

OUTLAW, OUTCAST, AND OBERGEFELL: AN ANALYSIS OF THE UNITED
STATES SUPREME COURT'S IDEOLOGY IN CASES THAT IMPACT THE LGBT
COMMUNITY

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OUTLAW, OUTCAST, AND OBERGEFELL: AN ANALYSIS OF THE UNITED STATES SUPREME COURT'S IDEOLOGY IN CASES THAT IMPACT THE LGBT COMMUNITY

This study employs an ideological rhetorical analysis to investigate three United States Supreme Court decisions concerning the liberties of the LGBT community. An analysis of the rhetoric from these cases for both the majority and dissenting opinions is conducted. These artifacts include *Lawrence v. Texas* (2003), *United States v. Windsor* (2013), and *Obergefell v. Hodges* (2015).

The purpose of this study is to analyze the rhetoric of these cases to understand the themes undergirding decisions about cases concerning the LGBT community. Themes of liberty, fundamental rights, equal protection, power, and polarization emerge in this study. Ultimately, it is determined that two groups are impacted by these decisions, these groups include the LGBT community and religious members who deem homosexuality as immoral.

Catherine A. Dobris, Ph.D., Chair

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Chapter I: Introduction

Prologue

In the book *From Disgust to Humanity: Sexual Orientation and Constitutional Law*, American Philosopher, Martha Nussbaum observed, “The American Politics of sexual orientation, over the years, has been suffused with appeals and disgust. Crucial stages in our political evolution have been shaped by these appeals, just as our new emerging legal culture has been shaped by their rejection” (2010, p.2). Nussbaum indicated that as the landscape of the political system grapples with questions concerning equal rights and sexual orientation, so does our highest court in the land, the Supreme Court of the United States (SCOTUS). Ultimately, cases lost in state level courts and debated in district level courts may be decided by SCOTUS.

Although SCOTUS determines what is legal in the United States, Communication scholars have only evaluated rhetoric by SCOTUS as a limited sample. Legal Communication and Women’s Studies scholar, Katie Gibson indicated that “scholars are not paying enough attention to judicial rhetoric [and scholars] need to direct more attention to the rhetoric of the Supreme Court” (2008, p. 327). Moreover, communication scholar David Tschida concluded that communication scholars “can be significant actors in the future debates by exploring the complexities they represent” (2012, p. 491). By examining the rhetoric of SCOTUS, scholars can better understand the impact that SCOTUS communication has on the American people.

Over the past sixty years, the rights of the Lesbian, Gay, Bisexual, and Transgendered (LGBT) community has evolved. LGBT issues were first brought before

SCOTUS in 1958 when a gay pornography magazine was found by the court to be protected as free speech, under the first amendment (*One, Inc. v. Olesen*, 1958). However, not all SCOTUS cases have granted rights to the LGBT community. In 1986, SCOTUS concluded that sexual acts by gay people in their own bedrooms was against the law since gay sodomy had no connection to family, marriage, or procreation (*Bowers v. Hardwick*, 1986). By 1996, the acceptance of the LGBT community into society was still mixed. Future cases would allow for special protections, if a city, town, or county felt it was necessary (*Romer v. Evans*, 1996) but SCOTUS still sided with larger organizations who did not believe that homosexuality aligned with its beliefs (*Boy Scouts of America v. Dale*, 2000). These cases helped to shape LGBT treatment in society through the twentieth century.

While SCOTUS rulings in the twentieth century brought a variety of results in regards to liberties for the LGBT community, the twenty-first century generated three major SCOTUS cases that helped to reshape the landscape of equal rights in regards to sexual orientation. The first case in the twenty-first century that was a step forward in granting rights for the LGBT community was *Lawrence v. Texas* (2003). This case overturned *Bowers v. Hardwick* (1986) and decriminalized sexual acts by gay people in private settings. The verdict of this case eliminated sodomy laws across America; some of these laws were specific to sodomy but only enforced on same-sex partners while other laws were specific only to same-sex encounters.

The second case of the twenty-first century involving gay rights was *United States v. Windsor* (2013). This case nullified the Defense of Marriage Act (DOMA), which indicated the terms “marriage”, and “spouse” were to be applied to heterosexual unions

only. *United States v. Windsor* (2013) overturned DOMA, essentially ordering states to treat all marriages the same including those between two people of the same sex.

The third and final case was *Obergefell v. Hodges* (2015). This case challenged the definition of marriage and was the consolidation of six lower court cases. The highest court in the land sided with the LGBT community and same-sex couples were granted the right to marry legally in any state in America.

The passing of these landmark cases allows for an analysis of the rhetoric of impactful SCOTUS case decisions that have importance in the LGBT community. Using an ideological lens, an analysis of *Lawrence v. Texas* (2003), *United States v. Windsor* (2013), and *Obergefell v. Hodges* (2015) SCOTUS decisions will be conducted. The analysis will include the rhetoric of the Justices in the majority opinion and the rhetoric of the Justices with dissenting opinions to understand the ideologies of SCOTUS in these cases. An ideological framework is useful as it allows for the rhetoric of SCOTUS Justices to be analyzed to understand how the dogma of SCOTUS Justices provides a firm basis for legal discourse.

Ideological criticism is a useful methodology that has been applied to artifacts such as popular literature, architecture, and film. Rene Stovall's M.A in Communication thesis applied this methodology. Stovall identified themes of economic, political, and social oppression in the popular fictional trilogy, *The Hunger Games* (2015). Ideological criticism has also been employed to understand contemporary Chinese architecture to explain the difference between two developmental directions within the country (Wei & Wuirong, 2010). Finally, Benjamin Mann's M.A. in Communication thesis concerning the ideology of the series *Transparent* found that the series was mixed in advancing the

representation of the members of the LGBT community (2016). Using ideological criticism, a variety of artifacts can be better understood.

The examination of SCOTUS rhetoric is important since the role of the SCOTUS is to base decisions through the lens of the Constitution but also factor in that popular majorities cannot pass laws that harm or take undue advantage of unpopular minorities (United States Courts, 2016). Determining the ideologies applied by SCOTUS Justices in these cases will shed light on how the justices interpret the Constitution in an effort to make and justify their decisions.

In this study, I will employ an ideological framework to analyze the rhetoric of SCOTUS decisions, both the majority and dissenting opinions in three major U.S. Supreme Court cases. These cases include *Lawrence v. Texas* (2003), *United States v. Windsor* (2013), and *Obergefell v. Hodges* (2015). In this chapter, I will begin with the rationale and research questions explored in the study. I will also provide an overview of the organization of chapters for the remainder of the thesis.

Rationale and Research Questions

Equal rights for members of the LGBT community, as recognized by SCOTUS, has become known only in the past few decades. As progressive initiatives have been granted by the high court, it is apparent that an evolution in thought-process and decision-making may be occurring. An analysis of three landmark decisions for the LGBT community to date may help to determine ideologies of the U.S. Supreme Court.

Three research questions will be addressed in this study.

RQ1: What are the ideologies manifest in these artifacts?

RQ2: Who are the groups whose interests are represented in the identified ideologies?

RQ3: What are the implications of these ideologies for the community in which they participate?

Chapter II: Review of Literature

Introduction

Peer-reviewed work by Communication scholars in the area of SCOTUS rulings has been limited. A search of the Comm-abstracts database only yielded twenty journal articles that could be reviewed to analyze SCOTUS rulings by our discipline. Most of the work in this area has been conducted using freedom of speech cases based on the First Amendment. The remaining scholarly work that evaluated SOCTUS cases was in regards to issues concerning women, communication, the environment, political, and indirect-voice representation.

This literature review section will begin with a historical appraisal of cases heard by SCOTUS concerning LGBT issues. Second, an analysis of academic articles published in communication journals that evaluated first amendment cases will be conducted. The literature review will conclude with an assessment of SCOTUS and issues concerning women, communication, the environment, political, and indirect-voice representation.

Historical Background of LGBT Issues and SCOTUS

This research proposes the use of three high profile and recent Supreme Court decision concerning the rights of LGBT people. It is important to first look at the entire history of SCOTUS and its treatment of LGBT people. The following section will review eight Supreme Court rulings when considering LGBT issues. This review will include every SCOTUS case concerning LGBT issues except for the three SCOTUS cases analyzed as artifacts in this thesis.

One, Inc. v. Olesen (1958).

One, Inc. v. Olesen was the first case in history that addressed any concern brought forth by a member of the LGBT community regarding an LGBT issue. In this case, the Federal Bureau of Investigations and the United States Post Office determined that the magazine *One: The Homosexual Magazine*, was considered obscene and therefore could not be delivered by the U.S. Postal Service. After losing the initial case as well as the appeal, the publishers of *One* took their case to SCOTUS. The Supreme Court, primarily based on free speech, reversed the lower court rulings. Justices Frankfurter, Douglas, Clark, Harlan, and Whitaker were in the majority opinion. Justices Warren, Black, Burton, and Brennan were in the dissenting opinion.

Bowers v. Hardwick (1986).

This case tackled the Georgia state law of sodomy and the right to privacy. In a 5-4 decision, it was determined that the right of privacy was only afforded to intimate marital and familial relations. SCOTUS Justices in the majority opinion argued that gay sodomy had “no connection between family, marriage, or procreation” (*Bowers v. Hardwick*, 1986). This decision solidified the criminalization of gay sex. SCOTUS Justices in the majority opinion included Justices White, Rehnquist, O’Connor, Burger, and Powell. The Justices in the dissenting opinion included Justices Blackmun, Brennan, Marshall, and Stevens.

Webster v. Doe (1988).

In 1988, SCOTUS reviewed the case of *Webster v. Doe*. This case focused on the admission by a CIA employee that he was homosexual. Doe, the name given to the anonymous employee, was placed on leave of absence and eventually terminated. The

issue put before the court was if the termination was judicially reviewable. SCOTUS determined that The National Securities Act made it impossible to review this case procedurally however; SCOTUS determined that the case could be heard constitutionally. Justice Rehnquist authored the majority opinion and it was concurred by Justices Brennan, White, Marshall, Blackmun, and Stevens. Justice Kennedy took no part in the decision of the case while Justice O'Connor concurred in part but dissented in part. Justice Scalia authored a dissenting opinion indicating that the Constitution, laws, or common sense gives an individual the right to come into court to litigate their dismissal as a CIA officer (*Webster v. Doe*, 1988).

Carlucci v. Doe (1988).

This case was similar to *Webster v. Doe* in that it focused on the termination of an employee from a government job based on information disclosed by the employee about being gay. In *Carlucci v. Doe*, Doe was a cryptographic material control technician for the National Security Agency (NSA) and admitted to having sexual relations with foreign nationals. SCOTUS ruled unanimously that the termination was allowed under NSA guidelines. Justices for this case included Rehnquist, Brennan, White, Marshall, Blackmun, Steven, O'Connor, Scalia, and Kennedy.

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc. (1995).

In Boston Massachusetts, a group of Irish-Americans held an annual parade celebrating St. Patrick's Day. The group barred the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB) from participation. The council stated that including GLIB as a participant in the parade meant that it would be forced to endorse a message

beyond the councils will. SCOTUS, in a unanimous decision, determined that private citizens who formed a council and put on an event like this one had the right to protect its intended message. Justices for this case included Justices Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer.

Romer v. Evans (1996).

In 1992, the voters of Colorado approved a measure that prevented any city, town, or county from enacting any law or ordinance that recognized gays and lesbians as a protected class. After Amendment 2 of the Colorado Constitution passed, the measure was challenged in state court where it was found that the amendment would infringe on the fundamental rights of gays to participate in the political process (*Evans v Romer*, 1993).

On May 20, 1996, the United States Supreme Court argued in a 6-3 decision that Colorado's Amendment 2 was unconstitutional. The court majority opinion communicated that they felt the amendment was based on animosity towards homosexuals and therefore was not aligned with any legitimate governmental purpose. The Supreme Court Justices in the majority opinion included Justices Kennedy, Stevens, O'Connor, Souter, Ginsburg, and Breyer. The Justices in the dissenting opinion included Justices Scalia, Rehnquist, and Thomas (*Romer v. Evans*, 1996)

Boy Scouts of America v. Dale (2000).

After the Boy Scouts of America revoked the adult membership of Eagle Scout, James Dale because he was gay, Dale sued the organization. The Boy Scouts of America asserted that homosexual conduct did not align with the values that the Boys Scouts of America tried to instill in young boys. In a 5-4 decision, SCOTUS sided with the Boy

Scouts of America. The court indicated that the organization had the right to refuse or revoke membership if “the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints” (*Boy Scouts of America, et al v. Dale, 2000*). The Supreme Court Justices in the majority opinion included Justices Rehnquist, O’Connor, Scalia, Kennedy, and Thomas. Those in the dissenting opinion included Justices Stevens, Stouter, Ginsburg, and Breyer.

Christian Legal Society Chapter v. Martinez (2010).

SCOTUS reviewed the case of the *Christian Legal Society (CLS) of Hastings College v. Martinez* in 2010. This case challenged Hastings College policy that all students must be allowed admission into a group for the group to receive school funds. The CLS chapter at Hastings College believed this violated their first amendment to exclude gay people because they did not condone the behavior by the LGBT community. SCOTUS found in a 5-4 decision that Hasting’s policy did not violate the first amendment when it denied acknowledgement of the student group for refusing to admit all students. Justices Ginsburg authored the majority opinion and Justices Stevens, Kennedy, Breyer, and Sotomayor joined in the opinion. Justice Alito authored the dissenting opinion and was joined by Justices Roberts, Scalia, and Thomas.

Conclusion.

The preceding eight cases heard by SCOTUS demonstrated a split in LGBT victories; The LGBT community won four cases and four cases were lost. SCOTUS solidified its support of free speech as demonstrated in *One, Inc. v. Olsen*. SCOTUS also recognized the LGBT community as a group who deserved a voice, this was apparent in *Webster v. Doe*. SCOTUS also protected the LGBT community from a state denying a

city, town, or county the right to consider those of the LGBT community as a protected class.

However, with these victories also came some defeats that helped to enlighten how the LGBT community was perceived by SCOTUS. *Bowers v. Hardwick* outlawed gay sodomy because it had no connection to family. SCOTUS did not consider gay partners as being family the same way that they perceived heterosexual partners. *Carlucci v. Doe* made it possible to terminate LGBT individuals from government positions if guidelines were established as precedent.

SCOTUS has demonstrated that it is wary of LGBT presences in public spaces and its impact on changing intended messages of other groups. In both *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* and *Boy Scouts of America, et al v. Dale* the decisions handed down by SCOTUS were based on the idea that an LGBT presence would change the message that the established group sought. According to SCOTUS, the message of a parade celebrating being Irish people would be altered if an LGBT group had representation in the parade. Moreover, SCOTUS deemed that the message of what is acceptable conduct and what is not for boys in the Boy Scouts of America would be altered if they allowed members to be openly gay.

SCOTUS' decisions have been inclusive when it came to approving the application of school funds. If a group wanted to receive money from available school funds then they needed to follow the guidelines set forth by the school. In *Christian Legal Society (CLS) of Hastings College v. Martinez*, SCOTUS concluded that if CLS wanted to obtain funds from the school then they would need to be inclusive and accept members who identified as LGBT.

Communication Analysis of SCOTUS Cases

The following sections will review all twenty articles written in the last twenty years found in the Comm-Abstracts database and were written about SCOTUS cases throughout time. This review includes a variety in types of SCOTUS cases. While the focus of this thesis is SCOTUS and LGBT issues, these twenty articles only revealed two articles that touched on these issues. One article splits its analysis between the *Bowers v. Hardwick* case and another case that was not focused on LGBT issues. This article is discussed further in the section entitled ‘indirect representation and SCOTUS.’ The only other article that considers SCOTUS and LGBT issues is addressed in the section ‘The First Amendment and SCOTUS.’ In this section, the case *Snyder v. Phillips* is analyzed. This case involves the Westboro Baptist Church (WBC). While the case focusses on WBC and its presence at a military funeral, a brief history of the WBC and the LGBT community is shared. Outside of these two articles, our field is limited in the examination of LGBT issues and SCOTUS.

The following sections will start with an analysis of the largest area of SCOTUS research conducted by our discipline. Twelve articles have been dedicated to analyzing SCOTUS treatment of the First amendment. The remaining sections are detailed using no specific priority. They include two articles in the section ‘women’s issues and SCOTUS’; one article in the section ‘communication issues and SCOTUS’; one article in the section ‘environmental issues and SCOTUS’; three articles in the section ‘political issues and SCOTUS’; and one article in the section ‘indirect voice representation and SCOTUS.’

The First Amendment and SCOTUS.

The literature search revealed two journal articles that analyzed the rhetoric of the Supreme Court case of *Citizens United v. FEC*, (2010). This case was important for two specific reasons; first, it removed any limit of money that corporations and unions could spend on independent expenditures in campaigns; second, it overturned two previous decisions by SCOTUS. According to Silver and Kozlowski (2012), “stare decisis” is the primary way justices will determine decisions. Stare decisis is based on precedent which is established by a previous decision made by the Supreme Court. Justice Kennedy wrote the majority decision for the court and Justice Roberts concurred. Silver and Kozlowski suggested concern for this decision as it appeared only based on “personnel changes” to the bench of SCOTUS. These scholars indicated that this change in Justices altered the ideology of the group as a whole and influenced the direction of the country. Kerr (2010) determined Justice Kennedy authored the majority opinion and concurred by Justice Roberts, Justice Scalia, and Justice Thomas. Kerr argued that language used in the majority opinion of *Citizens United v. FEC*, (2010) was the construction of the ‘ancient’ baseline. The collaboration of politics and big business and the theme of money and power intersecting was at the core of Kerr’s logic. These two articles indicated that the make-up of Justices has a severe influence on the direction of the United States and that ideology had changed over time.

Communication scholar Gregory Lisby evaluated the way SCOTUS had treated the First Amendment rights of high school and college students. Lisby questioned the point where an educational institution relinquished control over student expressive activities (2002). He pointed to the 1986 SCOTUS case of *Hazelwood v. Kuhlmeier*. In

this case, SCOTUS determined that unless a high school newspaper was deemed a student forum it was protected less by the First Amendment than independent student expression or high school newspapers that were established specifically as a student forum. Lisby concluded that the determination of ‘full reign’ was left unanswered. University level journalistic practices were brought to court and the application of *Hazelwood v. Kuhlmeier* has been difficult to apply as precedent.

Professor Robert Dreschel analyzed the findings of the SCOTUS case of *Garcetti v. Ceballos*. This Supreme Court decision determined that public employees do not hold First Amendment protection against retaliation for speech that they engage in as part of their job duties (Dreschel, 2011). It was found that in its decision SCOTUS did not clearly define what was considered job duties. This has been problematic for cases that try to use *Garcetti v Ceballos* as precedent. The justices who authored the dissenting opinion first established this concern. Dreschel argued that the result of this decision could slacken the flow of information from government employees to the public through mediums such as newspapers or other media. As liberties are censured, so is the risk to divulge information.

Silver and Kozlowski (2012) analyzed the rhetoric of Justices Brennan, Scalia, and Thomas in regards to the ideology of originalism. Originalism is the concept that Justices will look at the original intent of the Constitution in order to make judicial decisions. Justices will employ originalism ideology in order to provide their opinions with legitimacy (Silver & Kozlowski, 2012). Silver and Kozlowski discovered that Justice Brennan believed in the evolution of textual meaning. When analyzing the rhetoric of Justice Scalia and Justice Thomas, it was determined that both advocated for

originalism. In essence, Justice Brennan believed that the constitution should be evaluated based on its current meaning while Justices Scalia and Thomas believe that the constitution should be evaluated using its original meaning.

Scholar Jessica Gall analyzed the Supreme Court Case of the *Republican Party of Minnesota v. White*. In this case, it was declared, “unconstitutional a Minnesota judicial cannon prohibiting judicial candidates from announcing their views on issues likely to come before them” (Gall, 2008). Justice Scalia indicated that as a country, we have never prohibited candidates for election to communicate information that was relevant to voters, Justice O’Connor concurred with this assertion. While SCOTUS found that restricting candidate speech was not constitutional, the decision was not unanimous. Justices Stevens, Outer, Ginsburg, and Breyer all dissented. Their argument was that Judges were not policymakers but rather elected to play an impartial role in government (Gall, 2008). While a segment of the bench of SCOTUS established their decision based on an application to all candidates, another segment based their decision on the possible impact and responsibilities of Judges. Gall concluded that this decision allowed democracy to properly function and citizens to self-govern as this restriction would have been akin to censorship.

Communication scholar, Wat Hopkins reviewed the concept of the ‘Marketplace of Ideas’ in his 1996 article. This theory was based on the marketplace of competition where the truth will emerge when competing ideas are discussed and are transparent (Gordon, 1997). The author evaluated the rhetoric used in freedom of speech cases to determine if SCOTUS was using freedom of speech in a way that could not be protected by the law or if it had been used in a way that protected speech. Hopkins (1996)

concluded that the metaphor of marketplace of ideas was first introduced to SCOTUS in 1919. Up to 1996, the metaphor had been used by SCOTUS ninety-seven times. Moreover, it was used approximately two-thirds of the time in rhetoric that was part of the majority opinion or a concurrence with it. Hopkins discovered that SCOTUS applied the marketplace of ideas to a variety of decisions. In essence, SCOTUS had created various mini-marketplaces; these included applications to political speech, libraries, mail systems, etc. Hopkins suggested that the creation of marketplaces allowed for the protection of expression. By determining the unique marketplace for which this issue competes, the use of this metaphor allowed decisions to be made by SCOTUS.

One first amendment article that is of particular interest to LGBT concerns is that of *Snyder v. Phelps: The U.S. Supreme Court's spectacular erasure of the tragic spectacle* by Bruner and Balter-Reitz (2013). The authors analyzed *Snyder v. Phelps*, which is a case about the freedom to protest funerals. Fred Phelps, the founder of the Westboro Baptist Church (WBC) had organized a protest of the funeral of Marine Lance Corporal Matthew Snyder. The WBC had a history of protesting military funerals because the church believed that the military defended the United States, who in-turn permits policy that allowed and condoned homosexual behavior (Bruner & Reitz, 2013). The majority opinion authored by Justice Roberts concluded the WBC were allowed First Amendment protection since the statements were on matters of public concern, were provably false, and were expressed solely through hyperbolic rhetoric. Justice Alito dissented indicating Albert Snyder, the plaintiff in the case, and father of the deceased military man, was not a public figure and that the WBC issued a press release and turned Matthew's funeral into a tumultuous media event. Bruner and Balter-Reitz (2013)

concluded that Justice Alito was concerned about establishing precedent for those who spread hate speech. While the protest by Snyder and the WBC was not appreciated by the court, it was still deemed to be protected by the First Amendment.

Three articles published by Communication scholars in the area of SCOTUS decision making were in regards to the landmark decision of *The New York Times v. Sullivan*. This case established specific criteria that must be met before journalistic information could be deemed libel or defamation of character. The ruling allowed journalists to report freely the civil rights movements that were occurring in the south. Scholar John Watson reviewed the ethical considerations of *The New York Times v. Sullivan*. Watson lamented, “When courts have to weigh competing values and principles it is not uncommon to see the scales tipped against truth” (Watson, 2002). Watson indicated that *The New York Times v. Sullivan* ruling was an example of creating law in order to further social goals. On the surface, *The New York Times v. Sullivan* determined what was necessary to deem journalistic practice as malice; however, its biggest impact was allowing social injustices to be illuminated in newspapers across the nation. Professor Urofsky concurred with this assertion in his 2014 assessment of this case. If SCOTUS had ruled in favor Sullivan then “one of the most important social movements of the twentieth century would have been stifled” (Urofsky, 2014). Communication scholars Susan Ross and Kenton Bird observed that the Times case gave a broader meaning to the protection of freedom speech as it removed a serious threat to the civil rights movement (Ross & Bird, 2004). Moreover, it was indicated that this decision was a product of the era. It was clear that the SCOTUS used this case as way to help fight social injustices.

In 2005, scholars Kristen Moritz and Mary Elizabeth Bezanson evaluated the SCOTUS case, *United States v. American Library Association* (ALA). This case investigated the right of use of the internet at public libraries; the suit determined information such as pornographic websites could be blocked. It was found in a 6-3 decision that using a filtering device did not impede the First Amendment. Moritz and Bezanson, (2005) concluded that SCOTUS moved away from precedent. The authors contested that “by limiting certain messages, such as those it deems indecent or obscene, individuals lose the ability to create a common meaning on their own terms” (Moritz & Bezanson, 2005, p. 98). While protecting a certain population from certain images and rhetoric, SCOTUS also obstructed another population from autonomy.

When considering these twelve articles about the First Amendment and SCOTUS, several themes emerge. First, as a new SCOTUS Justice replaces another, the ideology of the court is often impacted and altered. This makes sense since every human has her/his own ideology therefore, new justices would not have the same ideology on every issue as the justice they are replacing. Second, the framing of decisions vary by the Justices. Justices Scalia and Thomas are both considered an originalist while Justice Brennan based his decisions on his interpretation of the current meaning of the constitution. Third, SCOTUS values the marketplace of ideas. An evaluation of First Amendment cases and SCOTUS revealed that this concept was mentioned in approximately two-thirds of the majority opinions or those who concurred with the majority opinion. A fourth theme to emerge in this analysis is the fight for justice or the fight against injustice by SCOTUS. This is apparent in the three articles that analyzed *The New York Times v. Sullivan*. Moreover, SCOTUS decisions seem to be inconsistent

based on either medium or government influence. For example, in *Snyder v. Phelps*, the WBC was found to be protected by the freedom of speech but the court still indicated to the WBC that they were not appreciative of the speech and that they had concerns that it could lead to precedent concerning the approval of hate speech. Alternatively, *United States v. American Library Association*, allowed censorship of message. The main differences between these two cases were the medium and government influence. One case was about a protest and the other was about information that flowed through the internet. Moreover, the government does not fund or have influence on the WBC but it does fund public libraries and therefore does have influence over that entity.

The following sections will review areas of focus by our discipline outside of the First Amendment. The sections will evaluate articles authored by communication scholars in regards to SCOTUS cases. The areas addressed include SCOTUs and issues concerning women, communication, the environment, politics, and indirect-voice representation.

Women's Issues and SCOTUS.

Communication scholar Katie Gibson has published two articles in regards to SCOTUS and the treatment of women's issues. Her first article addressed *The United States v. Virginia*. In this decision, SCOTUS struck down the Virginia Military Institute's (VMI) male-only admission policy. Gibson suggested in her analysis "that different methods of Constitutional interpretation allow for different stories of women to be told" (Gibson, 2006, p. 133). A 7-1 decision occurred with one Justice recused because his son was enrolled at VMI at the time. Gibson argued that SCOTUS was responsive to history as appropriate.

In a second article concerning SCOTUS and women's issues, Gibson analyzed the rhetoric of *Roe v. Wade*. This famous case made it legal for women to have abortions. In this review of *Roe v. Wade*, Gibson determined that the rhetoric of "women-as-patient-as-womb denied the very existence of woman-as-agent" (Gibson, 2008, p. 327). Moreover, Gibson established that reproductive freedom must be reframed to promote women's voices. Finally, Gibson concluded that SCOTUS' opinion was significant and promised to yield more accessible judicial discourse.

Communication Issues and SCOTUS.

Shelby Bell wrote in a 2014 article about the rhetorical implications of silence in the SCOTUS case *Berghuis v. Thompkins*. This case investigated the right to remain silent as communicative action. Thompkins had been arrested for a shooting at a local delicatessen. His Miranda rights were read to him, which included the right to remain silent. Thompkins remained silent for over two hours of his interrogation before finally speaking. The question SCOTUS needed to address was 'does one need to speak in order to invoke their right to remain silent?' or 'had Thompkins invoked his right to remain silent by not speaking for over two hours?' Bell discovered the SCOTUS Justices had a variety of interpretations of what the communication strategy of silence meant. For Justice Kennedy, who wrote the majority opinion, "Thompkins silence [was] not an invocation of his right to remain silent, but as invoking nothing, and thus as meaning nothing" (Bell, 2014, p. 184). In an opposing view and interpretation on the "Right to Remain Silent", Justice Sotomayor, who wrote a dissent, indicated that Thompkins had "at least indicated a desire to invoke the right to remain silent (Bell, 2014, p. 188). It is clear that interpretation of communication strategies by Justices of SCOTUS are not

always in alignment. Bell concluded that theories of rhetorical silence point to the idea that silence rests the possibility of communication and resistance. Moreover, rhetorical silences can be interpreted differently from each other and there are consequences to rhetorical silence.

Environmental Issues and SCOTUS.

Communication Scholar David Tschida analyzed the SCOTUS case of *Massachusetts v. Environmental Protection Agency* (EPA). In this case, it was determined in a 5-4 decision that greenhouse gasses were pollutants and therefore the EPA had the right to regulate their emissions. Tschida specifically looked at the arguments made by Justice Stevens who authored the majority opinion. He found that Justice Stevens used a specific strategy that included the “function of presumption and burden of proof in science and law to refute claims of uncertainty” (Tschida, 2012, p. 487). Tschida argued Justice Stevens also communicated certainty using precedent and scientific rhetoric. The strategy of using certainty was important as scientific hypothesis could easily be rebuffed, making legal action difficult.

Political Issues and SCOTUS.

Clark Rountree conducted a Dramatic Analysis about the SCOTUS case *Korematsu v. United States*. In this case, it was found that it was constitutional to order Japanese Americans into internment camps after the bombing of Pearl Harbor. In the analysis, Rountree suggests that judicial opinions were mainly concerned with determining action motives (2001). Moreover, it was determined that precedents were often reduced to agency; this could provide them power in the future.

Analyzing the rhetoric of *Bush v. Gore* communication scholars, Theodore Prosise and Craig Smith determined SCOTUS Justices had abandoned consistency with the way each had based their rulings previously and voted partisan instead (2001). In this SCOTUS case, the court decided that time was a concern to continue a recount of Florida's cast ballots for President of the United States. Prosise and Smith concluded, "that the Supreme Court violated the boundaries of the legitimate linguistic possibilities for its ruling, thereby undermining the credibility of the decision" (2001, p. 628). In all, it was suggested that, the Justices of SCOTUS could have self-serving political motives.

Scholars Johnston, Hillygus and Bartels evaluated the ideology of the Affordable Care Act ruling and SCOTUS legitimacy. In their 2014 article, the authors were able to conclude that "the ACA decision seemed to influence opinions of Supreme Court legitimacy for low and moderate sophisticates [however] highly sophisticated was associated with high levels of legitimacy" (Johnston, Hillygus, & Bartels, 2014, p. 970). It was hypothesized that ideology and legitimacy of SCOTUS was associated.

Indirect Voice Representations and SCOTUS.

Finally, communication scholar, Glenda Conway analyzed the rhetoric of two SCOTUS cases, *Scott v. Sandford* and *Bowers v. Hardwick*. She considered these cases before the Supreme Court as instances where indirect voices were represented. *Scott v. Sandford* was a SCOTUS case in 1857 that held that a Negro could not be a citizen of the United States if he or she was brought to the country as a slave or was the child of a slave. *Bowers v. Hardwick* is of particular interest to this study since this case upheld the Georgia sex law that prohibited sodomy by consenting adults. *Bowers v. Hardwick*, as previously discussed, was considered precedent when considering *Lawrence v. Texas*.

Conway (2003) found that the rulings of both of these cases depicted SCOTUS as a “resistant body, unsympathetic toward and repulsed by these two disturbingly aberrant individuals who so brazenly had challenged the ways in which law served to limit their freedom” (p. 491). Conway indicated that Scott was treated as a ‘no one’ while Hardwick was treated as ‘unheard and unaccepted’.

Conclusion.

In analyzing these twenty scholarly articles, three areas seem paramount. First, an evaluation of these articles indicates that SCOTUS values precedent. The verdict and rhetoric of a SCOTUS case is often used as reasons to rule a certain way in future cases, not only in the Supreme Court but also in lower courts. Roundtree’s analysis of *Korematsu v. United States* concluded that precedents would often become agency to give them the power of influence on future cases (2001). Moreover, in *Snyder v. Phelps*, Justice Alito wrote a dissenting opinion stating that he was concerned that if the WBC won this case then the victory would be used as precedent for future hate speech cases.

Second, the ideology of SCOTUS is always in flux. The articles that addressed the First Amendment cases and SCOTUS indicated that as the justices change so do the ideologies. As Gibson stated, various interpretations of the Constitution by the justices allow stories to be told through different frames (2006). Two specific frames discovered in friction with each other is originalism and progressivism. Silver and Kozlowski (2012) discovered that Justices Thomas and Scalia applied the philosophy of originalism when interpreting the Constitution. Alternatively, Justice Brennan applied the philosophy of progressivism. Gibson (2006) recognized that SCOTUS was responsive to the current issues, allowing women to be accepted into a historically male-only academy. This idea

of currency can also be seen in *The New York Times v. Sullivan* when the verdict allowed newspapers to continue to report on social injustices without fear of frivolous libel suits.

Third, SCOTUS cases regarding underrepresented or minority groups is of particular interest since the LGBT community falls in these categories. When Gibson evaluated SCOTUS rhetoric regarding women she indicated that the high court did not treat woman as agent and women's voices needed to be promoted. This concept of the unheard underrepresented was also present in Conway's article that explored indirect voices (2003). Conway employed *Scott v. Sandford* and *Bowers v. Hardwick* to indicate that SCOTUS was resistant to and unsympathetic towards those who challenged the laws that limited their freedom. Yet, the aforementioned *New York Times v. Sullivan* verdict and rhetoric allowed social injustices to be fought. The cases under analysis occurred in various times of history. The ideology of SCOTUs during a specific time will have an impact on the decisions made by the high court. SCOTUS' approach to these cases is particularly important to this research since the three artifacts under investigation focus on a minority group that is underrepresented and fighting for social justice

Chapter III: Methodology and Artifacts

Ideological Criticism

The definition of ideological criticism has been argued since Michael McGee's 1980 work, *The 'Ideograph': A link between Rhetoric and Ideology*. McGee suggested that an ideograph was the capturing and reinforcing of words that demonstrate a specific ideology. McGee originally focused on political ideology. Furthering this discussion was Philip Wander in his paper, *Ideological Turn in Modern Criticism*. Dr. Wander concluded that ideology was the unmasking of ethical and political dilemmas (1983). Fellow of the British Academy, Terry Eagleton posited in his 1991 work that there were a variety of meanings for ideological criticism, these included assigning meaning to and values in social life as well as ideas or false ideas, which help to legitimize a dominant political power. Cloud (1994) concluded that when material reality and ideology were separated the power of the social structure diminishes. In essence, the determination of an ideology by a group of people can create or enhance power for that group or another. Shome (1996) furthered this notion of quality with her 'Theory of Other' where she indicated that there was a dominant framework biased through the lens of white western heterosexual males. Beach (2007) concluded that "the rhetoric of the American Dream focus[ed] on unrealized promises found in the Declaration of Independence and it articulate[d] the need of equality and freedom for all members of our society" (p. 148). Determining ideologies is not only essential for analyzing the powerful members of our communities but important for all citizens. Groups are formed in many different sizes. It is through the nuances of smaller groups that unique perspectives and ideologies can be

explored. The constant exploration of ideas by smaller groups allows critical dialogues to take place and an evolution in thoughts and practices. If our society only focused on majority groups then potential thought evolution would be limited by the scope of the status quo.

Foss (2009) concluded Ideological criticism determined a group's interpretation of an aspect in the world. This interpretation allows the group to form beliefs about what is reality. There are four tenets to Ideological criticism. The first tenet of Ideological criticism is to determine the rhetorical aspects that are presented. In this part, the critic identifies any assumptions made that help to create the ideology. Coding of specific artifacts from the group help in this identification process. In the second tenet, the critic takes the coding from tenet one and interprets the message for meaning. In this point, the discovery of the ideology starts to take place. In the third tenet, the critic uses the suggested elements to formulate the ideology of the group; clusters of common themes emerge and are used to help determine the beliefs of the group. In the fourth and final tenet, the critic determines how the ideology functions for the audience who encounters it and the consequences it has on the world (Foss, 2009). What message does the ideology disseminate using the artifact?

Description of the Artifacts

The following three artifacts were chosen because they represent three SCOTUS cases that had great impact on the LGBT community. Each case explored the liberties of this group and the decisions altered the rights granted to them by the United States. These cases were pivotal in the fight for equality by the LGBT community. The following three cases are listed in chronological order. This is necessary since rhetoric of the initial cases

is often used in future cases by SCOTUS justices. SCOTUS Justices have used rhetoric from the first case explored in this research and cited in the second and third cases. The second case explored also has rhetoric used by certain Justices in the third case.

Lawrence v. Texas (2003).

John Lawrence and Tyson Garner were arrested on September 17, 1998 for engaging in “deviant sex” in the home of Lawrence. The police were called when another man indicated that in a nearby home there was a “black male going crazy with a gun” (Egan, 2007). When police arrived, they entered the house. Later, two officers reported that they had witnessed Lawrence and Garner having sex. After verifying with the Assistant District Attorney, the first arriving police officer, Joseph Quinn determined that the state statute forbade this type of sexual conduct even within the private residence of a home. Lawrence and Garner were arrested and held overnight, later pleading ‘Not Guilty’ to the charge of homosexual conduct.

Lambda Legal, a not-for-profit law firm that worked to progress equal rights for the LGBT community quickly took on the case as the trial lawyers for Lawrence and Garner. The firm had their clients change their pleas from “not guilty’ to ‘no contest’ (Lithwick, 2012). The defendants were imposed a fine of \$100 each plus court costs of \$41.25. Since this was below the minimum required fine to appeal the conviction, the attorneys for Lawrence and Garner asked for it to be raised. With the agreement of the prosecutor, Justice of the Peace, Mike Parrot agreed to raise the fine to \$125. Parrott was aware that Lambda Legal intended to raise a constitutional challenge using this case (Carpenter, 2012).

An appeal of this ruling was filed in Harris County Criminal Court. The Lambda Legal team asserted that the charges should be dismissed based on the Fourteenth Amendment, equal protection grounds and that the law was unconstitutional since it only prohibited sodomy between same-sex couples and not heterosexual couples. *Bowers v. Hardwick* was also cited as “wrongly decided” (Carpenter, 2012). Judge Sherman Ross denied the motion by the defense and the defendants plead “no contest” again. The defendants were each fined \$200.

The Texas Fourteenth Court of Appeals heard the case on November 3, 1999. In a 2-1 decision, it was deemed that the Texas law was unconstitutional. On March 15, 2001, the Court of Appeals decided to review the case and in a 7-2, decision reversed the decision. Lambda Legal then asked the Texas Court of Criminal Appeals, the highest appellate court in Texas for criminal matters to review the case. A year later, that request was denied.

Lambda Legal on behalf of Lawrence and Garner petitioned the United States Supreme Court on July 16, 2002. The court agreed to hear the case and on June 26, 2003 in a 6-3 decision, the U.S. Supreme Court ruled in favor of Lawrence and Garner and overruled the previous statute set by the case *Bowers v. Hardwick*. This not only changed the law in the state of Texas but also revised the law in thirteen other states who had similar ordinances. Justice Kennedy authored the majority opinion and was joined by Justices Stevens, Souter, Ginsburg, and Breyer. Justice O’Connor authored a concurrence. Justices Scalia authored a dissent and was joined by Justices Rehnquist and Thomas. Justice Thomas also authored his own dissent.

United States v. Windsor (2013).

Edith Windsor and Thea Spyer met in 1963 and began dating. Although marriage between two women was not legally recognized, Spyer proposed to Windsor in 1967 (Roig-Franzia, 2012). The pair lived in New York; however, Canada recognized same sex marriage before the United States did therefore, Windsor and Spyer decided to marry legally in Toronto (Shapiro, 2012). In May of 2008, the Governor of New York ordered that state agencies should recognize same-sex marriages performed in other jurisdictions.

When Thea Spyer passed away in 2009, Edith Windsor inherited her estate. Since the United States did not recognize same-sex marriages, Windsor was forced to pay \$363,053 in federal inheritance taxes that she would not have had to pay if she had been married to a man (Schwartz, 2010). Believing that she had been unfairly treated, Windsor filed a case in the U.S. District Court for the Southern District of New York.

On February 23, 2011, the Attorney General for the United States released a statement regarding the Defense of Marriage Act (DOMA) section III. Section III defined marriage as between one man and woman and spouse was considered only as someone of the opposite sex. Attorney General Eric Holder indicated that in previous cases there were precedents established by that specific jurisdiction and therefore a rational basis standard existed for reviewing laws concerning sexual orientation. Windsor had filed her case in the Second Circuit Court of Appeals and no such precedent had been established. It was determined that the constitutionality of DOMA would not be defended by the United States in the Windsor case (United States Department of Justice, 2011).

The Bipartisan Legal Advisory Group (BLAG) of the House of Representatives filed a motion to defend DOMA and the constitutionality of Section III. Section III of DOMA was reviewed for rational basis and it was determined to be unconstitutional as it violated Windsor's guarantee of the Fifth Amendment. The Department of Justice filed an appeal with the Second Court but the Windsor victory was upheld.

The Department of Justice petitioned the Supreme Court and oral arguments were heard on March 27, 2013. On June 26, 2013, in a 5-4 decision, the Supreme Court ruled that Section III of DOMA was unconstitutional and Windsor would receive a refund of her inheritance taxes paid plus interest (Liptak, 2013). Justice Kennedy authored the majority opinion for the case with the support of Justices Ginsburg, Breyer, Sotomayor, and Kagan. Justices Roberts, Scalia, and Alito each authored dissenting opinions. Justice Thomas joined in the dissenting opinion made by Justices Alito and Scalia. Justice Roberts joined in part of Justice Scalia's dissenting opinion.

Obergefell v. Hodges (2015).

Six cases regarding same-sex marriage were heard in District Courts in four states (Michigan, Ohio, Kentucky, and Tennessee); the rulings were in favor of the same-sex couples. All four states banned same-sex marriage yet the plaintiffs had won all six cases. The six decisions were appealed to the United States Court of Appeals for the Sixth Circuit Court. The Sixth Circuit Court reversed all six cases.

The United States Supreme Court agreed to hear four of the reversed cases that dealt with same-sex marriage challenges to the state laws as once case. These included *DeBoer v. Snyder* from Michigan, *Obergefell v. Hodges* from Ohio, *Bourke v. Beshear*

from Kentucky and *Tanco v. Haslam* from Tennessee (Ortiz, 2015). The case of the constitutionality of same-sex marriage was filed as *Obergefell v. Hodges*.

Oral arguments were delivered on April 28, 2015. On June 26, 2015, the United States Supreme Court in a 5-4 decision required all states to grant same-sex marriages and to recognize those marriages from other states based on the fourteenth amendment. Justice Kennedy authored the majority opinion and Justices Ginsburg, Breyer, Sotomayor and Kagen supported it. Each of the remaining four justices including Justice Roberts, Scalia, Thomas, and Alito authored dissenting opinions.

Research Questions

This study will explore three Research Questions based on the evaluation of the three SCOTUS cases:

RQ1: What are the ideologies manifest in these artifacts?

RQ2: Who are the groups whose interests are represented in the identified ideologies?

RQ3: What are the implications of these ideologies for the community in which they participate?

Chapter IV: Analysis and Findings

Artifact 1: *Lawrence v. Texas* (2003)

The SCOTUS case *Lawrence v. Texas* (2003) has four pieces of written opinions that will be analyzed. The majority opinion for the court was written by Justice Kennedy and joined by Justices Stevens, Souter, Ginsburg, and Breyer. Justice O'Connor wrote a concurrence. A dissenting opinion was written by Justice Scalia and was joined by Justices Rehnquist and Thomas. Justice Thomas also wrote an additional dissenting opinion. Three major themes emerged from this case including liberty, fundamental rights, and equal protection.

Liberty.

A major theme that emerged in *Lawrence v. Texas* was liberty. While this theme occurred as a dominant ideology for both Justice Kennedy's majority opinion and Justice Scalia's dissenting opinion, the interpretation of this theme varied by the two Justices. Justice Kennedy discussed liberty, spotlighting how the Fourteenth Amendment and the Clause of Due Process protect it. Justice Kennedy argued, "Individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of liberty protected by the Due Process Clause of the Fourteenth Amendment" (*Lawrence v. Texas* p. 578). Kennedy positioned the right of liberty as it was already given to heterosexual couples who engaged in sexual intimacy with no hope of conceiving a child. Kennedy used this precedent to infer that liberty is protected by Due Process.

Liberty is ‘for all citizens of the United States’ was another way in which Justice Kennedy discussed the application of liberty. In this reference, Justice Kennedy refers to liberty as it was used in *Roe v. Wade* and the right to choose as part of women’s rights. Moreover, Kennedy spoke directly about the Texas anti-sodomy law and stated, “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” (*Lawrence v. Texas*, p. 558). Justice Kennedy went further in his statement indicating that SCOTUS is obliged to define liberty for all but not enforce a moral code.

One final area that Justice Kennedy explored in regards to liberty was that of “right to define one is own concept of existence, of meaning, of the universe, and of the mystery of human life” (*Lawrence v. Texas*, p. 574). In this aspect of the majority opinion, Justice Kennedy advocated for autonomy as a right of liberty. Moreover, the majority opinion declared that liberty allowed for exploration in one’s own life in order to determine meaning and gain clarity.

Justice Scalia also spoke to the theme of liberty. Justice Scalia began his dissenting opinion by asserting, “[l]iberty finds no refuge in a jurisprudence of doubt” (*Lawrence v. Texas*, p. 586). This statement was originally used to defend *Roe v. Wade* in the SCOTUS decision *Planned Parenthood v. Casey* and the challenge to five provisions of the Pennsylvania Abortion Control Act of 1982. Justice Scalia employed the theme of liberty but implied that it was locked in a law of uncertainty.

Justice Scalia challenged Justices Kennedy’s assertion that liberty was part of the Fourteenth Amendment, Due Process, and under SCOTUS jurisdiction. Justice Scalia stresses that the Fourteenth Amendment gave states the right to deny liberty to an

individual as long as that state provided Due Process. Because the state of Texas had denied the right to consensual sodomy for same-sex couples, Due Process had been applied and liberty had been rightfully denied to these individuals.

Justice Scalia also disputed Justice Kennedy's determination that SCOTUS was not to implore a moral code in their judgements. Justice Scalia pointed to the liberty provided to heterosexuals to have a legal recognition of marriage where homosexuals were denied this right. He goes on to discuss how laws and traditions in the past have used morality as a clause to forbid certain sexual practices, therefore constraining liberty.

Justice Kennedy had interpreted liberty as a right to one's own concept of existence, meaning and mystery, Justice Scalia contested this notion emphasizing the concept of existence and mystery of life only casts doubt on the application of our laws. Moreover, Justice Scalia proclaimed that the use of this phrase as part of the majority opinion placed the power of the government in to question.

Fundamental Rights.

Justice Scalia has been described as an originalist (Wood, 2010). He believed that the laws that govern our society should be based on the intent of the law when it was written. In essence, he did not believe that rights and liberties evolve over time as society learns new information or changes its perspective on issues. Justice Scalia put the theme of fundamental rights forth in his dissent of *Lawrence v. Texas*. He argued that nowhere in the majority decision was the act of homosexual sodomy described as a fundamental right. Justice Scalia stated, "Nowhere does the Court's opinion declare that homosexual sodomy is a fundamental right under the Due Process Clause; nor does it subject the Texas law" (*Lawrence v. Texas*, p.586). Because the original interpretation of the

constitution did not include homosexual sodomy as a fundamental right therefore, according to Justice Scalia, it should not be granted.

Justice Scalia's concern with identifying what was considered a fundamental right was due to the provision that fundamental rights are given a heightened level of scrutiny. Fundamental rights are protected against unnecessary government encroachment. Justice Scalia cited *Bowers v. Hardwick*, the precedent case that had upheld the Georgia anti-sodomy law. In this case, homosexual sodomy was not subject to heightened scrutiny because it was not considered a fundamental right.

Finally, Justice Scalia considered fundamental rights and the nation's history. He concluded "We have held repeatedly, in cases the Court today does not overrule, that only fundamental rights qualify for this so-called heightened scrutiny protection that is, rights which are deeply rooted in this Nation's history and tradition" (*Lawrence v. Texas*, p.593). He referred to *Bowers v. Hardwick* again and determined that the conclusion drawn in that case that homosexual sodomy was not a fundamental right that was deeply rooted in our nation's history and the rhetoric of that case should not be questioned or defeated.

Equal Protection.

In her concurrence with the majority opinion, Justice Sandra Day O'Connor wrote about the ideological theme of equal protection. In her seven-page articulation, Justice O'Connor discussed equal protection with great importance. She argued that equal protection was the lens that should be used in determining *Lawrence v. Texas*. She also discussed the theme of equal protection as it related to rational basis and moral disapproval.

Justice O'Connor sided with the majority opinion but determined that the conclusion should be supported using the Equal Protection Clause and not the Due Process Clause. Justice O'Connor cited *Cleburne v. Cleburne* and stated "[t]he Equal Protection Clause of the Fourteenth Amendment is essentially a direction that all persons similarly situated should be treated alike." (*Lawrence v. Texas*, p.579). The Texas anti-sodomy law only applied to homosexuals; it was not against Texas state law for heterosexuals to partake in consensual sodomy.

Rational basis is the default standard of review when considering cases under Due Process or Equal Protection. Justice O'Connor contended that "[w]hen a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause" (*Lawrence v. Texas*, p.580). Moreover, Justice O'Connor indicated that SCOTUS typically held laws as unconstitutional when it inhibited personal relationships. In support of this argument, she cited *The Department of Agriculture v. Moreno* and its determination that equal protection applied so hippies would not be discriminated.

Finally, Justice O'Connor addressed the nature of moral disapproval and how it applied to the theme of equal protection. Justice O'Connor cited *Bowers v. Hardwick* and concluded, "Moral disapproval of a group is a rational basis under the Equal Protection Clause to criminalize homosexual sodomy when heterosexual sodomy is not punished" (*Lawrence v. Texas*, p.582). Moreover, she proclaimed since Texas only forbade homosexuals from partaking in consensual sodomy while heterosexuals could lawfully do so, moral disapproval would not apply to the act but rather the group of people. She asserted that this difference discriminates among a group of people.

Advancing her assertion, Justice O'Connor cited the words of Justice Robert H. Jackson in the case *Railway Express v. New York*, "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally" (*Lawrence v. Texas*, p.585). If the law against sodomy were imposed on all citizens of the United States, Justice O'Connor declared that it would not be approved and made law.

In review of *Lawrence v. Texas*, there are four major documents; Justice Kennedy's majority opinion, Justice O'Connor's concurrence, Justice Scalia's dissent and Justice Thomas' dissent. Justice Thomas' dissent is absent from this criticism not because it was not reviewed but rather for the sparsity of the document. Justice Thomas wrote a half page dissent that concluded the case was "silly" and should be decided by the states rather than SCOTUS.

Artifact 2: United States v. Windsor (2013)

In the SCOTUS case *United States v. Windsor*, four documents are analyzed. These documents include Justice Kennedy's majority opinion, and the dissenting opinions of Justice Roberts, Justice Scalia, which Justice Thomas joined, and Justice Alito. In analyzing the *United States v. Windsor*, two major themes emerged as paramount. Justice Scalia's rhetoric demonstrates the theme of power. The ideology of polarization emerges through Justice Scalia and Justice Alito's rhetoric.

Power.

Power materialized as a major theme in the rhetoric of *United States v. Windsor*. All four Justices who drafted the majority opinion or a dissenting opinion explored the theme of power. Specifically, the theme of power was explored as a decision factor, abuse, and inequalities. An analysis of the three dissenting opinions written by Justices Scalia, Roberts, and Alito found that each Justice felt that SCOTUS did not have the power to determine this case. Justice Scalia stated in his dissent “We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate this democratically adopted legislation” (*United States v. Windsor*, Scalia, p.1). His argument concluded that marriage was defined by each individual state and Congress initiated The Defense of Marriage Act (DOMA) rightfully. Justice Scalia goes on to state that the three branches of government were established in a way that separated power and SCOTUS ruling on this issue was not appropriate. Justice Roberts agreed with Justice Scalia that SCOTUS lacked jurisdiction. Moreover, Justice Alito indicated that SCOTUS Justices were unelected officials and that congress has the power to enact laws.

Justice Kennedy also spoke to the theme of power. In his majority opinion Justice Kennedy stated “[t]he history of DOMA’s enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute” (*United States v. Windsor*, Kennedy, p.20). Justice Kennedy lamented that DOMA was an abuse of power by the federal government because it interfered with the states right to provide full privilege to couples who were legally married in that state.

Kennedy further purported that DOMA treated same-sex marriages as different and unequal, which ultimately affected the dignity of this group.

Establishing that DOMA caused an inequality, Kennedy goes on to conclude “DOMA undermines both the public and private significance of state sanctioned same-sex marriages; for it tells those couples, the Court and all the world, that their otherwise valid marriages are unworthy of federal recognition” (*United States v. Windsor*, Kennedy, p.22). In this instance, the rhetoric by Kennedy demonstrated that DOMA took power away from same-sex married individuals when state statute indicated they should have equal power to heterosexual married couples.

Justice Roberts warned in his dissent “while ‘[t]he State’s power in defining the marital relation is of central relevance’ to the majority’s decision to strike down DOMA here, that power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions.” (*United States v. Windsor*, Roberts, p.3). Justice Roberts concluded that the power given to same-sex married couples through the majority opinion would be used in the future to challenge the legality of state marriage definitions.

Polarization.

Two justices used the theme of polarization as a part of their argument. Contrasting two ideas as being entirely different, Justices Scalia and Justice Alito described how the argument by the majority implied that those who were against the removal of DOMA were “bigots or superstitious fools” (*United States v. Windsor*, Alito, p.13). Justice Alito purported that there were two opposing sides to marriage, the first was what he deemed as traditional and the other he called consent-based.

Traditional marriage, as defined by Justice Alito was only between those of opposite sex and “created for the purpose of channeling heterosexual intercourse into a structure that supports child rearing” (*United States v. Windsor*, Alito, p.13). Justice Alito described consent-based marriage as “a vision that primarily defines marriage as the solemnization of mutual commitment— marked by strong emotional attachment and sexual attraction—between two persons” (*United States v. Windsor*, Alito, p.14). While these two views indicated two different views about who can marry and who cannot, Justice Alito described his interpretation of what the majority opinion was asking “to endorse the consent-based view of marriage and to reject the traditional view” (*United States v. Windsor*, Alito, p.14). Justice Alito claimed that embracing consent-based marriage meant rejecting traditional view of marriage; therefore, this was an argument of polarization.

Justice Scalia also employed the theme of polarization by inferring from the majority opinion those who did not support the abolition of DOMA opposed equality. Justice Scalia questioned the rhetoric and reprimanded the majority for stating that those who supported DOMA do so with the purpose of disparaging and injuring same-sex couples. Furthermore, he claimed “[b]y formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition” (*United States v. Windsor*, Scalia, p.24). In essence, Justice Scalia maintained that the majority’s rhetoric had drawn a hypothetical line with one side being right, just, and for equality, while the other side was against all of these virtues.

Artifact 3: Obergefell v. Hodges (2015)

In the SCOTUS case *Obergefell v. Hodges* five different documents are analyzed. Justice Kennedy wrote the majority opinion. Four dissenting opinions were authored; Justice Roberts joined by Justice Scalia and Justice Thomas; Justice Scalia joined by Justice Thomas; Justice Thomas joined by Justice Scalia; and Justice Alito joined by Justice Scalia and Justice Thomas. The themes of liberty and fundamental rights were dominant in these artifacts.

Liberty.

The theme of liberty emerged once again when analyzing the SCOTUS case of *Obergefell v. Hodges*. Both Justice Kennedy and Justice Thomas explored this premise in their opinions. Justice Kennedy began his narrative by stating that “[t]he Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity” (*Obergefell v. Hodges*, Kennedy, p.1). With this expression, Kennedy indicated that liberty extended to all citizens including those who were not part of the majority. Kennedy furthered his argument by concluding that this freedom afforded by the constitution applied to same-sex partners who wanted to legally marry and have that marriage recognized in the same way that heterosexual marriages were recognized.

Kennedy identified that the Constitution did not specifically speak to marriage nor the rights of gay people. Kennedy indicated “[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning” (*Obergefell v.*

Hodges, Kennedy, p.10). Kennedy suggested that the foundation of the constitution had been laid but the current SCOTUS justices would decide its application to future issues.

Justice Kennedy professed that gay rights had progressed and more liberty had been brought to those individuals however, it had not been enough. Kennedy referenced the decision made in *Lawrence v. Texas* and concluded, “Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty” (*Obergefell v. Hodges*, Kennedy, p.10). While the *Lawrence* decision allowed for certain liberties and freedom for sexual activity between consensual gay adults, not being able to marry kept these individuals from full liberty.

Justice Kennedy linked equal protection to liberty by referencing *Loving v. Virginia* in which the majority opinion stated, “There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.” With this link to equal protection, the Court proceeded to hold the prohibition offended central precepts of liberty. Kennedy concluded, “To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law” (*Obergefell v. Hodges*, Kennedy, p.20). *Loving v. Virginia* legalized interracial marriage and its rhetoric was highly applicable to *Obergefell v. Hodges*. Kennedy concluded this idea by incorporating phrases from *Loving v. Virginia* and tying equal protection of all citizens to the right of liberty.

Justice Thomas also promoted the theme of liberty but established its definition in a different way than Justice Kennedy did. Justice Kennedy began his opinion by stating

“Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits” (*Obergefell v. Hodges*, Thomas, p.1). With this statement, Justice Thomas implied that liberty should be mandated to citizens of the United States through the freedom from government action but liberty did not allow government intervention to allow additional freedoms.

Justice Thomas challenged the application of liberty as it pertained to the Fourteenth Amendment and the Due Process Clause. He maintained “[t]he majority claims these state laws deprive petitioners of ‘liberty,’ but the concept of ‘liberty’ it conjures up bears no resemblance to any plausible meaning of that word as it is used in the Due Process Clauses” (*Obergefell v. Hodges*, Thomas, p.3). Justice Thomas did not believe that the guideline used to approve marriage equality established liberty in the same way that the majority opinion stated. He concluded that the Due Process Clause used liberty as a way to indicate that a person should be without restraint unless the law required it.

Justice Thomas evolved his argument from challenging the guidelines by which the majority based their decision to religious liberties and its importance. Justice Thomas stated, “[a]side from undermining the political processes that protects our liberty, the majority’s decision threatens the religious liberty our Nation has long sought to protect” (*Obergefell v. Hodges*, Thomas, p.14). He concluded that the majority’s opinion would have unavoidable and wide-ranging implications to religious liberties. Justice Thomas professed “[h]ad the majority allowed the definition of marriage to be left to the political process—as the Constitution requires—the People could have considered the religious liberty implications of deviating from the traditional definition as part of their

deliberative process” (*Obergefell v. Hodges*, Thomas, p.16). Justice Thomas pointed to the importance of religious liberty and minimized the liberty of those in same-sex partnerships.

Finally, Justice Thomas concluded what he believed liberty meant and how SCOTUS should apply it; he stated “[o]ur Constitution—like the Declaration of Independence before it—was predicated on a simple truth: One’s liberty, not to mention one’s dignity, was something to be shielded from—not provided by—the State” (*Obergefell v. Hodges*, Thomas, p.17). Justice Thomas concluded that we should not be given additional liberties and additional liberties are something for which we need protection.

Fundamental Rights.

Justice Kennedy began his discussion about the fundamental rights of humans by stating “[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution” (*Obergefell v. Hodges*, Kennedy, p.11). In this statement, Justice Kennedy implied that those who decided the meaning of the Constitution determined what a fundamental right is. In the United States of America, SCOTUS interprets the meaning and application of the constitution.

Building his argument, Justice Kennedy continued to employ the theme of fundamental rights. He cited previous SCOTUS cases including *Loving v. Virginia* which stated that interracial marriages should be legal and *Turner v. Safley* which gave prisoners the right to be legally married “because their committed relationships satisfied the basic reasons why marriage is a fundamental right” (*Obergefell v. Hodges*, Kennedy, p.15). Using this evidence, Justice Kennedy argued that same-sex partners should also

have this fundamental right. Justice Kennedy proclaimed, “[s]ame-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning. The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest” (*Obergefell v. Hodges*, Kennedy, p.18). In essence, same-sex couples deserve the same treatment as opposite-sex couples when it comes to marriage because it is a fundamental right. Kennedy makes a final statement “These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court held that same-sex couples might exercise the fundamental right to marry (*Obergefell v. Hodges*, Kennedy, p. 23). The theme of fundamental rights was used as Justice Kennedy’s primary rationale for the legalization of marriage for same-sex couples.

In his dissenting opinion, Justice Roberts begins his discussion about fundamental rights by stating, “The fundamental right to marry does not include a right to make a State change its definition of marriage” (*Obergefell v. Hodges*, Roberts, p.1). In this argument, Justice Roberts concluded that the fundamental rights of a citizen did not outweigh the rights of the state. Moreover, he proclaimed “[s]tripped of its shiny rhetorical gloss, the majority’s argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society” (*Obergefell v. Hodges*, Roberts, p.10). Justice Roberts purported that this right has no basis in the constitution and therefore should not be decided by SCOTUS.

Justice Roberts then goes forward with his argument to caution the application of fundamental rights and proposed that the opinion by the majority could be used in the future for the rights polyamorous relationships. He states “It is striking how much of the majority’s reasoning would apply with equal force to the claim of a fundamental right to plural marriage” (*Obergefell v. Hodges*, Roberts, p.20). This slippery slope argument shifted the focus away from determining what a fundamental right is for the current subject and moved the focus of the argument to a subject not being explored.

Justices Alito, Thomas, and Scalia addressed the theme of fundamental rights in a limited fashion. Justice Alito concluded, “[n]oting that marriage is a fundamental right, the majority argues that a State has no valid reason for denying that right to same-sex couples” (*Obergefell v. Hodges*, Alito, p.3). In this statement, Justice Alito determined that the majority had chosen an argument that could not be combatted with an argument of what the federal government should decide and what individual states should decide. Justice Thomas addressed the theme of fundamental rights in one statement “[this argument] invites judges to do exactly what the majority has done here—‘roa[m] at large in the constitutional field’ guided only by their personal views’ as to the ‘fundamental rights’ protected by that document (*Obergefell v. Hodges*, Thomas, p.2). Here, Justice Thomas claimed that the majority had viewed and interpreted the constitution through their own lens instead of its original intent. Justice Scalia also addressed the theme of fundamental rights with one phrase. He stated “[the majority] have discovered in the Fourteenth Amendment a ‘fundamental right’ overlooked by every person alive at the time of ratification, and almost everyone else in the time since” (*Obergefell v. Hodges*,

Scalia, p. 7). Justice Scalia perpetuated the argument made by Justice Thomas in that the fundamental rights for same-sex marriage are not found in the constitution.

Conclusion

After analyzing these three artifacts, certain ideological underpinnings emerge through the majority opinions and the dissenting opinions. The majority opinions in all three of these cases embraced a ‘liberty for all’ ideology. Justice Kennedy authored all of the majority opinions and was inclusive of all citizens as part of his rhetoric. He wrote about liberty being all citizens in both *Lawrence v. Texas* and *Obergefell v. Hodges* while condemning DOMA as an abuse of power that minimizes liberties in *United States v. Windsor*.

The dissenting opinions embraced an ideology that purported that ‘liberties for one can have a negative consequence for another.’ In *Lawrence v. Texas*, Justice Scalia indicated that liberty should be constrained by a moral code. Justice Thomas in *Obergefell v. Hodges* furthered this ideology when he indicated that the inclusion of same-sex couples in the definition of marriage ignored religious liberties. Essentially, the analysis of these artifacts revealed ideologies that were in contrast between the Justices of the majority and dissenting opinions.

Chapter V: Conclusion

Judicial decisions by SCOTUS are of the utmost importance to evaluate from an academic standpoint since the rhetoric from these justices is used to help shape our realities. Analyzing these artifacts is valuable because it helps us to understand the ideologies that drive SCOTUS decisions regarding LGBT issues. The following chapter will begin by answering the Research Questions posed at the beginning of this thesis. The next area will address the limitations of using ideological criticism and of this research. Finally, I will summarize the findings of this thesis.

Research Questions

Three Research Questions were posed at the beginning of this thesis: What are the ideologies manifest in these artifacts? Who are the groups whose interests are represented in the identified ideologies? What are the implications of these ideologies for the community in which the participate?

RQ1: What are the ideologies manifest in these artifacts?

Two major ideologies and three minor ideologies that were uncovered through this analysis. The major ideologies of fundamental rights and liberty were explored by multiple SCOTUS Justices in all three of these artifacts and were paramount in two of them. The minor ideologies explored in these artifacts include equal protection, polarization and power.

Fundamental Rights.

Fundamental rights are a theme that emerged through the rhetoric of *Lawrence v. Texas* and *Obergefell v. Hodges*. Justice Scalia addressed the application of fundamental

rights in *Lawrence v. Texas*. Justices Kennedy used this theme as part of his majority opinion in *Obergefell v. Hodges*. Justices Roberts, Alito, Thomas and Scalia used this theme as part of their rationale when they wrote dissenting opinions in *Obergefell v. Hodges*. Both Justices Scalia and Thomas have been described as devotees to the theory of Originalism (Silver & Kozlowski, 2012). This theory, as used in judicial cases means that the constitution should be applied by its original intention (Solum, 2011). Justice Scalia used this lens when addressing his dissenting opinion in *Lawrence v. Texas*. Justice Scalia indicated that homosexual sexual activity was not a fundamental right given by the Constitution or the Bill of Rights, therefore this right should not be granted through judicial means. Justice Scalia also applied the theory of originalism in *Obergefell v. Hodges*. Justice Thomas concurred with Justice Scalia in *Obergefell v. Hodges* and indicated that if the majority was considering marriage of same sex couples a fundamental right then they were interpreting the constitution differently than originally intended by the authors of the Constitution. Justice Thomas posited that this was not aligned with originalist framing. Justices who prescribe to the notion of originalism will keep their ideologies statics and not evolve in their beliefs as time moves forward. The ideologies of these Justices are aligned with the ideologies of our ancestors who penned the Constitution.

While examining the artifacts the theme of fundamental rights emerged through the concepts of precedent, history and tradition. Justice Scalia, in *Lawrence v. Texas*, concluded that considering homosexual sodomy as a fundamental right was not rooted in history and tradition. Moreover, Justice Scalia looked at precedent or former case rulings and rhetoric from SCOTUS cases. Here, he determined that former cases such as *Bowers*

v. Hardwick did not claim that homosexual sodomy should be viewed through ‘heightened scrutiny’. This practice would have been necessary to determine whether sexual practices are considered a fundamental right.

Justice Kennedy also addressed the theme of fundamental rights in reference to precedent. In *Obergefell v. Hodges*, Justice Kennedy wrote about marriage being a fundamental right. He included precedent cases by SCOTUS and indicated those outside the majority population (i.e. heterosexual, white, and non-prisoners) had the fundamental right to marriage. *Turner v. Safley* allowed prisoners to marry as a fundamental right and *Loving v. Virginia* allowed interracial couples to marry as a fundamental right.

Constraint was an application used when describing fundamental rights. In *Obergefell v. Hodges*, Justice Roberts stated that fundamental rights should not outweigh the laws governed by the states. Moreover, Justice Roberts warned of the slippery slope nature of identifying marriage as a fundamental right. He proclaimed that the arguments used by the majority for marriage as a fundamental right could be easily applied to polyamorous relationships. Justice Kennedy identified the use of constraint when addressing fundamental rights, but took a different perspective. Justice Kennedy stated in *Obergefell v. Hodges* that SCOTUS responsibility was not only to identify and protect fundamental rights but also to interpret the constitution for application. Justice Kennedy argued that fundamental rights should be constrained by state law or should be hindered based on possible future applications of a similar argument that determined a fundamental right for a select group.

Liberty.

In both *Lawrence v. Texas* and *Obergefell v. Hodges*, the theme of liberty was discovered. This ideology was uncovered in both the majority and dissenting opinions of these cases. Although the theme of liberty was explored, its meaning differed between those who wrote for the majority opinion and those who wrote dissents. In both *Lawrence v. Texas* and *Obergefell v. Hodges*, Justice Kennedy wrote the majority opinion. In his use of the theme of liberty, Justice Kennedy indicated that liberty is for all citizens of the United States and moral code should not enforce it. Justice Scalia in his dissent countered this argument and stated that liberty can be constrained by a moral code. He stated “if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed” (*Lawrence v. Texas*, Scalia, p. 6). Furthermore, Justice Scalia indicated that the approval by SCOTUS for the engagement of same sex sexual encounters promoted the homosexual agenda in regards to “eliminating the moral opprobrium that has traditionally attached to homosexual conduct” (*Lawrence v. Texas*, Scalia, p. 18). While the majority opinion argued that liberty should be paramount, Justice Scalia in his dissenting opinion disagreed and concluded that morality trumps liberty.

Justice Kennedy continued his discussion about liberty in *Lawrence v. Texas* when he implied that liberty gave the freedom to choose and to “discover one’s own meaning of the universe and human existence.” Justice Scalia argued against this concept and concluded that liberty was not a freedom without implemented controls. Justice Scalia stated that law restrained liberty and that Due Process meant that a state could regulate additional liberties if those challenging it were given a judicial review. Finally,

Justice Scalia lamented that encouraging citizens to explore through liberty the mysteries of human life only casts doubt on the power of the government. In this investigation of liberty, the majority opinion argued that humans have the right to continue to investigate and make determinations about the meaning of life and the pursuit of happiness. The dissenting opinion authored by Justice Scalia indicated that the control superseded individual liberty.

Justice Thomas used the theme of liberty in his dissent of *Obergefell v. Hodges*. Justice Thomas implied that some liberties should be protected and that the liberty of same-sex marriage infringed on religious liberty. He stated that the majority's decision to approve same-sex marriage could have "potentially ruinous consequences for religious liberty" (*Obergefell v. Hodges*, Thomas, p. 16). Justice Thomas scolded the majority opinion for only addressing liberty in regards to religious liberty in one sentence. Justice Thomas valued religious liberty as much as individual liberty.

Justice Kennedy, in his majority opinion in *Obergefell v. Hodges* concluded that the founding father of the constitution could not possibly determine the applications for all future liberties. He asserted that the application of liberty evolved as society evolved. Justice Thomas debated this point and argued additional liberties were not provided through the application of the Constitution but rather the Constitution constrained future liberties.

In review of the application of liberty in these two SCOTUS cases, two different sides emerged. The majority opinion argued that liberty allowed for choice, exploration of meaning of human life, and should be applied to all citizens. Those justices who authored a dissenting opinion lamented that law should determine liberty, and that

additional liberties are a threat to government power and religious freedom. The majority argued the application of liberty evolves while those in dissent argued that it should be controlled.

Equal Protection.

Justice O'Connor's rhetorical contribution to these cases was evident in *Lawrence v. Texas* and the theme of equal protection. Equal Protection, Justice O'Connor proclaimed, was applied to equate individuals or groups who are similarly situated. Justice O'Connor's intention was to safeguard minority groups by applying this standard to her majority opinion in *Lawrence v. Texas*. Moreover, Justice O'Connor concluded that moral disapproval should not undermine equal protection, therefore if certain sexual activity was deemed illegal for one group; it should be deemed illegal for all.

Polarization.

The theme of polarization emerged in the case *United States v. Windsor* with two justices employing this theme. Justice Alito created the strongest argument of polarization by determining that there were two different schools of thought when it came to determining who should be married and who should not. Justice Alito wrote about traditional marriage as one perspective and consent-based marriage as a second perspective. Moreover, Justice Alito and Justice Scalia indicated that the majority opinion in *United States v. Windsor* had polarized the two different sides. Justice Alito claimed that the majority placed those against them as 'bigots' or 'fools' while Justice Scalia claimed that the majority implied those against them are an 'enemy of human decency'. The theme of polarization by those who wrote dissenting opinions was used to

indicate that those who wrote the majority opinions placed justices in an either/or situation; either the Justice sided with the majority or she/he was a bigot.

Power.

In the SCOTUS case, *United States v. Windsor* power emerged as a theme. The power of SCOTUS, the power of State government, and the impact power had on minority groups were discussed in this case. Justices Alito, Scalia, and Roberts all discussed that SCOTUS did not have the power to decide *United States v. Windsor*. These three Justices declared that only Congress could repeal DOMA. Justice Roberts lamented that *United States v. Windsor* would provide applications to future cases that would minimize the power of state government to decide issues concerning marriage. Finally, Justice Kennedy explored this theme by discussing how DOMA abused the power of the federal government and unless DOMA was overturned by SCOTUS, it would take the power away from state recognized same-sex married couples and ultimately affect the dignity of these individuals. These artifacts discussed power as a way to make decisions and apply rights.

RQ2: Who are the groups whose interests are represented in the ideology?

The artifacts investigated as part of this study were specific SCOTUS cases dealing with LGBT issues. The themes in *Lawrence v. Texas* including fundamental rights and liberty had an impact on those who are part of the LGBT community. This case was specific to sexual practices by those who identify as lesbian, gay, bi-sexual, or transgender. The themes of power and equal protection in *United States v. Windsor* had an impact on this group. Justice Kennedy wrote about the federal government abusing power to hinder LGBT rights. Justice O'Connor concluded that those who identify as

LGBT deserve protection equal to those who do not identify as LGBT. The themes of fundamental rights and liberty in *Obergefell v. Hodges* also had an impact on those who identify as LGBT.

A second group whose interests are represented in these artifacts are those who identify as religious and find homosexuality immoral. In *Lawrence v. Texas*, Justice Scalia discussed religious liberty and indicated that liberty for others should be constrained by moral code. Justice Thomas indicated that the approval in same-sex marriage in *Obergefell v. Hodges* infringed on religious liberty concluding the decision had “potentially ruinous consequences for religious liberty” (*Obergefell v. Hodges*, Thomas, p. 16). Furthermore, the theme of polarization was applicable to this group. In all three cases, the courts decided in favor of granting additional rights to members of the LGBT community. Justices Alito and Scalia in *United States v. Windsor* indicated that the majority framed those who find homosexuality immoral as bigots and opposed to human decency.

A third group whose interest is represented in these ideologies is the institution of government, both state and federal. In *Obergefell v. Hodges*, Justice Roberts proclaimed that the state government decisions should outweigh fundamental rights of citizens. Justice Kennedy addressed this assertion and stated the opposite, fundamental rights should be paramount. Justice Thomas addressed state government power in *Obergefell v. Hodges* when he indicated that the state should not provide additional liberties, only protect those already provided. In *United States v. Windsor*, three SCOTUS justices addressed the role of the federal government and the role of the state government. The theme of power emerged as an ideology that helped to determine the perspectives of these

justices when it came to the federal and state government. Moreover, Justice Kennedy explored the theme of power in regards to the federal government, he indicated the federal government had abused its power and the decision made in *United States v. Windsor* helped to mitigate this abuse of power.

RQ3: What are the implications of the ideology for the world in which it participates?

This analysis concluded that five ideologies emerged; two major ideologies include fundamental rights and liberty and three minor ideologies include equal rights, polarization, and power. This analysis also concluded that there are three worlds in which these ideologies impact: members of the LGBT community, those affiliated with religious practices who deem homosexuality as immoral, and the institution of the government.

The application of fundamental rights granted by the constitution place members of the LGBT community and religious members who deem homosexuality immoral in conflict. In *Lawrence v. Texas* and *Obergefell v. Hodges*, the argument made by the majority opinion was that members of the LGBT community deserved these rights because they were fundamental and provided for by the constitution. Those in the dissenting opinion provided proclamations that fundamental rights did not protect sexual activity and marriage. The constitution concluded that equal rights, one of the minor themes found in these artifacts were deemed fundamental rights. In *Lawrence v. Texas*, the evidence that heterosexuals were legally allowed to sodomy as a sexual practice, an equal right would allow for members of the LGBT community to have that same right. The argument made by the majority opinion is sound, since equal rights are considered

fundamental rights. The same logical process can be followed when evaluating the argument of marriage for same-sex couples as a fundamental right. Heterosexual couples, of course, could already be legally married.

Some individuals, who follow religions and find homosexuality immoral based on the interpretation of their religious traditions, can employ the theme of fundamental rights since another fundamental right granted by the constitution is the right to freedom of religion. As detailed earlier, one of the groups identified as having an interest in the ideologies found in this analysis are those who are religious and find homosexuality immoral. In essence, these two fundamental rights: equality and religious liberties are in conflict. While it can be argued that granting equal rights does not infringe on religious liberties, being part of a community can place one's viewpoint of the world in a silo. For instance, those who are members of the LGBT community may not understand why others cannot easily see why their group is disenfranchised. The same argument can be applied to those who are religious and view homosexuals as immoral. These individuals often defend their views based on the Bible or other religious doctrine. Individuals who are members of this group may not easily understand why others do not see the world in the same way that they do.

Another fundamental right granted by the constitution and identified as an ideology in these artifacts is the right to liberty. Liberty, which is the freedom from oppression, is a highly applicable viewpoints of members of the LGBT community. Laws created by the state or federal governments-- the third group identified as impacted by these ideologies-- have been viewed by the LGBT community as oppressive and impacting liberty for this group. While the LGBT community is challenging

governmental laws, shifts in legal rights have been argued to impact religious liberty, ultimately affecting those who are religious and consider homosexuality immoral. Both groups understand that government can stand by the status quo or shift laws to change the impact of liberty. In either case, the government will create a winner and loser. One community will be happy and the other will feel the action is unjust and violates their liberties.

Power is a theme that has an impact on all three groups affected by the ideologies uncovered in these artifacts. For example, in *United States v. Windsor*, power was an ideology that emerged when considering the United States government. Most of the rhetoric concerning this ideology focused on the power of the federal government versus power of state governments. While SCOTUS had agreed to hear these cases, arguments were made that SCOTUS did not have the power to make decisions as it infringed on the rights and power of state government. Once again, an identified ideology has placed a group in conflict with another group, albeit an internal conflict between the federal and state government.

Power is also a theme that has an impact on both the LGBT community and those who are religious and view homosexuals as immoral. Arguably, the artifacts analyzed and their judicial results allowed for additional rights for the LGBT community; i.e. sexual practices are now legalized, the federal government recognizes state recognized marriages and provides equal benefits, and same-sex marriage is legally equal to heterosexual marriage. As additional rights are provided for a group, their power increases. Although, it appears that the LGBT community and religious individuals who view homosexuality as immoral are in conflict, power gained by the LGBT community

does not minimize power of any other group since rights of one group have not been transferred to a different group. Power through acknowledging fundamental rights such as individual liberties and equal rights for the LGBT community does not infringe on the power of those who are religious and deem homosexuality as immoral. By SCOTUS legally recognizing that members of the LGBT community are deserving of fundamental rights that are granted by the constitution, the same as they do to groups such as those who are religiously affiliated and deem homosexuality immoral, they have essentially acknowledged that members of the LGBT community should not be an 'other' but rather a group included in the norm that deserves the same rights as all citizens of the United States of America.

Unfortunately, too often dichotomous rhetoric is used to create an 'either/or' world that leads to polarization. In essence, if one person sides with one group then they must be completely against another group. This is quite apparent through the polarization theme that emerged through the analysis of these artifacts. In *United States v. Windsor*, the dissenting opinions written addressed these concerns. In this world, the two groups of the LGBT members and religious members who deem homosexuality as immoral are described as polarized. Individuals must decide which group they belong to and cannot belong to both groups. Moreover, if someone is an 'other' and belongs to the other group, then they must be wrong and may even have character flaws which influence their perspectives; e.g., members of the LGBT community are viewed as immoral by some religious practitioners and religious members who view homosexuals as immoral are viewed as bigots by Gay and Lesbian groups. Moreover, the rhetoric of the SCOTUS justices draws strong lines that create two separate camps of thought. Justice Alito

indicated in *Obergefell v. Hodges* that individuals were categorized in one of two groups: traditional marriage or consent-based marriage. This type of rhetoric divides citizens through a misleading argument. It is possible to believe that marriage should be legal for both those who would fit into the concept of traditional marriage and those who fit into the concept of consent-based marriage.

Limitations

Every methodology used for rhetorical investigation has limitations and can only help to illuminate certain areas of the discourse. Employing rhetorical criticism as a method of analysis is a useful tool; however, there are still limitations. One limitation to address is the consideration of frame of reference. Rhetorical criticism allows for a variety of lenses to be used to evaluate and analyze an artifact. Each lens allows a different conclusion to be drawn and new worlds to emerge. Rhetorical criticism is subjective and each critic filters their analysis through their own frame of reference. Our experiences, education, and other factors help to view or even shape the world. Our frame of reference provides us a bias as we analyze the world around us. No two people have the same frame of reference. While making a conscious effort to factor in one's own frame of reference can help to mitigate bias, it can never be fully eliminated.

The selection and use of ideological criticism also has its limitations. Ideological criticism, like other types of rhetorical criticism, filters the critics' argument through a specific lens. Ideological criticism is used to determine the dominant ideologies of the artifacts under investigation. While ideological criticism allows for a thorough critique to take place regarding ideology, its lens is narrowed to only this focus. The application of

other rhetorical lenses such as narrative or feminist criticism would illuminate different details about this artifact.

If narrative criticism were employed during this study, then these artifacts would be investigated by reviewing the stories that are used in the rhetoric of the justices. This approach would allow the scholar to analyze the artifact in an effort to determine how well it achieved its objective. This methodology would allow for the various story-telling strategies that are used as arguments to surface from both the majority and dissenting opinions.

Feminist criticism could be applied to these artifacts to help determine if the treatment of those who identify as Lesbian or Gay are treated differently than those who identify as heterosexual. Moreover, power relationships can be uncovered and the artifacts could be analyzed to reveal how it portrays economic, political, social, or psychological operations. This methodology could help to illuminate differences in perception about these communities by SCOTUS Justices. A different lens of criticism will uncover new information about the artifact.

Summary

Disenfranchised groups who seek additional liberties will continue to challenge the status quo. As our country continues to debate issues like those concerning the LGBT community, concerns will escalate and decided by SCOTUS. These judicial decisions will continue to shape our country. This project analyzed the rhetoric of the Supreme Court of the United States of America in regards to the treatment of members of the LGBT community. In the present study, three artifacts were analyzed, including *Lawrence v. Texas*, *United States v. Windsor*, and *Obergefell v. Hodges*. In this

examination, both the majority opinion and dissenting opinions were analyzed to determine the major and minor ideologies. The analysis ultimately uncovered that themes of fundamental rights and liberty were dominant while themes of equal rights, polarization, and power were also evident.

The rhetoric of SCOTUS regarding the treatment of members of the LGBT community, allows for the ideological themes of fundamental rights and liberties granted by the Constitution of the United States of America, as well as equal rights, power, and polarization to emerge. Two primary groups were found to be impacted by these ideologies: members of the LGBT community and religious members who deem homosexuality as immoral. These two groups are polarized and shifts in legal proceedings have an impact on their perceived position of power.

As the Supreme Court continues to review cases that influence the rights of the LGBT community, new ideologies may emerge. It is important for arguments made in both the majority opinion and in the dissenting opinion to consider the impact of their rhetoric. Fundamental rights are for all Americans, and as the disenfranchised continue to gain power through legal channels, it should not come through the sacrifice of unity. Polarizing two major groups belittles the impact that SCOTUS rulings have on rectifying inequalities in America.

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Curriculum Vitae

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Education

Ph.D. in Organization and Management	Capella University
M.A. in Applied Communication	Indiana University
Master of Business Administration	University of Phoenix
B.A. in Communication Studies	Indiana University

Professional Experience

Western Governors University, Program Manager, 2015- Present

Western Governors University, Course Mentor, 2014-2015

Strayer University, Adjunct Faculty, 2014

Indiana University-Purdue University Indianapolis, Adjunct Faculty 2014

Strayer University, College of Business Faculty, 2011-2013

Indiana University-Purdue University Indianapolis, Adjunct Faculty 2006-2012

Strayer University, Adjunct Faculty, 2009-2010

Charter One Bank, Assistant Branch Manager, 2003-2006

Presentations and Publications

“Religious rhetoric as justification for state law and the ‘Pence Must Go’ campaign: Ideology, identification, and subaltern counterpublics” presented at the 38th Annual Conference of the Organization for the Study of Communication, Language, & Gender in Bowling Green, KY. 2015.

“The rhetoric of the human chair: Evaluating art as argument” presented at the 38th Annual Conference of the Organization for the Study of Communication, Language, & Gender in Bowling Green, KY. 2015.

“Converging, Diverging, and Merging Masculinities” Respondent and Critic for the Sexual Orientation and Gender Identity Caucus at the Central States Communication Association Annual Conference in Madison, WI. 2015.

“The Argument over the Human Chair: Evaluating Logical Fallacy in the Rhetoric of Art.” An accepted paper presented at the International Communication and Culture Conference. University of Wroclaw; Wroclaw, Poland. 2014.

“The Departure of the Insurance Agent: The impact organizational commitment, organizational justice, and job satisfaction has on intent to leave in the insurance industry.” A Dissertation Proposal presented to the full committee at Capella University, 2009.

“Investigating the Ethicality of Marketing in the Pharmaceutical Industry” A peer reviewed presentation with Darin Ramsey, Pharm.D., BCPS, at the 15th Annual International Conference Promoting Business Ethics. St. Johns University; New York City, NY. 2008.

Handlon, R.L. (2009). *The Departure of the Insurance Agent: The Impact Organizational Commitment, Organizational Justice, and Job Satisfaction have on Intent to leave in the Insurance Industry.* (Doctoral dissertation). Capella University, Minneapolis, MN.

Honors and Awards

- Indiana University-Purdue University Outstanding Paper in Communication Research Methods, 2016
- Butler University The Academic Honor Society of Phi Kappa Phi 2009
- Honored as a 'Favorite Professor' by IUPUI student-athletes, 2008 and 2009
- Nomination to FACET Associate Faculty and Lecturers' Conference, October 2007
- Associate Faculty Gateway Scholar Recipient, June 2007
- Indiana University Outstanding Individual Project in Communication 2001
- Indiana University Finalist in Women's Studies Project 2001
- Indiana University College of Liberal Arts Dean List 2000