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12. Plato in the Courtroom: The Surprising Influence of the *Symposium* on Legal Theory

Jeffrey Carnes

It is not often that classicists find themselves in the middle of public policy debates, at least not in this day and age; yet this is precisely what has happened in recent years in the ongoing public battle over gay rights, in which proponents of both sides have invoked Plato to strengthen their positions. To some extent, this has been an outgrowth of traditional attempts to re-interpret and appropriate the Greek and Roman past: to argue that these societies, forming the largest non-Judeo-Christian component of our intellectual heritage, provide a model of plurality and tolerance; or a non-religious moral precedent for the condemnation of homosexuality; or a stern warning about the dangers of excessive personal liberty. More surprising, perhaps, is the extent to which theorizing about the past—including views on sexuality as a social construct, developed in large part based on classical models—has influenced the courts, in particular in the case of the U.S. Supreme Court's 2003 decision in *Lawrence v. Texas*, which declared state sodomy laws unconstitutional. The most abstract, theoretical, and apparently purely academic aspects of our work have, in fact, had a direct impact on the lives of millions of Americans.

This paper explores the background to this surprising turn of events. I begin with an examination of the well-known intervention of Platonic scholarship in *Romer v. Evans*, the case that began in 1993 as a challenge to the constitutionality of Colorado's anti-gay Amendment 2. The next section of the paper backtracks to the U.S. Supreme Court's 1986 *Bowers v. Hardwick* decision, in which a 5-4 majority upheld the constitutionality of Georgia's sodomy law, basing its decision in part on what it viewed as the "ancient roots" of proscriptions against homosexuality. Finally, I examine the Court's broad reversal of *Bowers* in *Lawrence*, in which the majority expressed a radically different view {272|273} of human sexuality, including an acceptance of social constructionist theory, which was argued for—

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and against—on the basis of certain key texts, including Plato's *Symposium*.

1. Romer v. Evans

The first serious intervention of classics into the realm of laws concerning sexuality came in 1993, in the case of *Evans v. Romer* (known as *Romer v. Evans* on appeal).[1] In 1992, the voters of Colorado passed a ballot initiative known as Amendment 2, which stated that neither “the State of Colorado,” nor any of its individual municipalities, could “adopt or enforce any statute, regulation, ordinance or policy” that prohibited discrimination on the grounds of “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.”[2]

Challenges to the constitutionality of the amendment were immediately launched in a lawsuit filed by a number of plaintiffs, including various municipalities whose anti-discrimination ordinances would have been nullified. The suit claimed that the “moral judgment” expressed by Amendment 2 is nothing more than irrational hostility toward lesbians, gay men, and bisexuals. Amendment 2 does not serve any legitimate purpose.” That is, they challenged the constitutionality of the amendment to withstand the rational basis test, under which a government entity passing laws that will deliberately disadvantage a particular group must demonstrate some legitimate government purpose in so doing.

One of the arguments used by the plaintiffs—and in fact one of the ones deemed least likely to succeed—was that Amendment 2 should be thrown out because it was in violation of the establishment of religion clause of the First Amendment. That is, prejudice against gays and lesbians is derived from Christianity (and ultimately from Judaism as well), and is therefore not a legitimate reason for discriminatory legislation. Enter Plato—in this case, in the person of his interpreters, beginning with the Oxford moral philosopher John Finnis, who was brought in by the defense to argue that disdain for homosexuality has, in fact, roots in other Western, non-Christian traditions; and, further, that such disdain forms part of “natural law,” providing a wholly legitimate moral ground for disliking, and therefore discouraging, homosexual behavior.[3] If the Greeks (arguably the most identifiable non-Judeo-Christian part of our cultural tradition) despised homosexuality, then this part, at least, of the case will fail; and the natural law arguments will go a long way toward providing something to pass the “rational basis” test, and might help meet the standard of strict scrutiny which was in fact applied in this case.

Finnis, then, had the task of showing that the Greeks disapproved of homosexuality. Questions relating to defining the category of homosexuality don't arise, of course: natural law, along with common sense and most pre-1980 scholarship, sees categories of sexuality as essentially invariant (or invariably essential). Now, the casual observer might point out that if the Greeks disapproved of homosexuality, they had a funny way of showing it. Finnis gets around this difficulty in two ways: first, by narrowing the scope of his inquiry to

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include only philosophical texts, in particular those by Plato and Aristotle; second, by carefully distinguishing between same-sex affection, or inclination, or desire, on the one hand; and its actual physical fulfillment on the other. By focusing on acts rather than inclinations, any questions of the commensurability of ancient and modern sexual categories were taken out of play; and more importantly, it become possible to explain away the large amount of homoerotic material in the philosophical texts as pertaining only to desire, not to its consummation.

This is a line of reasoning few, if any, classicists would pursue today, and in fact Finnis’s status as outsider came to play a large role in the controversy, particularly in regard to his ability to read Greek. He is a Catholic natural law philosopher whose arguments seem to imply, in Thomistic fashion, that Plato and Aristotle to some extent presaged Christian morality:

Marriage, with its double blessing—procreation and friendship—is a real common good. Moreover, it is a common good which can be both actualized and experienced in the orgasmic union of the reproductive organs of a man and a woman united in commitment to that good. Conjugal sexual activity, and—as Plato and Aristotle, and Plutarch and Kant all argue—*only* conjugal activity is free from {274|275} the shamefulness of instrumentalization which is found in masturbating and in being masturbated or sodomized.[4]

In particular, Finnis held that only non-contracepted sex by a married couple may be free of such instrumentalization (although he did make an exception for those married couples who are infertile)—all else is regarded as sodomy and masturbation.

Finnis’s arguments concerning Plato and Aristotle sound curiously old-fashioned, insensitive to context, and anachronistic. While citing certain passages in the *Laws* that actually do seem to condemn same-sex activity (although even here context makes it far from certain how to read Plato’s intentions), he vastly over-generalizes: “To know or tell Plato’s views on the morality, and the immorality, of all such non-marital conduct as homosexual sex acts, one need go no further than these unmistakably clear passages in the *Laws*, texts with which every other text of Plato can readily be seen to be consistent.”[5] Classicists might object that the *Symposium* contains precious little about marriage, and that Finnis seems not to have read the *Republic* on the communal family arrangements to be imposed on the Guardian class. Yet elsewhere he seems to realize that this is over-statement, referring to the “*mature* Plato of the *Laws*” (emphasis mine) as the source to be taken as authoritative, in contrast, I suppose, to the “*immature*” Plato of the erotic dialogues and the *Republic*. Worthy of note here are two tendencies in the interpretation and invocation of Plato: first, a desire to make Platonic doctrine seem more unified than it

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actually is (a tendency to which professional classicists are typically less prone than other academics and pundits); second, a preference for Plato the Censor—the stern lawgiver and moral authority of the *Republic* and the *Laws*, who speaks across the ages with an authoritative Voice of Reason. These tendencies are perhaps not surprising in a context in which Plato is being invoked as part of the history of Western thought; but as we shall see, this is hardly the only way in which he may be brought into the debate.

From a classicist's perspective, Finnis proved to be, in effect, a weak advocate, one who should be easily trounced by any competent philologist—especially one as learned and formidable as his actual opponent, Martha Nussbaum. And in fact she *did* trounce him, at least so far as the published arguments go. Her affidavit, as reconstructed in her *Virginia Law Review* article, effectively undercuts almost all of Finnis's specific claims concerning {275|276} Plato, Aristotle, and other philosophers. In particular, she deals very effectively with those situations in which Plato does, in fact, demonstrate some aversion to same-sex sexual activity, pointing out that Plato was in general suspicious of all bodily appetites (not just of sex, much less homosexuality) and that his finding bodily appetites and their fulfillment *inferior to* spiritual pleasures is not at all the same as his saying that such appetites and pleasure are “shameful, depraved, and depraving,” as Finnis claimed. In addition, she distinguishes in key passages—particularly those in the *Nicomachean Ethics* and the *Gorgias*—between the Greeks' general approbation of, or sympathy toward, active, penetrative males and their fear of and contempt for the figure of the habitually passive *kinaidos*. Where Finnis spoke of attitudes toward homosexuality *tout court*, Nussbaum points out that to do so is at best over-generalization, at worst a complete misreading of the Greeks' categorization of sexuality.

Better still is her treatment of the implications of scholarship, and the question of why reading ancient texts should have any relevance for the modern legal system. Her *Virginia Law Review* article begins with a story of the conservative jurist and legal theorist Richard Posner reading Plato's *Symposium* and finding himself “surprised to discover that it was a defense, and as one can imagine a highly interesting and articulate one, of homosexual love. It had never occurred to me that the greatest figure in the history of philosophy, or for that matter any other respectable figure in the history of thought, had attempted such a thing.” [6] Posner, in his book *Sex and Reason*, attempted to remedy the ignorance about homosexuality he found throughout the legal profession, claiming that the *Bowers v. Hardwick* decision evidenced “irrational fear and loathing” of homosexuality, and that judges, in their ignorance of sexual issues, are “likely ... to vote their prejudices.”[7] Nussbaum whole-heartedly agrees with Posner's educational project, and the conclusion to her affidavit makes a plea for reason and greater understanding of sexuality.

Obviously, Nussbaum will have the Greeks teach us a rather different lesson from the one Finnis had in mind. Rather than showing us a set of universal principles that take the form of natural law, and are instantiated with varying degrees of perfection in various legal

Plato's <i>Symposium</i> in the Italian Renaissance from Bruni (1435) to Castiglione (1528), Diskin Clay (/CHS/article/index/6322.15-the-hangover-of-plato-s-symposium-in-the-italian-renaissance-from-bruni-1435-to-castiglione-1528-diskin-clay)	systems, they will provide us with a contrasting world-view—one in which sexuality is less central, more equated with other appetites. Examining the Greeks (and here she quotes Foucault) will “free our thought from what it silently thinks, and so enable it to think differently” (1994:1598). Attacking Finnis on his own ground, she {276 277} invokes the Catholic branch of the natural law tradition against him: if it was possible for the Greeks, a culture we in general admire as one of our moral and intellectual forebears, “to hold that same-sex relationships are not only not per se shameful, but potentially of high spiritual and social value,” then it cannot simply be claimed that all rational persons will despise same-sex relationships. It will be necessary, if one follows the Catholic natural law tradition, “which claims to derive its conclusions from reason, not from authority,” to “be sure that we have distinguished between reasoned argument and prejudice” (ibid).
16. Platonic Selves in Shelley and Stevens, David K. O'Connor (/CHS/article/index/6323.16-platonic-selves-in-shelley-and-stevens-david-k-o'connor)	If Finnis had an unenviable task—that of showing that the Greeks disapproved of same-sex activity—Nussbaum took on, for reasons that are easy to sympathize with, a task nearly equally difficult: that of explaining away virtually <i>every</i> negative reference to same-sex activity in the Greek world. It's an odd variation on the old sophistic theme: trying to make the Better case appear the Airtight; and in fact Nussbaum wound up making the Better case appear the Worse, at least in some circles. This is due in large part to the <i>tolmêma</i> controversy, in which it would appear that Nussbaum cited an earlier edition of Liddell and Scott in order to avoid having the definition “daring or shameless act” appear as one of the word's possible meanings when considering how best to render a passage in the <i>Laws</i>.
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	Finnis seized on this inconsistency and ran with it. Rather than being a minor oversight, or even a deliberate but small trick to present her case in the best possible light, he viewed Nussbaum's testimony as “a wholesale abuse of her scholarly authority and attainments.” His article in <i>Academic Questions</i> (a journal published by the National Association of Scholars) begins with a condemnation of the historical inaccuracies he alleges existed in testimony before the Court in various abortion cases, and goes on to see Nussbaum as a further practitioner of “law office history,” a sort of scholarship that is an “attempt to get the American people to constitute themselves around conceptions of their own past, and the past of their civilization, that are profoundly untrue” (Finnis 1994b:35). In his thoughtful analysis of the case, Daniel Mendelsohn suggests that there is perhaps a problem in the very nature of the competing discourses involved—those of the scholar and the lawyer. Perhaps, he muses, “the gap that separates law and scholarship may well be as unbridgeable as the gap that distinguishes tragedy from comedy” (Mendelsohn 1996:45). After all, courtroom testimony is designed to provide some specific answer, not to raise further interesting questions for study: “the narrow requirements of legal discourse as it actually proceeds may ultimately be incompatible with {277 278} the expansive nature of serious humanistic inquiry.”[8] Although the Solicitor General of Colorado was quoted as saying: “This is not just an academic issue—our courts make decisions based on this material” (Mendelsohn 1996:37), it seemed unlikely that there would be any real effect of

anyone's testimony on Plato or the ancient world. It was instead an interesting sideshow, one that the scholarly community was dragged into by the plaintiffs' long-shot establishment of religion argument. It's all very well and good to speak of educating the court, but how many judges are as inquisitive as Richard Posner? And after all, the court decisions, including that of the U.S. Supreme Court, made no direct reference to this material, and decided the issue on grounds of Due Process, not establishment of religion.

There is some irony in the fact that Plato could be brought in as a champion of liberties—religious and social—that accord ill with his large parts of his philosophical corpus; and that Plato's voice should be used to champion democratic decision-making. Also ironic is the notion that Greek ideas about sexuality should be seen as a liberating force, a counterweight to our own prejudices. Yes, same-sex behavior and affection were given greater leeway in Greece than they traditionally have been in the Judeo-Christian world—but only if they conformed to certain rigid notions of masculinity, in which grown men were expected to be active, dominant, penetrating partners, and were subject to severe disapproval if they varied from this norm. Further, if we are to use the Greeks as models of enlightenment concerning homosexuality, does this imply acceptance of their entire misogynistic gender system? For classicists to testify in court about the Greeks' philosophy, their loves, their ideas of friendship and the common good, yet passing over in silence the seclusion and denigration of women that were a contributing, and perhaps a necessary, precondition for the glories of their masculinist culture, seems at best bitterly ironic, at worst a betrayal of our scholarship and our personal moral principles.

While it might have been useful to acknowledge the Greeks' faults and limitations neither side in the *Romer* case adopted this approach. Both Finnis and Nussbaum revere the Greeks: as founders of some of our most cherished intellectual traditions, and, for Finnis, as the earliest Western example of natural law; while for Nussbaum, they serve as a diachronic example of cultural diversity, giving us an *autres temps, autres moeurs* lesson in tolerance. For Finnis, the key texts were the *Republic* and the *Laws*, texts that position {278|279} Plato as a serious and stern moral authority. For Nussbaum, the key text was the *Symposium* (and to a lesser extent the *Phaedrus*): texts that not only focus on sexuality and desire, but in which one could view Plato's thought as open and radically incomplete, and to discern different voices speaking through the Platonic mask of authority.[9] But if modern scholarship tends in this direction—what we might call the *Symposium* approach to interpretation—we might well ask whether this can provide a useful tool for legal analysis, which after all looks for certainty and precedent, not the endlessly regenerating eroticism of the text.

Further, the reading of the *Symposium* espoused by Nussbaum (and more explicitly by Posner) seems to validate Foucault's repressive hypothesis, in that we now celebrate our own openness and tolerance in regard to sexual matters, and pride ourselves on having thrown off the shackles of Victorian prudishness. Thus we proclaim our liberation, and are

pleased to find that people in the more distant past may have been liberated as well. Yet to celebrate Plato as a champion of “gay rights” and to see the *Symposium* as a “defense of ... homosexual love” is profoundly ahistorical: not only would Plato probably fail to recognize the categories employed in the debate, but the notion that same-sex affection or sexuality needed defending in the first place remakes Plato in our own image. He becomes, like ourselves, a modern, liberal thinker. A better approach—at least in the scholarly world, if not in the courts—might be to leave aside case-by-case arguments about whether Greek philosophers approved of same-sex attraction, kissing, or intercourse, and to argue instead that the Greeks’ sexual system was so different from our own as to be for all practical purposes useless as a basis for comparison.[10] If the ancient world did not recognize the concept of the homosexual, or recognize homosexuality as a category that classified individuals in a meaningful way, then how can we legitimately speak of their attitude toward these phenomena?

Nussbaum takes up this argument near the conclusion of her article. While conceding that such an approach might say “important things about the two cultures,” she alludes to two speeches in the *Symposium* as proof that the Greeks *did*, in fact, have sexual categories similar to our own. Further, she points out that Finnis’s arguments were based on acts rather than dispositions, and so anti-essentializing arguments would have little countervailing force. Nussbaum, then, might be viewed as a “loose constructionist”: that is, {279|280} one who believes that sexual identity is socially constructed, but also believes that—for the Greek world at least—our basic categories of straight and gay have some justification, even though they may be defined differently in practice (and even though other categories may exist as well).[11] As for Finnis’s distinction between acts and dispositions, this is probably due to a certain strategic difficulty on his part: that the only way around the Greeks’ obvious approval of certain same-sex affects is to divide mind and body, affect and practice, and demonize the latter member of each dichotomy. But in fact this does little to speak to the issue at hand: the language of Amendment 2 specifically targeted individuals for their status or orientation (as well as for their conduct, although we must imagine that this is secondary, given the purpose of the legislation). Further, the *Bowers* and *Lawrence* cases show that regulation of conduct and of status go hand in hand, so the creation of a Plato who approves of some version of homosexual status, while condemning homosexual conduct, fails to make Plato an effective advocate for anti-gay legislation.

Neither side, then, presented an uncontroversial view of ancient sexual categories and their possible relevance to modern civil liberties. Yet suppose Nussbaum *had* wanted to make the strict constructionist, anti-essentialist argument outlined above—could she have done so? After all, this would involve explaining the history of scholarship: the fact that scholars up until about 1980 accepted certain categories as unproblematic and universal, but now believed quite the opposite. Such an argument would, in fact, be subject to easy “refutation,” if by refutation is meant finding eminent scholars (quite likely, even a majority

of the reputable sources on the subject) to affirm essentialism. Explaining to a court a lot of details about Greek sexual practices and attitudes, talking about Foucault, trying to get them to accept a proposition that is on the face of it seriously counter-intuitive—all this certainly seemed an ill-advised and quixotic project. Add to this the fact that constructionism is sometimes viewed with disdain or embarrassment within the gay community, in part {280 | 281} because it can be seen as undermining a hard-won identity and giving ammunition to cultural conservatives who view homosexuality as a conscious choice.

2. Bowers v. Hardwick

Several of the issues we have identified resurfaced in the U.S. Supreme Court's decision on *Lawrence v. Texas* in June, 2003. But first, a recap of the notorious earlier case, *Bowers v. Hardwick*, that was overturned by *Lawrence* (after having been seriously damaged by *Romer v. Evans*). The *Bowers* case started in 1982, when Michael Hardwick was charged with violating a Georgia statute criminalizing sodomy, the text of the act reading as follows:

- (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another ...
- (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years.[12]

Hardwick was arrested in the bedroom of his own home, when a roommate directed the police (who were looking for him on an unrelated matter) to open his closed bedroom door. Although the sodomy charges were soon dropped, he brought suit, asserting that, as a practicing homosexual, the statute, “as administered by the defendants, placed him in imminent danger of arrest, and that the statute for several reasons violates the Federal Constitution.”[13] Since the statute was gender-neutral, the original action also included as plaintiffs a straight couple, John and Mary Doe, who claimed that they wished to engage in the sexual activity forbidden by the statute, but had been “chilled and deterred” from doing so by the statute itself and by Hardwick's arrest. The trial court, however, found that they had not sustained, nor were likely to sustain, any direct injury from the enforcement of the statute, and therefore lacked the proper standing to sue. This had significant consequences, since it allowed the court to focus on same-sex activities only, and to “express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy” (*Bowers* *ibid.*).

The decision—one of the most controversial of the past generation—was handed down in 1986, one of the last of the Burger court. Joining the Chief Justice in a 5-4 opinion were Powell, Rehnquist, O'Connor, and Byron White, {281 | 282} who wrote for the majority. Pointing out at the beginning that the Court makes no judgment on whether sodomy laws are “wise or desirable,” White framed the issue as one concerning the “judgment(s) about the limits of the Court's role in carrying out its constitutional mandate” (*Bowers* 190). The

most serious of Hardwick's claims was that any such law should be invalidated as unnecessarily infringing upon the right of privacy implicit in the Due Process clauses of the Fifth and Fourteenth Amendments.[14] The right of privacy had been rapidly expanding with a series of decisions relating to marriage and sex: *Griswold v. Connecticut*, and *Eisenstadt v. Baird*, which struck down laws banning the sale of contraceptives; *Loving v. Virginia*, which invalidated anti-miscegenation laws; and of course the 1973 abortion decision in *Roe v. Wade*. White drew a line in the sand with *Hardwick*: "No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated ... Precedent aside, however, respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do" (*Bowers* 191).

The question as White framed it was this: what is the nature of the rights that are said to qualify for heightened judicial protection? Defining "fundamental liberties," White quoted a pair of cases to the effect that such rights are "implicit in the concept of ordered liberty ... (such that) neither liberty nor justice would exist if [they] were sacrificed," and that these liberties are those that are "deeply rooted in this Nation's history and tradition." He continued: "It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots ... 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" (*Bowers* 191–192). {282|283}

White then launched a manifesto against judicial activism (*Bowers* 194–195):

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution ... There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

Finally, the Court rejected the possibility of overturning the law under the easier-to-pass rational basis test: the fact that there is a "presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" (*Bowers* 196) is sufficient; the law, White points out, is frequently based on notions of morality.

Chief Justice Warren Burger weighed in with a concurrence of particular significance for us here, emphasizing the “ancient roots” of the proscriptions against sodomy. “Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law ... To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching” (*Bowers* 196–197).

It was at this point where historians began to come in to the story, as well as psychologists. First, the Court was taking the “ancient roots” quite seriously, going back as far as late antiquity: the citations to sodomy as capital crime under Roman law were to the law codes of Theodosius and Justinian, and there were subsequent citations to the law codes enacted under Henry VIII. Further, there were references to the sodomy laws prevailing in the original thirteen colonies at the time of Independence (so we see that the historicist arguments used ten years later in *Romer v. Evans* were already present in the debate over sodomy laws). Clarifying whether or not all ancient societies held similar judgments would, in fact, be relevant to this Court.

Other issues are worthy of mention. First, Blackmun outlined the limits of deference to tradition, which will prove to be a key factor in *Lawrence*: “Like Justice Holmes, I believe that it is revolting to have no better reason for a rule {283 | 284} of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past” (*Bowers* 199). Second, he referred to the Court’s “almost obsessive focus on homosexual activity”—after all, Burger’s brief concurrence added no new doctrine or interesting dicta, and was merely an attack on sodomy *per se*—and in particular the ways in which this obsessive view of the Court misstated the apparent intent of the Georgia law, which is gender neutral. Third, and perhaps most interesting from a classicist’s perspective, is the analysis of whether or not homosexuality is a condition. Recognizing changing attitudes, Blackmun pointed out that homosexuality is no longer viewed as a disease by mental health professionals, but is also not a matter of deliberate choice. “Homosexual orientation may well form part of the very fiber of an individual’s personality ... an individual’s ability to make constitutionally protected decisions concerning sexual relations ... is rendered empty indeed if he or she is given no real choice but a life without any physical intimacy” (*Bowers* 203). The question adumbrated here was to what extent gays can be protected under the Equal Protection Clause without having to face the additional burden of proving that they are a suspect class; that is, one that has experienced a history of past purposeful discrimination or unequal treatment, and which is defined by a characteristic that is “obvious, immutable or distinguishing,” and whether it has met with systematic exclusion from redress via the normal political process. That is, the Court (or rather, a substantial minority of it) accepted that homosexual identity is a category that exists and is immutable for given individuals, and that these individuals are unduly

burdened by sodomy laws.

3. *Romer v. Evans* Redux

Hardwick was, of course, one of the most controversial decisions of the Burger Court, one attacked not only by liberals and gay activists, but also by conservatives of a libertarian bent. It was reported soon afterward that Lewis Powell, the swing vote on the case, had changed his vote after intense lobbying from the Chief Justice, and within a few years Powell himself made it known that he regretted this vote more than any other. In addition, as was revealed in his 1994 biography, Powell was operating in near-total ignorance of homosexuality, claiming that he had never to his knowledge met a homosexual—despite the fact that one of his clerks at the time was gay, but closeted. (We may recall Posner’s 1992:346 remarks about “the narrowness of legal learning,” and his assertion that “what lawyers and judges mainly know is their own prejudices {284|285} plus what is contained in judicial opinions.”) The Court itself seemed rather embarrassed by the *Hardwick* decision: as some scholars have pointed out, it was not always relied upon for precedent, and a mere ten years later it was partly overturned by the verdict in *Romer*.

It was not entirely overturned, of course—that didn’t happen until *Lawrence*—but it was weakened as regards its key implications. The Court’s finding in *Romer v. Evans* was based on the Equal Protection Clause of the Fourteenth Amendment. Writing for the majority, Justice Anthony Kennedy quoted with approval the 1973 decision *Department of Agriculture v. Moreno* (413 U.S. 528): “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest” (*Romer* 1632). And the Court does in fact find that this was the intent of Amendment 2, rejecting the notion that the amendment merely “deprives homosexuals of special rights ... to the contrary, it imposes a special disability upon those persons alone. (They) are forbidden the safeguards that others enjoy or may seek without constraint” (*Romer* 1626–1627). Since gays and lesbians do not constitute a suspect class, heightened scrutiny is not warranted; instead, the State must pass the simpler rational basis test, of the law bearing “a rational relation to some legitimate end.” Indeed, the Court finds this sort of deliberate, broad-based singling out of a group for hardship rare and unjustifiable.

Yet in his dissent Antonin Scalia found a rationale. Opening with the salvo “The Court has mistaken a Kulturkampf for a fit of spite,” he defends the amendment as “a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.” And he continues with a point whose logic is hard to deny (*Romer* 1631):

The case most relevant to the issue before us today is not even mentioned in the Court’s opinion: In *Bowers v. Hardwick* ... we

held that the Constitution does not prohibit ... making homosexual conduct a crime. That holding is unassailable, except by those who think that the Constitution changes to suit current fashions ... If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct.

Not entirely coincidentally, at the time the Court was reviewing *Romer*, Congress was busily engaged in crafting the Defense of Marriage Act in {285|286} response to the possibility that Hawaii would soon recognize same-sex marriages. The Act, which was passed overwhelmingly by both Houses, and signed into law by President Clinton, defined marriage as a union between opposite-sex couples only, and further granted states an exemption from the “full faith and credit” provision of the Constitution so that marriages from one state need not be recognized in another. Here, too, classics played a role, although in the more usual way: the field was mined for specious precedent and example rather than being called upon as a source of expert testimony.[15]

4. Lawrence v. Texas

On one evening in 1998 the petitioners in this case, John Lawrence and Tyron Garner, were engaged in anal sex in Lawrence’s apartment. The Houston police, apparently not realizing that *delicto* is normally a dead metaphor, responding to a call regarding a man with a weapon, broke into the apartment and found Lawrence and Garner *in flagrante delicto*. The police arrested the pair, who spent a day in jail before being released on bond. They sought, at the level of the Harris County criminal court, to have the charges dismissed on constitutional grounds; when this failed, they pleaded *nolo contendere* to the charges, were fined \$200 plus \$141 in court costs, and pursued the case to the Court of Appeals; when this was unfruitful, to the Supreme Court.

This was, in many respects, a better test case than *Hardwick*: first of all, the petitioners suffered actual harm: the conviction could debar them from or restrict their entry into a variety of professions in Texas. Further, after such a conviction they would have to register as sex offenders if they moved to certain states. The arguments that made *Hardwick* seem less compelling—no real prosecution; “no real harm” clearly did not apply here. Further, the fact that the Texas statute applied only to same-sex sodomy allowed the petitioners to raise an Equal Protection claim, since they were in fact members of a class being singled out, as they maintained, for its unpopularity, and therefore the precedent established by *Romer* was much more on point than it would be for a gender-neutral law. And, oddly enough, the fact that the petitioners were engaged in anal rather than oral sex also made it a better test case, since some recent Constitutional scholarship has argued that oral sex is not

generally prohibited by pre-twentieth century sodomy laws, and was not therefore the {286|287} object of a proscription that had “ancient roots.” This particular dodge would not work, and the Court would have to face squarely the question of whether such ancient proscriptions were to be overthrown.

The petitioners sought to have the case examined under both the Due Process and Equal Protection Clauses, and to have *Bowers* invalidated. The majority opinion, again written by Kennedy, concluded that the Due Process Clause was the relevant section of the Constitution, and that *Bowers* needed reconsideration. The Equal Protection Clause was not considered entirely sufficient for the Court’s ends, although it was invoked in Sandra Day O’Connor’s concurrence.

The main issue was substantive due process, and the opinion sketches out the development of certain privacy and spatial rights, including the *Griswold*, *Eisenstadt*, and *Roe* decisions. Then comes the key paragraph that dismisses the central claim of the *Bowers* decision—that is, that the right to engage in homosexual sodomy is not a fundamental one:

That statement, we now conclude, discloses the Court’s own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty

protected by {287|288} the Constitution allows homosexual persons the right to make this choice.[16]

Instead of focusing on “homosexual sodomy” the court spoke of dignity, choice, and bonding. Yet even when the decision had been made to regard private, in the home, sexual conduct as a liberty interest, protected by the doctrine of substantive Due Process, two loose threads remained: first, how to deal with the objection that “proscriptions against this conduct have ancient roots”; and second, how to overcome the principle of *stare decisis*, in which a Court is loath to overturn the decisions of its predecessors.

In fact, the Court adopted a version of the social construction theory of sexuality to explain why sodomy laws used to be gender neutral, and to try to get at the original intent of the framers of those laws. First, Kennedy noted that “there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter” (*Lawrence* 7). That is to say, beginning with the Reformation Parliament of 1533 and continuing through the nineteenth century, sodomy laws were thought to prohibit certain types of acts between men and women, or between men and men. Why the change? “The absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century.” Kennedy then quoted from Jonathan Katz’ *The Invention of Heterosexuality*: “the modern terms homosexuality and heterosexuality do not apply to an era that had not yet articulated these distinctions” and concluded: “Thus early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit non-procreative sexual activity more generally. This does not suggest approval of homosexual conduct. It does tend to show that this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons” (*Lawrence* 7–8).

Continuing further in his history of sodomy laws, Kennedy (*Lawrence* 10) suggests that,

far from possessing ‘ancient roots’, American laws targeting same-sex couples did not develop until the last third of the 20th century ... it was not until the 1970s that any State singled out same-sex relations for criminal prosecution ... In summary, the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their {288|289} historical premises are not without doubt and, at the very least, are overstated.

Several things are worth noting here. First, the rhetoric of possibility and uncertainty: the Court was seeking a way to get around the earlier proscriptions of sodomy, a way to deflect

their relevance for this particular case. The fact that the situation is not so simple as had been claimed, that many scholars now argue that there were no recognizable homosexuals before 1892, provided a window of opportunity. The kind of reading now favored by literary critics in which openness, lack of closure, and dialogue are valued above certainty and structure (what might be termed the “*Symposium*” approach), has come to prominence in legal discourse as well. The second noteworthy point is the irony that ancient theories concerning sexuality should be triumphing in their most radical form: while the sources cited are not classical, they clearly depend on Foucault’s *History of Sexuality* and its problematization of sexual categories (and, to a lesser extent, on the work of followers of Foucault such as David Halperin and Jack Winkler). The constructionist view of sexuality is brought in as a way of silencing the strict constructionist, original intent, approach to the interpretation of law. Third, the construction of the gay subject comes at precisely the right historical moment for the Court’s purposes (the straight subject is constructed, too, of course, but heterosexuality is, as always, viewed as unproblematic). That is, for the Court’s reasoning to work, categories of homosexuality and heterosexuality cannot exist during the formative period for sodomy laws, which lasts up until the end of the nineteenth century. And yet that category must exist now, since it is being subject to attempts at discrimination, and is an identity that marks out a class of citizens deserving of equal protection under the laws. Ironically, one of the reasons I mentioned earlier for resistance to constructionist theories of sexuality—that, whatever their truth value, they might lead to discrimination on the grounds that a constructed sexual identity is infinitely mutable, and a conscious choice—seems not to apply here at all. In what must be seen as the most important decision ever relating to gay rights in the United States, constructionism played a crucial role.

Of course, our sexualities, constructed as they are, are real, just as the sexual categories of the nineteenth century, or of fifth-century Athens, were real to those who inhabited them. But now we have seen them reified by the Court, in what we may view as the latest step in a long process of the construction of the modern subject. The Court’s own analysis mentions the evolution of sodomy laws from being directed at sexual predators, on the one hand, and {289|290} those who shirked their reproductive duties, on the other. In this analysis it is possible to see the well-known evolution of sexual categories, the move from the earlier equation of same-sex activity with pederasty and infertility, to its construction as a medical and legal condition: the mobilization of the juridico-medical regime that Foucault spoke of.

The Court’s logic concerning the construction of sexuality is, of course, by no means unassailable. Suppose that the Framers of the Constitution, and the legislators of the various states as they were admitted to the Union, *had* believed in homosexuality as a category and deliberately disadvantaged homosexual status and behavior with their legislation. The Court would then have to take those legal and moral strictures more seriously; but at the same time it felt free to override the express will of the current majority of actually existing citizens in such cases as *Romer v. Evans*, and to do so more freely because

they lacked the aura of tradition. That is, the Court's particular line of logic may be seen as a sop to foundationalism, as a way of making a rather radical departure from precedent seem less radical.

After establishing the basis for finding a liberty interest that would be violated by the sodomy statute, the Court moved on to deal with the questions of *stare decisis*. Having dismissed the "ancient roots" argument, Kennedy continued by saying "In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. 'History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.'"[17]

At this point the Court in essence issued an apology for its earlier decision, citing the 1955 Model Penal Code of the American Law Institute (which recommended removing criminal penalties for consensual sex), and even referring to the practices of the European Court of Human Rights (a very inclusive gesture, and one that nods as well towards the more liberal branches of natural law that underlie the human rights movement and much international legal theory). The Court continued by citing its own decision in *Romer*, reiterating that a "provision 'born of animosity toward the class of persons affected' has no rational relation to a legitimate government purpose." Other criticism of *Bowers* is said to have weakened it (here Posner is cited, among others), and in essence turns John Paul Stevens' dissent in that earlier case into a majority {290 | 291} opinion: "Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here." The opinion concludes with the following words (*Lawrence* 18):

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

A text consists not only of itself but also of the readings of it made throughout its history, and needs interpreters to bring out its true meaning, whether that text be Plato's *Symposium* or the United States Constitution. All judges are, by necessity, reception theorists.
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Footnotes

[back] **1.** *Evans v. Romer*, 854 P. 2d 1270 Colorado District Court (1993); *Romer v. Evans*, 882 P. 2d 1335 Colorado Supreme Court (1994); *Romer v. Evans*, 517 U.S. Supreme Court 620 (1996). Full texts of these and other major decisions are easily locatable on websites such as [and](#) a variety of university and advocacy websites such as [.](#)

[back] **2.** The full text of the amendment, passed by voter referendum in November, 1992, reads as follows: “No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status quota preferences, protected status or claim of discrimination.”

[back] **3.** Finnis’s arguments, set out in his affidavit, are expanded in Finnis 1994a.

[back] **4.** Finnis, affidavit, p. 46, quoted in Nussbaum 1994:1585.

[back] **5.** Finnis 1994a:1061.

[back] **6.** Posner 1992:1, quoted at Nussbaum 1994:1516.

[back] **7.** Posner, *ibid.*

[back] **8.** Mendelsohn 1996:46. At the time of reading Mendelsohn’s article, I was very much in sympathy with this particular argument, but am less so now, for reasons explained below.

[back] **9.** David Halperin (esp. 1990 and 1992) has been at the forefront of this trend.

[back] **10.** For those unfamiliar with the constructionist/essentialist debate, a good and balanced introduction to the controversy may be found in Skinner 2005.

[back] **11.** My own view is closer to that of the “strict constructionists,” who hold that there is little evidence for a trans-historical gay or straight identity, at least not for one that encompasses fifth-century Athens and twenty-first-century America. Ironically, it is the *Symposium* that provides the ideological litmus test for separating strict and loose constructionists: namely, whether Aristophanes’ taxonomic division of proto-humans into male, female, and hermaphroditic wholes is evidence that such categories were common in Greek thought. As I have argued elsewhere (Carnes 1997), the context of Aristophanes’ speech makes it extremely likely that this was a nonce construct, readily intelligible insofar as variations in sexual object preference were discernible among individuals, yet unlikely to reflect any deeper and more lasting categorization analogous to the ones in use today.

[back] **12.** *Georgia Code Annotated* §16-6-2 (1984).

[back] **13.** *Bowers v. Hardwick*, 478 U.S. Supreme Court 186 (1986).

[back] **14.** The text of the Fifth Amendment of the Constitution of the United States reads as follows: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” [back]The Fourteenth Amendment of the Constitution of the United States: Section 1. “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

[back] **15.** See, for example, the speech by West Virginia Senator Robert Byrd in which selections from various classical authors are marshaled in defense of the institution of marriage (*Congressional Record—U.S. Senate*, September 10, 1996).

[back] **16.** *Lawrence v. Texas*, 539 U.S. Supreme Court 558 (2003).

[back] **17.** *Lawrence* 11 (quoting *County of Sacramento v. Lewis*, 523 U.S. Supreme Court 833, 857 (1998)).