity. This is not to say that pre-modern sexual experiences or conceptions of sexuality were somehow more “authentic;” however, the pre-modern era provides a reference point by which to gauge the development of modern sexual discourses and the manner in which these discourses have promulgated the essential connection between the secret of one’s being and one’s sexuality. It is my intent that this chapter serve to disrupt this essentialism that links sexuality to a fixed conception of identity.

Jeffrey Weeks echoes the arguments made by both Foucault and Rubin regarding the historical contingencies of sexuality. He argues that there is no singular cultural or historical narrative to which homosexuality belongs. Socially constructed meanings surrounding homosexuality vary widely, even when they are attributed to very similar (if not the exact same) acts (Weeks, 1991, 15). In other words, Weeks argues that, “what…might be termed homosexual behaviors, which seem from historical evidence to be a permanent and ineradicable aspect of human sexual possibilities, are variously constructed in different cultures as an aspect of wider gender and sexual regulation” (1991, 15). Thus, there is no point in searching for a
“single, causative factor” for the “origins of homosexual oppression;” instead, we should focus on “the conditions for the emergence of this particular form of regulation of sexual behavior in this particular society” (Weeks, 1991, 15-6). My focus, then, is on the ways in which modern forms of juridical discourse (Chapter 3’s analysis of anti-sodomy laws) and political discourse (Chapter 4’s analysis of gay marriage) produce homosexuality as a field of identities in need of regulation.

Weeks, like Foucault, goes on to trace the evolution of homosexuality as a category adopted by the medical, psychological, and even legal communities. Still, Weeks also recognizes that “the emergences of the homosexual category was not arbitrary or accidental” (1991, 20). He resists the view that homosexuality is a transhistorical phenomenon that was simply in need of discovery, and, at the same time, he resists the view that homosexuality is “a necessary effect of a pre-existing causative complex” such as capitalism (which runs counter to Evans’ account) (1991, 21). Furthermore, Weeks rejects any functionalist explanation that would view the construction of homosexuality as a means of discerning between the permissible and the impermissible or as a way of segregating deviant behavior (1991, 22). Such a model would seemingly view homosexuality as a repository for those social ills that could potentially threaten the nuclear family – in effect, the categorized and identifiable homosexual would keep the family insulated from deviant threats. Weeks rebukes this model for a variety of reasons: it casts the homosexual in a negative role that is not socially sustained; it assumes that there is not a reciprocal relationship between social role and identity; it also assumes that the creation of the role was entirely intentional; finally, it relies upon a dubious, if not antiquated, view of sex roles and the family (1991, 22-3).
Like Rubin, Weeks also targets sexual essentialism and identifies three challenges to its dominance: the interactionist approach (Gagnon and Simon), the psychoanalytic approach (Lacan), and the historical approach (Foucault) (1991, 24-5). I follow the Foucauldian approach, not necessarily because of its historical trajectory, but because of its emphasis on the discursive production of the subject. Such an approach allows us to focus on the historical contingencies that have given birth to the present, or, better yet, to unearth the elements of the present that exist within those contingencies. Foucault’s genealogical approach, in Weeks’ words, runs counter to the “ahistorical bias” of interactionism (1991, 27). Furthermore, rather than attribute the organization of sexuality to repression like the psychoanalytic approach, Foucault’s discursive analysis focuses on the ways in which classification and regulation actually produce sexuality. It is because of this latter distinction that I employ Foucault’s analysis as the basis for understanding the production of the sexual subject and how this subject fits into the juridical discourse of rights.

Juridical Rights and the Regularization of Sexual Identity

At the beginning of this chapter, I explored the paradoxes of an identity-based politics of recognition, and I followed this exploration with a critical analysis of the contingencies of sexuality and homosexual identity. Throughout this analysis, I have drawn upon a number of readings from postmodern and queer theorists in order to expose the production of truth surrounding sexuality and to disturb the essentiality of sexual identity. I would now like to turn our attention to the specific problematics confronting juridical rights and their role in the production and regulation of sexual identities. Returning to Wendy Brown’s work, we can see the inherent problematics of an identity politics that seeks recognition through the discourse of
individual rights. First and foremost, Brown, along with Butler and Connolly, illuminates how identity politics need the norm to give meaning and significance to difference: “without recourse to the white masculine middle-class ideal, politicized identities would forfeit a good deal of their claims to injury and exclusion, their claims to the political significance of their difference” (1995, 61). Brown goes on to argue that not only do politicized identities require this norm for differentiation, they also require exclusion from the norm “for their own continuing existence as identities” (1995, 65). If this is the case, then Brown correctly concludes that, “Contemporary politicized identity is also potentially reiterative of regulatory, disciplinary society in its configuration of a disciplinary subject” (1995, 65).

By appealing to the legal system and articulating their demands for inclusion and recognition through the discourse of juridical rights, identity-based movements run the risk of further substantiating the very norms that are being contested. This also poses the potential threat of perpetuating future forms of exclusion premised by the reinforcement of the norm. For example, looking at the issue of gay marriage, while gay men and lesbians may strive for legitimate state recognition as married couples, such a project would reinforce a monogamous marital relationship as the norm for kinship. This would exclude individuals engaged in non-marital relationships from the economic and social benefits attached to the institution of marriage (not to mention the cultural respect and dignity that is also often associated with marriage). By focusing on legally conferred rights, in particular, marginalized sexual identities potentially preclude the possibility for a more inclusive politics in the future.

How can this be? Brown answers this question by focusing on the paradox of rights-based discourse. This paradox is rooted in the supposed universality of rights, which, in actuality, are established as the product of specific historical contexts (Brown, 1995, 97). Brown
argues that this paradox can manifest both temporally and spatially. Temporally, Brown argues that, “[the paradox] is expressed...in the irony that rights sought by a politically defined group are conferred upon depoliticized individuals; at the moment a particular ‘we’ succeeds in obtaining rights, it loses its ‘we-ness’ and dissolves into individuals” (1995, 98). She continues to argue in terms of a spatial dynamic that, “Rights that empower those in one social location or strata may disempower those in another” (1995, 98). She concludes that, “rights converge with powers of social stratification and lines of social demarcation in ways that extend as often as attenuate these powers and lines,” and that it is pointless to make a “generic” evaluation of rights without analyzing “the historical conditions, social powers, and political discourses with which they converge or which they interdict” (1995, 98). This is why I am hesitant to make a blanket argument that individual rights are problematic prima facie; the analyses that follow help to situate the latent paradoxical tendencies of rights within the specific historical, social, and political conditions and discourses in which they take place.

Brown draws upon Marx to further demonstrate the limitations of rights’ promise of political emancipation. In “On the Jewish Question,” Marx explores the difference between political emancipation and true human emancipation primarily by exposing the tensions in the secular split between the public and private. Marx contends that political emancipation does not entail freedom from religion but freedom of religion, that is, freedom to practice religion privately. The same goes for property: the elimination of the property qualification for “active and passive voting” is not emancipation from property but the freedom to own private property (Marx, 1994, 8). Thus, as Marx contends, “Man emancipates himself politically from religion by banishing it from the sphere of public law into private right” (1994, 10). In other words, the
constraints on true humanity are not abolished; instead, they are merely consigned to the private realm where they are no longer a matter of public concern and, consequently, political redress.

Political emancipation runs the risk of relegating social problems to the private sphere, thereby eliminating the political character of these problems. Political emancipation also depoliticizes the subject, casting her from the public sphere into the private and isolating her as a seemingly autonomous and free agent. In effect, she goes from a democratic and participatory citizen to a private, juridical subject endowed with equal rights. As Brown states, “Marx is again underscoring how certain modalities of social and economic domination are less eliminated than depoliticized by the political revolutions heralding formal equality” (1995, 112). She continues, “Marx is seeking to articulate the extent to which the modern individual is produced by and through, indeed as, this depoliticization and in the image of it” (1995, 112). Marx concludes that political emancipation posits the individual as free and authentic in civil society without refashioning the meaning of the elements of civil society or the individual herself:

The political revolution dissolves civil life into its constituent elements without revolutionizing these elements themselves and subjecting them to criticism. It regards civil society – the realm of needs, labor, private interests, and private right – as the basis of its existence, as a presupposition needing no ground, and thus as its natural basis. Finally, man as a member of civil society is regarded as authentic man, man as distinct from citizen, since he is man in his sensuous, individual, and most intimate existence while political man is only the abstract and artificial man, man as an allegorical, moral person. Actual man is recognized only in the form of an egoistic individual, authentic man, only in the form of abstract citizen (1994, 20).

Furthermore, the constitution of civil society and “authentic” man only manifests through and on behalf of the state. Recourse to the state, through appeals to rights, as guarantor of political emancipation only augments state power and reinforces its authority to define the parameters of civil society and citizenship.
Ultimately, by conferring formal equality to citizens through the establishment of individual rights, political emancipation only "frees" the individual [from] politicized identity – the treatment of a particular social identity as the basis for deprivation of suffrage, rights, or citizenship" (Brown, 1995, 105). Again, drawing from Marx, Brown continues that, "emancipation from this constraint does not liberate the individual from the conditions constitutive or reiterative of the identity" (1995, 105). In fact, if we look to Brown’s channeling of Foucault, we can see that one can never be emancipated from identity. Thus, "Foucault’s account not only severs ‘political emancipation’ from a phantasmic progress of emancipation, it also problematizes the Marxist presumption that the quest for such emancipation issues from historically subordinated or excluded subjects seeking a place in a discourse of universal personhood" (Brown, 1995, 118). For Foucault, and other postmoderns, there is no "universal personhood" and there is no singular power that stands in opposition to other identities, suppressing and excluding them from this universality. Power produces and proliferates identities, working through them and not against them. Accordingly, Brown argues that Foucault’s account “suggests instead that these claims may issue from contemporary productions of the subject by regulatory norms, productions that may be entrenched as much as challenged or loosened through political recognition and acquisition of rights” (1995, 118). This means that, at least through a Foucauldian analysis, individual rights facilitate both the production and regulation of identities.

In fact, at some level, a sense of identity is essential to one’s social and political existence. Social interactions produce identities and the relations by which collective identities coalesce, while, at the same time, identities form the basis for social interaction itself. Let us feign, along with Connolly, that the following truths are self-evident:
…that each individual needs an identity; that every stable way of life invokes claims to collective identity that enter in various ways into the interior identifications and resistances of those who share it; that no god created humanity so that contending claims to identity will coalesce into some harmonious whole or be dissolved into some stable, recognizable, and transcendent principle; that the singular hegemony of any set of identities requires the subordination or exclusion of that which differs from them (1991, 158).

Thus, while identity and difference are interdependent in a paradoxical relationship, Connolly argues that, “Entrenched in this indispensable relation is a second set of tendencies…to congeal established identities into fixed forms, thought and lived as if their structure expressed the true order of things” (1991, 64).

One could argue that compulsory heterosexuality fits into this set of tendencies. Presenting itself as essential and immutable, it is the norm operating at the center of many contemporary discourses, where it serves to proliferate identities and render those that are different as deviant. Compulsory heterosexuality fixes the meaning of sexual identities – heterosexuality is deemed natural, while homosexuality, bisexuality, and transsexuality are defined away as deviant and abnormal – thereby establishing the opposition between these identities as “the true order of things.” Furthermore, this fixing of the categories of sexual identity inhibits the potential for other possible sexual identities to come into being and express themselves. However, as we know, these inhibitions are never entirely successful; tendencies to fix identities will always be accompanied by the proliferation of anomalous identities. It then becomes a matter of examining the power relations that attempt to fix identities and the level of violence done to contrasting identities in an attempt to differentiate and regulate them.

In her landmark essay “Compulsory Heterosexuality and Lesbian Experience,” Adrienne Rich exposes the regime of power underlying and sustaining compulsory heterosexuality as the sexual norm:
Some of the forms by which male power manifests itself are more easily recognizable as enforcing heterosexuality on women than are others. Yet each one I have listed adds to the cluster of forces within which women have been convinced that marriage, and sexual orientation toward men, are inevitable, even if unsatisfying or oppressive components of their lives. The chastity belt; child marriage; erasure of lesbian existence (except as exotic and perverse) in art, literature, film; idealization of heterosexual romance and marriage – these are some fairly obvious forms of compulsion, the first two exemplifying physical force, the second two control of consciousness (1980, 640).

Ultimately, compulsory heterosexuality exists as a norm at the center of the discursive production and regulation of sexual identities, while simultaneously legitimating the forms of physical and psychological violence that enforce it on a daily basis. Yet, even with the level of violence and oppression documented by Rich, compulsory heterosexuality does not eliminate sexual difference. As is the case with the normalizing society, the norm proliferates identities and is employed to regulate and manage them. Even in cases of the disavowal of homosexuality, and particularly lesbian sexuality by the law, sexual identities are still discursively regulated: “Within the law, the discursive representation of sex between women has arguably been more tightly regulated than the material practice…Thus the material act was regulated, and the physical body punished (or destroyed), while at the same time there was an attempt to avoid discursively acknowledging its very existence” (Ussher, 1997a, 134).

Furthermore, compulsory heterosexuality does not solely regulate lesbian sexuality. There are a myriad of ways in which gay men are also subjectivated by the norm of heterosexuality and suffer through similar forms of physical and psychological violence attempting to enforce this norm (from hyper-masculine images that seemingly dominate the media to cases of brutalization such as that suffered by Matthew Shepard to the kind of juridical regulation I examine in chapter 3). The larger point here is that the norm of heterosexuality operates discursively to produce and regulate sexual identities in an attempt to fix their
meanings. I believe that Chambers’ account of “discursive heterosexism” mirrors the compulsory heterosexual norm that attempts to fix sexual identities by targeting subject positions: “This discursive heterosexism cannot be grasped at the individual level of homophobia but only at the level of discourse itself, because it targets not individuals but subject positions” (2003, 163). Chambers demonstrates this facet of power in his analysis of the Defense of Marriage Act (DOMA). He examines Congress’ attempt “to stabilize a strategic relation through governmental intervention, to take an open power relation and rigidify it” through the lens of Foucault’s conception of domination (2003, 164). This act of domination seeks to fix identity by discursively disallowing “lesbians, gays, or ‘nontraditional’ straight people to take up the subject position that Congress wishes to reserve for ‘traditional’ heterosexuals” (Chambers, 2003, 164).

Drawing on Butler, Chambers argues that, “DOMA seeks to prevent any changes in discursive practices, changes that might call into question the grid of cultural intelligibility that naturalizes gender and sexual difference into binaries” (2003, 164). DOMA, then, is one of many political interventions, including anti-sodomy laws, state bans on gay marriage, and the exclusion of homosexuality from hate crime legislation, aimed at rigidifying the identity\difference relationship by institutionalizing heterosexuality as the norm in opposition to the “abnormal” homosexual. Consequently, juridical rights are particularly problematic when it comes to the regulation and normalization of sexuality because their very articulation is an act of discursively fixing the meanings of identities. Like DOMA, juridical rights naturalize difference and create a system of domination that subordinates deviant identities. With this in mind, the next two chapters can be read as examinations of specific attempts to fix and naturalize identities through the right to privacy and the regulation of marriage.
Claims for inclusion and recognition based on individual rights will always have the unintended effect of “fixing” (I use the term “fix” loosely because meanings are never entirely fixed) those identities seeking recognition while excluding oppositional identities from the same level of recognition. So, while juridical discourse may produce and regulate the very categories of sexual identity, it manages these identities by relegating some of them to the margins, thereby effectively eliminating the possibilities for alternative or so-called subaltern identities to be expressed in the same legitimate context as the dominant or hegemonic identities. In terms of Connolly’s conception of the politics of becoming, such a movement would hinder the potentiality of other identities to be formed and expressed by rigidifying the relations in which identities are negotiated. In this way, juridical rights can also limit the development of modes of political engagement and the ways that identities can seek membership in society. This is why it is so necessary to move away from a rights-based discourse that has the potential of excluding other possible identities and has a limiting effect on how we conceptualize democratic politics and citizenship.

One approach to dealing with this paradox is to try to sidestep it completely. Postmodernism constitutes such an approach in its unwillingness to ground a political project in terms of an emancipative vision, as Seidman notes:

Furthermore, in place of the global, millennial politics of Marxism, radical feminism, or gay liberationism, I view postmodernism as speaking of multiple, local, intersecting struggles whose aim is less “the end [of] domination” or “human liberation” than the creation of social spaces that encourage the proliferation of pleasures, desires, voices, interests, modes, of individuation and democratization (1993, 106).

This proliferation of pleasures, etc., reflects the postmodernists’ commitment to abandoning identity politics because of the “exclusions and conflicts elicited around identity” (Seidman, 1993, 130). Seidman continues to argue that, “Appealing to one’s sexual, gender, or ethnic
identity as the ground of community and politics is rejected because of its inherent instabilities and exclusions” (1993, 130). A postmodern approach would help to avoid the reaffirmation of the hierarchical coupling of hetero- and homosexuality that Seidman identifies:

If homosexuality and heterosexuality are a coupling in which each presupposes the other, each being present in the invocation of the other, and in which this coupling assumes hierarchical forms, then the epistemic and political project of identifying a gay subject reinforces and reproduces this hierarchical figure (1993, 130).

Diverging from an identity-based politics that seeks recognition and inclusion and shifting to a “postmodern” politics that seeks to proliferate those things that have come to constitute identity (pleasures, desires, etc.) would seemingly disrupt the dualism of hetero/homo and create spaces for more fluid subjectivities.

However, the problem with postmodernism, particularly as the basis for a political project, is that it “offers a thin politics as it problematizes the very notion of a collective in whose name a movement acts” (Seidman, 1993, 135). So, while one may make the move away from an identity politics that relies on an attachment to a “true” self, an attachment that necessarily produces exclusions, the other apparent option, poststructuralism, renders a collective political movement impossible. Seidman’s concerns echo those of Fraser in her critique of a purely deconstructive approach to social transformation. It seems that we are stuck between two poles in terms of a politics that can take polymorphous sexual experiences seriously and yet maintain a concrete basis by which to anchor claims for social, political, and economic change:

Positing a gay identity, no matter how it strains to be inclusive of difference, produces exclusions, represses difference, and normalizes being gay…Poststructuralism is a kind of reverse or, if you wish, deconstructive logic; it dissolves any notion of a substantial unity in identity constructions leaving only rhetorics of identities, performances, and the free play of differences and possibility (Seidman, 1993, 135).
On one hand, there is too much rigidity in the construction of sexual identity, so that it will always lead to some level of exclusion and repression; on the other hand, there is too much fluidity in allowing for the free flow of sexualities, so that no cohesive political project or social movement could ever hope to form around it.

I believe that it is necessary to approach the issue of sexuality and its inclusion and exclusion in contemporary liberal democratic politics from another perspective. I agree with Seidman that what is needed is “a shift away from the preoccupation with self and representations characteristic of identity politics and poststructuralism to an analysis that embeds the self in institutional and cultural practices” (1993, 137). This, in part, is what I attempt to do in the following two chapters: to examine how the self, in terms of its identification with homosexuality, is subject of and subjugated by legal institutions, and how both institutional and cultural practices come to bare on conceptions of homosexuality through popular politics and the issue of gay marriage.

The solution that Connolly poses to this conundrum is instructive. His response to the political paradox of identity and difference is agonistic democracy, which he defines as, “a practice that affirms the indispensability of identity to life, disturbs the dogmatization of identity, and folds care for the protean diversity of human life into the strife and interdependence of identity\difference” (1991, x). Connolly’s political project seeks to cultivate an ethos in which an identity is aware of its own contingency as well as the contingency of those identities that differ from it. Looking across a range of possibilities for the “ontological depth” of an identity, Connolly recognizes that such a self-aware and receptive identity can exist:

An identity…might conclude that it is crucial to its individual and collective bearers but historically contingent in its formation and inherently relational in its form – contingent not because it alone in the world of identities has no ground but because it treats as true the proposition that no identity reflects being as such; no
identity is the true identity because every identity is particular, constructed, and relational (1991, 46).

Connolly continues by arguing that such a position “accepts the indispensability of identity and lives within the medium of identity while refusing (while struggling vigorously to refuse) to live its own identity as intrinsic truth” (1991, 46). In much of his subsequent work, Connolly situates this ethical position within an ethos of pluralization.

In his discussion of Nietzsche and Foucault’s contributions to our understanding of ethics and identity, Connolly contends that they embark on a project to seek out not the “why” or “what” of ethics, but the “ways to cultivate care for identity and difference in a world already permeated by ethical proclivities and predispositions to identity” (1991, 10). Democratic politics is the “privileged mode of public life” in which such an ethical identity may be cultivated (Connolly, 1991, 10). This ethical identity manifests itself in what Connolly calls “agonistic respect”:

Agonistic respect carries the expectation that you may contest one another on the source of respect, particularly when one party insists that eligibility for respect itself requires you to accept the universal it affirms. It also includes the possibility that something said or done by others may nudge you to reinterpret your existential faith, or draw you toward conversion to another (2002, xxvii).

However, there are obstacles to the realization of such an “agonistic respect” in contemporary democratic politics. Often times, identity does not exist as a field of contestation, but rather as a predetermined entity that gives rise to competing claims for legitimacy and political struggle. This places identity in a paradoxical position wherein identity is both enabling and constrictive.

Connolly supplies us with an articulation of the ethical paradox that besets identity politics: “Without a set of standards of identity and responsibility there is no possibility of ethical discrimination, but the application of any such set of historical constructions also does violence to those to whom it is applied” (1991, 12). Again, this reinforces the need to envision a
democratic project that is attentive to the contestability and contingencies of identity, as well as the limitations of the individual rights to which marginalized identities appeal. I will put these considerations on hold and address them in greater detail in my final chapter, while I turn our attention to some specific analyses of the problematics of identity and rights-based discourse.
Chapter 3

Private Liaisons and Public Regulation:
Same-Sex Sodomy and the Right to Privacy

The invisibility of gay sexuality in the fight for gay rights has made it difficult to respond to right-wing attacks on gay sex, because the movement has been focused on demanding a “right to privacy” rather than on formulating a strong defense of gay sexuality.

– Michael Bronski
The Pleasure Principle

*Private Acts, Public Sex?*

As much as we might like to think that sex and sexuality are essentially private matters, often times, they are anything but private. Compulsory heterosexual norms underlie contemporary social and cultural institutions, and, historically, many political and legal debates have focused on the public regulation of issues pertaining to sex and sexuality, including reproductive rights, pornography, the legality of sexual acts, and marriage law. While the norm of heterosexuality often goes unnoticed, many people treat the visibility (not to mention the very existence) of homosexuality as a threat to the social fabric of America. Even those who are supportive of the gay rights movement sometimes unwittingly advocate a position that thrusts homosexuality back into the private sphere and away from social and public legitimacy.

For example, when I have a discussion regarding gay marriage with some individuals who are sympathetic to the cause, it seems that a common position for his or her support rests upon the notion of privacy. Inevitably, someone will say, “What do I (or does anyone, for that matter) care what consenting adults do in the privacy of their own bedrooms?” This response seems commonsensical enough; after all, what right does the state have to intervene in the bedrooms of its citizens and to regulate their sexual behavior and preferences? Of course, this is
a completely loaded question, and anybody who is somewhat familiar with gender studies, queer theory, or the recent history of legal cases waged over issues of sexuality should see red flags. Historically, the state has felt compelled in one way or another to regulate the sexuality and sexual activities of its citizens. Some of these regulations continue today and seem perfectly rational (if not absolutely necessary) to many people: from the regulation of the accessibility of contraceptives to reproductive rights to the issue of gay marriage itself.

In fact, even appeals by sexual minorities for greater state protection only further reinforce the state’s right to regulate sexuality and sexual behavior. Paradoxically, some movements in support of gay marriage run the risk of relegating homosexuality to a sphere hidden from public sight. Sometimes, simple ambivalence over the right to marry is belied by its rhetoric: “As long as I don’t have to see it, then what do I care?” What happens, then, when sexual freedoms are pushed, to greater and greater degrees, into the realm of the private sphere, while they are simultaneously made a more public issue? Can they still be considered freedoms? To grapple with these questions, one must come to terms with how sexuality’s attachment to an essential conception of identity – the ways in which it is studied and analyzed medically, regulated legally, and administered politically – shapes our conceptions of privacy and the bounds of sexual freedom.

Such concerns are particularly important when we consider that sexual freedom presents itself as a paradox within the larger rubric of freedom, that is, the kind of freedom afforded by the dictates of negative liberty. The juridical discourse of rights, which provides the structure of negative liberty, creates the paradoxical conditions of sexual freedom: on one hand, it carves out the spaces for the practices of sexual freedom (in the Foucauldian sense of practices of freedom); on the other hand, it regulates behavior and, as we shall see, may effectively depoliticize the
subject seeking protection via the law. Juridical discourse helps to construct sexual identities, and it provides certain protections that allow for the expression, not to mention physical safety, of those identities. However, as a part of that regulation, sexual identities will always have to exist in relation to and in light of those discursive constructions. Sexual freedom, then, illuminates that paradox in which individual practices of freedom emerge from discursive regulations, yet it may contribute to furthering other forms of exclusion and/or domination. Since all of this takes place within the context of freedom as designated by individual rights (i.e. negative liberty), sexual freedom may very well prove to be a site where individual practices of freedom can transgress the limitations of freedom framed by negative liberty.

Wendy Brown identifies this general problematic in terms of the regulation of identity at the hands of rights in *States of Injury*. She asks: “When does identity articulated through rights become production and regulation of identity through law and bureaucracy” (1995, 98)? Put yet another way: “When does legal recognition become an instrument of regulation, and political recognition become an instrument of subordination” (1995, 98)? To put this into context, I want to examine how sexuality, as a purported matter of one’s essential identity, fits into modern juridical systems. The focus of this analysis is modern juridical discourse in the United States, which is primarily rights-based. This discourse determines the possibilities and limits for the expression, recognition, and inclusion of various sexual subjectivities. In fact, the juridical power to name and classify various categories of sexual experience and identity are the very means of sexuality’s production and regulation. Inherent to the complicated relationship among sexuality, politics, and law are the ways in which sexuality becomes attached to identity and the ways in which sexual acts and identities are normalized or criminalized through compulsory
heterosexuality. These processes of categorization and regulation are framed by the same rights-based discourse that many sexual minorities turn to for legal protection and recognition.

As such, this chapter performs two functions: first, it highlights the interactions between sexuality (and identity politics, in much broader terms) and the legal system, specifically through an examination of the right to privacy; second, it exposes the limitations, and even contradictions, of a rights-based discourse as a means of achieving recognition and inclusion for minoritized groups, primarily through an examination of the right to privacy. Overall, this analysis will wrestle with some of the paradoxical risks of extending state power that Butler is concerned with in *Excitable Speech*. Butler argues that, “In many ways, [the] very extension of state power...comes to represent one of the greatest threats to the discursive operation of lesbian and gay politics” (1997, 22). She goes on to identify three categories of speech acts that have been construed as “offensive and injurious conduct,” one of which is “*explicit self-declaration*, such as that which takes place in the practice of coming out” (1997, 22). It is this notion of “explicit self-declaration” that I am most concerned with here, not strictly as a matter of coming out, but more generally as it relates to issues of privacy and visibility.

Specifically, in this chapter I will trace how sexuality has been subjected to a particular regime of juridical power by focusing on anti-sodomy laws in the United States. I will concentrate on *Bowers v. Hardwick* and *Lawrence v. Texas*, since these cases were pivotal in the evolution of the right to privacy as it relates to issues of sexuality. Furthermore, many commentators (both proponents and opponents of gay marriage) have heralded the *Lawrence* decision as the first step in the inevitability of state-legitimized gay marriage. Examining *Bowers* and *Lawrence* in particular, and anti-sodomy laws in general, allows me to explore how sexual activity and identity have been conflated and fixed in a very specific manner under the
law allowing for the criminalization of homosexuality. Furthermore, the ways in which sexuality has been subjected to legal strictures have produced the limitations and possibilities of sexual freedoms shaped by the legal construct of the “right to privacy.” As Foucault argues, power operates through identities; power produces them and manages them, but it does not negate them. Thus, power does not stand in opposition to identity. In the context of the legal treatment of sexuality, juridical power operates through identity to create spaces for the practices of freedom. But, even with the creation of these spaces, there are tradeoffs, exclusions, and maybe even increased means of state-sanctioned administration.

Recently, sexual freedoms and identities have become embedded in the spaces of privacy carved out by the legal battles leading up to Bowers v. Hardwick and culminating with Lawrence v. Texas. For these reasons, and the perceived importance of repealed anti-sodomy laws in paving the way for gay marriage, I will begin by tracing the history of court cases leading up to the Lawrence decision. First, I will provide a succinct overview of the limitations of the rights-based concept of privacy, followed by a brief overview of some of the cases dealing with sexuality and privacy leading up to Bowers v. Hardwick and Lawrence v. Texas. I will then discuss Bowers and its implications for sexual freedom as a precedent for Lawrence. In this section, I will focus my analysis on how this case construed (homo)sexuality so that it was subject to state intervention. That is, I want to examine how the Supreme Court conceived of sexual act and identity in its verdict. In doing so, I also want to focus on Justice Blackmun’s dissenting opinion as a one of the foundational arguments for the right to privacy (and particularly for its extension into the realm of sexuality). Following this, I will examine Lawrence and the repeal of the Texas anti-sodomy law. Finally, I will return specifically to the issue of privacy, rendering its construction, via Lawrence, problematic in light of continuing
modes of normalization. As such, I argue that the right to privacy is limited in its ability to foster
sexual freedoms. In fact, by drawing on the works of Marx, Foucault, and Brown, I argue that
the right to privacy might be counterproductive as part of a rights-based discourse that increases
the means of possible public regulation and state administration.

Before engaging in this analysis, I would like to offer a few words on terminology,
particularly to disaggregate the meanings of privacy, private, and the private sphere. In the
context of this chapter, I understand privacy to refer to a legal entity that protects the individual
from intrusion by the state and one’s fellow public. The right to privacy, although not
enumerated explicitly in the Constitution, operates as an integral marker of citizenship. Privacy
helps to officially delineate that which is private from that which is not. Often times, what we
consider to be a private matter is anything but private without legal recognition. Thus, “private”
refers to a quality of activities, interactions, and beliefs, as well as the spaces in which these
phenomena occur, conferred by the right to privacy. “Private” is a quality that those things
possess by means of privacy. Therefore, we think of a variety of things as, essentially, private:
religious, political, and social beliefs; conversations between husband and wife, doctor and
patient, and lawyer and client; ownership of property, the spaces within property, and the
interactions that take place within those spaces; and, one’s sexual orientation, preferences, and
activities. Of course, it is this last category of the private that is under contestation here.

Finally, the meaning of the private sphere is derived, most notably, from Habermas’
(1989) analysis of the public and private spheres and the impact of late capitalism and
instrumental reason on social and political institutions. Habermas discusses the emergence of the
German word “privat” in the 16th century, and notes that, “‘Private’ designated the exclusion
from the sphere of the state apparatus; for ‘public’ referred to the state that in the meantime had
developed, under absolutism, into an entity having an objective existence over against the person of the ruler” (1989, 11). In this context, I take the private sphere to be the abstract realm of personal interests and interactions – be they economic, religious, familial, etc. – that is distinct from the public realm of state authority and the communal interests of the body politic.

Nevertheless, Habermas recognizes that such a distinction between public and private is not necessarily so clearly defined. It appears that the public and private spheres have increasingly seeped into one another, particularly in terms of the fusion of economic and political interests. In reference to the historical emergence of bourgeois society, Habermas draws upon Arendt’s recognition of the “publicly relevant” private sphere as a consequence of the “rise of the social”: “‘Society is the form in which the fact of mutual dependence for the sake of life and nothing else assumes public significance, and where the activities connected with sheer survival are permitted to appear in public’” (Arendt, qtd. in Habermas, 1989, 19). This is analogous to Foucault’s discussion of “the discovery of society,” in which greater disciplinary techniques as well as the apparatuses of bio-power permeate the social and individual body (1984a). The methods and institutions of administration, regulation, and control that came along with this “discovery” were not simply the means of mastery over very large populations; in fact, as Foucault states, “it became apparent that if one governed too much, one did not govern at all” (1984a, 242). Unlike the heavy hand of sovereign power, disciplinary power and bio-power are diffuse and capillary, and these latter forms of power operate through the production and maintenance of identity rather than against it.

In a way, this project is concerned with the surreptitious spread throughout society of disciplinary and bio-political techniques of governance, which operate under the guise of individual rights. In this chapter, specifically, a Foucauldian analysis of juridical discourse
allows me to probe the ways in which rights have become a means of moderating the private
sphere by manipulating the notions of “private” and “privacy” into modes of subjectification and
regulation. In what ways do greater regulatory and normalizing mechanisms take hold in the
private sphere when individuals and social groups pursue the kind of protection that that the label
“private” affords (a label, one might add, that is only meaningful when the legal right to privacy
is attained)? More generally, how has a rights-based discourse been complicit with the extension
of disciplinary and bio-political techniques of control throughout the social body?

The Significance of Juridical Discourse

My primary concern is with the juridical and rights-based discourse that has constructed a
zone of privacy around issues of sexuality over the last half-century. It is important to focus on
this discourse because it has developed as a means of subjectification. Law, and the rights it
bestows upon individuals and social groups, operates through the production and regulation of
identity to encompass (and sometimes shape) all modes of behavior. In fact, in the case of the
right to privacy, the law defines the spaces in which certain behaviors may or may not take place,
and, furthermore, it determines the subjectivities that may inhabit those spaces by attaching
certain behaviors to specific identities. As Butler argues, “the subject appears only as a
consequence of a demand for accountability;” thus, “there can be no subject without a
blameworthy act, and there can be no ‘act’ apart from a discourse of accountability and,
according to Nietzsche, without an institution of punishment” (1997, 46). She continues to argue
that this account of subject formation seems to prefigure a discourse that can delineate
“blameworthy acts” and mandate punishment, i.e. the law.
Furthermore, as Foucault argues, it is through the law that public moralities are enforced; therefore, these “instances of authority” must be the target of our analysis:

With moralities of this type, the important thing is to focus on the instances of authority that enforce the infractions; in these conditions, the subjectivation occurs basically in a quasi-juridical form, where the ethical subject refers his conduct to a law, or set of laws, to which he must submit at the risk of committing offenses that may make him liable to punishment (1985, 29-30).

Perhaps Butler’s (1997) analysis of hate speech helps to clarify this relationship between juridical discourse and subject formation. She argues that “the state produces hate speech,” not because it is the originator of hate speech, but because the state creates the very categorizations that make hate speech possible, delineating between the “speakable” and the unspeakable” (1997, 77). The ethical subject exists because of and in relation to these legal categories that make its behavior meaningful and discernible. I will expand this discussion later to incorporate anti-sodomy laws, privacy, and the production/regulation of sexual subjects, but, for now, I merely want to illustrate the importance of focusing on juridical discourse.

While I do recognize that there are other discursive regimes that operate in modernity that supplement, if not replace, juridical power and overt state intervention, some of the most prominent struggles over issues of sexuality during the last fifty years, and particularly the last two decades, have been waged along juridical lines and within rights-based discourse. The forces of normalization and subjectification come from many disparate sites, but often these forces (medical categorization and religious moralization, for example) coalesce as a part of legal discourse. Foucault and those who are attentive to Foucault’s discursive analyses are very aware of the persistence of juridical power, even in light of proliferating regimes of power (including disciplinary power and bio-power).
Thus, I disagree with Evans (1993) that Foucault is ambivalent (to the point of avoidance) about the role of juridical power. In fact, juridical power and, as Brown (1995) argues, the greater dispersion of individual rights, are the perfect vehicles for the dispersion of bio-power. So, while Evans argues that, for Foucault, the experts and knowledge of “Mandarin” discourses are “seemingly detached from any hierarchy of power,” I believe that Foucault is consistent in articulating a position that is aware of the linkages among various fields of knowledge and power (1993, 23). It is true that Foucault’s conception of power is more diffuse and not hierarchical. Consequently, the regulation of sexuality is not “ultimately” rooted in juridical power (or any other form of power, for that matter); however, juridical power does play a significant role in regulating sexuality, and, as such, it is linked (reciprocally) to a multiplicity of discourses – medical, religious, psychiatric, economic, etc.

There is one other reason that I find an emphasis on the legal apparatus to be important: the law occupies a unique position between progressive politics and public opinion; it is both proactive and reactive. Since the judicial branch is relatively divorced from public opinion, “[m]ost minorities have found [it] to be the one most open and accessible to claims that run against the grain of public opinion” (Wald, 2000, 18). Because of this freedom from the pressures of public opinion, the courts have had a somewhat progressive history of providing legal protection to minorities, including gay men and lesbians. “Because of that reputation for openness, gays have frequently turned to the courts for protection against various forms of discrimination” (Wald, 2000, 18). Yet, Wald adds that “the results have been mixed”: “The state-level courts have often overturned antisodomy laws in the name of privacy and equal treatment…Yet while courts possess the greatest leeway to act on behalf of oppressed minorities,
judges are hardly immune to public attitudes, and more than one judge has sent the message that gays do not enjoy public respect” (2000, 18).

On the other hand, the law may also impact public opinion and may foster increasing tolerance and acceptance. Wald argues that such an argument gained acceptance in the 1950s and 60s: “By forcing white Americans to confront African Americans on the job, in public spaces and other venues of where segregation once ruled, the law changed fundamental racial beliefs” (2000, 16). Even though the law is often the public expression and institutionalization of moral codes that have historically marginalized sexual “minorities,” it also contains the potential to foment social change.

Still, it seems that laws targeting issues of sexuality are slow to change. It is evident that the moral codes that govern sexuality are rationalized through legal strictures in a particular way, that is, by enforcing the norm of procreative (hetero)sexual activity. Furthermore, in many people’s opinion, this justification has a long-standing precedent in American jurisprudence. Statutes dating back to the colonial era have implicitly (if not explicitly) mandated procreative sex as the only legal form of sexual expression (I will discuss some of this history in greater detail below). Beyond the institutionalization of procreative sex, the law is a means of mediating between individual liberties and the public good. As Morris Kaplan argues, “Lesbians and gay men are seen as asserting individual liberties that directly conflict with the right of the community to use the criminal law to define standards of morality” (1997, 22). As we shall see, the decision in Bowers v. Hardwick hinged upon this notion of society’s right to enforce a common moral standard at the expense of the individual’s freedom.

The logic underlying this line of thought echoes Sir Patrick Devlin’s arguments in response to Britain’s Wolfenden Report. In his case against the decriminalization of certain
consensual sex acts, Kaplan points out Devlin’s argument that, “the state has a right, indeed a
duty, to maintain the moral fabric of society through the use of criminal sanctions, even against
private consensual conduct” (1997, 23). Of course, to assume that sexuality is necessarily and
unproblematically of the realm of morality is highly contentious; but, this is all the more reason
to focus on the manner in which sexuality has been subjected to institutionalized forms of
moralization and regulation.

Some Historical and Theoretical Notes on Sex Laws
and the Limits of Negative Liberty

In the US, the 20th century saw an increased emphasis on constructing and enforcing laws
that would severely regulate homosexual activity and marginalize gay men and lesbians. This is
evidence of the perception that the public was in need of protection from the supposed threats of
sexual deviance. Jason Pierceson notes that from the 1930s through the 1950s the US became
obsessed with sexual deviants: “Homosexuality was seen as a direct threat to the nation’s well-
being and was also linked directly to the sexual abuse of children” (2005, 64). Anti-sodomy
laws became a means of regulating homosexuals, as Pierceson argues: “The force of state power
was used to flush out and identify homosexuals, largely using sodomy laws as a pretext” (2005,
64). While many states already had sodomy laws, some of which dated back to colonial times,
there seemed to be a growing desire for more severe punishment during this time. As politicians
tried to protect the social fabric of a heterosexual public from the threat of sexual deviance,
Congress passed the Miller Act, making sodomy a crime punishable by up to ten years in prison;
12 states were quick to follow (Pierceson, 2005, 64).

In response to these increased acts of persecution, the gay and lesbian communities
initiated movements aimed at decriminalizing sexual relations (particularly movements in the
1950s to decriminalize sodomy, which assumed a variety of definitions under different state laws). Yet, arguments defending lesbian and gay men’s sexual activity against moral persecution have often come from a similar source of utilitarian justification. The Millian principles underlying arguments that advocate the enforcement of community moral standards in the name of the greater good – protecting the social fabric and promoting public solidarity – are the same principles used to buttress rights-based arguments for individual liberty that protect sexual freedoms from moralizing interventions. Yet, these arguments based on negative liberty are not enough. In fact, an understanding of the sovereign subject, who is protected by negative liberty, might be counterproductive in light of a Foucauldian conception of the subject: “Whilst conventional liberal conceptions stress independent individual sovereignty bound by rights in public, and respectfully unregulated by juridical laws in private, Foucault’s ‘sovereign’ subject is no more than the complex product of colonising discursive knowledge” (Evans, 1993, 14). Problematizing this notion of privacy and the sovereign individual allows us to recognize how the subject position is constructed as a matter of a rights-based discourse that emphasizes the right to privacy. It illuminates how sexuality, as the “epitome of the ‘personal,’ ‘private,’ ‘mysterious,’ and natural, that which most naturally resists the cultural,” is penetrated and produced by power relations (Evans, 1993, 11).

In his attempt to articulate a conception of lesbian and gay rights in relation to democratic and liberal theory, Morris Kaplan argues that, “A full blown conception of lesbian/gay rights requires that we go beyond a right of privacy narrowly construed as a negative ‘right to be left alone’” (1997, 17). I agree with Kaplan’s assessment; on its own, this “right to be left alone” merely creates a small space (in this case, the bedroom) in which an individual is supposedly free from public moralizing and its accompanying punitive effects. Thus, Kaplan argues that, “Such
a limited conception of privacy rights at best grounds arguments against the criminalization of private consensual homosexual acts between adults; it has little bearing on the regulation of discrimination or on the recognition of lesbian and gay partnerships and institutions” (1997, 17). At worst, as I contend, not only does the right to privacy not protect against discrimination or public castigation, it may actually operate to reinforce public morality and augment the power and legitimacy of state intervention (an argument I will develop further below). So, while privacy may very well be a “necessary component in a full blown articulation of lesbian and gay rights” (Kaplan, 1997, 17), it is not enough (especially in its current formulation) to provide an adequate foundation for a contemporary understanding of sexual freedoms and a truly democratic form of citizenship.

I argue that the right to privacy, articulated primarily through negative conceptions of liberty, is a legal fiction that has operated in different ways historically to regulate, conceal, and normalize homosexual activity. Paradoxically, the creation of a protected, private space in which sexual activity, even homosexual activity, is free from state intervention has further entrenched sexuality in a domain of public classification, administration, and regulation. Jason Pierceson contends that arguments favoring privacy rights for homosexuals “are successful not because of a concern for gay rights, specifically the need to allow sexual minorities the same right to intimacy as the majority in the name of developing the full person; rather, because opposition to sodomy laws has found success grounding itself in starkly negative terms” (2005, 62).

What are these negative terms? According to Pierceson, they are the calls to the right to privacy, which are based entirely on Millian principles. In other words, the reformation of anti-sodomy laws (and sex laws in general) has occurred because of utilitarian justifications. Thus, reformed sex laws are more likely the product of issues of practicality – the inability to enforce
effectively the law because of an exorbitant demand for a vast and penetrative police force to do so – than they are of a deep-seated respect for sexual freedoms and self-expression. Even in his dissenting opinion for Lawrence, Clarence Thomas recognized the issue of impracticality underlying the enforcement of Texas’ anti-sodomy law: “If I were a member of the Texas Legislature, I would vote to repeal it. Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthwhile way to expend valuable law enforcement resources” Lawrence v. Texas, 539 US 558, 605 (2003).

Similarly, the movements in the 1950s to decriminalize sodomy were guided by concerns for practicality and were justified by utilitarian beliefs. As Pierceson argues, “the debate focused primarily on the efficacy of enforcement;” in this debate, a prominent member of the American Law Institute (ALI) “supported decriminalization on the grounds that a bad, unenforceable law was worse than no law at all” (2005, 65). Learned Hand, the aforementioned member of ALI, contended that, “Criminal law which is not enforced practically…is much worse than if it was not on the books at all” (Pierceson, 2005, 65). He continued, “‘It is merely an expression of moral disapprobation…I think it is a matter of morals, a matter very largely of taste, and it is not a matter that people should be put in prison about’” (qtd. in Pierceson, 2005, 65). Yet, even with this recognition and the seeming desire to disentangle the problematic relationship between public morality and sexual conduct, it seems highly unlikely that sexuality can be freed from legal strictures. This is especially true when it seems that individuals willingly accept an unproblematic relationship between sexuality and the moral domain, where the law is merely the codification of “popular taste.” In this light, one can see that even the right to privacy operates
as a function of the public regulation of sexuality, further reasserting the normalcy (and therefore public nature) of heterosexuality while relegating homosexuality strictly to the private sphere.

Part of the decriminalization movement of the 1950s was the development of the Model Penal Code by the ALI. The goal of the Model Penal Code was to “clarify and unify state criminal law” (Pierceson, 2005, 64). This was done on the basis of “liberal, even Millian,” claims regarding the status of criminal behavior – the negative terms that Pierceson attributes to the right of privacy protecting sexual conduct (2005, 64). In such terms, the Model Penal Code, “declared that conduct should only be deemed criminal ‘that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests’” (Pierceson, 2005, 64). The Code became the standard by which sex laws were reformed, although attempts to decriminalize sodomy were met with resistance, particularly in terms of “moral arguments against homosexuality” and the “usefulness of having sodomy laws on the books as moral sanctions” (Pierceson, 2005, 65). Thus, it was not uncommon to couch arguments supporting the decriminalization of sodomy in terms of a practical rationality, as noted above.

Even with the establishment of a zone of privacy protecting sexual conduct, according to the Model Penal Code, sexuality has been the subject of popular morality and regulated by state intervention. The Model Penal Code and its British equivalent, the Wolfenden Report, have carved out private space for sexual “deviants” in order to protect public morality:

The Wolfenden Report and the Model Penal Code have reserved for the dominant morality an exclusive place in the legal order – all public space. The documents’ liberality consists largely of the miserly permission to sexual nonconformists to use the cracks and crevices of what is left – a narrowly defined “private space” – for the furtive practices which offend dominant morality (Backer, 1993, 764).

In effect, privacy becomes a defense mechanism for the dominant morality, and, as such, it is an extension of state authority, albeit an indirect form of social control.
If the legal right to privacy has now become a means of publicly regulating private sexual conduct, rendering homosexual activity completely private and distinct from a public sphere dominated by the heterosexual norm, then, at a very basic level, gay men and lesbians are excluded from fully participating and being protected in public life. As mentioned above, the right to privacy does not protect gay men and lesbians from public acts of discrimination nor does it extend legitimacy (including economic and social rights) to gay and lesbian couples. This means that any sexual “minority” is not able to fully take part in or enjoy the benefits of democratic citizenship. “Democratic citizenship,” as Kaplan argues, “is embodied in a plurality of voluntary associations and community institutions that result from the exercise of situated freedoms by specific individuals and groups” (1997, 13). In the context of the public sphere, these “situated freedoms” and voluntary associations are circumscribed by heterosexual norms and are often not available to gay men and lesbians (among others).

As such, the legal establishment of zones of privacy, while necessary for procuring a basic level of individual security, may actually be counterproductive in the absence of a richer conception of democratic citizenship that accounts for sexual difference. This is especially true since, “[f]orms of erotic life especially are deeply imbricated in the cultural organization of family relations and individual self-formation” (Kaplan, 1997, 13-4). As much as we, along with Foucault, might want to question why we consider sexuality so crucial to identity and self-formation (and therefore would want to problematize this relationship), there is little doubt that many individuals attribute a great deal of power to sexuality in defining who they are. Furthermore, these definitions, whether individuals embrace them as a means of self-identification or an external source imposes them upon the individual, form the basis of the kinds of categorization that include and exclude people from various aspects of citizenship.
Because of this, we must recognize the specific limits of the legal right to privacy, as well as the more general limitations of a democratic discourse that focuses on individual rights. Instead of relying on a conception of democratic politics that furthers state power and intensifies the classification of individuals and groups through the distribution of rights, we must seek to articulate citizenship as a field of on-going contestation between identity and politics. Kaplan comes to a similar conclusion, arguing that, “General norms of liberty and equality must be realized through social interaction that transcends the terms of legal entitlement and prohibition while at the same time requiring legal protection and support; continuing contestation of the limits and uses of state power must inform any exercise of active citizenship in modern democracies” (1997, 13). I believe that this call for active citizenship is embodied in the ethos of pluralization that I articulate in Chapter 5. The struggles over the right to privacy that has surrounded cases calling for greater sexual freedoms illustrated, to a degree, this kind of contestation of state power; however, this right is also subject to the forces of heterosexual normalization, pushing anything that deviates from this norm into the private sphere while increasing the state’s capacity to penetrate the social body. Consequently, it is important to examine the historical relationship between the legal system and sexuality to see how the right to privacy has emerged as a problematic construct.

Privacy in the Making: The Legacy of Sexuality and Privacy Rights

I would like to go into some greater detail with this historical narrative regarding juridical interventions with sexuality. Specifically, I would like to briefly explore the relationship between sexual freedom and privacy as it developed over the last half of the 20th century in the United States. We can track this development through a few landmark cases, of which Lawrence
v. Texas is the most germane to the issues at hand. Lawrence is significant and relevant to the issue of gay marriage, if for no other reason than it represented the inevitable future support for marriage equality by both opponents and proponents of gay marriage (Reverend Jerry Falwell and Senator Rick Santorum thought they saw the writing on the wall just as at the same time Lambda Legal Defense’s Patricia Logue and Ruth Harlow celebrated the decision) (Cahill, 2005, 50-1). But, beyond the popular fears of, and aspirations for, gay marriage in the wake of Lawrence, this case brings to light significant issues regarding privacy (including the limitations and paradoxes of privacy), the legal standing of sexual freedom, and the conflation of sexual acts and identity as a matter of juridical subjectification.

As we have already seen, sexuality and privacy have a long, interrelated history in the legal system. In fact, some might argue that our modern conception of privacy owes itself to a history of legal battles over state regulation of sexuality. These battles have not been waged solely over issues of sexual orientation and legal recognition; many cases that have blazed a trail for arguments defending sexual activity under the umbrella of privacy have dealt with relations among heterosexual (and sometimes married) couples. The accessibility of contraceptives to married couples has been one such issue, and the Supreme Court’s ruling in Griswold v. Connecticut played a pivotal role in establishing a married couple’s right to privacy. As Jo Ann Citron and Mary Lyndon Shanley argue, “It could be said that modern privacy jurisprudence in this country was born at the moment that Justice Douglas, writing for the court in Griswold v. Connecticut, imagined the police entering the marital bedroom to search for ‘telltale signs of the use of contraceptives’” (2005, 214).

Griswold took to task Connecticut laws that criminalized the promotion and use of contraceptives. In overturning these statutes, the Court deemed that, “a right to privacy exists
and that it protects the marital relationship and secures the marital bedroom” (Citron and Shanley, 2005, 214). Thus, in 1965, Griswold established a zone of privacy in the bedroom that would protect a married couple’s sexual activity in the form of contraceptive use. It would be another seven years until such a right would be afforded to single people: the 1972 case, Eisenstadt v. Baird, vindicated the “individual’s right to sexual expression” without depending upon “the sanctity of family, home or the marital union” (Citron and Shanley, 2005, 217). This would foreshadow future tensions between arguments, on the one hand, espousing the intrinsic values of individual liberty and, on the other, those that ground the public good in the rhetoric of family values and traditional social institutions.

Various Constitutional provisions contain the bases for the Justices’ decisions in Griswold – the First Amendment (Justice Douglas), the Ninth Amendment (Justice Goldberg), and the Due Process Clause (Justice Harlan). Of these, it is the last – Justice Harlan’s interpretation of the Due Process Clause – that has proven to be the most critical to future Supreme Court cases dealing with issues of privacy and anti-sodomy laws. Justice Harlan argued that, “a ban on contraception ‘violates basic values “implicit in the concept of ordered liberty”’ guaranteed by the Due Process Clause” (Citron and Shanley, 2005, 215). Citron and Shanley contend that Harlan’s argument has been critical in “the development of the Constitutional doctrine of substantive due process, the doctrine at the heart of the sodomy cases” (2005, 215). To explain why this is the case, it would be helpful to take a brief look at the components of the Due Process Clause.

The Due Process Clause has two components: the procedural component and the substantive component. Citron and Shanley summarize the implications of the two:

In its procedural mode, it guarantees that the government cannot deprive an individual of life, liberty, or property without providing notice and an opportunity
to be heard. In its substantive mode, it guarantees that, absent a compelling state interest, the government cannot interfere with an individual’s fundamental liberty interests, though considerable dispute circulates around identifying what those interests are (2005, 215-6).

The procedural component of the Due Process Clause traditionally dealt with issues concerning the execution of the law (thus, we hear the notion of Due Process invoked when we talk about the right to a fair trial). However, throughout history there have been several appeals in the name of the 14th Amendment’s Due Process Clause that have contested the validity of the substance of various state laws. A number of these contestations have been primarily business-oriented, in which a plaintiff challenges an unfair trade law based upon the premise of deprivation of property (FindLaw, 2007). These appeals were repeatedly struck down, and in the 1877 case of Munn v. Illinois, Chief Justice Waite highlighted the limitations of the Due Process Clause in regulating substantive matters: “For protection against abuses by legislatures the people must resort to the polls, not to the courts” (qtd. in FindLaw, 2007). This quote illustrates the “extra-democratic” means of appealing to the courts for protection from the oft-slow change of democratic politics, as well as the resistance of the Court to utilize the Due Process Clause as a transformative mechanism in the name of greater egalitarianism. Still, the substantive component of the Due Process Clause would emerge as the result of increase litigation involving property rights.¹

In time, the development and extension of the right to privacy became integral to the evolution of substantive Due Process. In fact, Justice Harlan’s concurring opinion in Griswold (as well as his prior dissenting opinion in Roe) played a critical role in establishing the substantive mode of the Due Process Clause so that “due process reaches beyond enumerated property rights.¹

¹ For a more detailed explanation of this development – and the development of substantive Due Process in general – see FindLaw’s annotations on Section 1 of the 14th Amendment, available at: http://caselaw.lp.findlaw.com/data/constitution/amendment14/03.html#1.
rights to embrace rights that are deemed ‘fundamental’” (Citron and Shanley, 2005, 216). Since
the right to privacy is not explicitly listed as a right in the Constitution, its articulation must be
“read into” history as a fundamental right implicit to life, property, and liberty. With the
development of the right to privacy, the Due Process Clause could increasingly be invoked in its
substantive modality as a means of expanding the umbrella of privacy and eliminating laws that
unconstitutionally excluded certain persons and activities. Citron and Shanley go on to argue
that the majority of interpretations of due process now cover both those rights enumerated in the
Bill of Rights and Constitution as well as those “that belong to the citizens of all free
governments and the securing of which is the very reason that men and women enter into
society” (2005, 216). One of these rights is sexual freedom.

Unfortunately, since the rights afforded by substantive Due Process must be articulated
via historical inference, the privacy rights guaranteed by the Due Process Clause are largely
rooted in tradition: “The scope of privacy rights, like the reach of the Due Process clause
generally, is defined through interpretive arguments that identify and analyze competing private
and public claims in regard to the values, history, and practices of the United States polity”
(Kaplan, 1997, 21). As a consequence, “traditional” historical values largely defined the
fundamental rights to which Justice Harlan referred. These values, when it comes to defining a
realm of sexual freedoms, are rooted in the norms of monogamous heterosexual relationships.
This means that the right to privacy granted by the Due Process Clause has only applied to
heterosexuals, particularly married couples, historically. The assumption of marriage that
underlies privacy laws (i.e. the sanctity of the marital bedroom, and even the level of
confidentiality between spouses) has been evident in the unequal application of anti-sodomy
laws, that is, either anti-sodomy laws have targeted same-sex couples only or the enforcement of
such laws discriminates between married and unmarried (read: homosexual) couples. I will address this disparity further below, but it should be apparent that the prohibitions against same-sex sodomy and the prohibitions against gay marriage are interrelated, and that this interrelationship manifests itself most readily in the form of privacy law.

Returning to the Due Process Clause, it is clear that it has been far from progressive because of its attachment to traditional norms of heterosexual marriage: “As Cass Sunstein has stressed, adjudication under the Due Process Clause tends to be conservative in the sense of respecting history and tradition as the locus of cherished values and recognized constraints on government, whereas litigation under the Equal Protection Clause has been critical and forward looking in its application of constitutional aspirations to equality” (Kaplan, 1997, 21). While the substantive mode of the Due Process Clause has had to rely on historical interpretations to counter unfair state laws and to bring forth rights not explicitly enumerated in the Bill of Rights and Constitution, the Equal Protection Clause has been utilized to more forthrightly address and remedy inequalities in the formulation and application of the law (segregation would be a primary example here).

For all of the progress made in establishing a zone of privacy in the marital bedroom, the Due Process Clause has been, historically, limited in its application to protect a full range of sexual freedoms; specifically, non-marital and non-heterosexual conduct has been troubling to this conception of privacy. Yet, regardless of these limitations, cases dealing with the legality of homosexual conduct, particularly contestations of anti-sodomy laws, would come to hinge upon these notions of privacy and sexual freedom. The primary concern in these cases became a matter of determining, as Citron and Shanley pose it, “what legal principle [has confined] the protection of sexual freedom to heterosexuals” (2005, 217). This question would play out in
both *Bowers v. Hardwick* and *Lawrence v. Texas*, as both cases dealt with gay couples targeted for engaging in sodomy. I will begin with a brief discussion of *Bowers* since it established the precedent later overturned by *Lawrence*.

*Bowers v. Hardwick*

In 1986, Michael Hardwick was arrested for having sex with his partner. The two men were in the “private” sphere of Hardwick’s bedroom when police entered to serve Hardwick an arrest warrant for an outstanding ticket. Yet, the facts leading up to this incident seem to indicate that the police targeted Hardwick because of his sexual orientation. I have taken the story that follows from Michael Hardwick’s own account in Peter Irons’ *The Courage of Their Convictions*. According to Hardwick, he was first given a ticket for drinking in public outside of a gay bar at which he worked. The police officer, K. R. Torick, asked Hardwick what he was doing outside of the bar. Hardwick responded that he worked at the bar, “which immediately identified [him] as a homosexual, because [Torick] knew it was a homosexual bar” (Irons, 1988, 394). Due to an inconsistency in the court date printed on the ticket, Hardwick did not show at the courthouse. Within two hours, Officer Torick was at Hardwick’s house with an arrest warrant, but Hardwick was not there.

Upon finding out about the warrant, Hardwick went to the county clerk and paid a $50 fine. After mentioning the warrant to the clerk, the clerk responded that that was impossible because it took 48 hours to process a warrant. Hardwick later found out that Officer Torick processed the warrant himself: “‘What I didn’t realize, and didn’t find out until later, was that he had personally processed a warrant for the first time in ten years’” (qtd. in Irons, 1988, 394). Hardwick continues, “‘So I think there is reason to believe that he had it out for me’” (qtd. in
Three weeks after paying the fine, three unidentified men in civilian clothing attacked Hardwick. His account of the attack is brutal:

I got out of the car, turned around, and they said ‘Michael’ and I said yes, and they proceeded to beat the hell out of me. Tore all the cartilage out of my nose, kicked me in the face, cracked about six of my ribs. I passed out. I don’t know how long I was unconscious…I managed to crawl up the stairs into the house, into the back bedroom. What I didn’t realize was that I’d left a trail of blood all the way back (qtd. in Irons, 1988, 395).

A few days later, Officer Torick again showed up at Hardwick’s house to deliver the arrest warrant. The front door open, Torick entered the house and found the bedroom door partially opened. Upon entering the bedroom, he found Hardwick involved in “mutual oral sex” with another man. Officer Torick told Hardwick that he had a warrant for his arrest. But, when Hardwick told him that the warrant wasn’t any good, Officer Torick responded that it did not matter and that he was “acting under good faith” (Irons, 1988, 396).

The police took Hardwick and his friend into custody, and throughout the course of processing, Torick made it graphically clear to fellow officers and holding cellmates what the two were in for. In Hardwick’s words: “The guards were having a real good time with that” (qtd. in Irons, 1988, 396). A few days later, the ACLU contacted Hardwick and he accepted their offer to challenge Georgia’s anti-sodomy law. This law, which was enacted in 1816, “provided that ‘a person commits the offense of sodomy when he performs or submits to any sexual act involving organs of one person and the mouth or anus of another’” (Irons, 1988, 383-4). In Georgia, this law applied equally to heterosexuals and homosexuals, theoretically. Yet, Hardwick’s story illustrates the inequality of this law’s enforcement. To be targeted as a gay man highlights how public recognition of homosexuality led to state intervention in the private sphere, an occurrence to which heterosexuals have certainly been immune. Furthermore, the
Supreme Court’s decision in *Bower’s* would reinforce the unequal status between homosexuals and heterosexuals.

When Hardwick’s challenge to Georgia’s anti-sodomy law made it to the Supreme Court, a majority of five justices determined that Hardwick’s right to privacy did not cover his sexual acts. Writing for the majority, “Justice White concluded that the constitutional right of privacy described by the Court’s prior cases did not extend to ‘homosexual sodomy’” (Goldstein, 1997, 43-4). One could assume that these cases included *Griswold* and *Eisenstadt*. As Peter Irons writes, “Despite the Court’s approval of ‘privacy’ rights for married couples, unmarried heterosexuals, and pregnant women, the justices adamantly refused to hear appeals by homosexuals for similar protection against state prosecution for their intimate activities” (1988, 382).

Why would the Court not afford homosexual sodomy the same privacy of the bedroom as heterosexual access to contraceptives (or any sexual freedoms afforded to heterosexual couples, whether they are married or unmarried, in general)? Anne Goldstein (1997) argues that the differences between the majority opinion and the dissenting opinion are due to more than just different interpretations of prior cases; instead, she contends, fundamental disagreements over the meanings of “privacy” and “homosexuality,” as well as contrasting political values, were the core of these disagreements. I am not as concerned with these contrasting political values as I am with the understandings of “privacy” and “homosexuality” employed by the justices.

The Court’s conception of the right to privacy was largely dependent upon the nature of the activity in question. The litmus test for an act’s protection under the “right to privacy” is its similarity or dissimilarity to other acts already deemed to be protected by this right. Thus, as Goldstein states, “When Michael Hardwick’s lawyers claimed that his arrest violated his ‘right to
privacy,’ they explicitly compared his desire to be uninterrupted in sexual activity in his own bedroom to the desire of a heterosexual couple to use birth control without interference, or the desire of a woman to terminate an early pregnancy” (1997, 48). *Griswold v. Connecticut* and *Roe v. Wade* became the precedents by which the Supreme Court would Judge Hardwick. Consequently, the Court had to determine two things: the nature of the activities protected by the “right to privacy” in the past, and the nature of Hardwick’s act (Goldstein, 1997, 48-9).

The first question we must ask, then, concerns the nature of those activities protected by prior cases involving a right to privacy. These cases, *Griswold v. Connecticut, Eisenstadt v. Baird,* and *Roe v. Wade,* set the precedent for establishing a zone of privacy around both a couple’s and an individual’s sexual conduct. It is evident from Justice White’s majority opinion in *Bowers* that the nature of such sexual activities was to be understood strictly in terms of heterosexual conduct: “No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated.” 478, U.S. 186, 192 (1986). Furthermore, Justice White contends that, “any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable.” 478, U.S. 186, 192 (1986). This means that the precedent set by these cases cannot extend to conduct that does not fit under the umbrella of activity that relates to issues of family, marriage, and procreation. Thus, legal precedent excludes homosexual conduct, prima facie, from considerations of right to privacy protection. According to the majority opinion, homosexuality does not comply, by definition, with the nature of acts protected by prior claims to the right to privacy.

The next step, as Justice White himself contends, is to decide whether “a fundamental right to engage in homosexual sodomy” exists. 478, U.S. 186, 192 (1986). To decide on this, the
Justices had to determine the nature of Hardwick’s act. Determining the nature of Hardwick’s act is entirely contingent upon one’s conception of homosexuality. Goldstein highlights the ambiguity of the meaning of “homosexuality” quite nicely in a footnote: “The term ‘homosexuality’ is lexically ambiguous because it can refer either to desire or to conduct” (1997, 49). It appears that the majority opinion focused on understanding homosexuality as a matter of conduct, and, as such, it categorized “the act” of homosexuality as both immoral and criminally harmful:

Justice White and Chief Justice Burger relied upon what they claimed were historical conceptions of “homosexual sodomy” that they assumed informed the framers’ vision of the Bill of Rights and the Fourteenth Amendment. Claiming to be uninfluenced by their personal preferences, these Justices also relied on the “presumed belief of a majority of the electorate in Georgia that homosexuality is immoral.” By comparing “homosexual sodomy” to other crimes, and relying on other sodomy statutes in effect in 1791 and 1868, Justice white also implied that homosexual sodomy is criminally harmful (Goldstein, 1997, 50).

These claims relied, problematically, on historical claims regarding the status of homosexuality and homosexual sodomy. Beyond the difficulties (if not impossibility) of reconstructing the intentions of the framers, the Justices neglected the historicity of homosexuality.

Looking to history to decide whether there is a right to engage in homosexual sodomy, Justice White writes: “Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights.” 478, U.S. 186, 193 (1986). He continues to argue that at the time of the Fourteenth Amendment’s ratification, “all but 5 of the 37 State in the Union had criminal sodomy laws.” 478, U.S 186, 194 (1986). Finally, Justice White infamously concludes that, “Against this background, to claim that a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious.” 478, U.S. 186, 195 (1986). Similarly, Justice Burger, in his concurring opinion, refers to the entirety of Western civilization and Judeo-Christian morality
as a historical basis for the condemnation of homosexual sodomy. 478, U.S. 186, 197 (1986).

Not only does this rhetoric reflect a moral current running throughout the religious foundations of Western civilization, it also reflects something else embedded in the nation-state that is less apparent: the importance of procreative sex in nation-building.

In her work, *Reproducing the State*, Stevens addresses the centrality of the family to the state. Her focus is on the ways in which “[t]he familial nation reinforces the membership rules of political society” (1999, 9). In other words, the family is the basic political unit insofar as kinship is the primary means of establishing citizenship and passing on national identity. By understanding the state as “a membership organization [that] has rules for individuals’ inclusions and exclusions,” Stevens is able to help clarify the saliency of kinship to the state (1999, 56-7). Since familial membership governs inclusion and exclusion in political society, procreative sex produces individuals who are members of political society by birthright, and these future citizens go on to “reproduce” the state. A couple that can only engage in non-procreative sex cannot reproduce (at least not by “traditional” methods), and therefore they cannot help reproduce the state. Thus, same-sex sodomy cannot be condoned by the state (of course, singles and heterosexual couples who do not want to or cannot have children would also fall under this rubric as “lesser” citizens). The “familial nation,” then, seems to be integral to Justice White’s conception of nation – one that has historically prohibited same-sex sexual relations. I will discuss the relationship between the family and the state in greater detail in the following chapter, which addresses gay marriage specifically.

While there is clearly evidence that anti-sodomy laws have existed as state statutes throughout history, dating back to the colonial era, the association of sodomy with homosexuality seems to be a relatively recent construct. In fact, even if we do not assign a
specific date to the emergence of homosexuality, as Foucault does, it would be difficult to argue that homosexuality, even in its various contemporary understandings, existed prior to the emergence of specific modes of classification. It did not. The word “homosexual” itself would have been meaningless to the framers of the Constitution. Goldstein argues that, “All of the [majority] Justices seem to have assumed that ‘homosexuality’ has been an invariant reality, outside of history” (1997, 57). She continues: “No attitude toward ‘homosexuals’ or ‘homosexuality’ can really be identified before the mid-nineteenth century because the concept did not exist until then” (1997, 57). Therefore, the colonial and early American laws prohibiting same-sex sodomy were addressing quite a different phenomenon, with a different meaning, than anti-sodomy laws address today.

Goldstein concludes that, “Before the late 1800s, sexuality…was something a person did, not what he or she was” (1997, 57). This distinction seems to be conflated today as acts increasingly define identity, which, in turn, allows for the criminalization of homosexuality:

The conflation of sexual activity with sexual identity strikes at the heart of the problems of privacy, gay visibility, and outing. Homosexuals are defined by their sexual activity in a way that heterosexuals are not. The slightest indication of gay visibility immediately implies the overt presence of gay sexuality to mainstream culture…This is why all forms of gay visibility, including simple coming out, are socially disruptive…The threat of gay sexuality is so strong that it is not only seen as inseparable from gay sexual activity, but it instills a desire to regulate and control any visible sign of homosexual identity (Bronski, 1998, 180).

Judith Butler’s work on doing gender (1999 and 2004) readily applies to the ways of doing and naming sexuality. In Gender Trouble, she contends that, “words, acts, gestures, and desire produce the effect of an internal core or substance” (1999, 173). She continues to argue that the “essence or identity” constructed by words and acts are, in fact, “fabrications manufactured and sustained through corporeal signs and other discursive means” (1999, 173). The conflation of sexual act and sexual identity is a product of proliferating discourses seeking greater degrees of
classification and regulation within the social body. In particular, juridical discourse is part of the “doing” of homosexuality; it names homosexuality as the site of a collection of sexual acts, and this naming seeks to establish identity as an essential and permanent fixture that gives rise to various sexual behaviors (an attempt to establish a doer behind the deed). In this way, the very means attempting to regulate sexual behavior attributed to homosexuality bring the juridical subject into existence.

The majority opinion viewed sodomy as a matter of conduct specific to and definitive of the homosexual, and, more specifically, the gay man. Since this behavior violated both moral standards and criminal law, the conflation of identity and act allowed the Court to exclude homosexuality from the legal protection of the right to privacy. Same-sex sodomy epitomized this conduct for the Justices writing in the majority, and as such, they subjected it to the strictures of criminal law. With this ruling, Bowers would come to stand as the precedent excluding homosexuality from the realm of privacy for 12 years. For as much as it seemed that society wanted to keep homosexuality out of sight of the public eye, the state attempted to deprive gay men (predominately) and lesbians of a private space in which they could engage in intimate relations. This regulation took place through very public means; so, ironically, as the panoptic

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2 I recognize that the analysis in this chapter largely ignores the lesbian experience, but it is important to note that the wording of both the Georgia and Texas anti-sodomy laws defines so-called sodomy in terms of oral sexual contact, which makes these laws more readily applicable to lesbian sexuality as well. Thus, authors such as Cheshire Calhoun argue that anti-sodomy laws regulate both homosexuality and lesbianism (2000, 82-87). However, Jane Ussher (1997a) focuses on the tensions between the material and discursive regulations of lesbian sexuality. She argues that, “while the law might position ‘homosexuality’ as a physical act, regulating the material body of the person who is caught engaging in this offence, it also serves to regulate the discursive representation of lesbian sexuality,” often doing so by actively avoiding “discursive acknowledgement” of lesbianism (1997a, 134). As a case in point, the Georgia anti-sodomy law did not contain language that included lesbian sexuality until 1968. Judith Butler comes to a similar conclusion as Ussher, arguing that, “Lesbianism is not explicitly prohibited in part because it has not even made its way into the thinkable, the imaginable, that grid of cultural intelligibility, that regulates the real and the nameable” (1991, 20). Finally, lest we think that there have been no explicit legal codes against female same-sex activity, Ussher catalogues some of the historical codes in Western societies that have regulated and punished sexual acts among women, including the Code of Orleans in France and English Law (1997b, 226-232). The differences in discursive production and regulation of lesbian sexuality make for an interesting avenue of future research.
gaze of society tried to ignore homosexuality, society paid more attention to how to regulate homosexual activity. In 1998, the issue of same-sex sodomy, and homosexuality in general, would find itself in the courtrooms again, and thus these juridical practices would re-expose the very public nature of regulating sexuality.

*Lawrence v. Texas*

*Lawrence v. Texas* began with the arrest of John Lawrence and Tyron Garner for violating the Texas Homosexual Conduct law. The boiled down version, according to Dale Carpenter, goes like this:

> On the night of September 17, 1998, someone called the police to report that a man was going crazy with a gun inside a Houston apartment. When Harris County sheriff’s deputies entered the apartment they did not find anybody with a gun but did witness John Lawrence and Tyron Garner having sex. This violated the Texas Homosexual Conduct Law, and the deputies hauled them off to jail for the night. Lawyers took the men’s case to the Supreme Court and won a huge victory for gay rights (2005, 107).

Yet, Carpenter argues that to reduce *Lawrence* to this story is to miss a lot of complexity, as well as to gloss over many inconsistencies and possible inaccuracies. I am not overly concerned with providing a detailed account of the events leading up to the *Lawrence* decision, at least, not as concerned as I am with the arguments behind and implications of the decision. Nevertheless, I believe that it would be worthwhile to go into some detail regarding these events. The account that follows comes from the interviews that Carpenter conducted for his piece “*Lawrence Past.*”

At 10:30 pm on September 17, 1998, Robert Eubanks placed a call to the Harris County Sheriff’s Department reporting that, “a black male was going crazy in the apartment and he was armed with a gun” (Carpenter, 2005, 110). Deputies Quinn, Lilly, Tipps, and Landry responded to the apartment in question. After checking the door, and determining that it was unlocked, the
deputies proceeded to enter the apartment with Quinn taking the point. It is at this point that accounts begin to diverge. The account from lead officer Quinn is the most detailed, while Lilly, Tipps, and Landry all have less detailed accounts due to their subordinate roles. Quinn and Lilly were the only deputies to see Lawrence and Garner having sex, yet Lilly gave a very limited initial account and the department later told Carpenter that Lilly could no longer discuss the case. Tipps’ account is very limited and Carpenter was unable to obtain an interview with Landry. Thus, Quinn’s account provides the majority of this narrative.

Upon entering the apartment, the deputies saw no one in the living room and proceeded to shout, “Sheriff’s Deputies!” After no response, the deputies proceeded to explore the apartment and found and apprehended an unidentified man in the kitchen. It was at this point that the deputies noticed a bedroom behind the kitchen. With the door partially open and the aid of the kitchen light, Lilly was able to discern to men having anal sex. Lilly and Quinn entered the bedroom, the light was turned on, and Quinn “Stop!” and “Step back!” Yet, the two men continued to have sex. According to Quinn, Lawrence looked him directly in the eye and the two men continued to have sex “well in excess of a minute” (Carpenter, 2005, 112). The deputies had to separate Lawrence and Garner forcefully.

After handcuffing them, the police took Lawrence and Garner into the living room with Eubanks and the fourth man, and some heating exchanges followed. Lawrence accused the deputies of “‘harassing’ them because they were homosexuals,” to which Quinn responded, “‘I don’t know you. And I don’t know your sexual orientation. So how can I be harassing you because you’re homosexual other than that I caught you in the act’” (qtd. in Carpenter, 2005, 113)? In his interview with Carpenter, Quinn stated that he thought it was a set up because the men surely must of heard the deputies and should have had the decency to stop, “meaning that
Lawrence and Garner wanted to be caught in the act in order to be arrested and then to challenge the sodomy law” (2005, 112).

If it were the case that Lawrence and Garner were setting up the police in an attempt to contest the Texas anti-sodomy law, then Quinn seems to have easily taken the bait. As Carpenter argues, “Because homosexual conduct was a Class C misdemeanor (like a traffic ticket), punishable by fine but not prison, Quinn knew that the deputies had the option simply to issue a citation without actually taking them to jail” (2005, 113). Yet, “Quinn recommended that the men be charged with violating the homosexual conduct law and be taken to jail” (Carpenter, 2005, 113). Quinn argues that his recommendation was based on the “totality of the circumstances” and the fact that someone could have gotten hurt over a lover’s triangle (qtd. in Carpenter, 2005, 113). In his words, “They were stupid enough to let it go that far” (qtd. in Carpenter, 2005, 113).

The other deputies’ accounts vary slightly, mostly because of their positions in the “raid.” Carpenter also offers up several different explanations for the varying accounts as well as the motivations behind the arrest. But, I am not as concerned with these details as I am with the legal ramifications themselves. Therefore, I would like to turn my attention to the Constitutionality of the Texas anti-sodomy law and the verdict of the Supreme Court in the Lawrence case.

In delivering the opinion of the Supreme Court for Lawrence, Justice Kennedy defines liberty in terms dealing with both privacy and a transcendent notion of the autonomous self:

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

Yet, even with this acknowledgement of the “more transcendent dimensions” of liberty, the Court’s decision rested almost entirely on the issue of privacy. Furthermore, it was not solely a matter of protecting personal conduct in the home from state intervention, but it was more a matter of privacy levied against the rational interests of the state. Thus, Justice Kennedy and the majority opinion conclude that, “the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.” 539 US 558, 564 (2003). Justice O’Connor’s concurring opinion qualifies this: “Under our rational basis standard of review, ‘legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.’” 539 US 558, 579 (2003).

As we shall see, the Court found that state intervention in acts of private same-sex sodomy was not “rationally related to a legitimate state interest.”

The legal codification of morality is evident in Texas’ law against same-sex sodomy. As Justice O’Connor argues, “because Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior.” 539 US 558, 583 (2003). In effect, the same-sex sodomy law became a mechanism for the State to assert the moralization of sexuality over the populace; the state did this, somewhat ironically, through the relative non-enforcement of the law itself. Yet, as Justice O’Connor contends, “the effect of Texas’ sodomy law is not just limited to the threat of prosecution or consequence of conviction.” 539 US 558 581 (2003). The shadow of moral condemnation cast over issues of sexual conduct classified homosexuals as deviants and criminalized their sexual activities. Citing *State v. Morales*, Justice O’Connor
illustrates how Texas itself was aware of the implications of this law in that it “‘legally sanctions discrimination against [homosexuals] in a variety of ways unrelated to criminal law,’ including in the areas of ‘employment, family issues, and housing.’” 539 US 558, 584 (2003).

Still, these implications were justified on the grounds of the state’s right and responsibility to promote a moral doctrine. Justice O’Connor notes that, “Texas attempts to justify its law, and the effects of the law, by arguing that the statute satisfies rational basis review because it furthers the legitimate governmental interest of the promotion of morality.” 539 US 558, 582 (2003). It is on the grounds of this “rational basis of review” that the majority opinion of the Supreme Court, and particularly Justice O’Connor’s concurring opinion, overturned Texas’ same-sex sodomy law. This also distinguishes Lawrence from the precedent-setting Bowers, as Justice O’Connor argues:

    In Bowers, we held that a state law criminalizing sodomy as applied to homosexual couples did not violate substantive due process. We rejected the argument that no rational basis existed to justify the law, pointing to the government’s interest in promoting morality. 478 U.S., at 196. The only question in front of the Court in Bowers was whether the substantive component of the Due Process Clause protected a right to engage in homosexual sodomy. Id., at 188, n. 2. Bowers did not hold that moral disapproval of a group is a rational basis under the Equal Protection Clause to criminalize homosexual sodomy when heterosexual sodomy is not punished. 539 US 558, 582 (2003).

Thus, O’Connor concludes that, “Moral disapproval…is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause” 539 US 558, 582 (2003).

Yet, even in claiming that moral disapproval does not form a basis to discriminate against a group of people under the Equal Protection Clause, Justice O’Connor reaffirms the link between sexual conduct and identity. She contends that, “Texas argues…that the sodomy law does not discriminate against homosexual persons,” but that it “discriminates only against homosexual conduct” 539 US 558, 583 (2003). Justice O’Connor responds that this conduct is
“closely correlated with being homosexual” 539 US 558, 583 (2003). Therefore, she concludes that the sodomy law is “directed toward gay persons as a class” 539 US 558, 583 (2003). While this may establish a zone of privacy in which such “defining” conduct may take place, the Justice’s logic further entrenches a divide between heterosexual conduct and homosexual conduct. If such conduct is so defining of a person’s identity (let alone an entire class of persons’ collective identity), then it can be used as a basis to differentiate between different classes of sexual identity under other conditions.

In fact, Justice O’Connor alludes to the possibilities, if not the necessities, of other sorts of mandated divisions between heterosexuals and homosexuals:

That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations – the asserted state interest in this case – other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group. 539 US 558, 585 (2003).

Justice Kennedy makes a similar claim in writing for the majority opinion:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. 539 US 558, 578 (2003).

The key in both of these excerpts, which is indicative of the logic invoked by Justices O’Connor and Kennedy throughout their arguments, is that a distinction is maintained between heterosexuality and homosexuality even while the right to privacy is extended to protect same-sex sodomy. The public norm of heterosexuality, manifested principally through monogamous marital relationships, remains separate from the private conduct considered indicative of
homosexuality. Furthermore, as both Justices claim, this case does not require the state to recognize same-sex relations as legitimate; in fact, they make it quite clear that the door is wide open for the state to deprive homosexuals of equal legal standing (especially when it comes to marriage or any other formal relationship), provided that moral disapproval is augmented by perceived state interest. Thus, this discourse maintains the hierarchy of sexuality with heterosexuality its place of hegemonic privilege.

Joe Rollins (2005) makes a similar argument regarding the maintenance of this hierarchy and the exclusion of gay men and lesbians from public recognition in his piece, “Lawrence, Privacy, and the Marital Bedroom.” Rollins contends that in the majority decision in Bowers “act, identity, behavior, the Constitution, and the Bible were schematically sampled and woven into a web of heteronormative and homophobic possibilities,” while “Lawrence draws from gay-affirmative research, acknowledges the constructedness of the homosexual subject, and tears down one important boundary between gay and straight citizens” (2005, 170). Yet, he continues, Lawrence “also accepts the distinction between gay and straight as real and material, privileges the status quo, and reifies extant hierarchies of sexual value and gender difference” (2005, 170). As such, Justices O’Connor and Kennedy all-too-quickly accept the static dichotomy between sexual identities, along with its accompanying normative implications, that would allow any future legislation to perpetuate divisions between heterosexuals and homosexuals. For example, this neglects the normative aspects implicit to the issue of marriage – aspects intertwined in the relationship between conduct and identity that the Justice articulates. That is, the value placed on procreative, heterosexual sex runs throughout legal discourse, and Justice O’Connor’s argument maintains this as the norm.
While the Equal Protection Clause deemed unconstitutional the blatant moral disapproval exhibited by the Texas anti-sodomy law, moralization persists through legal strictures. This moralization is attached to the hierarchy established by the norm of heterosexuality. Accordingly, while moralization and normalization do not necessarily mean the same thing, the two work in tandem through the law. Much of the *Lawrence* decision reinforces this hierarchy by relying on an oversimplified dichotomy between heterosexuality and homosexuality. But, not only do Justices O’Connor and Kennedy articulate moral disapprobation of homosexuality by supporting a position that bars same-sex relationships from state recognition, they also create a sphere of privacy that insulates the heterosexual public sphere from homosexual conduct. Thus, by coupling the right to privacy for sodomy with a provision allowing (if not encouraging) the state to deny legitimacy to same-sex relationships, the Justices ruling in the majority created a means of further regulating homosexuality. Although a positive development in the battle for gay civil rights, the right to privacy established by the *Lawrence* decision has, paradoxically, limited the scope of sexual expression for gay men and lesbians.

*Keeping it in the Closet: Public Regulation of the Private*

While the abolition of anti-sodomy laws has extended protection against state intervention to homosexuals and same-sex sexual activity, the right to privacy that guarantees this protection has, paradoxically, become a regulatory mechanism to enforce the (public) norm of heterosexuality. In his book, *The Pleasure Principle*, Michael Bronski makes a similar argument regarding privacy as another means of regulating sexuality. He contends that, historically, sexual pleasure has been viewed as a threat in Western culture, especially if that pleasure is based in nonreproductive sexuality (1998, 158). Thus, Bronski argues that, “The
evolution and construction of ‘privacy’ has been, to a large extent, an attempt to regulate and contain sexual activity and pleasure” (1998, 158). Bronski also contends that, while privacy has offered a safe haven to gay people, “this retreat to privacy has prevented gay people and the gay community from living openly, from establishing themselves as a distinct and articulate social presence, and from gaining the most basic rights and elements of citizenship that other people and groups enjoy” (1998, 158).

One might argue that the right to privacy does constitute one of these basic rights, and that with Lawrence the gay community has gained one of the fundamental elements of citizenship. Certainly, the protection offered by the right to privacy is a positive advance; a minimal guarantee of physical security is a prerequisite for establishing greater degrees of freedom. Yet, the implications of privacy for gay men and lesbians do not seem to be the same as those for straight men and women. In fact, it would seem that the right to privacy that heterosexuals enjoy is anything but private. The norm of heterosexuality is always very public, while homosexuality has shouldered the undue burden of fighting for both public and private recognition. Privacy functions in this matter because heterosexual sex maintains a hegemonic position of public visibility and acceptability:

Society approves of public expressions short of actual heterosexual sexual acts, such as solicitation for sex at one's home, hand holding, and kissing, while society condemns and punishes similar behavior among gay men and lesbians. It is to that quite significant extent that the modern trend of decriminalizing sexual acts offers little; society remains free to criminalize presexual acts with respect to which it is indifferent when men and women engage in such acts (Backer 1993, 759).

This list of expressions neglects the many other ways in which heterosexuality dominates the public sphere (if not defines the public sphere as such) – particularly the assumptions of heterosexuality, and consequent gender roles, in the imagery of popular culture. Not only do we
see acts of affection among heterosexuals on a daily basis, but advertising, television, and film
inundate us with images of heterosexual norms (although I do recognize that pop culture outlets
have become more progressive in their sexual content, through television shows like Will &
Grace and movies like Brokeback Mountain; but, then again, these phenomena may come back
around to Evans’ discussion of the materialism of sexuality in late capitalist culture).

Within this system, toleration of homosexuality is a matter of “out of sight, out of mind.”
This conception of sexual toleration is the central thesis of Larry Backer in his piece “Exposing
the Perversions of Tolerance”: “Gay men and lesbians, sexual noncomformists, are tolerable and
tolerated in American society and under American law only if they keep their identities
submerged and participate in their own public obliteration” (1993, 756). We can consider the
fight for the right to privacy as part of this “public obliteration.” Backer continues: “The sexual-
conduct taboos of dominant culture mark sexual intercourse other than heterosexual vaginal
intercourse within a monogamous marriage as a breach of a basic, clear, and immutable Divine
commandment” (1993, 756). We may add to this “Divine commandment” multiple other
discourses that operate in conjunction with the legal apparatus to constitute the domain of sexual
regulation, including the implicit rules of the “familial nation” discussed above.

It seems that, ultimately, the success of Lawrence may have the unintended effect of
keeping homosexual relations behind closed doors. Bronski explains how the right to privacy
reinforces the publicity of the heterosexual norm:

The social contract that permitted sexual privacy concerned heterosexual activity. Public display of heterosexual orientation was allowed and encouraged. Since heterosexuality informed the most basic social structures, it was, by nature, very public. It was impossible to separate heterosexual orientation from activity; the existence of children, for example, was an indication that sexual activity had occurred. Essentially, this meant that while heterosexual activity was “private,” it was still allowed public display” (1998, 160).
One might argue that adoption challenges the notion of the existence of children as a public manifestation of heterosexual procreative sex. Returning to the “familial nation,” Stevens makes a similar argument regarding adoption as a possible “loophole” in the rules for familial membership in the nation. By drawing on Butler, Stevens contends that adoption poses a challenge to kinship as a prerequisite for membership in political society (1999, 119). Regardless, the heterosexual norm still maintains its position of dominance and visibility – one could even site the challenges to homosexual adoptions as evidence of this hegemony.

We have seen repeatedly in the preceding court cases and through my subsequent analysis the continual reinforcement of the hierarchy of heterosexuality and its persistent analytic priority. Before Lawrence, it was the standard that determined privacy; after Lawrence, it became the norm that measured sexual conduct (and, in some cases, it was the determinant in forcing conduct into conformity). In other words, heterosexuality operates as a very public ordering principle that at one time was the rationale for exclusion, and at another time was the rationale for inclusion and normalization. Much of this, I believe, stems from the confusion among sexuality, action, and identity that mark the arguments of the prior cases.

Justices Kennedy and O’Connor contend that a zone of privacy protects homosexual conduct from moralized state intervention; however, even this secular protection seems to reinforce the public nature of heterosexuality (and all the moral baggage that comes with it) and surreptitiously regulates homosexuality through very public means. In this way, the law becomes a means of making the private publicly controllable. The establishment of a private sphere in which homosexuals can have sex without fear of state intervention is a product of the domain of state regulatory power, to which sexuality is subject.
Regardless of Justice O’Connor’s comments above regarding the separation of “moral disapproval” and “rational basis of review,” the outcome of Lawrence may have the possible consequence of reinforcing a public morality (even if this consequence was unintended or even intentionally guarded against by the Justices). One could argue that the right to privacy is the product of “the politics of shame” that Michael Warner details in The Trouble with Normal (1999). With this right, “shameful” homosexual conduct is pushed further away from the public’s eye: “At bottom, the permission to use the private spaces of the social order permits an unrelenting confirmation of the baseness of the privatized conduct, one which is so shameful it is not permitted to see the (societally speaking) light of day” (Backer, 1993, 765). In the public eye (at least the majority of the public), the attachment of morality to sexuality assigns the label of shame to homosexuality.

Furthermore, as long as the government has the power to determine and regulate the nature of the relationship between morality/shame and sexuality, homosexuality will consistently be relegated to the margins: “As long as offense, and particularly moral offense, remains a legitimate source of governmental power to regulate, no decision of any court will truly liberate sexual noncomformists from the darkness of the private spaces the government and society have assigned for them” (Backer, 1993, 787). Pierceson attributes this line of analysis to a postmodern critique, in which “the liberal distinction between public and private is a construct that allows the state to exert formal and informal power over that which it considers deviant” (2005, 69). Wendy Brown puts forth such a critique in States of Injury.

Brown’s work exposes the limitations and possible contradictions of a rights-based discourse in which marginalized social groups often enhance state power through their very appeals to the law for recognition and inclusion. I believe that these limitations and
contradictions lie at the heart of the analysis I have undertaken in this chapter. The right to privacy, for example, allows the state to further classify and manage various identities across the private/public divide. Consequently, it determines which identities merit public expression and which identities may exist only in private. By drawing on Patricia Williams’ work, *The Alchemy of Race and Rights*, Brown focuses on the ways in which increased privatization removes subjects from being political. Commenting on Williams’ account of the problem of privacy, Brown summarizes that, “‘privatization’…depoliticizes socially constructed problems and injustices…and undermines a notion of political life as concerned with the common and obligating us in common” (1995, 123).

How, Brown questions, is it possible to reconcile Williams’ attack on privatization with her simultaneous defense of rights (not to mention in light of the many other individuals to whom rights represent the hope of a better future) (1995, 124)? After all, by drawing on Marx and Foucault, Brown shows us that “rights…are in fact *effects* of the social power they obfuscate,” and that perhaps nothing could more thoroughly obscure “the domination by regulatory norms…than the figure of the sovereign subject of rights” (1995, 123-4). She rhetorically asks, “And what would more neatly converge with the late modern disciplinary production of identity, and regulation through identity, than the proliferation of rights” (1995, 124)?

Brown points to two strands of argumentation that Williams invokes to defend the role of rights in a politics of recognition and inclusion. The first deals with the appeal and promise of rights in the face of “the historical deprivation of social, sexual, and physical integrity that rightlessness conjured for blacks in the United States” (1995, 125). This is evident in Williams’ argument regarding the symbolic meaning of rights as the means of bringing the excluded body
into social being: “For the historically disempowered, the conferring of rights is symbolic of all
the denied aspects of their humanity: rights imply a respect that places one in the referential
range of self and other, that elevates one’s status from human body to social being” (1991, 153).
It is this first strand of defense, as it relates to the issue of privatization, which most readily
pertains to the argument presented in this chapter. The right to privacy, although not explicitly
mandated in the Constitution, is fundamental to the establishment of the modern sovereign
subject. The right to privacy helps to secure an autonomous private sphere free from government
intervention.

Yet, as I have argued in this chapter, the pursuit of such rights may be at one and the
same time both enabling and limiting. Repealing anti-sodomy laws and gaining the right to
privacy is both a legal victory over state intrusion in the private sphere and a reaffirmation of
state power to determine the limits and locations of acceptable behavior. The establishment and
preservation of a private sphere, protected by the legal right to privacy, detaches the individual
from public, collective identities. Inherent to this quandary is the depoliticization of the sexual
subject, which illustrates that “the same device that confers legitimate boundary and privacy
leaves the individual to struggle alone, in a self-blaming and depoliticized universe, with power
that seeps past rights and with desire configured by power prior to rights” (Brown, 1995, 126).

This is the irony of identity politics and the social movements seeking individual rights to
which they give rise: struggles to gain rights for the members of various social groups, struggles
that are rooted in and unified by collective identities, ultimately efface those very collectivities in
whose name they are waged by securing autonomous subject-positions for their constituent
members in the private sphere. While they establish a realm of security, abstract individual
rights, particularly the right to privacy, also individuate subjects and place them in a position
independent of the politicized identities upon which they based their claims for recognition and inclusion. In the case of anti-sodomy laws, the pursuit of the right to privacy effectively depoliticizes the gay rights movement by pushing homosexuality further into the private sphere while simultaneously reinforcing the state’s prerogative (and ability) to regulate sexuality.

This leaves Williams’ second strand of defense, which deals with the referential limitations of a rights-based discourse. Williams argues that we must become more adept at speaking the language(s) of rights discourse: “What is needed, therefore, is not the abandonment of rights language for all purposes, but an attempt to become multilingual in the semantics of evaluating rights” (1991, 149). According to Williams, the promise of rights remains “the magic wand of visibility and invisibility, of inclusion and exclusion, of power and no power,” and that the very concept of rights “is the marker of our citizenship, our relation to others” (1991, 164). As such, we can understand Williams’ attachment to rights in terms of the need to redefine and expand the scope of their meaning:

The task for Critical Legal Studies, then, is not to discard rights but to see through or past them so that they reflect a larger definition of privacy and property: so that privacy is turned from exclusion based on self-regard into regard for another’s fragile, mysterious autonomy…In discarding rights altogether, one discards a symbol too deeply enmeshed in the psyche of the oppressed to lose without trauma and much resistance. Instead, society must give them away (1991, 164-5).

Brown also quotes extensively from the passage above to demonstrate Williams’ regard for rights because of its lingering meaning for not only African-American, but for any disenfranchised group that has suffered outside of the protective umbrella of rights. Perhaps, though, this attributes too much power to words – at least to those words that are the products of historical struggles and yet deal in abstraction and are articulated as ahistorical and universal.

Brown addresses the problematic limitations of “what can be accomplished with words”: “while [rights] may formally mark personhood, they cannot confer it; while they promise
protection from humiliating exposure, they do not deliver it” (1995, 127). While I agree with Brown insofar as she recognizes the limitedness of rights to guarantee the physical protections that they promise, I would resist projecting this limitedness on to the ability of words to construct and regulate identities, particularly as a matter of juridical discourse. Brown continues on to argue that, “The necessarily abstract and ahistoricizing discourse of rights mystifies the conditions and power that delimit the possibility of achieving personhood, while its decontextualizing force deprives political consciousness of recognition of the histories, relations, and modalities of power that produce and situate us as human” (1995, 127). Surely there is some truth to the mystifying effects of rights, but to attribute their regulatory capacities solely to mystification is to overlook the more overt role they play in constructing subjectivities and managing the conditions of personhood. The juridical discourse of rights not only masks the history of struggles and power relations that “produce and situate us as human,” but, as we have seen, it also figures prominently in the actual production itself. Still, Brown’s analysis elucidates the limits of a rights-based discourse in its capacity to remedy the injuries of exclusion and misrecognition; it also points to the need to invoke a politics that is cognizant of the ways in which the subject is the product of various discourses and power relations, including the juridical discourse of rights.

Out of Bounds: Exceeding Identity and Moving Beyond the Confines of Privacy

The persistence of the problematic discursive relationships among sexuality, action, and identity, which produce the subject, demands the development of a more dynamic conception of sexual citizenship that is detached from the rigid structures and hierarchies of “identity” and the limitations of legal rights. Conceptions of identity and sexuality must be destabilized (this
includes conflating action with identity, or dogmatically holding on to a static conception of desire) in conjunction with the reevaluation of legally conferred individual rights. One way to do this, and I will elaborate on this in subsequent chapters, is through Butler’s notion of performativity.

Although we should be careful to not reduce sexuality to gender (or vice versa), I believe that Butler’s analyses of gender can help inform the ways in which identity and sexuality can be constructively destabilized. Butler’s (1999) performative subversions are a means of problematizing the relationship between identity and sexuality, that is, of highlighting the protean nature of sexual identity. Performative subversions are a strategy aimed at the “appropriation and redeployment of the categories of identity themselves, not merely to contest ‘sex,’ but to articulate the convergence of multiple sexual discourses at the site of ‘identity’ in order to render that category, in whatever form, permanently problematic” (Butler, 1999, 163).

Butler argues that genders “are only produced as the truth effects of a discourse of primary and stable identity” (174). Likewise, sexuality itself is only the truth effect of the medical, juridical, and religious apparatuses that produce sexual identities. But, in producing the dominant discourses of sexuality, these institutions also produce the categories and practices therein that create space for the possibilities of various sexualities.

The arguments for exclusion in Bowers, and inclusion (or normalization) in Lawrence, were based on a stable, unified, or “true,” identity. In particular, the majority decision in Bowers, as mentioned above, based itself on an a-historical conception of homosexuality. But, in general, these decisions rested upon a claim of homosexual identity that was static, and which had emerged unproblematically as the opposite of heterosexual identity. Thus, heterosexuality was the implicit, existing norm that the Court further substantiated with its decisions: in Bowers
the deviant nature of the homosexual was deemed a threat to the heterosexual norm and therefore had to be excluded from legal protection; in *Lawrence* an aspect of homosexuality was normalized through the notion of privacy (although this still acted as a principle of exclusion by relegating homosexuality to the privacy of the bedroom and separate from the heterosexual public sphere). In both cases, juridical power operated through identity by creating the identities themselves and then rationalizing their inclusion and exclusion under the law.

Yet, if sexuality can be destabilized, as I have argued above, then the norm operating at the center of these court cases could be perpetually troubled in relation to the regulation of sexual activity. The “truth” of the heterosexual norm could be exposed as arbitrary in a similar manner as Butler’s analysis of gender identity. As Butler argues, “If gender attributes and acts…are performative, then there is no preexisting identity by which an act or attribute might be measured; there would be no true or false…and the postulation of a true gender identity would be revealed as a regulatory fiction” (1999, 180). She concludes that, “Genders can be neither true nor false, neither real nor apparent, neither original nor derived” (1999, 180). Similarly, sexuality, understood not just as the subject of juridical power but also as its product, can be neither true nor false. Such an understanding can expose the arbitrariness of the dominant discourse of sexuality and consequently alter the administration of sexuality by the legal system. Furthermore, this understanding of sexual identity could generate energies of political participation and contestation that feed nicely into a democratic and pluralistic ethos.

While I elaborate on what these energies might look like in Chapter 5, it might be worthwhile to gesture towards some possibilities. For one, it could stop making issues of sexuality strictly a matter of privacy. Instead, we could have a conception of sexual freedom based on more fluid conceptions of sexual desire and pleasure rather than on the standard of
heterosexuality and the appropriateness of conduct. With many competing discourses attempt to
discover the “nature” of sexuality, it should be evident that a static conception of sexuality may
not only be undesirable but may also be impossible to ascertain. The problem, as Rollins argues,
is that “legal contests superimpose narrative order on a material world, rendering coherent,
meaningful, and predictable stories from events that are often random, meaningless, chaotic, and
unintentional” (2005, 169). Increasingly, the legal system has relied on science to deal with such
“messy” issues (Rollins, 2005, 170). Sexuality is one such messy issue, yet its indeterminacy
cannot simply be resolved via scientific investigation. This leaves sexuality inconclusively
determined by a variety of discourses: “Despite enthusiastic study, very little about sexual
identity is known with scientific certainty and, as a result, legal scripts must instead rely on the
more obviously political discourses of religion, tradition, morality, and history” (Rollins, 2005,
170). By relying on these discourses, the legal system has attempted to produce sexual identities
that are seemingly permanent, stable, and fixed.

Ultimately, as indicated above, sexual identity exceeds the parameters of its very
construction. That is, the production of sexual identity through various discourses, as well as its
becoming the subject of juridical power, create the very possibilities for sexual freedom and the
formulation of new, and perhaps more fluid, identities (for example, the establishment of a zone
of privacy creates the space in which individuals may practice sexual freedom, allowing them to
explore acts that they may or may not attribute to a sense of identity). I believe that cultivating
those senses of possibility and fluidity are critical to a more inclusive form of politics, one that
takes into account sexual identities but does not presuppose them (or construct them as if they
are presupposed).
Chapter 4

Conjugal Contradictions:
Same-Sex Marriage and the Power of the Norm

Look, for example, at the confusion and equivocation that surround pornography, or the lack of elucidation which characterizes the question of the legal status that might be attached to the liaison between two people of the same sex. I don’t mean that the legalization of marriage among homosexuals should be an objective; rather, that we are dealing here with a whole series of questions concerning the insertion and recognition – within a legal and social framework – of diverse relations among individuals which must be addressed.

– Michel Foucault,
“Sexual Choice, Sexual Act”

Gay Marriage and the Politicization of Sexuality

The debates regarding gay marriage during the 2004 election and the recent developments in the New Jersey Supreme Court demand a critical examination of gay marriage. While the legal system has extended the umbrella of privacy rights to same-sex conduct, an overwhelming majority of the voters in the 11 states that had anti-gay marriage legislation on the ballots during the 2004 elections denied the legal right of marriage to individuals who happen to be gay (even the closest margin of defeat, Oregon, rejected same-sex marriage 57% to 43%). It appears that after (and, as I argued in the previous chapter, even because of) Lawrence, homosexuality is still subject to a particular regime of power that governs its inclusion, exclusion, and expression in contemporary society. To understand what is at stake, and what power relations are immanent to the issue of gay marriage, one must understand its origins and its contestations both within and outside of the gay and lesbian community. Specifically, I argue that if one examines sexuality through contemporary postmodern, feminist, and queer critiques, then it is apparent that the issue of gay marriage is bound in a field of regulatory power relations in which modes of normalization and contestation are contemporaneous. Within this system,
appeals to a rights-based juridical discourse for inclusion and recognition run the risk of assimilation; petitions to the state to confer legitimacy on same-sex couples seeking marriage may only reinforce the state’s authority to determine what constitutes a legitimate union. Yet, at the same time, the limitations that confine the realm of “legitimate” sexual relations also produce the very possibilities for transgressing those limits and exploring other, heretofore undefined, relationships.

We must be aware of the ways in which the issue of gay marriage highlights how regulation and normalization can operate under the guise of subversion. That is, while gay marriage may appear to play the subversive role of challenging the institution of marriage, in actuality, it is often rationalized by assimilationist arguments – articulated in politico-economic terms – that conform to the institutional norm. Even if gay and lesbian couples were to achieve legal marital status, the institution of marriage is further entrenched as a norm that excludes non-married individuals. Thus, the appearance of subversion may ultimately reduce to conformity via the forces of normalization. My argument should not be construed as an indictment of gay marriage, but as a call to awareness of the unintended effects of claims for inclusion and recognition and certain modes of resistance. As such, the struggle for gay marriage within the modern US politico-legal system remains a site of normalization and exclusion as well as a possibility for reconfiguring power relations.

The constellation of issues concerning state regulation of marriage and the risks of normalization highlight the problematics of the very terms that have come to constitute this debate. That the issue of gay marriage has become an issue at all already assumes that marriage is the appropriate format by which to understand sexual relations and render them as either legitimate or illegitimate. The very terms invoked in the arguments for or against gay marriage
preclude any possibility for alternative conceptions of what constitutes a legitimate, or even an illegitimate, sexual relation precisely because marriage is taken to be the marker of legitimacy. Butler argues that, “This means that the sexual field is circumscribed in such a way that sexuality is already thought of in terms of marriage and marriage is already thought of as the purchase on legitimacy” (2004, 106).

However, Butler argues, there is a whole field of sexuality, which we might understand purely as possibility or as “unrepresentability,” that falls outside the binary domain of legitimate and illegitimate:

There is outside the struggle between the legitimate and the illegitimate – which has as its goal the conversion of the illegitimate into the legitimate – a field that is less thinkable, one not figured in light of its ultimate convertibility into legitimacy. This is a field outside the disjunction of illegitimate and legitimate; it is not yet thought as a domain, a sphere, a field; it is not yet either legitimate or illegitimate; has not yet been thought through in the explicit discourse of legitimacy (2004, 105).

Thus, the politicization of sexuality in the form of the question of gay marriage delimits the field of illegitimacy as well. It does this by constituting “sexual possibilities that will never be eligible for a translation into legitimacy” (Butler, 2004, 106). Furthermore, it is not just a matter of these sexual possibilities waiting in limbo for future legitimation (which we might ascribe to a dialectical view of the development of rights); instead, in Butler’s words, “it is we might say the irrevocable and irreversible past of legitimacy: the never will be and never was” (2004, 106).

In this light, I want to explore along with Butler, how the politicization of sexuality has taken this particular form and how it has been circumscribed by the limiting terms of marriage. How is it that the legitimacy and recognizability of relations among gay men and lesbians have come to hinge upon the possibility of marriage? How is it that such debates concerning the position of sexuality in politics are only intelligible in terms of marriage? In answering these
questions, I want to adopt the perspective of criticality that Butler suggests and examine the ways that marriage has come to constitute the central institution of kinship and legitimacy in a democratic politics of sexuality. This way, we can see how, like privacy, legitimation through the institution of marriage is dual-natured. As Butler argues, “it is crucial that, politically, we lay claim to intelligibility and recognizability; and it is crucial, politically, that we maintain a critical and transformative relation to the norms that govern what will and will not count as an intelligible and recognizable alliance and kinship” (2004, 117). By adopting this perspective, we can examine the power relations that surround and constitute the field of sexuality. Furthermore, we can investigate how these relations produce the possibilities for legitimation and sexual freedom and simultaneously limit those very possibilities through the redeployment of regulatory norms, specifically the regulatory norms inscribed in the discourse of rights that adjudicate sexuality and marriage law.

With Butler’s perspective of criticality in mind, I will begin by looking to the privileged position that marriage has maintained historically in the lineage of democratic theory. In doing so, I will examine the ways in which marriage, as the central institution of kinship, plays into modern conceptions of citizenship. I will briefly examine why marriage has played an often unwritten, yet prominent role in modern theories of democratic citizenship, with a focus on the lineage of the liberal conception of citizenship that dominates contemporary American politics. I will follow this with a succinct overview of the origins of the gay marriage movement, as well as a discussion of the pro and con arguments concerning marriage within the gay rights movement. Next, I will examine the discursive regulation of sexuality through an analysis of the state’s denial of recognition for Donita Ganzon and Jiffy Javellana. Finally, while I cannot concretely envision that which is rendered outside the scope of intelligibility and as not even illegitimate
(since this non-field of sexuality is constituted by its very “unrepresentability”), I want to gesture towards a political project that we might associate with “the never will be” and “the never was,” that is, a project that lends itself to pluralization and a dislodgment of the need for inclusion/recognition from the discourse of rights.

*Kinship and the Origins of Citizenship*

Throughout the history of Western politics, kinship has been at the center of matters concerning citizenship and the distribution of citizens’ rights. In ancient Greek and Roman societies, where hierarchies of citizenship were rigorously maintained, citizenship was attained directly through kinship – a practice that largely persists in contemporary politics. As discussed in the previous chapter, Stevens’ *Reproducing the State* does an excellent job of exploring the ways in which kinship and kinship rules function as a means of establishing political membership. In Western cultures, marriage, and more specifically heterosexual marriage, is widely assumed to be a fundamental institution and the primary form of kinship that not only reproduces the family, but also sustains the political culture through the reproduction of its citizens.

Many authors have examined the ways that heterosexual marriage figures prominently into hegemonic conceptions of citizenship in Western, particularly American, cultures. For example, Richardson examines how “heterosexuality is constructed as a necessary if not sufficient basis for full citizenship” (2000, 84-85). In her discussion of Gayle Rubin’s “The Traffic of Women: The ‘Political Economy’ of Sex, Butler highlights the assumption of heterosexual, exogamic relations as a prerequisite for the reproduction of cultures and as a function of the incest taboo in kinship:
Because all cultures seek to reproduce themselves, and because the particular social identity of the kinship group must be preserved, exogamy is instituted and, as its presupposition, so is exogamic heterosexuality. Hence, the incest taboo not only forbids sexual union between members of the same kinship line, but involves a taboo against homosexuality as well (1999, 93).

Finally, in her analysis of the ways in which legal barriers to same-sex marriages relegate gay men and lesbian to the fringes of civil society, Calhoun argues that heterosexual marriage is understood to play a “foundational role” in civil society:

In particular, being fit for marriage is intimately bound up with our cultural conception of what it means to be a citizen. This is because marriage is culturally conceived as playing a uniquely foundational role in sustaining civil society. As a result, only those who are fit to enter marital and family life deserve full civic status. Bars on same-sex marriage encode and enforce the view that lesbians and gays are inessential citizens because they are unable to participate in the foundational social institution (2000, 108).

Thus, we can conclude along with Bell and Binnie that all citizenship should be considered to be sexual citizenship since “citizenship is inseparable from identity, and sexuality is central to identity” (2000, 67). And, heterosexuality is the privileged identity at the core of the hegemonic understandings of contemporary US citizenship, and, as such, it is the norm that excludes all other forms of sexual identity from full political membership.

Consequently, I take heterosexual marriage as the central institution in Western conceptions of kinship, particularly those forms of kinship evident in the tradition of Western political thought that determine inclusion in civil society as citizens. Even though there is certainly evidence to the contrary that marriage is the central and only form of kinship in Western (American) culture – by drawing on anthropological work exploring forms of kinship that are not based upon marriage, Butler (2004) points out that kinship and marriage do not necessarily imply one another – it unquestionably operates as a regulatory norm in contemporary

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3 This is both an important and tenuous conclusion to draw considering my previous discussions of Foucault and deconstruction of sexual identity; that is, the centrality of sexuality to identity is questionable and yet it plays a significant role in enabling political action.
politics. Moreover, I want to engage how it is that marriage has assumed this central position in
the politico-juridical discourse that frames the debate for sexual citizenship. Familial
membership establishes the basis for inclusion in civil society, and the monogamous,
heterosexual marital relationship is the model for kinship in modern Western society.

However, kinship and the institution of heterosexual marriage are often not recognized as
being salient to the public realm of politics. Even though familial relations may underwrite
citizenship, in most Western political thought kinship is understood, at best, as a precursor for
political society. Shane Phelan argues that, “Kinship is treated as the primary realm of nature”
societies and the only natural one, is that of the family” (1987, 18). Rousseau also creates a
pseudo-anthropological account of the formation of the family in the state of nature in his
*Discourse on the Origin of Inequality*. This account becomes the basis for the development of
society and, consequently, the need for government; yet, the family and the marital relationship
are excluded from any consideration as fundamental institutions in the construction of
democratic citizenship. Addressing the private/public divide between marriage and citizenship,
Ursula Vogel concludes that, “Political theory has had little to say about the relationship between
the institution of marriage and the status of individuals in the public spaces of a democratic
politics” (1994, 77).

Instead, with the emergence of civil society, familial relations are thrust into the private
sphere. While these relations are deemed to be non-political, civil society relies on such private
institutions as marriage and the family for its very existence, as Carol Pateman contends, “when
the state of nature is left behind, the meaning of ‘civil’ society is not independently given, but
depends upon the contrast with the ‘private’ sphere, in which marriage is the central
relationship” (1988, 55). Thus, the traditional view of the distinction between kinship/marriage and politics is ironic: while marriage is maintained as essentially private and is therefore denied any political status, it is absolutely political in that civil society depends upon it for a variety of reasons, including the reproduction of the state and the maintenance of patriarchal power relations (which I discuss below). Locke’s discussion of paternal power in the *Second Treatise of Government* exemplifies the liberal democratic treatment of this distinction between the private sphere of the family and the public sphere of politics and civil society.

Locke regards the family as the warden of its children until they are capable of reason and governance under the laws of society. He writes: “First, then, *Paternal* or *parental power* is nothing but that which parents have over their children, to govern them for the children’s good, till they come to the use of reason, or a state of knowledge wherein they may be supposed capable to understand that rule…they are to govern themselves by” (1980, 88). The function of the family and, by extension, the marriage contract is to initiate children in the ways of civil society. As Stevens argues, the role of the family is to produce future citizens, that is, to reproduce the political culture of the nation through the production and education of its constituent members. Vogel comes to a similar conclusion, adding that this reproduction ensures the transfer of private property: “Marriage…serves the sole end of reproducing the membership of civil society – yet in a form that will guarantee the orderly, legitimate passage of property from one generation to the next” (1991, 74). Locke refers to this transfer of property as a power inherent to the father, a power that “men generally have to *bestow their estates* on those who please them best; the possession of the father being the expectation and inheritance of the children” (1980, 39).
Locke’s portrayal of the family is typical for theorists of the modern liberal democratic tradition. However, what this characterization masks is the patriarchal power relation inherent to the family and its central institution – marriage: “Reference to the family or the household as an undifferentiated unit tends to obscure – behind the screen of the natural authority of parents over children – the primary relation between two adults one of whom is subordinated to the personal power of the other” (Vogel, 1991, 67-8). Consequently, marriage has long been considered to be strictly a matter of the private sphere, and, therefore, it largely has been ignored as a political issue, as Carol Pateman notes in her work, *The Sexual Contract*:

The story of the social contract is treated as an account of the creation of the public sphere of civil freedom. The other, private, sphere is not seen as politically relevant. Marriage and the marriage contract are, therefore, also deemed politically irrelevant. To ignore the marriage contract is to ignore half the original contract (1988, 3).

However, as the last line of Pateman’s quote implies, marriage is an implicit part of the formulation of civil society. Pateman’s analysis reveals how, through social contract theory, the maintenance of the public sphere – the bastion of civil society and civil freedoms – has relied on its separation from the private sphere. Civil society depends on the perpetuation of certain forms of subjugation in the private sphere that, historically, have been ignored or recognized as not political. One of these forms of subjugation is that of the marriage contract, and, in fact, it is the privacy “afforded” to marriage that helps to preserve its patriarchal inequalities.

Just as the right to privacy promises protection and freedom under the law while effectively depoliticizing the subject, marriage and the sexual contract, which underlie civil society and its accompanying freedoms, reinforce patriarchy and the subjugation of women. Pateman argues that while social contract theory seemed to dispense with patriarchal power, it has actually reinforced it – a point that is routinely ignored among political theorists:
‘Patriarchy’ refers to a form of political power, but although political theorists spend a great deal of time arguing about the legitimacy and justification of forms of political power, the patriarchal form has been largely ignored in the twentieth century. The standard interpretation of the history of modern political though is that patriarchal theory and patriarchal right were dead and buried three hundred years ago. Since the late seventeenth century, feminists have been pointing out that almost all political theorists have in fact, explicitly or tacitly, upheld patriarchal right (1988, 19).

Much like the right to privacy presents subjection as protection and freedom from external interference, contract theory “justifies subjection by presenting it as freedom” (Pateman, 1988, 39). It does this by sweeping away “all the grounds through which the subordination of some individuals, groups or categories of people to others had been justified,” and replacing them with one legitimate form of subordination: voluntary agreement to a contract (Pateman, 1988, 39-40). Thus, individuals must voluntarily subordinate themselves to one another.

What Pateman calls “civil subordination” is the product of the hold that social contract theory has had on all aspects of life, including marriage. Furthermore, social contract theory was born out of the liberal emphasis on legally conferred rights and possessive individualism. Vogel argues that the Natural Law, or liberal, conception of citizenship “was less concerned with the modes of active citizen participation than with the normative foundations of civil society conceived as a comprehensive and unified system of legal relations” (1991, 71). She continues: “It is this tradition which established the civil-rights basis of citizenship, i.e. a universal status of membership based upon the assumptions of the legal independence and legal equality of all individuals” (1991, 71). And finally Vogel concludes: “it follows from the premise of universal legal agency that all relations of authority have to be constructed and justified by reference to the paradigm of contractual exchanges,” including marriage (1991, 72).

The problem with social contract theory is that it perpetuates a system of subordination, both voluntary and involuntary, while purporting civil freedom. Marriage, by Pateman’s
account, is a form of involuntary subordination; it is the product of the sexual contract, which underwrites the social contract, and stipulates that women are not equal to men: “Men alone have the attributes of free and equal ‘individuals’…Women are born into subjection” (1988, 41). Yet, this form of subordination has rarely merited the attention of political theorists outside the feminist and neo-Marxist traditions, because, as mentioned above, it takes place in the private sphere: “Civil subordination in other ‘private’ social arenas, whether the economy of the domestic sphere, where subordination is constituted through contract, is declared to be non-political” (Pateman, 1988, 54). The persistence of civil subordination through the institution of marriage anticipates tensions within the gay rights movement over issues of marriage, patriarchy, and assimilation. For many feminist and queer theorists, the realization of same-sex marriages would serve to further reinforce marriage as a legitimate institutional site of patriarchal power. Yet, some queer theorists argue that same-sex marriage would actually transform the institution of marriage by eliminating the notion of sexual difference. In doing so, it would expose, and ultimately undo, the patriarchal underpinnings of marriage. Through my analysis, I highlight this dual-nature of same-sex marriage: it is simultaneously a site of assimilation and transformation, that is, it contains the paradoxical possibility of both reaffirming and undermining patriarchy. However, before exploring the problematics confronting the struggle for gay marriage, it would be helpful to address the history of this struggle – how it came into existence and what the stakes are of its politicization. I will then move on to an analysis of the internal tensions within the movement itself.
The Origins and Evolution of the Fight for Gay Marriage

Marriage has not always been a goal for gay men and lesbians. This should come as no surprise considering the levels of intolerance and violence suffered by homosexuals throughout history. The fear of being publicly recognized as a homosexual, let alone publicly fighting for the right to legally wed a member of the same sex, certainly trumped many (if not all) individuals’ desires to be married. These fears ran the gamut from political and legal prosecution to job discrimination to physical violence. Even up to the present, struggles for the right to be married have generally been localized and waged mostly by individuals and not by national gay and lesbian organizations. The reason for this is that marriage remains a highly contentious issue among gay men and lesbians. In fact, George Chauncey, author of Why Marriage? The History Shaping Today’s Debate Over Gay Equality, states that, “Indeed, the long and contentious gay and lesbian debate over the wisdom – and even the desirability – of pursuing marriage rights should disabuse anyone of the idea that there has ever been a single ‘gay agenda’” (2004, 88). He continues, “Not until the 1990s did marriage become a widespread goal, and even then it received more support from lesbians and gay men at the grassroots level than from the major gay organizations” (2004, 88). The debate between assimilation and true sexual liberation has kept national organizations relatively quiet in terms of gay marriage, leaving the decision up for individuals to decide what is in their best interest.

How is it, then, that gay marriage has seemingly burst onto the scene of political contestation over the last decade? According to Sean Cahill, director of the National Gay and Lesbian Task Force Policy Institute, “[t]he 2004 election mark[ed] the fourth presidential election in a row in which gay issues played a significant role” (2005, 49). These issues have been predominately about gay marriage, including: Pat Buchanan’s denouncement of gay
marriage at the 1992 Republican convention; the debate over the Defense of Marriage Act (DOMA) in 1996; Republican condemnation of Vermont’s supportive stance on equal benefits to gay couples in 2000; and, of course, the centrality of the Federal Marriage Amendment (FMA) as well as the eleven states with anti-gay marriage legislation on their ballots in 2004 (2005, 49). Many people attribute the proliferation of anti-gay marriage initiatives to religious right groups and conservative politicians trying to court the right’s vote. There is certainly some truth to this, but to leave it at that is to miss the historical legacy of the struggle over gay marriage, as well as a more critical understanding of the dual-natured role that gay marriage has played in the gay and lesbian fight for political and legal recognition. Consequently, we must attend to the developments in gay marriage over the course of the last half of the twentieth century.

In Why Marriage?, Chauncey traces the development of the fight for gay marriage over the last half-century. As a starting point, he looks to the post-World War II era and the creation of a gay “identity movement.” He contends that changes in the ways that gay men and lesbians have been treated in America, particularly by the legal and political systems “depended on the emergence after the Second World War of a gay ‘identity movement’ set in motion by the relentless assertion by the state and other authorities that sexual identity provided a key to the self and that being gay categorically barred one from citizenship rights” (2004, 23). The evolution of a collective identity among gay men and lesbians made it possible to begin thinking in terms of political mobilization.

While the right to marry may not have been one of the initial goals of the burgeoning gay rights movement, certain changes in the institution of marriage itself made this right a distinct possibility. Chauncey states that, “Four fundamental changes in marriage since the nineteenth
century have made the right to marry seem both more imaginable and more urgent to lesbians and gay men”:

First, the right to choose one’s partner in marriage, no matter how much that choice distressed one’s family, ethnic community, and co-religionists, came to be seen as a fundamental civil right. Second, the sharp differences in the marital roles assigned husbands and wives declined, so that it became easier to imagine a marriage between two people of the same gender. Third, marriage became a crucial nexus for the allocation of public and private rights and benefits, so that the exclusion of same-sex couples from marriage imposed increasingly significant economic and legal consequences. Finally, the power of any one religious group to impose its marriage rules on others, while never strong, sharply declined (2004, 59-60).

Of these four changes, I would like to focus on the third to highlight the ways in which the institution of marriage has acted as a means of depriving individuals of full citizenship status in the US. This illustrates how the struggle over gay marriage has essentially been a struggle for political and legal recognition and inclusion.

It is evident that access to both health care and social security benefits is largely determined by one’s marital status, as Chauncey notes: “While every other industrialized society made health care and old-age security a right of citizenship, the tenuous ‘security net’ created in the United States in the twentieth century made access to many benefits contingent on employment or marriage” (2004, 71). He points directly to a report made by the General Accounting Office (GAO) to Congress in 1996 as support for the ways that access to the benefits of Social Security are contingent upon marriage; it is also proof of the way that exclusionary practices revolving around marriage are built into the system of distributing economic and healthcare benefits:

“[R]ecognition of the marital relationship is integral to the design of the program…Once the law sets forth the basic right of an individual participant to retirement benefits, it prescribes in great detail the corresponding rights of the current or former spouse. Whether one is eligible for Social Security payments,
and if so how much one receives, are both dependent on marital status” (2004, 72).

Referencing the Hawaiian Supreme Court case of *Baehr v. Lewin*, Michael Warner lists some of the other benefits incurred through marriage:

1. a variety of state income tax advantages, including deductions, credits, rates, exemptions and estimates;
2. public assistance from and exemptions relating to the Department of Human Services;
3. control, division, acquisition, and disposition of community property;

This list does not exhaust all of the benefits enumerated by Warner, but it provides a good sense of all the economic, legal, and social advantages tied into marriage.

Along with the four aforementioned changes in marriage, the evidence of these advantages became more apparent to gay men and lesbians, making marriage a more desirable and, supposedly, realistic goal. Thus, individuals who sought a same-sex marriage, after initial rejections for marriage licenses by the county clerks, began to turn to the courts to appeal their cases. In fact, Rimmerman contends that the struggle for gay marriage has developed primarily in the courtroom and has been the product of a few individuals rather than large, sweeping social movements:

The campaign for same-sex marriage has depended on success in the courts. It was inspired not through consensus among activists but by a relatively small coterie of lawyers. Thus the campaign is rooted in litigation, though it has now garnered the support of most major national lesbian and gay organizations (2002, 72).

Although *Baehr v. Lewin* may be the most well-known court case involving gay marriage, one can go back to 1970 to see the emergence of the first cases dealing with this issue. Chauncey documents that on May 18th, 1970, Mike McConnell and Jack Baker applied for a marriage license in Minneapolis, and, two months later, Marjorie Jones and Tracy Knight did the same in Louisville Kentucky (2004, 89-90). According to Chauncey, several more same-sex applications
would be filed over the next few years, and all of them would be rejected, but McConnell and Baker and Jones and Knight would go on to file lawsuits disputing their rejections.

The decision to reject the application for a marriage license in both cases was upheld by the states’ Supreme Courts. While the courts conceded that “neither state law restricted marriage to a man and a woman, [they] nonetheless concluded that marriage could not mean anything else” (Chauncey, 2004, 91). So as to ward off any confusion in the future, fifteen state legislatures quickly passed laws that defined marriage as strictly limited to heterosexual couples (Chauncey, 2004, 91). It seems that history does indeed repeat itself as the reactions to the Minnesota and Kentucky cases are mirrored by the eleven anti-gay marriage initiatives in 2004, which, one could argue, were reactions to the gay marriage cases in Hawaii and Vermont. However, throughout the rest of the 1970s and into the early 1980s, appeals for gay marriage were all but nonexistent.

Although support for marriage as a right for same-sex couples waned in the 1970s, there was resurgent interest in the 1980s largely, Chauncey argues, as the result of three developments: “the dramatic growth in the visibility and acceptance of lesbians and gay men in some parts of the country and some segments of society…the devastating impact of AIDS and the astonishingly rapid appearance of what everyone soon called the lesbian baby boom” (2004, 95). In particular, the latter two developments – the prospects of becoming a parent and dying – heightened gay and lesbian attention to the desire for “securing their relationships” (Chauncey 2004, 95). As a result, domestic partnerships became a way of securing certain rights, including access to healthcare and death benefits. Unfortunately, these partnerships were not universally recognized, and this led to several tragic instances where partners were disallowed to see
terminally ill significant others before their passing. The attention garnered by these instances resulted in a new impetus for the right to marry.

A major breakthrough came in the Hawaii Supreme Court case of *Baehr v. Lewin*. In this case, three gay couples sought lawyers willing to help them get married. Ultimately, Dan Foley, former directory of Hawaii’s ACLU, and Evan Wolfson, an attorney for Lambda Legal Defense Fund, worked on the case. Wolfson became a pivotal figure in the case, arguing that marriage is the “central social and legal institution of this and virtually every other society, and you can’t say that you’re for equality and then acquiesce in our exclusion from it” (qtd. in Chauncey, 2004, 124-5). He continued that marriage was important “because [it] provided ‘a vocabulary in which non-gay people talk about larger important questions – questions of love and commitment and dedication and self-sacrifice and family, but also equality and participation and connectedness’” (Chauncey, 2004, 125).

Wolfson’s portrayal of marriage certainly deviates from analyses that expose the institution’s patriarchal underpinnings or conceptions of marriage as the locus of certain economic and civil rights. Nevertheless, it is insightful insofar as it illustrates how deeply ingrained the institution of marriage is in the psyche of heterosexuals; without this institution, relations between two people may very well be unintelligible to heterosexuals and unimaginable in a predominately heteronormative society. There is a danger here as well, however. The “need” for legitimately recognized gay marriage to render intelligible notions of love, commitment, equality, etc., to heterosexuals runs the risk of assimilation and the normalization of gay and lesbian relations. The threat here is that the movement for gay marriage can be construed to merely be pandering to traditional heterosexual conceptions of kinship. That is, one

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could argue against gay marriage on this basis because it forces gay and lesbian relations into hetero roles for recognition, consequently precluding the very possibility for not only alternative conceptions of kinship, but differing modes of the aforementioned notions of love, commitment, equality, etc. By making same-sex relations intelligible to heterosexuals, gay men and lesbians may be effacing their attempts to establish a loving relationship on their own terms. I will address these concerns regarding the normalization at greater length below, but Wolfson’s comments lend themselves to a brief foreshadowing of these risks at this point.

Returning to *Baehr v. Lewin*, to prove that the state discriminated against gay men and lesbians, Wolfson and Foley appealed to the privacy and equal protection clauses of Hawaii’s state constitution. The state Supreme Court did in fact find the marriage ban to violate the equal protection clause of the state constitution: “It found nothing in the state constitution that prevented lesbian and gay marriage, and it argued that denying same-sex couples access to the benefits and rights associated with marriage is a form of sex discrimination” (Rimmerman, 2002, 74). Yet, while the Hawaii Supreme Court ruled the marriage ban to be in violation of the state’s Equal Rights Amendment, “it remanded the case to the trial court to determine if there was a ‘compelling state interest’ in denying the couples’ right to marry” (Chauncey, 2004, 125). In addition to determining whether a “compelling state interest” existed or not, “[the state] would further have to prove that the gender classification was narrowly tailored to accomplish the state’s purpose” (Rimmerman, 2002, 74).

Ultimately, in 1999 the state Supreme Court ruled that Hawaii could exclude lesbian and gay couples from marrying. The Court had found a “compelling state interest” and significant enough language in the passage of a piece of legislation “forbidding same-sex marriage, thus codifying the heterosexual character of marriage” (Rimmerman, 2002, 75). This piece of
legislation had passed through Hawaii’s legislature at about the same time that DOMA passed through the US Congress, and it provided the Court with the necessary foundations, by definition, to reject the couples’ appeals for the right to marry. Essentially, the Hawaii state legislature retroactively created a “compelling state interest” to legally deny same-sex couples the right to marry. Even in light of the state legislature’s actions, the initial ruling was a landmark in terms of judicial appeals for same-sex marriage: “Baehr v. Lewin [was] a pathbreaking departure from the usual interpretation of applicable constitutional principles in the area of same-sex marriage. Almost all American courts have held, both under state and federal constitutional law, that failure to recognize same-sex marriage is not unconstitutional” (Richards, 1999, 154-5). Perhaps it was in response to this pioneering ruling that DOMA was passed through Congress in September of 1996.

In fact, Richards goes on to argue that the intent behind DOMA was to block the possibility of gay marriage in Hawaii:

[DOMA’s] purpose is to exercise federal power to limit the force of the possible legality of same-sex marriage in Hawaii, and it does so in two ways. First, it expressly excludes same-sex marriage from any of the benefits that accrue to married couples under federal law (thus, discouraging even Hawaii gay and lesbian couples from exercising their rights to marry). Second, it ordains that no other state shall be required to give effect to such same-sex marriage. The purpose of the second provision is to limit any extraterritorial effect of the Hawaii legitimation of same-sex marriage under the Full Faith and Credit Clause of Article IV, section 1 of the U.S. Constitution” (1999, 169).

Sean Cahill makes a similar argument regarding DOMA and the anti-gay backlash caused by the Hawaii decision (2005, 54-7). He points to the role that gay marriage played in the 1996 election where “activists held a rally denouncing same-sex marriage just before the Iowa caucuses” in which “[n]early every Republican candidate attended and signed a pledge to ‘defend’ heterosexual marriage” (2005, 54). President Clinton removed gay marriage from the campaign
agenda by signing DOMA into law and by making sure that it was publicly known through broadcasts on Christian radio stations (Cahill, 2005, 55).

Nevertheless, gay marriage would find its way back on the campaign agenda in the 2004 presidential election and even on the ballot in eleven states. The year leading up to the 2004 election saw two resolutions proposed in Congress aiming to define marriage strictly as a relationship between a man and a woman. In the House, Representative Marilyn Musgrave (R-CO) introduced H.J. Resolution 56 on May 21, 2003; in the Senate, Senator Wayne Allard (R-CO) proposed S.J. Resolution 26 on November 25, 2003. The purpose of these pieces of legislation, which would come to be known as the Federal Marriage Amendment (FMA), was to explicitly limit marriage and its associated benefits to heterosexual couples. The FMA would restrict courts at the state level from extending any form of marital benefit or recognition to same-sex couples; in other words, “[it] would short-circuit state efforts to legalize marriage for same-sex couples by banning same-sex marriage and prohibiting courts and legislatures from citing state or federal law, or state or federal constitutions, to mandate more limited forms of recognition, such as hospital visitation rights, domestic partner health benefits, and second-parent adoption” (Cahill, 2005, 57).

It is widely assumed in popular culture that the issue of gay marriage quickly became the decisive issue in the 2004 presidential election. As Cahill argues, even though gay men and lesbians may constitute a small percentage of the US population, with only a fraction of that percentage wanting to pursue marriage, the struggle for gay marriage has become “symbolically central in US politics” (2005, 47). Some political analysts question the polarizing effect of gay and lesbian rights on the US populace (for example, Fiorina, et al, 2005), and even Cahill exposes the limited effect of the anti-gay marriage initiative in Ohio on rallying Bush supporters.
However, this “symbolic” issue has had some very concrete impacts on countless people. I have already listed some of the ways in which gay men and lesbians have been deprived from health care benefits or access to loved ones during times of illness, but the resulting statistics from the successful anti-gay marriage legislation in Ohio are telling:

In Ohio, nearly 48,000 men, women, and children in gay and lesbian families, including 10,048 children, are now ineligible for the most basic family protections. In addition, because the amendment appears to ban any of the benefits of married couples for unmarried couples, gay or straight, more than 200,000 straight unmarried couples are now ineligible for family protections. Some 45 percent of these straight unmarried couples in Ohio are raising children (Cahill, 2005, 67-8).

That 200,000 unmarried couples, regardless of their sexual orientation, will potentially be deprived of basic family protections speaks to the on-going problematical relation between the institution of marriage and the distribution of economic and healthcare benefits. This is why authors such as Butler and Warner argue that benefits and rights must be disassociated from marriage. The distribution of these benefits based on marital status divests “nontraditional” couples and their families from access to basic healthcare provisions, and, accordingly, one of the arguments against gay marriage is that it reinforces such an inequitable system.

*Tensions within the Gay Marriage Movement*

I have alluded several times to the divisions within the gay rights community over the issue of same-sex marriage, and, at this point, a further explication of these divisions would help to shed light on the stakes of gay marriage. This will also help contribute to a critique of the limits of the rights-based discourse in which the institution of marriage is embedded. In very broad terms, the division is between those who support the right to marry, like Wolfson, and those who oppose it on the grounds of being too “assimilationist,” like Warner. However, we
can discern several varying arguments from within both the “assimilationist” and anti- 
assimilationist” camps.

Cheshire Calhoun (2000) does an excellent job of presenting arguments from both 
perspectives. In terms of arguments that support the right to marry, Calhoun contends that there 
must be a moral argument to support this claim and not just an argument based on the concept of 
formal equality and/or practicality. Without moral arguments, she explains, we would not 
question the underlying validity of the institution of marriage; Calhoun uses an instructive 
example to illustrate her point: if there were a situation in which white males were allowed to 
own slaves, but white females were not, it would not make sense to extend the “right” of 
ownership to white females on the basis of formal equality because this would leave the moral 
problem of slavery unexamined (2000, 108-9). Thus, Calhoun offers three possible positive 
moral arguments for same-sex marriage.

The first argument she presents deals with marriage as an institutional norm guiding the 
way that relations of kinship and intimacy should be recognized: “[Marriage] is the normative 
ideal for how sexuality, companionship, affection, personal economics, and child rearing should 
be organized” (Calhoun, 2000, 110). In effect, this argument would justify state regulation of 
marriage without questioning why marriage is the norm that renders these relations intelligible; it 
augments state authority to determine what constitutes a legitimate union, worthy of economic 
and social benefits, and what does not. A second moral argument, which is perhaps more 
palatable, is gender-based: “According to gender-based arguments for same-sex marriage, 
cultural hostility to same sex marriage derives from the fact that same-sex marriages are gender-
free” (Calhoun, 2000, 115). This implies that such marriages would challenge relations of
patriarchal power. This harkens back to Pateman’s discussion of the marriage contract, and I will return to this argument in greater detail below.

Finally, Calhoun refers to DOMA’s defense of heterosexual status. She contends that such arguments “presuppose views about gays’ and lesbians’ gender deviance, lack of sexual self-control, and unfitness for family life. They thus assume that heterosexuals and nonheterosexuals are different kinds of people who should therefore be treated differently under the law” (Calhoun, 2000, 123). Moral counterarguments in favor of same-sex marriage would speak directly to this construction of personhood and would challenge the authority of the heterosexual norm to organize intimate relations. In this context, Calhoun discusses the transformative possibilities of same-sex marriage; I will also return to the transformative possibilities of same-sex marriage (in relation to Pateman’s argument) below, but for now I want to continue sketching out the pros and cons of the gay marriage argument.

Ultimately, pro-same-sex marriage arguments hinge upon two contrasting views of the institution of marriage itself. Calhoun elaborates on these views. On one hand, we may consider marriage as a pre-political institution: “We assume that marriages and families are essential to the functioning of any society in a way that other voluntary associations are not” (Calhoun, 2000, 128). In this case, Calhoun goes on to explain that, “Same-sex marriage rights would, in essence, affirm gays’ and lesbians’ fitness to participate in this foundational institution” (2000, 129). Again, this line of argumentation would fit more neatly into the “assimilationist” camp. “On the other hand, we might reject the idea that marriage and family differ in any politically significant way from other voluntary associations” (Calhoun, 2000, 129). By this understanding, marriage is not a pre-political institution; instead it is purely a social construct. Thus, Calhoun contends that, “Same-sex marriage rights would, on this second view, disrupt gay and lesbian
subordination not by incorporating them into a special, foundational institution, but by denying that marriage and family had any special political importance in the first place” (2000, 129). In other words, same-sex marriage would help to expose the social construction of marriage and displace the heteronormativity that has been arbitrarily built into it.

The problem with the former view, which takes marriage to be pre-political, is that it must ultimately support a position encouraging gay men and lesbians into conformity within the strictures of a traditionally heterosexual institution. As Meeks and Stein argue, such a view would further entrench exclusions around the norm of marriage: “A political rhetoric that argues that gays and lesbians share ‘traditional family values’ and are ‘normal’ only deepens the divide between conforming and non-conforming sexualities” (2006, 143). Furthermore, if we were to apply the risks of normalization and privatization discussed in chapter 3 to the problematic of gay marriage, we could see along with Meeks and Stein that such rhetoric may also depoliticize the gay and lesbian struggle (2006, 143). Meeks and Stein elaborate: “Normalizing arguments view homosexual oppression as the result of individual forms of bigotry, not as the result of widespread, entrenched institutional and cultural forces, such as the absence of marital protections, of Federal hate crime legislation, or the cultural entrenchment of rigid sex and gender roles” (2006, 141). The cause of homosexual oppression, then, is understood as residing in bigotry, such as that of the religious right, rather than in systemic political and cultural norms. Because of this, gay and lesbian struggles would be essentially relegated to the private sphere, away from reworking the cultural norms entrenched in the public sphere of politics.

Furthermore, both the “assimilationist” and transformative arguments supporting the right for same-sex marriage seem to fall victim to an additional set of critiques. Nan Hunter articulates these two critical positions:
Opponents [of same-sex marriage within the gay rights community] have relied on two primary arguments. First, they invoked a feminist critique of marriage as an oppressive institution which lesbians and gay men should condemn, not join. Second, these activists have drawn on the politics of validating difference, both the difference of an asserted gay identity and culture which resist assimilation, and the differences between persons who would marry and those (homosexual or heterosexual) who would elect to forgo marriage and thereby, it is argued, become even more stigmatized (1995, 109).

I would like to examine each of these criticisms in turn. Beginning with the feminist critique of marriage as an institution upholding patriarchal power relations, I return to Carol Pateman’s work in The Sexual Contract. I then move to a discussion of the transformative potential of same-sex marriage considering criticisms of assimilation and normalization in what Meeks and Stein (2006) might call a “post-queer politics of gay and lesbian marriage.”

Reaffirming Patriarchal Power?

In The Sexual Contract, Pateman argues that marriage can never be truly contractual, and because of this marriage will always be an institution embodying patriarchal power relations. Marriage cannot be about two equal individuals voluntarily contracting into a relationship; instead, she argues that marriage is always about power relations that result in domination and subordination. For these relations to disappear and for the two individuals to be truly equal, Pateman argues that sexual difference must be effaced: “If marriage is to be truly contractual, sexual difference must become irrelevant to the marriage contract; ‘husband’ and ‘wife’ must no longer be sexually determined” (1988, 167). “Indeed,” Pateman concludes, “from the standpoint of contract, ‘men’ and ‘women’ would disappear” (1988, 167). But, sexual difference can never really be eliminated because the notion of the individual, according to Pateman, is itself a patriarchal construct (1988, 168). She argues that, “The individual is masculine and his sexuality is understood accordingly…The patriarchal construction of sexuality, what it means to be a
sexual being, is to possess and to have access to sexual property” (1988, 184-5). Thus, a contractual understanding of marriage presupposes that man is to possess woman, and, because of this, marriage remains a relation of domination and subordination.

Pateman’s analysis provides a critique of marriage in general, as well as an articulation of the ways in which marriage, as matter of contract, reinforces patriarchy while espousing freedom. It also contributes to a critique of gay marriage from within the queer and feminist communities. As I have discussed above and Chauncey (2004) notes, historically marriage has not been a mainstream goal of the gay and lesbian movement because many critics viewed it as too assimilationist. Lesbian feminists in particular have been opposed to the institution of marriage because of its role in reproducing the kind of patriarchal power relations discussed above. One of these opponents that Chauncey specifically identifies is law professor and legal activist Nancy Polikoff, who grounded her opposition to same-sex marriage in the belief that, according to Chauncey, “marriage was inescapably linked to its historic role as a central institution perpetuating male domination over women” (2004, 120). Many “anti-assimilationists” contend that seeking the right to marry reinforces one of the primary forms of the institutionalization of patriarchal power. In other words, the reaffirmation of marriage as the primary form of kinship is equal to further legitimization of patriarchal and subjugating relations of power in same-sex relations and throughout society at-large.

However, the prospect of same-sex marriage would seemingly hold the promise of dissolving the marital relation of domination. As Pateman argues, a truly contractual marriage would require the dissolution of sexual difference. It would appear that marriage between two people of the same sex does indeed fit this requirement. Furthermore, it would seem that the patriarchal construct of the individual itself is undermined since, in a same-sex marriage, there is
no presupposition of man’s possession of woman. In fact, although never expressed explicitly, it is quite possible that those who vehemently oppose same-sex marriage fear that such acceptance will explode the patriarchal power relations within the institution of marriage.

Certainly many individuals who oppose same-sex marriage hold on dearly to a very traditional view of marriage – a view grounded in conventional gender roles in which the wife is submissive to the husband. Yet, these individuals believe that “family values” have come under attack and that these attacks jeopardize the tradition of marriage. As Richards argues, “The uncritical ferocity of contemporary political homophobia draws its populist power from the compulsive need to construct Manichean differences where none reasonably exist, thus reinforcing institutions of gender hierarchy perceived now to be at threat” (1999, 164). He continues: “In particular, as Whitman argued, democratic equality in homosexual intimate life threatens the core of traditional gender roles and the hierarchy central to such roles” (1999, 164).

Perhaps, then, the fear associated with gay marriage is that it will accomplish, at least in part, what Pateman argues is necessary for the dissolution of patriarchal power relations: the end of sexual difference in the marital relationship.

Maybe this is the sentiment behind the question that is often nonchalantly asked in reference to same-sex weddings: “So, who is the bride and who is the groom?” Perhaps it is so difficult for individuals to conceive of a marital relationship without some sort of power dynamic based upon sex and gender roles, that they must impose such a schema on same-sex relations. It is possible that patriarchy is so deeply ingrained in civil society, and in its foundational institution of kinship, that there needs to be a bride/woman to be dominated by a groom/man to make marriage intelligible. Again, this problem of intelligibility confronts gay marriage, and
many people who are supportive of gay rights are critical of gay marriage because of its implicit support of patriarchy.

Nan Hunter also takes up this issue of gender roles in a same-sex relationship. Instead of seeing such questions pertaining to who will be husband and wife as superficial expressions of embedded heterosexist and patriarchal norms attempting to render same-sex marriages intelligible, Hunter views them with a radically subversive potential:

Taunts such as ‘Who would be the husband?’ have a double edge, however, if one’s project is the subversion of gender. Who, indeed, would be the ‘husband’ and who the ‘wife’ in a marriage of two men or of two women? Marriage enforces and reinforces the linkage of gender with power by husband/wife categories that are synonymous with the social power imbalance between men and women. Whatever the impact that legalization of lesbian and gay marriage would have on the lives of lesbians and gay men, it has fascinating potential for denaturalizing the gender structure of marriage law for heterosexual couples (1995, 112).

The fact that there may not be an answer available to the question of “Who would be the husband?” in a same-sex marriage exposes the limitations of the terminology of “husband” and “wife.” It also reveals the arbitrariness of gender roles and the power relations associated with them as a function of social constructs.

Hunter argues that, “same-sex marriage would move beyond the formalistic equality in marriage law that has been achieved to date, and would radically denaturalize the social construction of male/female differentness, once expressed as authority/dependence relationships, that courts have deemed essential to the definition of marriage” (1995, 109). This denaturalization of what Hunter refers to as “male/female differentness” may go so far as to destabilize the heteronormativity upon which the institution of marriage is based. In turn, same-sex marriage could expose the fallacy of marriage as a “natural right,” and “[force] heterosexuals to view their relationships as deliberately enacted social practices, ‘life-styles’ that are dependent
on recognition of the state rather than inevitable, ‘natural’ accomplishments” (Meeks and Stein, 2006, 138).

According to Hunter, as well as Meeks and Stein, the mistake made by those who oppose gay marriage on the grounds of assimilation – arguing either that it perpetuates patriarchal power or that it normalizes gay men and lesbians and exacerbates exclusionary practices – is that they view marriage as an essentially static entity. Thus, Hunter states that, “Those who argue that marriage has always been patriarchal, and thus always will be, make the same historical mistake, in mirror image, as the courts that have essentialized the ‘nature’ of marriage. There is no ‘always has been and ever shall be’ truth of marriage” (1995, 113-4). Meeks and Stein add, “marriage needs to be re-conceptualized as a dynamic and changing, rather than static, institution” (2006, 149). In fact, they situate the struggle for same-sex marriage in the context of on-going changes in the dynamics of marriage, including: “increases in divorce rates, growing autonomy for women in heterosexual marriages, and increased rates of cohabitation before marriage and instead of marriage” (2006, 137). In his analysis of the emergence of legal contracts as a means of ordering intimate relationships in place of marriage, Rountree (2005) also attends to the larger social context of the changing nature of marriage/intimacy in which, as he notes, people are getting married later and are cohabiting more often.

Accordingly, these authors are working with an understanding of marriage that is already in flux – a conception that is more amenable to positing same-sex marriage not just as a distinct possibility, but also as a positive force in its ability to further transform the institution of marriage and our understandings of intimacy, kinship, and sexual relations in general. This certainly runs counter to Warner’s concerns with marriage. Meeks and Stein paraphrase Warner’s concern with marriage and its consequence for gay and lesbian sexuality: “Lesbians
and gay men often combine sex, intimacy and friendship in ways that heterosexuals do not. Marriage would limit the variety of intimacies that have been cultivated by queer people, and in doing so, deny a wide variety of needs...Same-sex marriage would only further subject queer life to the ethic of sexual shame” (2006, 144). But, in direct contrast to this concern, the view espoused by Hunter and Meeks and Stein holds that gay marriage would actually open up these possibilities by exploding marriage as a rigid, socially-constructed institution. Thus, Meeks and Stein argue, by drawing upon Calhoun, that same-sex marriage would de-center heterosexuality. It would make marriage’s dependency on state recognition apparent, and render heterosexual marriage as something that is contingent and not natural, and therefore subject to potentially radical change.

_Bodily Transformations, Discursive Regulation, and the Limitations of Rights Discourse_  

Unfortunately, I believe that such radical change and potential for transformation are severely curtailed by the strictures of the rights-based discourse in which marriage is situated. As we have seen, the struggle for gay marriage has been waged primarily in the courts, where appeals for recognition have been framed in terms of equal rights, that is, the right to marry and equal access to the rights afforded to married couples. However, this discourse of rights is inherently limited and beset by paradoxes, as I have already discussed. Much like the legal wrangling of the right to privacy and anti-sodomy laws essentialized a conception of homosexuality that conflated act with identity, appeals to extend marriage laws to include gay and lesbian couples have led to discursive regulations that essentialize the sexual nature of marital relationships and the sexuality of those involved in those relationships. Nan Hunter argues that, “in each of the rulings in a lesbian or gay marriage challenge, the courts have
essentialized as ‘nature’ the gendered definitional boundaries of marriage” (1995, 110). Thus, we can apply the lessons from *Bowers v. Hardwick* concerning the conflation of act and identity through the discourse of rights to the issue of gay marriage, as Bell and Binnie contend: “The framing of the challenge within rights discourse…opened up the terms of the debate in more far-reaching ways, by raising questions about the immutability (or mutability) of homosexual identity…and about the extent of overlap between ‘homosexual conduct’ and ‘homosexual identity’” (2000, 57).

This overlap, or conflation, of conduct and identity and the supposed immutability of the resulting conception of homosexuality are central to the legal exclusions of same-sex couples from marriage. That homosexuals cannot, by definition, engage in procreative sex excludes them from the marital union. This argument is the same as the one used to bar homosexuals from the right to privacy; it defines marriage strictly in terms of the capability for couples to engage in heterosexual, procreative sex. Still, as Bell and Binnie note, such a construction *may* create some loopholes that expose the arbitrariness of the way that marriage is legally defined:

By having to draw a boundary around marriage defined in relation to reproduction, it excluded involuntarily childless heterosexual couples, and its tortuous attempts to bring them in (by reference to medical technology and the *potential* for reproduction) threatened to open a door for same-sex couples (who could equally use medical technologies to overcome biological barriers to reproduction). As with legal definitions of sodomy…the precariousness of the homo-hetero binary is exposed; in this case, it is heterosexual identity that comes to be defined by conduct…Such problematic defining of sexuality exposes the constructedness of categories in law (2000, 56-7).

In “defending” marriage, then, the state courts and legislatures, as well as Congress, articulated the meanings of both heterosexuality and homosexuality in terms of sexual practices and the ability to reproduce.
Such an articulation performs two things: first, it defines what marriage is; second, it constructs essential conceptions of identities that either conform to or deviate from this definition. It is this definitional power that is crucial in the construction and regulation of homosexual identity, as Calhoun attests:

> [P]ortraying gays and lesbians as persons with traits that make them naturally unfit for family life has been central to the social construction of what it means to be lesbian and gay. Constructed as outlaws to the family, lesbians and gays have lacked the cultural authority that heterosexuals have to define and redefine what marriages and families are…*definitional authority* over what counts as marriage or family is even more important than the right to same-sex marriage (2000, 131).

Calhoun’s discussion also speaks to another key aspect of the construction of sexual identities: not only does the law characterize homosexuality in terms of sexual conduct, but an entire constellation of traits are ascribed to this characterization. Gay and lesbian couples are characterized as “unfit for family life” as a function of their inability to “naturally” procreate together. This includes moralizing the “homosexual lifestyle” so that gay men and lesbians are seen as contributing to the moral degradation of the marital institution and family life in general. More specifically, gay and lesbian couples are portrayed as incapable of raising children in a “healthy” home environment; instead, some argue that gay and lesbian parents will contribute to their children’s delinquency and even “turn” them gay. While this sentiment is not necessarily a part of DOMA or the state legislative and judicial reviews of same-sex marriage, it contributes to and is fueled by the definitional authority exerted by these institutions. As Calhoun contends, it is this definitional authority that is so critical to the regulation of sexual identities – it constructs those very identities and constitutes the means and parameters by which they are regulated. This notion of definitional authority also echoes Chambers’ (2003) concerns with DOMA’s role in “fixing” identities and meanings. The role that definitional authority plays in constructing and regulating sexual identities is an indispensable part of rights discourse; at the same time, it is one
of the primary reasons that this discourse limits the possibilities of freedom for sexual minorities and marginalized identities in general.

To explore the state’s growing definitional authority over sexuality, as well as the discursive regulation of homosexuality, in particular, I would like to turn our attention to a specific case involving the imposition of a classificatory system upon and in spite of bodily transformations. This case also reflects the broadening realm of law and politics that adjudicates matters involving sexuality and marriage. Such matters have taken on national and international importance since the authority to define what constitutes a legitimate marriage directly impacts issues of immigration and citizenship. Consequently, such issues go beyond domestic politics and cut across national borders. One might not think that the denial of citizenship for a gay or lesbian foreign partner happens all that often and that this may, therefore, be a somewhat inconsequential problem. In fact, this is a persistent problem for US immigration policy; furthermore, it speaks directly to tensions between state and federal law concerning the classification of transgender individuals who undergo sex reassignment surgery, as well as their marital status. The case of Donita Ganzon and Jiffy Javellana helps to illustrate the extent of this definitional authority and the ways in which it acts as a limit in rights-based discourse.

My retelling of this case comes from Lisa Katayama’s report for Mother Jones, and is as follows. In June of 2004, Donita Ganzon’s Filipino husband, Jiffy Javellana, applied for a green card to secure his permanent residency in the US. Ganzon, also a Filipino by birth, was already a US citizen. During the course of her husband’s application, the US Citizenship and Immigration Services interviewed Ganzon. In this interview, Katayama reports that Ganzon “casually mentioned to an immigration officer that she’d had a sex change operation years before” (Katayama, 2005). This immediately disqualified Javellana for a green card, as Katayama
explains: “Citing the Defense of Marriage Act of 1996, which defines marriage as strictly
between a man and a woman, the CIS – formerly the INS, and now operating under the aegis of
the Department of Homeland Security – argues that Ganzon’s and Javellana’s is a gay marriage –
and hence, under federal law, no marriage at all” (2005).

This is not the only case that deals with such issues. According to Katayama, “Ganzon’s
case is one of at least ten currently relating to marriages involving a transgender partner, half a
dozen of which touch on immigration rights” (2005). Still, one might argue that these numbers
may pale in comparison to the overall numbers of individuals seeking to immigrate into the US
and gain full citizenship status. Such rare cases hardly merit our attention, one might say.
However, the prospect for this being a much larger problem is clear when one considers the
number of individuals who are transgender. According to Katayama, “An estimated one in 2,000
people undergo male-to-female sex reassignment surgery, but the incidence of individuals with
unmatched gender and sex is presumably much higher once you factor in those who are unable
or unwilling – for social, cultural, physical, or financial reasons – to have surgery” (2005).
Considering that the population of the United States recently reached three hundred million, that
is an estimated 150,000 people who have had surgery to become females. Katayama continues
by citing one of Ganzon and Javellana’s attorneys, Debra Davies-Soshoux: “‘Being transgender
is more common than cystic fibrosis…but it has to do with sex, and people in this country are
uncomfortable with anything that has to do with sex’” (2005). Taking these numbers into
account, it should be more than evident that the legal status of transgender people will persist to
be a problem, and that this problem will be heightened when it comes to the issue of marriage as
the federal government attempts to legislate what constitutes a legitimate union between two
people and what does not.
Part of this problem stems from tensions between state and federal law, the root of which seems to be definitional disparities regarding what it means to be a man and a woman. I will discuss below the problematics of the desire to name and define individuals so that they fit into stable preexisting categories, but for now let us assume that such definitions and fixed categories are absolutely necessary for the law to function. In Ganzon’s case, she was identified as a male at birth, lived as such for 34 years, and then underwent sex reassignment surgery in 1981 in the US. She identifies herself as a woman, as does her husband, and “her driver’s license, marriage certificate, and passport all have her down as a woman” (Katayama, 2005). In fact, there are twenty-three states that recognize a union between two people, in which at least one person is transgender, as a heterosexual marriage (2005). Nevada and California are two of these states, and it was in Nevada that Ganzon and Javellana were married, while they currently reside in California.

Yet, the federal government, operating primarily through the Department of Homeland Security, is increasingly trying to trump state authority in the matters of marriage. The CIS becomes an apparatus through which this new federal authority is exerted: “The CIS is trying to override a state law by creating federal guidelines that would, for immigration purposes, withhold federal recognition of these marriages” (Katayama, 2005). Clearly, there are tensions between state law and federal law, tensions created by the definitional discrepancies between the two levels of government regarding gender attributes and sexual orientation. “[T]he federal government,” as Katayama notes, “has lately taken an interest in defining the marriage rights of transgender people – or rather defining them away” (2005). However, these definitions are not just about regulating relations between people; they are essentially about defining who a person is, making he or she classifiable and, ultimately, identifiable. This power to name and classify
brings the sexual subject into existence, and this is another reason why this case is so important to my examination of gay marriage, its limits, and the limits of the rights-based discourse in which it is ensconced.

This case is all the more striking when we consider its similarities to that of Herculine Barbin, a 19th century hermaphrodite who was labeled as a female at birth and then reclassified as male in his/her twenties. Although Barbin did not undergo sex reassignment surgery, his/her positioning as a sexually “amorphous” individual who gains a sexual identity through the imposition of feminine/masculine definitions is analogous to the legal definitions imposed upon Ganzon by the state. The primary and most salient difference between these two cases is that Barbin’s physical attributes were in question, and were thus subjected to medical examination, interpretation, and definition, while Ganzon’s body was inscribed with meaning because her sexual desires did not necessarily match her physical attributes. In other words, Barbin’s body was the primary target of power, while regulatory power targeted Ganzon’s desires. This reflects Foucault’s genealogy of power relations, in which disciplinary power – which targets the body and its behavior – gives way to bio-power and the regulation of desire itself.

Furthermore, Butler (2004) argues that state recognition of the legitimacy of marriage is, itself, a form of regulating desire. She argues that, “The state becomes the means by which a fantasy becomes literalized: desire and sexuality are ratified, justified, known, publicly instated, imagined as permanent, durable” (2004, 111). She adds, “And, at that very moment, desire and sexuality are dispossessed and displaced, so that what one ‘is,’ and what one’s relationship ‘is,’ are no longer private matters” (2004, 111). This is clearly evident in the case of Ganzon, where the state publicly manages the meanings of her desire, anatomy, and the nature of her relationship. Specifically, in the case of individuals who are transgender and undergo sex
reassignment surgery, states like Nevada and California bring into discursive existence heterosexual subjects as a matter of their bodily transformations. On the other hand, the federal government is attempting to impose a new set of definitions upon these individuals, primarily through what is perceived as a disjunction between sexual desire and physical attributes. The state is thereby bringing into existence homosexual subjects through the juridical regulation of desire in conjunction with its bodily manifestation/transformations.

We can see, then, that it is less the materiality of transformed bodies than it is their sexual desires that are relevant to the classificatory system bringing these subjects into existence as sexual beings. Yet, it is not that the materiality of the body does not matter; instead, the body becomes the site where subjectivity is discursively imposed, rendering it intelligible. The body (and, consequently, any transformations that it undergoes) is given meaning through the deployment of definitions and categorizations that subject it to numerous regulatory practices. This gets at the heart of the paradoxical relation between recognition/inclusion (in this case, in the form of the state’s recognition of legitimate marriage) and appeals to a juridical discourse of rights upon which such political and public legitimacy is predicated.

**Marriage Beyond the Limits of Rights Discourse?**

Marriage must be disarticulated from rights-based discourse for it to begin to address the concerns of opponents such as Warner and other anti-assimilationists. This would reduce the ability for essentially heteronormative institutions to impose sexual and marital definitions upon gay men and lesbians seeking marriage. Much as Marx argued that political emancipation could only go so far in truly liberating humanity, authors who are cognizant of the limitations of the juridical discourse of rights often argue that, at best, such a discourse can only go so far as to
include marginalized sexual identities in its dominant institutions. For many gay and lesbian couples this is all they want – to be equally included in the institution of marriage and to share in the benefits that come with such legitimate recognition. As discussed above, some even hope that this will revolutionize the way we understand marriage. However, such appeals also run the risk of reaffirming the hegemonic discourse of rights and the norms upon which it is grounded. Citing the contributions of Critical Legal Studies (CLS) to an understanding of the limitations and paradoxes of rights-based discourse, Hunter contends that, “the American political system has enormous capacity to absorb and co-opt seemingly radical demands for change; to truncate the range of political discourse to fit the boundaries of arguments for individualized, atomized entitlements; and, ultimately, to legitimate hierarchies of power, which rights claims can amend but never overturn” (1995, 120). She goes on to argue that, “The political viability of rights-based movements depends on an acceptance – and thus strengthening – of the existing system, which in turn preserves patterns of dominance by some social groups over others” (1995, 120).

This gets at the divide between legal-reformist vs. “radical” action arguments that Bell and Binnie (2000) discuss. The central paradox in these arguments concerns the transformative possibilities of same-sex marriage, in that claims for inclusion may reaffirm marriage by further marginalizing the unmarried and shift focus, or at least ignore, the economic aspects of marriage (Bell and Binnie, 2000, 58-9). Moreover, the Bell and Binnie contend that it also ignores popular discourse concerning “romantic love and commitment” (2000, 59). They argue:

A focus exclusively on challenging the legal discourse around marriage, therefore, falls short of considering which aspects of popular discourse are contested or reaffirmed by such a move. Since popular discourses then spill over into political and legal process…strategies for change need to consider the many meanings of marriage (and non-marriage) that contribute to its social (as well as legal) status (2000, 59).
Again, this goes back to Butler’s concern with the issue of intelligibility. By focusing on legal
discourse and appeals for inclusion/recognition via rights, the “popular” discourse of what
constitutes intelligible (and, therefore, legitimate) relations of intimacy and kinship is left
unquestioned. As a result, an entire field of intimate and sexual relations goes without public
acknowledgment, and, consequently, these relations go without accompanying political, legal,
and economic protections and benefits.

But, beyond this political and social conundrum, we are faced with another, perhaps
deeper, paradox. Drawing from Foucault’s critique of the repressive hypothesis, and Butler’s
analysis of this critique, we see that this subaltern field of sexual identities is, in many ways,
dependent upon the hegemonic sexual and legal discourse that attempts to regulate and repress
their very existence. We know from Foucault that power is productive, and not just oppressive;
because of this, the power relations that define and regulate sexual identities also help to bring
these identities, as well as any “deviant” sexual identities, into being. Butler argues that, “for
heterosexuality to remain intact as a distinct social form, it requires an intelligible conception of
homosexuality and also requires the prohibition of the conception in rendering it culturally
unintelligible” (1999, 98). Thus, the cultural dominance of heterosexuality depends on the
simultaneous production and repression of homosexual identity; it needs, with no pun intended, a
significant other that is perpetually reasserted and prohibited. There is a flipside to this coin as
well: homosexuality, then, depends on this hegemonic discourse to come into being, and so too
do any other different forms of sexuality and sexual identities. These subaltern identities exist as
a remainder of the hegemonic discourse that keeps heterosexuality dominant. They may “exist”
as only a pure possibility, but again, this possibility is entirely contingent upon the productive
capacities of power. Again, this is the realm of the “never will be and never was” that Butler discusses in *Undoing Gender*.

In the context of my analysis, juridical discourse has become the primary means of constructing and regulating sexual identities. Consequently, it is this juridical discourse of rights that marginalizes and disenfranchises gay men and lesbians, and it is this discourse that must be resisted, if not overcome. But, since this discourse is also crucial to the production of sexual identities, does it even make sense to talk of resistance and refashioning claims for recognition and inclusion? Could anything possibly stand beyond rights-based claims for recognition and inclusion, and what might happen to the institution of marriage if it is truly challenged beyond its legal construction? Much of the following chapter is devoted to trying to answer the first part of this question. However, I would like to take a moment here to address its second part and think through a way of conceiving publicly recognized and protected forms of intimate sexual relations outside the bounds of the legal construct of marriage.

We can begin by looking at the underlying principles of queer critiques of marriage to gain some insight into what an alternative conception of the interrelationship among sexuality, marriage, and citizenship might look like. Meeks and Stein enumerate a set of four assumptions that they contend are shared by queer critiques of marriage:

1. Queer oppression is the result of more than the actions and beliefs of bigoted individuals. Oppression results from the systematic and privileging of a narrow range of sexual practices and identities.

2. Marriage is a political institution that has been used to disqualify queer people from full citizenship. Marriage is central to the maintenance of homosexual oppression and a broad range of social hierarchies. The cultural images associated with ‘family values’ are used to pathologize sexual and intimate differences.

3. Queer politics is transformational. Queer politics should not simply secure rights for lesbians and gay men, but transform social institutions and dismantle socially patterned inequalities. Queer sexuality is thus inescapably political.
4. The queer community fashions new forms of intimacy. The proliferation of sexual difference is the only way to challenge heterosexuality and the normalizing politics of the mainstream gay community (2006, 145).

These assumptions contribute to an understanding of a political project that challenges the institution of marriage without relying on appeals to legal rights for inclusion; furthermore, they also foreshadow a conceptualization of democratic politics that is more pluralistic.

I believe that to act on these assumptions of queer critique (especially in regard to gay marriage), and to begin to realize the potential of a more pluralistic politics, we must continually contest the limits of rights-based discourse and attempt to disarticulate the struggles for recognition and inclusion from necessarily relying on this discourse. This means that part of this political project must essentially be about permanent critique (in Foucault’s words) and on-going contestation. But, critique is not enough. To this we must add the ability to build a political project that embraces difference – that actually takes difference as its starting point and fosters an ethos of critical responsiveness. Butler, for example, argues in terms of reworking, if not undoing, the hegemonic conception of marriage, “For a progressive sexual movement, even one that may want to produce marriage as an option for nonheterosexuals, the proposition that marriage should become the only way to sanction or legitimate sexuality is unacceptably conservative” (2004, 109). In other words, we must look beyond marriage as the primary institution for the distribution of certain rights and benefits. To accept, without question, that marriage should remain the central institution for public recognition and state legitimation of intimate relationships marginalizes and disenfranchises all other forms of sexual relations. Thus, Butler asks what the extension of the marital norm would do to “the community of the nonmarried, the single, the divorced, the uninterested, the non-monogamous,” and how it would reduce the legibility of the entire sexual field (2004, 109).
It seems, then, that the first thing that must be done to begin dealing with the
problematics associated with extending the norm of marriage is to recognize, as Michael Warner
does, that marriage is an ethical problem:

Because the institution of marriage is itself one of the constraints on people’s
intimate lives, to judge the worthiness of the institution is not to condemn the
people in it. But it does mean that marrying should be considered as an ethical
problem. It is a public institution, not a private relation, and its meaning and
consequences extend far beyond what a marrying couple could intend. The
ethical meaning of marrying cannot be simplified to a question of pure motives,
conscious choice, or transcendent love. Its ramifications reach as far as the legal

From this recognition of marriage as an ethical problem, I believe that there are two interrelated
means of addressing this problem: first, as Butler and Warner argue, the rights and benefits
associated with marriage must be extended beyond that institution, that is, marriage must be
dislodged from its centrality in modern democratic conceptions of citizenship; second, the forms
of sexual and intimate relations that are legitimated must be expanded. Meeks and Stein
emphasize the need for the latter in terms of pluralization: “In addition to critiquing the forces
that limit choice and autonomy, then, it is also necessary to work toward pluralizing the forms of
sex, intimacy and emotional commitment the state will recognize and endow with positive legal
protections” (2006, 151). This is suggestive of Connolly’s work on pluralization, which I now
turn to in the next chapter.
Chapter 5

Towards a Democratic and Pluralistic Ethos

Democracy does not speak in unison; its tunes are dissonant, and necessarily so. It is not a predictable process; it must be undergone. It may also be that life itself becomes foreclosed when the right way is decided in advance, or when we impose what is right for everyone, without finding a way to enter into community and discover the “right” in the midst of cultural translation. It may be that what is “right” and what is “good” consist in staying open to the tensions that beset the most fundamental categories we require, to know unknowingness at the core of what we know, and what we need, and to recognize the sign of life – and its prospects.

– Judith Butler,
*Undoing Gender*

Democratic Negotiations of Difference

In his essay, “Beyond Good and Evil: The Ethical Sensibility of Michel Foucault,” William Connolly carries out a number of interventions into the works of both Foucault and his predecessor, Nietzsche, in order to elucidate an ethical sensibility grounded in genealogy, an active cultivation of the self in relation to an ethos of pluralization, and agonistic respect of otherness and competing claims to moral/ethical authority. As part of this project, Connolly attempts to “locate this sensibility more actively on a political register” (1993, 379). To do so, he looks to the politicization of what he considers to be Foucault’s ethical sensibility. While recognizing the lack of an overt democratic project in Foucault’s work, Connolly nevertheless teases out “correspondences…between the ethical sensibility cultivated by Foucault and an ethos of democracy they invoke (1993, 379). Within this context, Connolly differentiates between democracy as a mode of governance and democracy as a practice of constructive political and social contestation:

A viable democratic ethos embodies a productive ambiguity at its very core. Its role as an instrument of rule and governance is balanced and countered by its logic as a medium for the periodic disturbance and denaturalization of settled identities and sedimented conventions. Both dimensions are crucial. But the
second functions politically to extend the cultural effects of genealogy, to open up the play of possibility by subtracting the sense of necessity, completeness, and smugness from established organ-izations of life” (1993, 379).

Finally, and I want to emphasize this last line, Connolly states:

If the democratic task of governance ever buries the democratic ethos of disturbance and politicization under the weight of national consensus, historical necessity, and state security, state mechanisms of electoral accountability will be reduced to conduits for the production of internal/external others against whom to wage moral wars of all too familiar sorts (1993, 370-80).

We must, according to Connolly, be aware of the dangers that accompany a focus on the institutionalization of democratic practices of governance at the expense of fostering the kind of micropolitical democratic milieu that productively sustains contestation and encounters with difference.

As a result, we must also resist the desire to theorize a political project with the intent of constructing democratic institutions and modes of governance capable of alleviating difference by simply granting greater inclusion and building consensus; such a project would be idealistic and, ultimately, self-defeating in its continual production of subjugated others. We cannot focus our efforts at refashioning state forms of governance. In her analysis of the “double binds” of recognition, Patchen Markell argues that such an analysis is misplaced, as Foucault famously said in terms of theorists’ attempts at cutting off the king’s head, and that democracy must be imagined “outside the frame of sovereignty” (2003, 188). It is in this spirit that I undertake my analysis in this chapter. In other words, rather than envision a democratic politics within the frame of sovereignty, in which claims for protection, equality, recognition, and inclusion are bound within the juridical discourse of rights, I would like to shift attention to a micropolitics intent on cultivating the kind of ethical sensibility Connolly endorses – one that productively
engages difference and the paradoxes of modern political life and seeks to instill what Connolly refers to as a deep pluralism.

In this light, the previous chapters should be understood not just as critiques of rights-based discourse, but also as explorations of the limitations and paradoxes of juridical power and the sovereign state more generally. Rights-based discourse, which promises formal equality but may serve to only entrench extant inequalities, is embedded in juridical power and the authority of the state. Ultimately, these critiques expose the limits of appealing to the state for inclusion, equality, etc. This is particularly true when it comes to appeals made through legal institutions, which are often the main avenue of recourse for marginalized identities when democratic politics are incapable (or are too slow) to manifest change. Accordingly, I believe that, when attempting to theorize a more democratic politics, the aim of such attempts should be the re-invigoration of a democratic ethos rather than the construction of new (and perhaps idealized) democratic institutions of governance. In other words, I want to resist articulating a vision of what a democratic state should look like. In an interview, which Connolly’s ethical analysis also draws upon, Foucault states that the questions he asks “do not tend toward the realization of some definite political project,” and that, “the forms of totalization offered by politics are always, in fact, very limited” (1984b, 375). Thus, like Foucault and Connolly, I am not presenting a totalizing politics that simply extends the bounds of inclusion and recognition to encompass marginalized and excluded groups.

But, this is not an abandonment of the political, per se, nor is it an attempt to drive a further wedge between the state and civil society, or politics and culture, or the public and private (or whatever dualism one might insert here). I do not want to fall prey to the “poor reading” of Foucault that, as Brown and Halley contend, combines his genealogy of biopower
with his call to “cut off the king’s head” “to imply that law has been historically superseded by nonlegal forms of power” (2002, 11). Instead of merely shifting analysis away from the state, I want to interrogate how micropolitics may promote a democratic ethos that engages paradox as a site of possibility for agency (Butler 2004, 3). I understand this notion of an “ethos” through Foucault’s likening of modernity to an attitude: “And by ‘attitude,’ I mean a mode of relating to contemporary reality; a voluntary choice made by certain people; in the end, a way of thinking and feeling; a way, too, of acting and behaving that at one and the same time marks a relation of belonging and presents itself as a task. A bit, no doubt, like what the Greeks called an ethos” (1984c, 39). The kind of ethos that I am calling for should not be construed simply as a call for increased tolerance. While tolerance may seem admirable, it is too passive of a political activity to foster the kind of engagement necessary to promote pluralization. Furthermore, a discourse of tolerance often serves to further delineate between the “normal” and the “deviant,” thereby legitimizing the state to act on behalf of the hegemonic norm (I will return to this argument below).

A democratic ethos, then, is a way of acting and behaving that promotes forms of political membership in which individuals engage each other based on their differences and not in spite of them. More specifically, rather than attempting to resolve the paradoxes posed by rights-based discourse and overcome its limitations, I would like to explore the productive possibilities of this ethos in developing a pluralistic society within the context of the paradoxes of juridical power and subject formation. I believe that these possibilities may originate with the “elements in the ethico-political sensibility of Michel Foucault” that Connolly identifies:

[G]enealogies that dissolve apparent necessities into contingent formations; cultivation of care for possibilities of life that challenge claims to an intrinsic moral order; democratic disturbances of sedimented identities that conceal violence in their terms of closure; practices that enable multifarious styles of life
to coexist on the same territory; and a plurality of political identifications extending beyond the state to break up the monopolies of state-centered politics (1993, 381).

I believe that the previous chapters of this work have already undertaken some of these elements, particularly in terms of exposing the contingency of identity and disturbing the ways in which they are sedimented through various aspects of juridical rights-based discourse. The analyses I have presented so far have intended to expose the paradoxical limits of juridical power in constructing and regulating sexual identities as democratic citizens. Now it is time to cut off the king’s head, to turn our attention away from critiques of juridical power and the limitations of rights-based discourse in which democratic citizenship is circumscribed. Rather, we must grapple with the cultivation of a democratic ethos that supports deep pluralism, and we must examine the ways in which such an ethos may refigure our conception of citizenship and inform democratic institutions and practices.

I would like to begin this chapter by briefly revisiting the problematics associated with juridical power and the discourse of rights. Marx and Foucault provide the basic theoretical frameworks that help to reveal these problematics; however, I also employ analyses performed by Patchen Markell and Wendy Brown who utilize Marx and Foucault to probe the limits of such interrelated issues as recognition and tolerance. Following this, I attend to these problematics by exploring, along with Connolly, the democratic possibilities in Foucault. Foucault’s work on ethics and micropolitics lends itself to the development of a democratic project operating at the site of the self. Accordingly, this project is not intent on refashioning the institutions of democratic governance, although this may certainly be the outcome of cultivating an ethos that sustains difference, promotes creative and fruitful contestation, and proliferates the means of political engagement. Finally, as part of the development of a democratic ethos, I want to delve
into how this project coincides with and supports Connolly’s vision of pluralism. I believe that this notion of pluralism is able to navigate the terrain of political paradox endemic in the juridical discourse of rights; in fact, I contend that pluralism takes paradox as its starting point, and, instead of seeking means of resolving such paradoxes, pluralization constantly negotiates the tensions between identity and difference, repression and subject formation, regulation and recognition/inclusion.

Rights Redux

I begin this chapter with a discussion of the dilemmas confronting the politics of recognition in order to revisit many of the main themes from the previous chapters, particularly the limits of state-conferred rights and the paradoxes of recognition/inclusion within that juridical discourse of rights. I have already problematized the notion of identity that operates at the heart of the politics of recognition, and Chapters 3 and 4 address some of the specific pitfalls and paradoxes that beset gay and lesbian identity-based claims for recognition/inclusion in contemporary juridical discourse; however, in this section I want to parlay the theoretical impetus for those critiques into an overt discussion of why the state cannot be the source of hope for marginalized groups who aspire for a more democratic and pluralistic society. As part of this discussion, I will show how recognition and tolerance are dependent upon state power, and how, consequently, they cannot account for the kind of democratic ethos that will support pluralism.

In her work, *Bound by Recognition*, Patchen Markell examines the problematics of recognition in modern political movements. Her analysis is framed by two sets of questions. The first set, drawing upon a lineage of thought traced back to the Greek tragedians to Hannah
Arendt, is primarily ontological and address such questions as, “What would the world have to be like for its vision of successful mutual recognition to be possible, or even intelligible?” and “[D]oes the pursuit of recognition, for all its democratic good intentions, actually blind us to certain ineliminable, and perhaps also valuable, aspects of our own situation?” (2003, 4). The second set of questions draws from Marx: “From this perspective, the crucial questions to be asked about the politics of recognition concern its presuppositions about the nature and sources of injustice in relations of identity and difference” (Markell, 2003, 4). Within the context of these two sets of questions, Markell emphasizes the troublesome relationships that sovereignty and the state have with the politics of recognition. Specifically, she argues that another kind of misrecognition apart from that of identity beleaguers the politics of recognition; this other sort of misrecognition deals with the “failure to acknowledge one’s own basic ontological conditions – and that these arise from the fact that the pursuit of recognition expresses an aspiration to sovereignty” (Markell, 2003, 10). Using Arendt to problematize sovereignty, Markell contends that we should be aware of how agency constitutes identity, that is, the sovereign self, and not necessarily vice versa.

The predominant belief that identity is the source of agency presents a problem to Markell. If the ability to act originates with an already defined core identity, then claims of misrecognition, exclusion, and injustice will always focus on issues of what Markell refers to as spatiality. In other words, misrecognition (or the complete lack of recognition) of that core identity will always be understood in terms of being barred access to something, whether it be rights, physical protection, or literal entrance into some space or relationship. This attention to spatiality is misplaced insofar as it overlooks concerns dealing with temporality, or the ways in which identities come into being and coalesce (or even fragment) through time. Thus,
misrecognition understood in temporal terms means that identities are denied the ability to even develop and express themselves. This kind of misrecognition – one that concentrates on issues of spatiality at the expense of issues of temporality – ignores the ontological conditions of and impediments to one’s becoming.

However, I believe that Markell suffers from a form of misrecognition herself. Markell provides an impoverished notion of subject-formation by failing to recognize the ways in which identities come into being as a matter of those very regulatory discourses that seemingly repress, subjugate, and marginalize. Invoking both Foucault (particularly his critique of the repressive hypothesis) and Butler here would help to illustrate not just how agency constitutes identity, or how identity forms through time, but how the notion of the “sovereign subject” is itself a construct produced by a number of external intervening forces. Markell does go some way in incorporating Foucault’s critique of those “misguided” analyses of sovereign power in her argument, but never seems to quite bring it into the context of subject formation. This is why I believe that Butler’s work on gender and sexuality would contribute greatly to Markell’s understanding of the paradoxes (or what she refers to as the “double binds”) that riddle the relationship between identity and the politics of recognition (paradoxes that I discussed in Chapter 2).

But, let us set aside this criticism for the moment and turn to Markell’s analysis of the role of the state in the politics of recognition. She conducts this analysis, in large part, through the framework of Marx’s argument in “On the Jewish Question.” Like Brown’s work in States of Injury, Markell’s close examination of Marx’s text reveals the ways in which guarantees of equality and freedom made via the state may actually entrench existing inequalities in the realm of the social. In fact, she does a nice job of invoking Marx to demonstrate how the secular split
between public and private (or the state and civil society) is really not a split at all. She argues, in this context, that the state is not an external mediator of the clashes in civil society: “To the limited extent that the state ‘resolves’ struggles for recognition, it does so not as a deus ex machina that appears from outside the social, miraculously transcending its conflicts once and for all, but by acquiring and maintaining a hegemonic position in the midst of the social” (Markell, 2003, 27). Later, she explicitly argues that, for Marx, civil society and the state are not independent of one another: “Civil society’s material, ideological, and affective dynamics continue to sustain and shape political life even while keeping it under a shadow of particularism; the institutions (and organized violence) of law and the state continue to sustain and shape civil society while also keeping it under a shadow of regulation” (Markell, 2003, 129).

The state, then, cannot be viewed as a neutral arbiter of social conflict; even when rights are attained in the name of equality and greater individual and group freedoms, the regulatory effects of these rights may very well enhance state power and serve to disenfranchise others in unforeseen ways. The regulatory powers of the law directly shape the contours of civil society by legitimizing certain forms of inequality and exclusion (even if unintentionally), while operating within the rhetoric of equality and freedom. We can see this very tension in Marx’s argument:

The state abolishes distinctions of birth, rank, education, and occupation in its fashion when it declares them to be non-political distinctions, when it proclaims that every member of the community equally participates in popular sovereignty without regard to these distinctions, and when it deals with all elements of the actual life of the nation from the standpoint of the state. Nevertheless the state permits private property, education, and occupation to act and manifest their particular nature as private property, education, and occupation in their own ways (1994, 8).

Essentially, the state mandates which forms of inequality will be permitted in the private sphere by deeming these forms to be non-political once formal equality has been established as a right
in terms of access to political participation. Thus, Markell states that, “Marx argues that political emancipation frees people only in an abstract and formal way, declaring differences in social status to be politically irrelevant while doing nothing to alter the social relations of power those differences express” (2003, 127). Such an argument is particularly useful to counter libertarian-style claims that issues such as gay marriage should simply be left to the discretion of private institutions (like the church), and that they are not matters of government involvement and regulation. Yet, unless the benefits attached to the institution of marriage are removed and distributed to people regardless of marital status (just for starters), such arguments in favor of privatization and government deregulation will simply reinforce social inequalities based upon sexual difference.

This is why Marx might have argued, along with the likes of Butler and Warner, that the struggle for same-sex marriage is limited, and perhaps misguided, within the current material and legal conditions of marriage itself. Marx writes: “The political revolution dissolves civil life into its constituent elements without revolutionizing these elements themselves and subjecting them to criticism” (1994, 20). Similarly, arguments in favor of gay marriage do not revolutionize the institution of marriage; it is simply placed right along side the other elements that Marx refers to as constituent of civil society – “needs, labor, private interests, and private rights” – which also serve as the presuppositions of the political state (1994, 20). We must question the very appearance of private rights, including the right to marriage, as the natural basis for the state rather than seek a greater scope of recognition and inclusion within these rights. Thus, Markell contends that when “faced with a relation of privilege and subordination, look for ways to dismantle or attenuate the privilege itself before (or while also) working to include a determinate group of previously excluded people under its protection” (2003, 181). Such a vision would
grant same-sex couples the right to marry while simultaneously detaching social and economic benefits from the institution of marriage so that they may be distributed regardless of marital status.

One of the obstacles to this double-move of inclusion and transfiguration is the inevitable conclusion by many people that such a movement would entail what they consider to be a devaluation of the institution of marriage. While this devaluation may already be in progress (thanks to climbing heterosexual divorce rates, television reality shows, and publicized Vegas shotgun weddings like that of Britney Spears), the move from allowing same-sex marriages to reworking the hegemonic position of the institution of marriage in both culture and politics would be an immense, if not unimaginable, proposition. Furthermore, might not the distribution of rights, even in this context, still face the troubles that both Marx and Brown identify, particularly in terms of the depoliticization of the subject and the subjugation of difference? Again, rights are granted only in a formal and universal form to the abstract citizen, and, as Marx argues, by virtue of these rights, egoistic man is presupposed as authentic and independent.

Thus, “[p]olitical emancipation,” or what we might regard as the conferral of rights to marginalized groups in the context of my argument, “is a reduction of man to a member of civil society, to an egoistic independent individual on the one hand and to a citizen, a moral person, on the other” (Marx, 1994, 21). Accordingly, rights relegate the concrete subject to the private sphere, where difference is allowed expression but is also subject to forms of inequality legitimized by the state. This is apparent in the gap between the Supreme Court’s confirmation of the right to privacy for homosexuals and its simultaneous and strenuous denial of the possibility of legalized same-sex marriage as a result of this verdict: the right to privacy allows
sexual difference to be expressed strictly in the private realm, but it does not open the door for more publicly acknowledged forms of sexual citizenship such as marriage.

*Tolerance as Governmentality, Tolerance as Limit*

How, then, might we deal with the obstacles confronting a politics that combines the forms of inclusion and reconfiguration envisioned by Markell? How do we overcome not only the aversion to including gay men and lesbians – or any marginalized identity group for that matter – in traditionally heteronormative institutions, but also the cultural and political problematics that inhibit the radical democratization of those institutions? We could begin by looking to a discourse of tolerance, since it has, as Wendy Brown notes, “become a beacon of multicultural justice and civic peace” (2006, 1). Tolerance would seem to promote a social environment in which individuals are more willing to negotiate animosities generated by different and competing identities. It would also seem that tolerance would generate the kind of political receptivity necessary to refashion institutionalized prejudices, inequalities, and exclusions – the kind of work called for by Markell that must accompany increased practices of inclusion. If this is the case and increased tolerance is a kind of panacea for the many ills of exclusion and mis/non-recognition, then it appears that the American body politic is already on its way. After all, the legitimization of civil unions for gay men and lesbians in a handful of states indicates an increased tolerance for “alternative” sexual lifestyles (even if these same populations will not tolerate same-sex marriage…but, maybe we just need to be patient and allow tolerance to continue to work on individuals’ levels of acceptance).

Tolerance also operates in a socio-political discourse that cannot be understood purely as an extension of state power. In this light, tolerance would appear to function as a counter-
hegemonic norm independent of, and perhaps counter to, state intervention. Brown understands tolerance to manifest through Foucault’s conception of governmentality, which shifts the locus of regulatory power away from the state and disperses it throughout society: “The state is not the wellspring or agent of all governing power, nor does it monopolize political power; rather, the powers and rationalities governing individual subjects and the populace as a whole operate through a range of formally nonpolitical knowledges and institutions” (2006, 79). She continues: “The ensemble of legal and nonlegal, pedagogical, religious, and social discourses of tolerance together produce what Foucault understands as the signature of modern governmentality…tolerance emerges as one technique in an arsenal for organizing and managing large and potentially unruly populations” (2006, 79). The discourse of tolerance, then, is dispersed throughout society along a number of disparate networks of power, and while these networks may not necessarily originate with the state, the discourse of tolerance serves to reinforce the state’s sovereign authority (the lingering role of the state is Brown’s primary corrective to Foucault’s decentered conceptions of power and governmentality).

However, tolerance does not emerge unproblematically as a facet of governmentality dealing with “potentially unruly populations.” As Brown goes on to argue, tolerance is limited in its ability to moderate difference and promote inclusion and equality; instead, it often acts as a force of normalization, serving to reinforce the hegemony of existing liberal democratic institutions: “tolerance as a mode of late modern governmentality that iterates the normalcy of the powerful and the deviance of the marginal responds to, links, and tames both unruly domestic identities or affinities and nonliberal transnational forces that tacitly or explicitly challenge the universal standing of liberal precepts” (2006, 8). This is reminiscent of the fears that anti-assimilationists have of the pro-gay marriage argument in that, for tolerance to be successful, it
must force differential identities into acceptable pre-existing categories; in other words, those who are considered deviant must assimilate to the extent that they can or face further marginalization. Thus, there is a limit to tolerance’s potential for a transformative politics because of the ways that it contributes to subject formation in relation to the norm. In this regard, Brown draws heavily from Foucault’s work on disciplinary power and the production of deviance.

Tolerance suffers from another limitation because of the way that it keeps claims for recognition and inclusion depoliticized and strictly in the private sphere: “since tolerance requires that the tolerated refrain from demands or incursions on public or political life that issue from their ‘difference,’ the subject of tolerance is tolerated only so long as it does not make a political claim, that is, so long as it lives and practices its ‘difference’ in a depoliticized or private fashion” (2006, 46). Because of this, I believe that the way in which tolerance operates in contemporary democratic politics, as revealed through Brown’s analysis, is paradigmatic of Marx’s critique of the secular split between the state and civil society. Drawing this critique into the context of late modernity helps to illustrate how tolerance reaffirms inequalities in civil society – inequalities that, as Marx identifies, act as presuppositions of the state. In contrast to Foucault’s account of governmentality and its “strategic diminution of the state,” Brown recognizes that tolerance discourse “shores up the legitimacy of the state and in so doing shores up and expands state power” (2006, 82). It does so precisely by relegating tolerance to the realm of civil society, that is, tolerance is a function of and response to secularization, which underpins the authority of the state. Brown’s discussion of tolerance and same-sex marriage helps to illustrate this point, as well as the specific limitations of tolerance discourse in sexual politics.
As we well know, secularism has relocated religious and moral discourses to the private sphere, and, in recent years, tolerance has become a more integral part of this secularization. While formal, juridical equality is guaranteed by the state, and social, economic, and cultural differences and inequalities are further entrenched in the private sphere, tolerance becomes the mechanism by which these differences are negotiated. Brown argues that the gay marriage debate is only possible because that very secularization of society opens up the possibility for private citizens to attack any exclusionary law that is grounded on a normative basis: “The campaign to legalize gay marriage is, in short, a campaign for inclusion that depends on there being a political-cultural hearing for a critique of state codification of masculinist and heterosexual norms in existing marriage law” (2006, 97). She continues: “Such a hearing is possible only when universal equality and inclusion have triumphed over other moral discourses constitutive of public life and state, when the commitment to juridical equality is the dominant chord in liberal public life” (2006, 97). However, Brown is also quick to note that those social and religious movements that oppose gay marriage also “[represent] a reaction to the emptying out of religious or cultural norms from state and public discourse” (2006, 97). The secular state has created the possibility for both movements: for the advocates of gay marriage, it has removed cultural and religious norms as impediments to formal, juridical equality, and it has opened up space for the critique of laws based on such norms; for opponents of gay marriage, it has created a vacuum in public discourse dangerously devoid of cultural/religious normative content that must be filled by their particular conception of universal morality.

The state is left in a somewhat precarious position, especially if it wants to preserve some of its normative foundations while maintaining the face of detached guarantor of formal equality and juridical rights (I use verbs that imply such a level of intention as “want” with hesitation, for
often state actors are not overtly aware of the ramifications of their words and deeds). This tension has been evident in the political and legal wrangling over the issue of gay marriage, and it is here that we can see tolerance invoked as a means of, in Brown’s words, “shoring up the legitimacy of the state.” Brown argues that the state uses the rhetoric of tolerance to navigate the terrain between refusing to recognize same-sex marriage and permitting (in some cases) private civil unions. By advocating tolerance without officially recognizing the legitimacy of gay and lesbian relationships, the state positions itself “as the potential peacemaker between the gay marriage advocates and the homophobes: it advocates tolerance of homosexuals as individuals while protecting the institution of marriage from the debasement feared in letting its gender economy slide” (Brown, 2006, 98). But, such toleration is to take place in civil society and is not a matter of public and state discourse.

Marx has shown us how, in the secular state, certain inequalities are shifted to the private sphere of civil society and are legitimated by the state’s very guarantee of equal rights; to that list, we can add the socio-economic inequalities associated with gender and sexuality, which coalesce around the institution of marriage. Now, we can see that marriage has been further entrenched as a source of inequality, and that tolerance has been integral in facilitating this entrenchment. Tolerance has become the means of both reaffirming the legitimacy of discriminatory marital practices and managing the resultant inequalities. The irony is that the state displaces the responsibility of tolerance on to private citizens in civil society and therefore does not work to establish equality, yet retains its position as sovereign authority precisely because of this displacement:

As the protector of heterosexual marriage and prerogative, the state itself does not and cannot stand for equality in the sexual field; and the tolerance it urges is not its own but is carried out by individuals toward individuals in the realm of the social, not the legal. Importantly, though, only by urging tolerance can the state
resecure legitimacy…while taking a position at odds with equality, and while taking a position that sides with one counterhegemonic movement against another. Thus, as tolerance substitutes for equal rights, this substitution is masked by its being performed by the citizenry rather than the state (Brown, 2006, 98).

If tolerance is a means of the state reasserting its legitimacy, and is in the service of heteronormative institutions as it is in this case, then it can hardly be the basis for the kind of project that calls for simultaneous inclusion in and transfiguration of the heretofore exclusionary institutions.

At best, tolerance merely assuages the hurt caused by institutional inequalities, with no corrective benefit; at worst, it is an active, albeit surreptitious, impediment to addressing entrenched and institutionalized inequalities based on difference. Brown seems to view tolerance as the latter, arguing that, “Tolerance can function as a substitute for or as a supplement to formal liberal equality or liberty; it can also overtly block the pursuit of substantive equality and freedom” (2006, 9). Furthermore, she identifies tolerance as antithetical to the kind of politics that I am trying to develop here:

The cultivation of tolerance as a political end implicitly constitutes a rejection of politics as a domain in which conflict can be productively articulated and addressed, a domain in which citizens can be transformed by their participation, a domain in which differences are understood as created and negotiated politically, indeed a domain in which “difference” makes up much of the subject matter (2006, 89).

Galeotti (2002) attempts to theorize a conception of tolerance that seems to attend to this problematic by focusing on toleration as a means of attaining greater social recognition, thereby disrupting the hegemonic norms upon which the liberal form of tolerance rests. She argues that, “When toleration as recognition legitimizes differences and identities as viable options within liberal society, then societal standards and conventions ought to be redrawn so as to make room
for the newly accepted identity” (2002, 170). I believe that this vision of tolerance would fit under the rubric of pluralism as part of the democratic ethos that I want to cultivate.

Consequently, by building off of Brown’s analysis, I want to ask how a political project can be sustained that attends to her vision of politics as a domain of productive conflict and transformative participation. I believe that such a project should also expose the paradoxes of identity/difference as well as the paradoxical relationship between subject formation and regimes of regulatory power. The goal is not to resolve these paradoxes, but to transform their institutionalization from a politics that primarily excludes, marginalizes, and disenfranchises on the basis of difference to one that engages difference and treats it as the basis of democracy rather than as the remainder of a politics in search of consensus. This, then, would be a democratic project that acknowledges the productive moments in its own regulatory apparatuses and cultivates a civic environment in which the resultant subjectivities may negotiate their differences. I believe that such a vision is implicit in Foucault’s work on ethics and micropolitics, and especially in Connolly’s notion of pluralism.

**Democratizing Foucault**

Let us consider the ways in which Foucault articulates a position in support of a democratizing and pluralistic ethos; doing so requires that we pay close attention to his arguments regarding the interrelationship of power, freedom, and, consequently, ethics – all of which center on the subject. This examination will help to illuminate how Foucault’s conception of the micropolitics of subject formation contributes to a democratic ethos in support of pluralization. Moreover, it will demonstrate the ways in which one can, and must, work within the strictures of existing power relations to transform oneself into an agonistic subject and open
the self to other and possible future subjectivities. We will be able to see, then, how the basis of a pluralizing and democratic ethos is laid when self-work is aimed at the cultivation of the agonistic subject within and because of forms of individuating power.

First, we must recognize that any form of resistance or transgression found in Foucault’s work does not imply a renunciation of power. Relations of power cannot be overcome; no “outside” can be sought. But, this does not necessarily limit the possibilities for freedom. In fact, according to Foucault, freedom is a presupposition for the exercise of power, and, in turn, power enables practices of freedom. Foucault states that, “freedom may well appear as the condition for the exercise of power,” and then adds, parenthetically, “at the same time its precondition, since freedom must exist for power to be exerted, and also its permanent support, since without the possibility of recalcitrance power would be equivalent to a physical determination” (2003a, 139). Certainly there are imbalances of power and relations of domination (the extremes being the rendering of what Foucault calls the “docile body”), but even in these moments the subject over whom power is being exercised retains the freedom to act contrary to and because of that power: “Power is exercised only over free subjects, and only insofar as they are ‘free.’ By this we mean individual or collective subjects who are faced with a field of possibilities in which several kinds of conduct, several ways of reacting and modes of behavior are available” (Foucault, 2003a, 139). This means that resistance and/or transgression must always be understood in terms of the subject’s ability to work upon itself and transform this work into the ability to act freely and ethically within and because of relations of power. Foucault’s later work focuses on those modalities of power that, in some ways, facilitate the subject’s ability to act by encouraging regiments of “self-work” (Barbara Cruikshank develops
this notion of self-work into an analysis of subject formation through modes of democratic self-
government, which I will return to later).

It is also important to recognize the interrelationship among freedom, power, and the
subject because it highlights the paradox of juridical power in modern democratic society:
inasmuch as it might regulate behavior and marginalize certain sexual subjects, juridical power
also helps to secure sexual identity and establish those conditions in which subjects can act
freely. We have seen in the previous chapters the ways in which juridical discourse produces
knowable sexual subjects (that is, the ways in which it functions as a form of individuating
power), as well as the ways that accompanying power relations target these subjects, rendering
them as either normal or deviant (and therefore deserving of full legal protections or not). Again,
as Foucault argues, power is not simply about saying “no;” it also has its productive capacities.
In fact, the form of power that Foucault concentrated on in his later works operates throughout
daily life to delineate individuality, contributing directly to subject formation: “[it] categorizes
the individual, marks him by his own individuality, attaches him to his own identity, imposes a
law of truth on him that he must recognize and others have to recognize in him” (130, 2003a).
This “necessary” attachment to one’s identity becomes the means by which subjects may be
regulated and even subjugated; but it also enables the subject to act freely in relation to power
and to work upon its own subjectivity.

It is the individuating form of power that has been the primary issue throughout this
work. Specifically, I have focused on the ways in which power, as a matter of juridical law, has
effected the truth of sexuality and inscribed this truth in the individual’s very being. It has
promulgated sexuality as the deep secret of our being, a secret that we must actively pursue so as
to gain a better and truer understanding of ourselves. As such, it has been linked to our identity
and has become the means by which we are publicly recognized and regulated. The juridical discourse of rights has been complicit in this linkage; it has helped to naturalize sexual identities through legal definitions (which also draw on a variety of other discourses, including medical and religious), and it has acted upon these definitions to regulate the behavior of individuals.

By Foucault’s account, we cannot hope to overcome the role of juridical power in modern regimes of governance and citizenship (even if that role is somewhat diminished in the face of disciplinary and bio-political regimes of power…although the regulation of sexuality seems to illustrate the integration of all three forms of power). Nor, as I have shown, is it enough to merely reformulate laws and create greater parameters for inclusion and recognition (in other words, we cannot just wait for the law to “catch up” to the demands for greater inclusion). Nor does tolerance provide an adequate corrective to the inequalities and paradoxes that are often maintained by the law. Instead of seeking to surpass juridical power or simply trying to reform it, the goal should be the kind of dual program that Markell advocates. Such a program would seek greater means of inclusion, while simultaneously working to contest and refashion the norms operating at the center of social and political institutions so that they are no longer sites of privileged citizenship.

Because a naturalized and universalized sense of identity often operates as the norm in constructing these institutions, I believe that this also means having to develop alternative and more immediate means of advocating pluralization to contest the sedimentation of these identities and norms. Furthermore, I believe that the cultivation of such an ethos could foster ways of creatively dealing with the paradoxes of juridical power (its dual role in subjectification and subjugation). By this I mean that a conception of the self embedded in an ethos of pluralization is more cognizant of its own contingency and is therefore more likely to be willing
to engage other differential identities rather than reject them or merely tolerate them. Such a
conception requires active work upon the self to nurture both an agonistic relationship with itself
and others. This brings me to what I believe are the democratizing and pluralistic capacities in
Foucault’s work on ethics and the care of the self – capacities that are embodied in the
development of the agonistic subject.

Because many of the forms of power in modernity aim at producing the truth of the
individual at the site of individual self-discovery – a process that naturalizes and universalizes a
certain sense of self-identity – Foucault argues that perhaps we should resist these modes of
power and the belief that “what we are” is fixed and immutable: “Maybe the target nowadays is
not to discover what we are but to refuse what we are. We have to imagine and to build up what
we could be to get rid of this kind of political ‘double bind,’ which is the simultaneous
individualization and totalization of modern power structures” (134, 2003a). This argument
implies that a liberationist (a term that Foucault would be hesitant to use) political project must
not just renounce state power:

The conclusion would be that the political, ethical, social, philosophical problem
of our days is not to try to liberate the individual from the state, and from the
state’s institutions, but to liberate us both from the state and from the type of
individualization linked to the state. We have to promote new forms of
subjectivity through the refusal of this kind of individuality that has been imposed
on us for several centuries (Foucault, 134, 2003a).

James Bernauer and Michael Mahon (2005) draw upon this notion of what we could be – the
promotion of new forms of subjectivity – to explicate what they call Foucault’s “ethical
imagination,” which consists of a stylization of the self that seeks to transgress the historical
contingencies of subjectivity.

Referring to Foucault’s essay “The Subject and Power,” Bernauer and Mahon also
contend that this transgression manifests in the form of an agonistic subject, one that is in a
position of “‘permanent provocation’ to the knowledge-power-subjectivity relations presented to us” (2005, 162). They continue: “Foucault’s ethics is an invitation to a practice of liberty, to struggle and transgression, which seeks to open possibilities for new relations to self and events in the world” (2005, 162). It is through this notion of an agonistic opening up to, or concern for, future possibilities of subjectivities that we can begin to see the democratizing and pluralistic vision in Foucault’s work. Such an ethos is rooted in the practices of freedom that, for Foucault, are born out of the reciprocal power relations that bring the subject into existence. This nexus between freedom and power is also the source of Foucault’s conception of ethics. Only in relation to and because of power can the ethical subject exist: the freedom to act, and to act ethically, is a product of the power relations in which the subject is immersed; conversely, power can only be exercised in relation to the free subject. For Foucault, ethics manifest in the form of the subject’s relation to itself, that is, in the work that it performs on itself to transform its subjectivity as a matter of those power relations. More specifically, the very possibility for practices of freedom – practices performed by the individual – lies in the “technologies of the self,” that is, “the way a human turns him- or herself into a subject” (Foucault, 126, 2003a).

These technologies “permit individuals to effect by their own means, or with the help of others, a certain number of operations on their own bodies and souls, thoughts, conduct, and way of being, so as to transform themselves in order to attain a certain state of happiness, purity, wisdom, perfection, or immortality” (Foucault, 2003b, 146). Foucault further characterizes these operations as a care or concern for the self. Because of this, he likens an ethics based on “technologies of the self” to the ethical system of ancient Greece, particularly that of Socrates (Foucault, 2003c). Accordingly, Foucault bases his ethics upon a conception of freedom that is achieved through an ascetic relationship with the self in which the individual governs his or her
own conduct, thoughts, body, etc. In modernity, these technologies are facilitated by an array of
discourses, apparatuses, techniques, and practices that circulate throughout numerous state and
social institutions – hospitals, schools, governmental agencies, etc.

By building off of his readings of Nietzsche, Foucault situates this notion of ethics within
genealogy. This means that Foucault’s ethics require work upon the self that is cognizant of its
own construction and historical contingency. Consequently, Connolly argues that, “these
techniques of the self,” which are derived from Nietzsche, “are designed to foster affirmation of
a contingent, incomplete, relational identity interdependent with differences it contests rather
than to discover a transcendental identity waiting to be released or to acknowledge obedience to
a commanding/designing god” (1993, 373). Foucauldian ethics do not merely advocate a selfish
attitude or the moderation of one’s own desires and conduct; instead, this ethical work on the self
entails recognition of one’s own contingent identity, which can be cultivated into greater
openness for differential identities. Thus, Connolly identifies four elements in Foucault’s
“ethical sensibility” that contribute to a democratic and pluralistic ethos:

1. Genealogical analyses that disturb the sense of ontological necessity,
historical inevitability, and purity of discrimination in established dualities of
identity/difference, normality/abnormality, innocence/guilt, crime/accident,
and responsible agency/delinquent offender.

2. Active cultivation of the capacity to subdue resentment against the absence of
necessity in what you are and to affirm the ambiguity of life without
transcendental guarantees.

3. Development of generous sensibility that informs interpretations of what you
are and are not and infuses the relations you establish with those differences
through which your identity is defined.

4. Explorations of new possibilities in social relations opened up by genealogy,
particularly those that enable a larger variety of identities to coexist in
relations of “studied” indifference on some occasions, alliance on others, and
agonistic respect during periods of rivalry and contestation (1993, 367-8).

Through Connolly, we can see how Foucault’s conception of ethics, and the kind of work
performed upon the self that it necessitates, contributes to pluralization – particularly in the way
that it prevents the individual from universalizing his or her own sense of subjectivity and imposing it upon others. This is key to cultivating an agonistic subject who is receptive to competing subjectivities.

In this light, I find the conception of agonism that is evident in Foucault’s work to be very similar to that of Romand Coles’ “agonistic receptive dialogue,” which is born out of Adorno’s negative dialectics. This dialogue advocates a “receptive engagement” of a plurality of subjectivities by opening “a greater space and desire for the ambiguous, the prolix, the paradoxical, the oblique” (Coles, 1995, 40). Although Foucault’s agonism is not primarily dialogical, in an interview with Paul Rabinow, he discusses the moral value of dialogue in “the search for the truth and the relation to the other” as opposed to the “parasitic figure” of polemics (1984d, 381-383). Furthermore, I believe that an extrapolation of his work on ethics and the care of the self reveals an implicit concern for others, which, to be more specific, manifests in the form of the kind of receptivity endorsed by Coles. Perhaps it would be more appropriate to say that Foucault’s concern is for “otherness,” that is, a concern for the ways in which others come into being and for an ethical treatment of the relationship between the self and the other. Thus, when Foucault advocates the promotion of “new forms of subjectivity,” he is implicitly arguing for an ethical relationship with the self that translates into receptivity for otherness.

Unlike tolerance, this is not merely a passive relationship. The kind of work upon the self that Foucault advocates requires active engagement with new subjectivities, and not just a distanced toleration of them. What begins as an internal agonism manifests outwardly as an agonistic relation with others. In part, this agonistic relation is due to Foucault’s characterization of the very nature of the relationship between power and freedom:

At the very heart of the power relationship, and constantly provoking it, are the recalcitrance of the will and the intransigence of freedom. Rather than speaking
of an essential antagonism, it would be better to speak of an “agonism” – of a relationship that is at the same time mutual incitement and struggle; less of a face-to-face confrontation that paralyzes both sides than a permanent provocation (2003a, 139).

Where power meets freedom, which by Foucault’s account is literally everywhere, the resulting tension is one of an agonistic relationship. If we combine this conception of an agonism between power relations with Foucault’s ethical work, then it is apparent that the self is the site of struggle and contestation between power relations, and it is precisely this struggle that frames the ethical subject. The point, then, is to cultivate that agonism into an active pursuit of a democratic and pluralistic ethos, that is, an ethos that takes the ethical subject (in the Foucauldian sense) as its starting point and encourages social and political engagement with different subjectivities through the very cultivation of the agonistic self. Furthermore, such an ethos would seek to channel these energies through democratic means to inform and transform the practices and institutions of democratic governance.

Thus, I argue that a democratic and pluralistic ethos comes into being through these conceptions of the agonistic subject and the micropolitics necessary for the subject to work upon itself. For example, Barbara Cruikshank (1996 and 1999) undertakes analyses along these lines by exploring the ways in which working on one’s own subjectivity cultivates democratic self-government. She argues that, “Democratic government, even self-government, depends upon the ability of citizens to recognize, isolate and act upon their own subjectivity, to be governors of their selves” (1996, 235). Furthermore, this entails “technologies of subjectivity and citizenship that link personal goals and desires to social order and stability, which link power to subjectivity’ (Cruikshank, 1996, 235). Cruikshank examines how individuals work on themselves through a variety of techniques, such as self-esteem programs, to promote self-government and, consequently, to help alleviate social ills such as drug abuse and dependency on welfare.
Similarly, I contend that the best hope for a pluralistic political project begins with the work that individuals are able to perform on themselves; work that is often facilitated through the various mechanisms mentioned above.

By invoking Foucault in her discussion of democratic citizenship and self-government, Cruikshank helps to elucidate the democratic possibilities in his work. Moreover, she highlights the fact that socio-political change does not come from the top down, but rather the bottom up: “The constitution of the citizen-subject requires technologies of subjectivity, technologies aimed at producing happy, active and participatory democratic citizens. These technologies rarely emerge from Congress; more often, they emerge from the social sciences, pressure groups, social work discourses, therapeutic social services programmes and so on” (Cruikshank, 1996, 247). I argue that not only can these technologies promote a care for the self that coincides with the dictates of democratic self-government, but they can also catalyze the necessary self-work for the cultivation of a pluralistic and democratic ethos. Thus, such an ethos is grounded in the development of the “self-styled” agonistic subject. Importantly, Cruikshank points out that the technologies requisite for this work are already in place. They do not originate in the form of the legal and political mandates passed down by the Supreme Court and Congress; instead, these technologies are dispersed throughout the social body in the form of a variety of micropolitical organizations, discourses, techniques, and practices. The task now is to examine how the Foucauldian conception of self-work can be translated into pluralization, and to explore what a democratic and pluralistic ethos entails.
Cultivating a Pluralistic Ethos

The form of pluralization that Connolly endorses helps to attenuate the paradoxes I have discussed in previous chapters. Because pluralization is an ethos that is cognizant of the tensions and ambiguities in politics, it demands that we attend to these paradoxes and work with them rather than through them or against them. Connolly’s conception of pluralization is like a permanent reactivation of democratic pluralism. He argues that, “preexisting pluralism provides new movements with funds of difference from which they proceed, subterranean connections from which responsiveness to them might be cultivated, and cultural continuities upon which new negotiations might build” (1995, xiv). However, he continues to argue that, “the culture of pluralism also engenders obstacles to new drives to pluralization that must recurrently be challenged” (1995, xiv). If this is the case, then pluralization must never rest upon its laurels. If we are to ward off the constant threats of the naturalization, marginalization, and possible domination of identities at the hands of regulatory power, then pluralization must continue as a process to build off of difference and revamp social relations. It is through “pluralistic enactment” that “new, positive identities are forged out of old differences, injuries, and energies” (Connolly, 1995, xiv).

Differences, injuries, and energies will continue to be the product of modern regimes of power in democratic society, including those juridical discourses that are intent on ameliorating differences and injuries; this is all inevitable. Yet, a democratic ethos of pluralization grapples with these paradoxical moments by creating avenues for new subjectivities and opening spaces for the negotiation of ever-evolving tensions. The “citizen-subject” (a term I borrow specifically from Cruikshank, 1999) of the pluralizing society is one who is actively involved in politics. This does not just mean regularly voting in elections or taking part in local politics, but
immersing oneself in a micropolitics that informs one’s beliefs, relations, activities, etc. Such micropolitics begin with a notion of self-artistry characterized in both Foucault and Connolly’s works. Furthermore, this “work on the self” contributes to the cultivation of what Connolly calls critical responsiveness, which is an integral part of pluralization. To explore the intersections of micropolitics, critical responsiveness, and pluralization, I would like to begin with a discussion of the self-artistry necessary for the development of this ethos.

In their introduction to the compilation *The Essential Foucault*, Paul Rabinow and Nikolas Rose present a succinct and lucid summation of the kind of transformative self-work called for by Foucault:

> What faces us, then, if we are to take historical ontology seriously, is not a grand gesture of transgression or liberation, but a certain modest philosophical and pragmatic work on ourselves: “a historical-practical test of the limits we may go beyond, and thus as work carried out by ourselves on ourselves as free beings.” A work, that is to say, which is both banal and profound, which we carry out upon ourselves in the very real practices within which we are constituted as beings of a certain type, as beings simultaneously constrained and obligated to be free, in our own present (2003, xxii).

The simultaneous banality and profundity of this work upon the self is, I believe, captured by Connolly’s discussion of relational arts of the self. In *Why I Am Not a Secularist*, Connolly couches these relational arts of the self in terms of developing an ethos of engagement, which, in turn, contributes to deep pluralization. These relations are banal in that they occur almost on a daily basis, often in the form of the most commonplace of encounters; however, they are profound in the impacts they can have on the individual in terms of changing attitudes and shaping beliefs. These relational arts can help to cultivate an ethos of engagement by refashioning the way in which the subject relates to the world. Individuals may open up themselves to alternative ways of being and systems of belief, accepting and incorporating some aspects into their own beliefs, while understanding yet ultimately rejecting other aspects.
Connolly (1999) provides an example of the way that such relational arts might operate. He asks his reader to suppose that he or she is someone who believes that death may only come naturally or when God deems it. Consequently, the reader would find doctor-assisted death to be abhorrent. But, through a series of encounters, this supposed individual might soften his or her stance, as Connolly elaborates:

Perhaps you attend a film in which the prolonged suffering of a dying person becomes palpable. Or you talk with friends who have gone through this arduous experience with parents who pleaded for help to end their suffering... You now visualize more starkly how contemporary medical practice often splits into distinct parts elements heretofore taken to constitute the unity of death itself. The brain may die while the heart still beats. Or the possibility of participating in cultural life may disappear while other signs of life persist... Through the conjunction of these diverse modalities of intervention, changes in the thinking behind your thoughts may now begin to form (1999, 147).

Ultimately, Connolly argues that these interventions might result in a more politically active subject who seeks to grapple with these uncertainties and reversals of thought, as well as engage others on the basis of these experiences.

We can imagine that one could undergo a similar process of relational arts of the self when it comes to confronting various opposing identities, much like tolerance has extended from beliefs to subjectivities. For example, we could construct a parallel narrative in terms of homosexuality. Say that an individual believes that homosexuality is morally wrong; this person finds the “gay lifestyle” repugnant and would view any public recognition and legitimization of same-sex relations as a moral threat to society. But, maybe this hypothetical person reads some articles recounting incidents of gay men and lesbians being barred from seeing their partners who were on their deathbeds. Something about these stories strikes this individual in a profound way; he or she may feel that it is wrong to be denied access to a loved one, even if that person is gay. Perhaps at another time in this person’s life a close friend decides to come out of the closet. This
person then watches as his or her friend must suffer through several painful ordeals – possibly telling unsupportive parents, or being harassed in public, or maybe even losing a job. Slowly our imaginary individual starts to see homosexuality in a different light. It is no longer a moral issue in the way that it was before for this person; instead, it is now a matter of real suffering and deprivations caused by a facet of one’s being. Maybe this person is remorseful for a homophobic joke he or she has made in the past and feels responsible for some of the hurt suffered by the friend. Again, we see a mixture of visceral reactions, deep emotions, and rational thoughts working upon one another as the individual grapples with the collision between experience and held beliefs.

In fact, Connolly presents a similar argument regarding the self-work that some heterosexuals undertake in his work *Pluralism*. He argues that straights can unsettle the belief that their “sexual affiliations” are natural and universal through a “micropolitics of self-modification…in which they cultivate a bicameral orientation to their own practices of sensuality” (2005, 30). What makes this self-artistry, Connolly contends, is the way in which the individual works through uncertainties and ambiguities in thought as an internal agonism and transforms this into a mode of critical responsiveness. It is the kind of “permanent provocation” called for by Foucault that results in an agonistic subject. For Connolly, it is a matter of self-work performed on multiple registers (that is, registers dealing with visceral reactions, emotions, rational thought, etc.) at the same time: “The key thing, the thing that makes this an example of self-artistry in the interests of critical responsiveness rather than merely reformation of an old pile of arguments, is that it involves movement back and forth between registers of subjectivity” (1999, 147-8). Through the relational arts of the self, the subject undergoes a series of techniques (although, sometimes unintentionally) that produce internal tensions, which, in turn,
open possibilities for the subject to work on his- or herself so as to negotiate these tensions. Such a process stands in contrast to just changing one’s mind. It is also different from being convinced to alter one’s beliefs, since it often takes place outside the frame of reasoned argumentation.

These narratives also provide examples of the ways in which self-artistry underlies Connolly’s conception of critical responsiveness, which is essential to pluralization. Critical responsiveness entails an “active cultivation of generosity to contemporary movements of pluralization” (Connolly, 1995, xv). This openness to new possibilities of subjectivity requires self-artistry, as we have seen. Connolly argues that, “To alter your recognition of difference…is to revise your own terms of self-recognition as well” (1995, xvi). This means that we must confront the way we understand ourselves and our beliefs as a means of reworking the way we relate to others. Connolly goes on to argue that critical responsiveness may very well alert individuals “to traces of the other in themselves”:

Each may come to acknowledge these traces as differences it regulates to be what it is, recognizing thereby a certain affinity with the other it resists or engages across the space of difference. It might even come to feel that it is implicated in a set of differences that help to define it and inhabited by diffuse energies, remainders, and surpluses that persistently exceed its powers of articulation. It may, thereby, affirm a certain indebtedness to what it is not while reconfiguring dogmatic interpretations of what it is (1995, xviii).

Self-artistry that cultivates critical responsiveness reworks the self and its relations to others by accepting certain aspects of difference, and even recognizing that some of these aspects can be integrated into its own way of being (i.e. recognizing that doctor-assisted death might be morally acceptable); however, one will also reject some aspects of difference, but, in doing so, this may reaffirm one’s own identity (by reaffirming what one is not) while encouraging an agonistic respect for those rejected differences (i.e. reaffirming one’s own identity as a heterosexual in
contrast to homosexuality, while simultaneously respecting the integrity of gay men and lesbians).

This brings us to what seems to be a very difficult impasse, namely the way in which these notions of self-artistry and critical responsiveness might be cultivated in support of a pluralistic political project – a refashioning of citizenship that is less bound by the dictates of juridical discourse and more open to a variety of current subjectivities and possible future subjectivities. The problem with invoking Foucault here is his resistance to articulating a definitive political project. In many ways, I embrace this resistance and want to also hesitate at putting forth a vision of how these relational arts of the self might be institutionalized as a means of promoting an ethos of democratic citizenship and pluralization. It is precisely such institutionalization that would stand in the way of the objectives of a democratizing and pluralizing project. In fact, subjects who undergo this kind of self-work should inform the practices constituting democratic institutions; an agonistic relationship with the self and with others could manifest in any number of political activities, from the ways in which one votes, to more immediate forms of participation at local level (membership in organizations, community outreach programs, demonstrations and protests, etc.).

Thus, I believe, along with Connolly, that a micropolitics could be developed and sustained for such political purposes without resorting to a macropolitical agenda. Connolly argues: “Self-artistry affects the ethical sensibility of individuals in their relations to others; micropolitics helps to shape an intersubjective ethos of politics” (1999, 149). The relationship between self-artistry and micropolitics is kind of like a feedback loop – self-artistry imbues micropolitics with practices that the individual performs on his- or herself in order to achieve some state of betterment, while at the same time micropolitics facilitates self-artistry by
promoting the means by which individuals can undertake these practices. Connolly continues on to explain that, while micropolitics operates at “the level of detail, desire, feeling, perception, and sensibility,” it also permeates social formations: “[Micropolitics] flows through and across clubs, families, neighborhoods, regions, armies, TV constituencies, Internet networks, and religious associations, even as it operates at different levels than macropolitics” (1999, 149). Micropolitics extends beyond the site of individual self-artistry, and yet it does not constitute a macropolitical project since it is loosely dispersed throughout social institutions and practices and is without a definitive political objective. However, when geared towards cultivating a democratic and pluralistic ethos, micropolitics encourages the kind of self-artistry that can, in turn, be channeled into various forms of political participation. In this way, self-artistry and micropolitics may inform democratic politics and refashion the way in which democratic citizenship is understood.

As a caveat to this conception of a democratic and pluralistic ethos, it should be made clear that certain programs do not quite constitute the kind of micropolitics necessary to cultivate this ethos. For example, “diversity training” programs in the workplace or school might contribute to a pluralistic ethos, but they are certainly not sufficient. I contend that such programs that try to teach tolerance of diversity are inadequate because they can only speak to people in a limited capacity. I have already addressed the limitations of tolerance, but in addition to those specific limitations “diversity training” can only relate its message through certain registers. If we return to Connolly’s work in *Why I am not a Secularist*, we can see how the development of an agonistic self attuned to a pluralistic ethos takes place through self-artistry that operates through multiple registers of understanding, feeling, and being. Rational argumentation that attempts to teach acceptance and tolerance of diversity can only do so much.
of this work. To really undergo the kind of self-work necessary to cultivate an ethos of pluralization, multiple registers must be worked upon, including what Connolly calls the visceral register. That which speaks to the gut will often do more work than that which speaks to the mind.

What is more, pluralization requires a diversification of diversity, as Connolly argues: “In a culture of multidimensional pluralism you do not simply honor diverse faiths and ethnic practices, you also extend diversity into gender practices, marriage arrangements, linguistic use, sensual affiliations, and household organization” (2005, 61). This means that pluralization requires an openess to multiple ways of life, and, more importantly, it requires a constant reactivation of this openness. In other words, it requires that an individual disassociate his or her own sense of identity from the belief that that particular identity represents the natural, essential, and universal order of things. By adopting this relationship with the self, the contingency of one’s own identity is perpetually reasserted, which can then be translated into active receptivity for otherness. This cannot be accomplished through any amount of “diversity training,” although such programs might be a start.

I do not find it particularly problematic to envision Foucauldian ethics informing a democratic and pluralistic ethos that could potentially transform political institutions without recourse to a definitive political project. To support this claim, I would like to invoke Ian Hacking’s analysis of Foucault’s ethics. Hacking argues that Foucault reverses Kant’s formulation of ethics as a matter that is “utterly internal, the private duty of reason,” thereby making the ethical life an outwardly work of art: “This was not some vapid plea for aestheticism, but a suggestion for separating our ethics, our lives, from our science, our knowledge” (1986, 239). Hacking continues: “At present rhetoric about the good life is almost always based on
some claim to know the truth about desire, about vitamins, about humanity or society. But there are no such truths to know” (1986, 239). This is ultimately the point of a democratic and pluralistic ethos – to undertake politics without a conception of a universal truth that must be realized. By separating our ethics and our lives from the truth, we would be able to develop an agonistic relation with ourselves and with others, and, consequently, we would be able to transform politics into a field of receptive engagement and productive contestation. With this in mind, I would now like to turn our attention to the possible implications that pluralization might have for sexual subjectivities that face juridical regulation in modern democratic society.

*Pluralizing Sexual Citizenship*

As much as we might want to resist, along with Foucault, forecasting the characteristics of social and political transformation, I would still like to hazard some insights into what a democratic and pluralistic ethos might look like for gay and lesbian struggles for recognition and inclusion. I believe that it would be instructive to look, at least hesitantly, at how this ethos can work on institutionalized norms that dictate the bounds of inclusion/exclusion and recognition/mis- or non-recognition as a matter of democratic citizenship. Doing so allows us to take the kind of micropolitical self-work that Connolly speaks of and connect it to a conception of macropolitical transformation. It also illuminates how the proliferation of sexual subjectivities within and because of juridical discourse might work to alter the parameters of that discourse. Such alterations can both lead to greater forms of inclusion in existing democratic institutions and rework the norms at the center of those institutions so that they are no longer the sites of certain social, economic, and political privileges; this would achieve the double move of inclusion and transfiguration that Markell advocates.
I believe that, in an interview published under the title of “Friendship as a Way of Life,” Foucault offers a conception of friendship that helps to illuminate the possibilities for democratic citizenship implicit in the pluralization of sexual subjectivities. If an ethos can be cultivated that promotes receptivity of difference and sustains social and political engagement, then sexuality should find greater forms of expression in both the public and private spheres. The true importance of this transformation lies in the possibility of forging new relationships and affiliations (and not just sexual relations), and unforeseen social and political energies can emerge from these new formations. For Foucault, friendship embodies the potentiality for new relations that challenge the social order in a society highly structured by law and custom. He argues that the notion of friendship is problematic for society because it “introduce[s] love where there’s supposed to be only law, rule, or habit” (1997b, 137).

This turn to friendship is certainly not a new one in the lineage of Western political thought; however, I would like to take a moment to situate Foucault, as well as my invocation of his argument, in relation to perhaps the most democratic trajectory within that lineage – that trajectory initiated by Aristotle and accelerated by Derrida. In doing so, I hope to accentuate the contribution of friendship, as a matter of the arts of the self, to a democratic and pluralistic ethos that would inform contemporary conceptions of citizenship. Beginning with Aristotle in the *Nicomachean Ethics*, he extols the virtues of friendship and examines its relationship with the various forms of political community. He argues that friendship and justice (since the two are interrelated, where friendship is of a greater order than justice – that is, justice can exist without friendship, but where there is friendship there is also, necessarily, justice) abound in democracies because its citizens are both equal and like-minded. What is more, because of the equal standing among friends qua democratic citizens, Aristotle likens this form of friendship to the fraternal
bond of brothers. It is fraternization, then, that is the logic behind the Aristotelian conception of
democratic friendship.

Questioning this fraternal notion of friendship, Derrida challenges us at the offset of The
Politics of Friendship: “Let us dream of a friendship which goes beyond this proximity of the
congeneric double...Let us ask ourselves what would then be the politics of such a ‘beyond the
principle of fraternity’” (2005, viii). He goes on to ask whether this would “still deserve the
name ‘politics,’” and notes that this question is particularly “crucial with respect to what is called
democracy – if, at least, one still understands by this terms the name of a regime which, as is
well known, will always have been problematic” (Derrida, 2005, viii). I believe that this “will
always have been problematic” speaks to the idea of “democracy-to-come” that Thomson (2005)
identifies in Derrida’s work. It anticipates a project in which Derrida strives to articulate a vision
of democracy that is perpetually unsettled; it is a vision in which democracy is rendered eternally
problematic because it exists only in the prospect of its realization:

For democracy remains to come; this is its essence in so far as it remains: not only
will it remain indefinitely perfectible, hence always insufficient and future, but,
belonging to the time of the promise, it will always remain, in each of its future
times, to come: even when there is democracy, it never exists, it is never present,
it remains the theme of a non-presentable concept (Derrida, 2005, 306).

What remains to be shown is how the problematic of friendship/fraternity relates to the
problematic of democracy, and how Derrida opens this up to the notion of “democracy-to-
come.”

I will briefly turn to Thomson’s exegesis on Derrida’s Politics of Friendship in order to
explicate the problematical bind between fraternal friendship and democracy. It is this central
problematic that opens a space for the futurity of democracy, which, in turn, is an element of
Derrida’s work that I find akin to my argument regarding the development of a democratic and
pluralistic ethos. Beginning with the paradox of friendship, Thomson differentiates between an active and passive experience of friendship. He argues that, “As an active experience, friendship is by definition an exclusive experience. I cannot be friends with everyone…” (Thomson, 2005, 15). “However,” he continues, “even if any actual (finite) friendship would be exclusive, in theory at least, I could be friends with anyone” (2005, 15). Active friendship is exclusive because, in the moment of calling someone a friend, others are excluded from that status; passive friendship is the pre-condition for active friendship because it is the pure possibility of forming friendships.

Thomson argues that Derrida directly engages this paradoxical relation as part of his attempt to move beyond the exclusionary fraternization of democracy:

Derrida seeks to separate out this possibility in friendship from its exclusive aspect, even though he knows they are inexorably connected. What would it mean to think what Derrida calls *aimance*, an experience of friendship which eluded the distinction between active and passive? This would have to be a relation without distinction, without the exclusion of those who are not my friends. *Aimance* would be a quasi-transcendental condition of friendship, a relationality prior to any activation or instantiation in the act of befriending (2005, 15).

Thomson continues, elaborating on the exclusionary character of fraternal (active) friendship:

Brotherhood is always already at work within friendship, predicting my choices and canceling my responsibility. For even if I do not privilege my friends in any way, I will always already have preferred them simply by calling them my friends. *Aimance* is not a present moment in a temporal scheme, but the necessary condition of friendship. Without the suspension of my choices, and the possibility of being friends with just anybody, I could never have any friends at all, but as soon as I have a friend, I have determined him as a brother (2005, 17).

As we have seen in Aristotle’s work, and as Thomson reiterates, fraternal friendship constitutes democratic politics; consequently, democratic politics are subject to the same exclusionary moment as friendship.
Derrida identifies a similar problematical bind of exclusion and possibility as “the wound” in democracy:

There is no democracy without respect for irreducible singularity or alterity, but there is no democracy without the ‘community of friends’ (*koina ta philon*), without the calculation of majorities, without identifiable, stabilizable, representable subjects, all equal. These two laws are irreducible one to the other. Tragically irreconcilable and forever wounding. The wound itself opens with the necessity of having to *count* one’s friends, to count the others, in the economy of one’s own, there where every other is altogether other (2005, 22).

Thomson also draws upon this passage and describes “the wound” in democracy as the same “problematic dichotomy” structuring friendship (20005, 18). The problem in democracy, as both Derrida and Thomson recognize it, is one of counting: how is it that democracy can maintain respect for difference in light of majoritarian politics that efface difference in the name of equality? Just as friendship is simultaneously structured by the openness of future possible friends and the exclusivity of immediate friendships, democracy is structured by a similar openness to “irreducible singularity” and difference in contradistinction to the equalizing (and universalizing) effects of representation inflicted by the majority. The need in democracy to count *who* is equal – in other words, to determine who is a friend – will perpetually close off (if only partially) the possibility to include (to befriend) others. It is a process that is inclusive in terms of its potentiality, but it is exclusive in terms of its practice. We can see that the difference between the passive and active experiences of friendship plays out in democratic politics as well.

This is why Derrida seeks a democratic politics that is beyond the logic of fraternization and its accompanying problematics. Thomson argues that we should read *The Politics of Friendship* via a “double strategy” of radical transformation and renegotiation: “Not only must we invent a new politics, as well as a new concept of politics, but we cannot simply give up on the old concepts. We must negotiate with them, or attempt to think them through differently”
It is in this context that Derrida proffers the notion of “democracy-to-come,” which Thomson defines as “what makes democracy what it is – the principle of equality or emancipation attested to by the name of democracy – but, like aimance, it is immediately effaced. It can never be made present or presented as such; the ‘to-come’ indicates that it is permanently deferred” (2005, 26). In its permanent deferment, we can never be sure of what democracy is to deliver, as Thomson elaborates:

The structure of democracy is caught between the promise of emancipation, of there being more democracy, more justice, more equality, and the threat of there being less democracy, of the disappearance of the democratic moment in its fraternal recuperation. The ‘futurity’ of the ‘to-come’ in ‘democracy-to-come’ is not of the order of something for which an arrival could be predicted; nor is it to be associated with a teleology – it is entirely possible that there have been ‘more’ democratic societies in the past. What Derrida is describing is more like a principle of disruption which opens democracy as we know it to the possibility of something else happening. Because this ‘something else’ cannot be specified, it could be ‘good’ or ‘bad’ – more equality or less equality (2005, 29).

This seems to be precisely the point of Foucault’s politics, and it has a particular resonance with the project at hand: the guiding imperative of a democratic and pluralistic ethos is that one should not enter the realm of politics armed with predetermined conceptions of “universal” truths.

Thus, it is in line with Derrida’s aimance that I invoke friendship as a means of cultivating a democratic and pluralistic ethos. I believe that this “friendship beyond fraternity” demands openness to future subjectivities, and, in this way, it promotes receptive engagement with otherness. It also helps to bridge the gap between the supposedly private character of friendship and the public demands of democratic politics: not only can the experiences that one has through personal friendships have politically relevant impacts on the self (which may manifest in the form of public action), but being open to the possibilities of friendship as a democratic citizen is to adopt a necessarily public disposition of active engagement with others.
This means that we should not think of the kind of self-work that we have been discussing as essentially private. It is always relational and takes on a public character as it feeds into an ethos of pluralization, which, in turn, contributes to a conception of democratic politics as “democracy-to-come.”

Returning specifically to Foucault, we can discern, by way of a counterexample, how homosexual relationships may provide a model by which to conceptualize a form of friendship that cultivates a democratic and pluralistic ethos. He looks to the stereotypical conception of the homosexual relationship, in which anonymous partners meet, flirt, and seek immediate sexual gratification, as an example of the way that mainstream society portrays homosexuality without “generating unease”: “it responds to a reassuring canon of beauty, and it cancels everything that can be troubling in affection, tenderness, friendship, fidelity, camaraderie, and companionship, things that our rather sanitized society can’t allow a place for without fearing the formation of new alliances and the tying together of unforeseen lines of force” (Foucault, 1997b, 136). This is precisely the sort of politics that an ethos of pluralization could and should engender – one that promotes new alliances and gives rise to forces of transformation that have heretofore been unimaginable. Furthermore, it seems that, for Foucault, there is something unique in the alliances and forces generated by friendship, which develops along the lines of sexual pluralization.\(^5\)

Foucault shifts the focus of our concern with sexuality away from it being the object of self-discovery to a means of creating and engaging in new relationships:

The problem is not to discover in oneself the truth of one’s sex, but, rather, to use one’s sexuality henceforth to arrive at a multiplicity of relationships. And, no

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\(^5\) Derrida also takes up the question of sexuality in relation to the Aristotelian conception of friendship. While we might wonder along with Derrida what the implications of non-fraternal bonds (sisterhood, brother/sister – that is, friendships that are not strictly between males) are for friendship, I choose to place these considerations aside and focus on the interrelatedness of friendship and sexual pluralization.
doubt, that’s the real reason why homosexuality is not a form of desire but something desirable. Therefore, we have to work at becoming homosexuals and not be obstinate in recognizing that we are. The development toward which the problem of homosexuality tends is the one of friendship” (1997b, 135-6).

This shift reflects Foucault’s ethical position, that is, the ethical subject emerges in the form of the individual who works on his or her sexual subjectivity and turns it into the foundation for developing affiliations with others (again, a reflection of the public nature of a pluralistic ethos). The subject transforms itself from the site where discourses of sexuality play out into an ethical agent who acts in relation to and because of those discourses. The point here is not only to experiment on the self, but to experiment with intimate social relations as well. Thus, Foucault goes on to state that, “it’s up to us to advance into a homosexual ascesis that would make us work on ourselves and invent – I do not say discover – a manner of being that is still improbable” (1997b, 137).

These experimentations and inventions are the practices of freedom necessary for a democratic and pluralistic ethos. Some might hesitate at this point and reiterate that these practices have no definitive endpoint – there is no vision of what politics and social relations should look like. But, this is precisely what Foucault wants to guard against. To adopt a truly democratic and pluralistic ethos is to recognize that the political is open-ended, that it is a realm of contestation and, in Foucault’s words, permanent provocation. For sexuality, a democratic and pluralistic politics means not only increased practices of sexual freedoms, but also the reinvigoration of modes of engaging with difference, of relating to and acting in concert with others, and of establishing socially and politically relevant friendships. These new relations and emerging energies will doubtlessly feed into various forms of political engagement, which, consequently, will lead to unforeseen transformations in the modes and institutions of democratic governance.
We can also find in the work of Judith Butler a conception of the impact that pluralization might have on sexuality. It seems that pluralization, and the manner in which it provokes the individual to unsettle the perceived universality of his or her subjectivity, speaks directly to Butler’s work on identity and gender performance. Performativity, as Butler defines it, deals with “acts, gestures, and desire [that] produce the effect of an internal core or substance, but produce this on the surface of the body, through the play of signifying absences that suggest, but never reveal, the organizing principle of identity as a cause” (1999, 173). Butler continues: “Such acts, gestures, enactments, generally construed, are performative in the sense that the essence or identity that they otherwise purport to express are fabrications manufactured and sustained through corporeal signs and other discursive means” (1999, 173). Identity is the effect of certain discursive regimes, but this does not mean that identity is coercively forced upon individuals. Instead, as Butler discusses, identity is produced as an effect of the subject’s own performances within and because of discourse. In terms of sexuality, it is a matter of the way in which the sexed body “acts its part in a culturally restricted corporeal space and enacts interpretations within the confines of already existing directives” (Butler, 1988, 526). In other words, sexual identities come into being through the subject’s ability to act within, and sometimes against, the preexisting norms implicit in the various discourses that shape sexuality.

Performativity illuminates the “‘citational’ nature of identity,” that is, the way that “the performativity of belonging ‘cites’ the norms that constitute or make present the ‘community’ or group as such” (Bell, 1999, 3). This means that individuals incorporate these “normalized codes” into their very being, creating a sense of identity through their very enactment of identity as dictated by those norms (Bell, 1999, 3). Sometimes these performances do not conform to the norm; instead they allude or transgress it. Regardless, the point is that sexual identity contains
no intrinsic truth because of its performative production. This is precisely where pluralization comes into play as a means of calling attention to this production of identity. As the “truth” of identity is destabilized through the processes of pluralization discussed above, individuals can become increasingly aware of the discursive interventions that help to shape their sense of identity, as well as the ways in which their actions contribute to this self-understanding of identity. This may, in turn, contribute to the displacement of heteronormativity that operates at the center of so many regulatory discourses. This does not mean that the power of the norm would be overcome, but that its contingency would be exposed and its centrality shifted so as to alleviate its more deleterious effects (i.e. the very concrete deprivations suffered by those with marginalized sexualities).

At the end of *Undoing Gender*, Butler addresses the possibility of social transformation in a world riddled with the paradoxes of normalizing power and the discursive production of sexual identities. The norm can never truly be overcome because, according to Butler, it is integral to the ways that identities come into existence. These identities come into being through the ways that bodies “occupy” the norm: “As a consequence of being in the mode of becoming, and in always living with the constitutive possibility of becoming otherwise, the body is that which can occupy the norm in myriad ways, exceed the norm, rework the norm, and expose realities to which we thought we were confined as open to transformation” (Butler, 2004, 217). The norm, then, is paradoxical in that it simultaneously enforces conformity and enables resistance through the ways in which the body acts in relation to it (Butler, 2004, 217). The key is to adopt a relationship with the norm that keeps open the possibilities of becoming and opposes those forces that would suppress and do violence to difference.
It is here that I find an implicit conception of pluralization in Butler’s work. The need to “[keep] our notion of the ‘human’ open to a future articulation,” which Butler finds to be an essential part of a “critical international human rights discourse and politics,” echoes the demands of a pluralistic ethos (2004, 222). She argues that a “radical democratic transformation” must entail the ability to continually rework the categories of existence:

For the purposes of a radical democratic transformation, we need to know that our fundamental categories can and must be expanded to become more inclusive and more responsive to the full range of cultural populations. This does not mean that a social engineer plots at a distance how best to include everyone in his or her category. It means that the category itself must be subjected to a reworking from myriad directions, that it must emerge anew as a result of the cultural translations it undergoes. What moves me politically, and that for which I want to make room, is the moment in which a subject – a person, a collective – asserts a right or entitlement to a livable life when no such prior authorization exists, when no clearly enabling convention is in place (2004, 223-4).

A pluralistic ethos makes possible this kind of democratic transformation where the categories by which we understand ourselves and live our lives undergo contestation and re-articulation. As Butler contends, this does not require pre-existing conventions or authorizations or a social engineer who comes to the table with a pre-conceived understanding of categories to which subjects must conform.

The deep pluralism advocated by Connolly attends to these very concerns by unsettling the established truths that feed into such conventions, forms of authorization, and categories of existence. Furthermore, a pluralistic ethos engages the paradox of the norm, parlaying the agency that is enabled by the norm into an agonistic relationship with the self and others, which, in turn, fosters democratic negotiations of the ways that the norm is institutionalized. For sexual citizenship, this means that the way in which heteronormativity is institutionalized as an exclusionary or assimilationist practice would be placed under increased contestation, and that citizens could be included and recognized in the public sphere as sexual subjects and not just in
spite of their sexuality. As the “truth” and universality of heterosexuality are increasingly unsettled for heterosexuals (work that must also be done by heterosexuals and performed upon themselves) through a pluralistic ethos, democratic institutions should transform under the weight of the demands made by its sexual citizenry.

As I have argued throughout the course of this work, the juridical discourse of rights that operates at the center of contemporary American democratic politics both defines sexual identities and limits their expression in public (and, to an extent, private) life. This paradox cannot be disentangled by juridical means; as a matter of fact, it is at the center of the power/subjectivity nexus in modernity and therefore cannot be resolved. What needs to be done, instead, is to develop a means of attenuating the ills that come with the regulatory power that is part of this paradox. I have introduced a democratic and pluralistic ethos as one such means of productively grappling with this paradox, with the intent of alleviating exclusions and forms of domination resulting from juridical forms of regulatory power. I believe that such an ethos can help to accomplish these feats by proliferating subjectivities and by promoting the receptive engagement of these subjectivities among its constituents. Moreover, this ethos can work on the norms that operate at the center of the institutions of democratic rule through the participation of individuals who first work upon themselves as agonistic subjects.

Specifically, by working on individuals’ capacities as democratic citizens to disassociate their particular identities from the belief that they also represent the true, natural, and universal order of things, then these individuals can open themselves to differential subjectivities. This is exactly the kind of work that Connolly argues straights can engage in to “come to terms, viscerally and reflectively, with the extent to which [heterosexual sexual affiliation] is neither the natural nor the universal form of sexuality” (2005, 30-1). Connolly goes on to contend that, “in
the interests of abetting sexual plurality, numerous straights have worked on themselves tactically, rendering the visceral sense that their sexuality is the only natural mode amenable to second-order correction” (2005, 31). As a matter of this “second-order correction,” individuals may transform their self-wrought energies into political action. Consequently, these individuals could put increasing pressure on democratic institutions to dislodge the norms that function to determine the parameters of inclusion and exclusion.

Again, this is part of the kind of double move that Markell calls for: not only can citizens lobby for greater inclusion in existing institutions, but they can also push to transform those institutions so that they no longer operate as the site of social, economic, and political privilege for certain identities and relations. A prime example would be the disruption of heteronormativity at the center of the institution of marriage (the first move), as well as the disarticulation of marriage as a privileged relationship that guarantees certain socio-economic benefits for its members (the second move). Such a double move leaves open the possibility for different and new identities to come into being in a socio-political context that promotes their expression. It also does not presume an understanding of the way that political institutions must work in order to negotiate the differences among identities. However, this does not abandon a concern for the way that democratic institutions should work. To the contrary, because a pluralistic ethos encourages citizens to approach political participation without a preconceived conception of the universal truth, such a citizenry must engage each other with a commitment to that democratic future and a willingness to negotiate it via an agonistic relationship among their ranks. Thus, Butler argues, and here I will give her the final word: “But to assume responsibility for a future is not to know its direction fully in advance, since the future, especially the future with and for others, requires a certain openness and unknowingness. It also implies that a certain
agonism and contestation will and must be in play. They must be in play for politics to become democratic” (2004, 226).
Chapter 6

Conclusion:
Traces of Transgression in a Normalizing Society

In Foucault’s view, the critic thus has a double task: to show how knowledge and power work to constitute a more or less systematic way of ordering the world with its own “conditions of acceptability of a system,” and to “follow the breaking points which indicate its emergence.” So it will not be enough to isolate and identify the peculiar nexus of power and knowledge that gives rise to the field of intelligible things. Rather, it is necessary to track the way in which that field meets its breaking point, the moments of its discontinuities, and the sites where it fails to constitute the intelligibility it promises. What this means is that one looks for the conditions by which the object field is constituted as well as the limits of those conditions, the moment where they point up their contingency and their transformability.

– Judith Butler,
*Undoing Gender*

As I stated at the offset of this work, my investigations have, in a very specific sense, been about pursuing the limits of our contemporary understandings of democratic citizenship as a matter of juridical discourse. The juridical discourse of rights frames the ways in which individuals may claim political membership as citizens, yet this discourse presents limits to our collective political imagination on two fronts: first, it creates exclusions by delineating between those who enjoy the benefits and protections afforded by citizenship and those who do not (this includes exclusions internal to the state between those with full citizenship status and those who are marginalized into “second-class” citizens, as well as external exclusions between citizens and non-citizens); second, it limits the ways in which we can even conceptualize citizenship and political membership in modern democratic politics by constricting the scope of what the political is. I have addressed both of these limits throughout the course of this work as they pertain to the ways that sexual subjects come to be citizens as objects of juridical power that both individuates and regulates. In doing so, I have tried to attend to the “double task” of the critic
that Butler identifies in Foucault’s work by exploring how the juridical discourse of rights constitutes a field of knowledge and power in which the sexed citizen is produced.

This field of knowledge and power produces, as its object, the juridical subject; this “intelligible entity” is the basis for the modern democratic citizen, who is recognizable by the rights with which it is endowed. But, in its very act of producing this subject-citizen, juridical power breaks down and reaches the limit of its ability to constitute such a field of intelligibility. Specifically, while the juridical discourse of rights promises to define the field of citizenship in terms of inviolable rights that guarantee certain protections (i.e. the right to privacy) and access to various benefits of political membership (i.e. the socio-economic benefits associated with state-recognized marital relations), it does so through a series of discontinuities that interrupt its supposed universality. In its paradoxes – where the right to privacy is a means of the public regulation and depoliticization of sexual identities, and where the normalizing powers surrounding marriage facilitate both assimilation and resistance among marginalized sexual identities – we can see the discontinuities of the juridical discourse of rights.

I have traced some of these discontinuities in the forms of the paradoxes and perpetuated exclusions that are an irrevocable part of the way that juridical discourse deals with the recognition and regulation of sexual identities. In Butler’s terms, I have followed the conditions constituting the field of sexual citizenship (the juridical production and regulation of sexual subjects as a matter of political membership in society) to its limits on two specific counts: first, by tracing the development of the right to privacy in relation to struggles over anti-sodomy laws, tracking this development to its moment of paradox; second, by exploring the contradictory forces of the norm operating at the center of the marital institution to the point where these forces contest the bounds of marriage itself. It is through these investigations that I have tried to
perform the “double task” of the critic by not only demonstrating how juridical power has come to regulate sexuality, but also by exposing where these regulations reach their limit and double back upon themselves.

Still, where there are limits, there are also possibilities for transgressing them. As Butler argues, the moment of contingency exposed by these limits also highlights the possibility for transformation. In this light, this work has also been about transgression, that is, it has been about transgressing the limits imposed by rights-based discourse and reconceptualizing citizenship as part of a democratic and pluralistic ethos. There should be no confusion about what this transgression entails. I have not approached transgression as a renunciation of power or as a dialectical movement; instead, it has taken the form of Foucault’s conception of a spiral relationship with the limit:

Transgression carries the limit right to the limit of its being; transgression forces the limit to face the fact of its imminent disappearance, to find itself in what it excludes (perhaps, to be more exact, to recognize itself for the first time), to experience its positive truth in its downward fall…Transgression, then, is not related to the limit as black to white, the prohibited to the lawful, the outside to the inside, or as the open area of a building to its enclosed spaces. Rather, their relationship takes the form of a spiral that no simple infraction can exhaust. Perhaps it is like a flash of lightning in the night which, from the beginning of time, gives a dense and black intensity to the night it denies; which lights up the night from the inside, from top to bottom, and yet owes to the dark the stark clarity of its manifestation, its harrowing and poised singularity. The flash loses itself in this space it marks with its sovereignty and becomes silent now that it has given a name to obscurity (2003d, 446).

Thus, transgression and the limit are interminably intertwined, and, as Foucault argues, transgression is given significance only in relation to the limit and vice versa. Because of this, transgression can never fully supersede or exhaust the limit. Furthermore, an act of transgression ceases to be as it comes into being, pushes on the limit, and re-establishes a space in which transgression and limit may continue to play out their interrelationship.
If we are to take a lesson from Foucault’s discussion of this interrelationship between limits and transgression, we should see that we cannot hope to completely transgress the limiting effects that juridical discourse has on democratic citizenship. The juridical discourse of rights will undoubtedly continue to play a role in structuring democratic citizenship by establishing the parameters of individual freedom and security, and, in doing so, unforeseen exclusions and paradoxes will always emerge as part of that discourse. The exclusions and paradoxes that I have explored constitute some of the limits of rights-based discourse, but they are also the moments that make transgression possible. They are the moments that produce identities that deviate from the norm; that create the conditions in which those identities can struggle for recognition and inclusion; that, by their very existence, reveal the contingencies and discontinuities of the juridical field of knowledge and power. The mode of transgression that I find implicit in these moments is one that does not seek to undo, overcome, or perfect the juridical discourse of rights; instead, it seeks to constantly renegotiate those paradoxes and exclusions, that is, to effectively unsettle such limits and put them into a state of permanent flux.

Thus, I believe that this conception of transgression also speaks to the kind of ethos that I seek to instill in democratic politics. An ethos of pluralization sustains the type of continual transgression necessary to contest limits and rework norms in a society where the very persistence of boundaries both inhibits and facilitates our political existence. Again, to invoke Foucault, limits mark our freedom; they do not merely inhibit it. Yet, these limits must be contested so that they do not become too rigid and ossify power relations that may render certain subjectivities as permanently marginalized, oppressed, and disenfranchised. The agonism of a pluralistic ethos, to which Foucault alludes and Connolly expressively develops, is precisely the attitude necessary for such productive contestation because it contains no pre-existing political
commitments beyond its own minimal requirements that sustain pluralization. In this way, it embodies Foucault’s vision of transgression:

Transgression contains nothing negative, but affirms limited being – affirms the limitlessness into which it leaps as it opens this zone to existence for the first time. But, correspondingly, this affirmation contains nothing positive: no content can bind it, since, by definition, no limit can possibly restrict it. Perhaps it is simply an affirmation of division; but only insofar as division is not understood to mean a cutting gesture, or the establishment of a separation or the measuring of a distance, only retaining that in it which may designate the existence of difference (2003d, 446).

Pluralization is, essentially, the affirmation of division to which Foucault refers in his conception of transgression. It affirms division among differential identities, and pushes on those limits that would otherwise suppress or normalize those divisions (even when those limits and norms are the very sources of difference). Pluralization brings no preconceived political project to the table in order to impose a new set of limits; rather, it illuminates the limitedness of being as the basis for a truly democratic politics.

This might pose the ultimate, yet most fruitful, paradox to contemporary democratic politics. The acknowledgment of the limitedness of our being – that is, coming to recognize that our individual and collective conceptions of identity and systems of belief are not natural, essential, or universal – helps to cultivate an attitude (we might call it by a number of names – an agonism, receptive engagement, permanent critique, etc.) of productive contestation and

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6 Here I defer to both Connolly and Butler, who provide articulations of the limits of such a pluralistic project. Connolly argues: “Pluralists set limits to tolerance to ensure that an exclusionary, Unitarian movement does not take over an entire regime – that is, to ensure that a territorial regime does not become too concentric and too closed. Moreover, we also define a set of general virtues and limits needed to nourish a pluralist ethos within a territorial regime. Granted, we are cautious in setting final limits in advance to the scope of diversity” (2005, 42). Similarly, in her discussion regarding the criteria for resignification, Butler contends that: “When we come to deciding right and wrong courses of action in that context, it is crucial to ask: what forms of community have been created, and through what violences and exclusions have they been created? Hitler sought to intensify the violence of exclusion; the anti-apartheid movement sought to counter the violence of racism and exclusion. That is the basis on which I would condemn the one, and condone the other. What resources must we have in order to bring into the human community those humans who have not been considered part of the recognizably human? That is the task of a radical democratic theory and practice that seeks to extend the norms that sustain viable life to previously disenfranchised communities” (2004, 225).
engagement with others. It is this attitude that would enable democratic citizens to challenge and rework the limits of their collective social and political existence. In fact, it would help to rework the way in which we understand ourselves as democratic citizens. No longer would we necessarily understand our status as citizens in terms of being individualistic recipients of “natural” juridical rights who occasionally partake in politics by voting based off of our particularistic interests. Instead, our duties and responsibilities as democratic citizens would extend to a much more profound and immediate level as we recognize the ways in which we are produced as democratic subjects (among other kinds of co-existing and interrelated forms of subjectivity).

When we are confronted with the limitedness of our own particular being, we become aware of the role that hegemonic norms have played in constructing our specific sense of identity. If, say, one defined oneself as a heterosexual and were to undergo the kind of self-artistry detailed in Chapter 5, then he or she would come to recognize that heterosexuality does not represent the universal truth of sexual preferences and relations. Furthermore, this individual would be more likely to see how the norms of heterosexuality underlie many modern institutions, thereby creating the impression that heterosexuality is and should be the universal standard by which individuals are recognized and included as full members of society. Being cognizant of one’s own limitedness as a heterosexual, in light of these norms, forces the individual to grapple with heteronormativity’s deleterious implications for what were once viewed as “deviant” sexualities; in other words, it forces the individual to realize how the norms that have reinforced the “truth” of his or her particular sexual identity have also been responsible for marginalizing and disenfranchising others with different sexual identities. As I argued in Chapter 5, with these kinds of agonistic self-transformations in hand, the democratic citizen can channel these energies
into modes of political participation that will pressure the institutions that have otherwise upheld heteronormativity.

Some might argue that this conception of citizenship and political participation undermines collective action and makes consensus building an impossible task, but it is precisely the pluralistic citizenry that is able to build a majority consensus out of a collection of disparate beliefs and subject-positions. Connolly provides an example of the way in which such a citizenry could respond to problems of inequality. He argues that, “In a culture of multidimensional pluralism, support for the reduction of inequality requires the mobilization of a majority assemblage rather than a unified nation” (2005, 9). Connolly goes on to contend that such an assemblage will consist of individuals motivated by a variety of reasons – some will act out of necessity, some out of a certain set of moral obligations, some because it is a concession that will grant them leverage on another issue, and many will act out of combinations of these and other reasons (2005, 9). Connolly likens this conception of democratic participation to a potluck supper that “is fashioned through a series of resonances between local meetings, internet campaigns, television exposes, church organizations, film portrayals, celebrity testimonials, labor rank-and-file education, and electoral campaigns by charismatic leaders” (2005, 9). When the citizen is engaged in an agonistic relationship with the self and with others, and this agonism is fed by such diverse channels as those listed by Connolly, then democratic politics will benefit from the multitude of subject-positions converging to address issues that pertain to the alleviation of suffering and violence among the populace.

If we were to construct an analogous narrative regarding attempts to alleviate the suffering of gay men and lesbians due to the inability to marry, for example, what might it look like? What sorts of transgressions would come to push on the limits of juridical regulations of
sexual relations? How might these transgressions filter into the kinds of democratic politics and majority assemblages envisioned by Connolly? To an extent, I have already touched on this vision in Chapter 4 by outlining the ways in which micropolitics might work on the individual to alter his or her outlook on gay marriage. But, we could also imagine that the institution of marriage itself could be transformed as it comes under pressure from a number of directions. On one hand, citizens may pressure state and federal legislatures to make marriage more inclusive. Again, this pressure can come from a number of subject-positions: gay and lesbian couples who desire and/or need the recognition afforded by marriage; gay and lesbian couples/individuals who oppose assimilating to the hetero model of marriage, but wish for others to have the right to marry; straights who vehemently oppose such sexual discrimination; straights who feel guilty that they can marry while their gay and lesbian friends cannot; straights who believe that extending marriage to gays and lesbians might be a way of controlling “deviant” sexuality; and the list goes on. On the other hand, or perhaps at the same time, citizens might find themselves compelled by these micropolitics to further transgress the norms operating at the center of marriage that make it a site of socio-economic privilege.

In the case of the latter, such transgressions would certainly represent the second move advocated by Markell by seeking to transform the marital institution itself, rather than just making it more inclusive. It may be that, in recognizing the central, yet arbitrary, role marriage plays in divvying out certain social and economic benefits, individuals will seek to unsettle marriage’s privileged position. If, as Warner (1999) argues, we come to understand the decision to marry as an ethical choice, then people should become more wary of the advantages that come along with marriage at the expense of those who are excluded from marriage or choose not to marry. Exploring the ethicality of such institutions is part of the process of pluralization that
would truly lead to their democratization; this process would entail putting pressure on socio-
political institutions such as marriage to be more inclusive, while also working to detach and
more fairly distribute those benefits that have traditionally accompanied them.

Similarly, a democratic and pluralistic ethos could help to “reorient” the normalizing and
regulatory effects of the juridical discourse of rights. Whereas the discourse surrounding the
right to privacy has essentialized a certain conception of homosexuality and has effectively
become a means of “keeping it in the closet” (or bedroom to be more exact), an ethos of
pluralization would contribute to a social atmosphere where individuals could safely explore
their sexuality under the protection of the right to privacy while also feeling that their sexuality
need not be confined to the bedroom. In a pluralistic society, the right to privacy would no
longer serve to reinforce the character of heterosexuality; instead, it would truly equally protect
both homosexuals and heterosexuals by establishing a zone of personal security for individuals
regardless of their sexual preferences. An ethos of pluralization can accomplish this by
destabilizing the heterosexual norm operating at the center of the juridical discourse that has
constructed the right to privacy around issues of sexuality. Furthermore, by promoting a socio-
political environment of agonistic relations and receptive engagement with otherness, the right to
privacy (along with other regulatory rights) is situated in a context of “permanent provocation”
that deprives it of its hegemonic function. The sort of transgression encouraged by the ethos of
pluralization does not supersede juridical power, but it does act as a corrective to it by pushing
on its limits, as well as by contesting and reworking the norms that are implicit in it.

It is necessary that we grapple with the implications of the politics of sexuality as they
have emerged in contemporary American society, for they deal with norms that for too long have
gone unquestioned yet remain pivotal in the establishment of full citizenship status.
Furthermore, these norms are central to the ways that we understand life in modernity. They simultaneously enable and restrain both hegemonic and counter-hegemonic identities, and, in this way, no one is left untouched by their powers to govern, regulate, administer, and sometimes deprive people of the means of life. Foucault explains eloquently what is at stake in the politics of sexuality in the concluding chapter of his first volume of *The History of Sexuality*. In this chapter, entitled “Right of Death and Power Over Life,” Foucault famously begins his explorations of bio-power, and it is with this “beginning” that I want to bring to a conclusion my own investigations because it speaks to the conditions of life, sex, and politics with which we are continuously faced.

In his discussion of the centrality of life to the political struggles that became part of the emergence of bio-power, Foucault states:

> The “right” to life, to one’s body, to health, to happiness, to the satisfaction of needs, and beyond all the oppressions or “alienations,” the “right” to rediscover what one is and all that one can be, this “right” – which the classical juridical system was utterly incapable of comprehending – was the political response to all these new procedures of power which did not derive, either, from the traditional right of sovereignty (1978, 145).

Life, then, became the object of political power, and politics developed into the science of securing and governing these rights. In this context, sex became a “a means of access both to the life of the body and the life of the species,” and, as such, “[i]t was employed as a standard for the disciplines and as a basis for regulations” (Foucault, 1978, 146). My investigations have explored one aspect of this political power – the juridical discourse of rights – as a field of knowledge and power that seeks to establish and secure the “right” to life, and all that it entails, through the regulation of sex. I have pursued this discourse to it limits, exposing its paradoxes and perpetuated exclusions as the moments where juridical power falters and either deprives
individuals of those rights it seeks to protect or further regulates the existence of their lives in the name of those rights.

Democratic citizens must again take up the process of struggle to reassert those rights that have become part of the regulatory apparatuses of the normalizing society. We must not seek out the utopian non-place of absolute freedom from power and the norm, but we must engage in acts of political contestation and agonistic/receptive engagement with others so as to promote those conditions in which life may flourish. Certainly this will not be a perfect political project, and I imagine that it will meet its share of setbacks, reversals, and errors along the way. But, it is only through such action that change can occur, and it is often in the most unforeseen ways that such change proves to be the most beneficial. If we are to undertake the modes of transgression that we find in Foucault’s work (and which we find, in varying forms, in those who have invoked Foucault, including especially Butler and Connolly), then we must come to know the limitedness of our being and act on that knowledge to affirm difference, and to extend the conditions of the politics of life through that affirmation. Perhaps it will come as a disappointment to those who expect a grand narrative to explain how this will all take place, but I firmly believe that it will be through those seemingly banal, everyday experiences and interactions that the most profound transformations of the self will occur. Consequently, it will be through such a micropolitics that we will alter the ways in which we see ourselves as democratic subjects, which, in turn, will feed into the ways that we act as democratic citizens.

Perhaps, ironically enough, we can find something instructive to conclude with in Justice Scalia’s dissenting opinion in *Lawrence v. Texas*. In his comments, he notes that the law offers a troubling alternative to democratic means:

> Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. Social perceptions of
sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is best...But persuading one’s fellow citizens is one thing, and imposing one’s views in absence of democratic majority will is something else. I would no more require a State to criminalize homosexual acts – or, for that matter, display any moral disapprobation of them – than I would forbid it to do so. What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new “constitutional right” by a Court that is impatient of democratic change. 539 US 558, 603 (2003).

If we set aside, for the moment, the threat of the tyranny of the majority and the very real and very immediate suffering that it inflicts (tyranny that can be prevented and suffering that can be remedied, both only to an extent, by the formal equality of rights), then Scalia’s comments reveal the limitations of appealing to a legal system that imposes equality and freedom through rights. Such appeals may do very little in terms of persuading one’s fellow citizens that he or she actually has a right to exist as such in society, regardless of one’s particular identity traits. In other words, juridical discourse is extremely limited in the kind of socio-political interactions and contestations that foment democratic change.

While Scalia certainly did not have in mind the kind of democratic and pluralistic ethos that I have endorsed throughout this project, his dissenting opinion speaks directly to the necessity of such an ethos to catalyze social and political change. In fact, I believe that an ethos of this type is necessary to inspire radical democratic action that breaks away from the “traditional” and “normal” means to which Scalia alludes. Thus, in many ways, appeals to the juridical discourse of rights have impeded the democratic changes demanded by marginalized and disenfranchised groups; only by adopting a democratic and pluralistic ethos can we hope to overcome the impatience of waiting for slow “traditional” democratic change. The more that the juridical discourse of rights is embedded in a socio-political environment guided by an ethos of pluralization (which itself is imbued with the micropolitics of agonistic self-artistry), the less
likely this discourse is to operate as a paradoxical obstacle to inclusion and recognition, that is, the less it will be an alternative, if not impediment, to democratic politics and truly progressive change. Incorporating a democratic and pluralistic ethos into our conceptions of citizenship not only helps to address the specific concerns of “sexual citizenship” that I have addressed here (among other concerns that have gone without explicit discussion), it also speaks more broadly to the limitations inhibiting a democratic citizenry from active engagement with one another in the hopes of alleviating the most pressing causes of suffering and violence throughout society.
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Education

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