No. 02-102

IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE and TYRON GARNER,
Petitioners,

v.

THE STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the Court of Appeals of Texas, Fourteenth District

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BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* [1]

The Cato Institute was established in 1977 as a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore limited constitutional government and secure those constitutional rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends, the Center publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus curiae* briefs with the courts. The instant case raises squarely the rights of free association, privacy, and equal protection under the rule of law and thus is of central concern to Cato and the Center.

STATEMENT OF THE CASE

Amicus adopts and incorporates Petitioners' statement of the case.

SUMMARY OF ARGUMENT

The Fourteenth Amendment requires that the state protect the fundamental liberties of its citizens, and that it do so on an equal basis. Texas's Homosexual Conduct Law violates both prongs of the constitutional assurance. By making only consensual "homosexual" sodomy illegal, the law violates the Equal Protection Clause as interpreted in *Romer v. Evans*, 517 U.S. 620 (1996). As in *Evans,* the statute here is a novelty in the law. Because consensual sodomy had become widely practiced and acceptable among the political

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[1] The parties' consent to the filling of this *amicus* brief has been lodged with the Clerk of this Court. In accordance with Rule 37.6, *amicus* states that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to the preparation or submission of this brief.

mainstream by 1973, Texas narrowed the crime to "Homosexual Conduct." Like the law in *Evans,* Texas's law imposes a "broad and undifferentiated disability on a single named group," i.e., "homosexuals," and its "sheer breadth is so discontinuous with the reasons offered for it that the [law] seems inexplicable by anything but animus against the class that it affects," gay people. *Id.* at 632.

There is a deeper problem with the Homosexual Conduct Law. America's founding generation established our government to protect rather than invade fundamental liberties, including personal security, the sanctity of the home, and interpersonal relations. So long as people are not harming others, they can presumptively engage in the pursuit of their own happiness. The Fourteenth Amendment's Privileges or Immunities Clause and its Due Process Clause (as interpreted by this Court) made this principle applicable to the states. A law authorizing the police to intrude into one's intimate consensual relations is at war with this precept and should be invalidated, for the same reasons this Court invalidated police intrusions into marital bedrooms, *Griswold v. Connecticut*, 381 U.S. 479 (1965); into home viewing of obscene materials, *Stanley v. Georgia*, 394 U.S. 557 (1969); and into the parental household, *Troxel v. Granville*, 530 U.S. 57 (2000). To be sure, this Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986), declined to read the Due Process Clause to protect consensual "homosexual sodomy." *Hardwick*, however, rested upon an incomplete understanding of Anglo-American legal traditions. For example, its survey identified sodomy laws with "homosexuality," when in fact nineteenth century sodomy laws applied to male-female as well as male-male activities (and did not apply to female-female activities). As understood in light of the common law and as applied, sodomy laws were aimed at public conduct and sexual activities that were not consensual. Because of its incomplete reading of history and its inconsistency with *Evans* and this Court's privacy precedents, *Hardwick*'s interpretation of the

Due Process Clause should be overruled. In the alternative, this Court should rule that the Privileges or Immunities Clause (not addressed in *Hardwick*) bars the states from criminalizing private sodomy between consenting adults.

ARGUMENT

I. FIRST PRINCIPLES: THE FOURTEENTH AMENDMENT REQUIRES THAT STATE CRIMINAL LAWS CLEARLY NOTIFY CITIZENS OF THEIR COVERAGE, NOT DISCRIMINATE ARBITRARILY AGAINST CLASSES OF PERSONS, AND RESPECT FUNDAMENTAL LIBERTIES.

The Framers of the Constitution and the Bill of Rights believed that government existed to protect the fundamental liberties of its citizens. The Framers of the Fourteenth Amendment elaborated upon this idea and applied it to the states. By their lights, the second sentence of Section 1 rendered the states accountable to three precepts: the legality principle, which requires the state to provide the citizenry with clear notice as to what conduct is criminal; the equality principle, which bars the state from applying the law arbitrarily or against a subordinated class; and the liberty principle, which requires the state to respect Americans' fundamental freedoms. Consistent with their expectations, this Court has vigorously enforced the legality principle under the Due Process Clause and the equality principle under the Equal Protection Clause. The liberty principle, originally embodied in the Privileges or Immunities Clause, has primarily been enforced under the Due Process Clause.

A. The Legality Principle

The Fourteenth Amendment's Due Process Clause was copied from the Fifth Amendment, which reflected the Magna Carta's concept of *per legem terrem*. For the government to act "according to the law of the land" requires

state officials to follow the rule of law and not their own biases. This Court has understood due process to require that criminal statutes give clear notice to the citizenry as to precisely what conduct is illegal, e.g., *McBoyle v. United States*, 283 U.S. 25 (1931), and to the police to assure that their discretion is strictly controlled. E.g., *Cox v. Louisiana*, 379 U.S. 559, 579 (1965) (Black, J.). Some of the precedents also support the idea that the state cannot criminalize conduct everyone engages in and then enforce the law only against marginalized citizens. E.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162-63, 169-71 (1972).

B. The Equality Principle

The Declaration of Independence announced that "all men are created equal."[2] Applying this principle to the states, the Framers of the Fourteenth Amendment emphasized that "the American system rests on the assertion of the equal right of every man to life, liberty, and the pursuit of happiness." Cong. Globe, 39th Cong., 1st Sess. 1088-89 (1866).[3] This equality principle embodied two complementary norms: rationality and anti-caste. Foundational for the liberal state, the rationality norm insists that state differentiations be reasonably connected to legitimate public policies and not be the result of prejudice against an unpopular minority. Impor-

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[2] The Constitution and the Reconstruction Amendments cannot be properly understood without reference to the Declaration of Independence. See Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 Harv. J. L. & Pub. Pol'y 63 (1989).

[3] On the drafting and ratification history, see William Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (1988).

tant for the peaceful functioning of pluralist democracies, the anti-caste norm debars the state from creating a subordinate underclass alienated from the law.[4]

Although the immediate beneficiaries of this principle were the freed slaves, the Framers understood the principle to apply generally, for "there is no more effective practical guaranty against arbitrary and unreasonable government than to require the principles of law which officials would impose upon a minority must be imposed generally." *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). Applying this precept, this Court in *Romer v. Evans*, 517 U.S. 620 (1996), invalidated an antigay initiative. Because the initiative imposed special, pervasive disabilities on gay people, it was class legislation. See also *Plessy v. Ferguson*, 163 U.S. 537, 552-55 (1896) (Harlan, J., dissenting). Because its antigay exclusions were neither necessary nor sufficient to achieve traditional state objectives, the Court inferred that the initiative was a product of inadmissible antigay "animus," per se invalid under the Equal Protection Clause.

C. The Liberty Principle

The American Revolution and the Constitution of 1789 sought to secure the blessings of liberty.[5] The Declaration of Independence asserted that it was "self-evident" that men "are endowed by their Creator with certain unalienable Rights," to

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[4] Introducing the proposed Fourteenth Amendment, Senator Howard said it would "abolish-all class legislation in the States and [do] away with the injustice of subjecting one caste of persons to a code not applicable to another." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866); see also Nelson, *supra* note 3 (thorough examination of the Framers' articulation of a general equality principle).

[5] See generally Roger Pilon, *On the First Principles of Constitutionalism: Liberty, Then Democracy*, 8 Am. U.J. Int'l L. & Pol'y 531 (1993).

wit: "Life, Liberty, and the Pursuit of Happiness." Among the rights the Framers had in mind were rights of personal security, or "a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation"; of personal liberty to move about; and of personal property, namely, "[t]he free use, enjoyment, and disposal of all his acquisitions, without any control or diminution save only by the laws of the land." 1 William Blackstone, *Commentaries on the Laws of England* *123-24, *125-29 (1765).

Consistent with the libertarian premises of Lockean social contract theory and Blackstonian common law, a premise of the Constitution was that We the People retained our traditional liberties, and the burden was on the government to justify any regulation thereof.[6] The same ideas applied to the states.[7] Before the Civil War, judges ruled that state common law or constitutional police powers justified "reasonable regulations as [legislators] may judge necessary to protect public rights, and to impose no larger restraints upon the use and enjoyment of private property, than are in their judgment strictly necessary to preserve and protect the rights of others."[8] In *Corfield v. Coryell*, 6 Fed. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230), Justice Washington construed Article

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[6] The Ninth Amendment explicitly recognizes unenumerated rights, and that was the intent of its Framers. See Randy Barnett, *The Rights Retained by the People: The History and Meaning of the Ninth Amendment* (1989); see also *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000); *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998).

[7] See William Nelson, *Americanization of the Common Law: The Impact of Legal Change in Massachusetts Society, 1760-1830*, at 89-110 (1975) (shift in regulatory emphasis in Massachusetts from "enforcer and guardian of Christian society" to "preserver of individual liberty" after the Revolution).

[8] *Commonwealth v. Alger*, 61 Mass. 53, 102 (1853). For decisions striking down state laws for interfering with personal or property rights, see *Wynehammer v. People*, 13 N.Y. 378 (1856) (relying on Blackstone); *Sears v. Cottrell,* 5 Mich. 251, 253 (1858).

IV's Privileges and Immunities Clause to protect rights "which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments." *Id.* at 551.

When the Framers of the Fourteenth Amendment borrowed the due process and privileges and immunities language to frame rights in Section 1, they intended to protect fundamental liberties (including those in Blackstone and the Declaration) against state intrusion.[9] In *Union Pacific R. v. Botsford*, 141 U.S. 250 (1891), this Court recognized bodily integrity as a species of constitutionally-protected liberty. Accord, *Planned Parenthood v. Casey*, 505 U.S. 833, 849 (1992) (joint opinion); *Cruzan v. Missouri Dep't of Health,* 497 U.S. 261, 287 (1990) (O'Connor, J., concurring). A second line of cases recognized the idea of physical inaccessibility for the home: the state is barred (unless it has good cause) from invading "the sanctities of a man's home and the privacies of life."[10] Accord, *Kyllo v. United States*, 533 U.S. 27, 37 (2001) (in the home, "all details are intimate details, because the entire area is held safe from prying government eyes"). A third line of cases found that liberty includes "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The joint opinion in *Casey* articulated this interest as a "liberty relating to intimate relationships." 505 U.S. at 857; accord, *Roberts v. United States Jaycees*, 468 U.S. 609,

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[9] See Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 73-81 (1986); Robert Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 Temple L. Rev. 361 (1993).

[10] *Boyd v. United States*, 116 U.S. 616, 630 (1886) (Fourth Amendment); see Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 299-300 (1868) (same idea as a matter of due process).

617-18 (1984) ("choices to enter into and maintain certain intimate human relations" are fundamental to liberty and "our constitutional scheme").

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), this Court invalidated a state law criminalizing the use of contraceptives by married couples in the privacy of their homes. *Griswold* illustrates the various dimensions of liberty protected under the Court's precedents: State conformity requirements are most questionable when they interfere with people's control of their own bodies, disrupt personal relationships, and intrude into the innermost sanctum of the home, the bedroom. The Court relied on *Griswold* to overturn a conviction for viewing obscene materials in the confines of one's own home in *Stanley v. Georgia*, 394 U.S. 557 (1969). The Court expanded *Griswold*'s right to contraceptives for unmarried persons in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and for unmarried minors in *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); see *id.* at 711 (Powell, J., concurring) (describing the right as "the constitutionally protected privacy in decisions relating to sexual relations"). In *Moore v. City of East Cleveland*, 431 U.S. 494 (1976), the Court struck down an ordinance making it a crime for unrelated people to live together.

In light of these precedents applying the liberty principle, some state courts ruled that consensual sodomy laws violate the Due Process Clause. E.g., *People v. Onofre*, 415 N.E.2d 947 (N.Y. 1980), *cert. denied*, 451 U.S. 987 (1981). In *Bowers v. Hardwick*, 478 U.S. 186 (1986), however, this Court found no inconsistency between such laws and the Due Process Clause. *Hardwick* did not resolve issues raised under the Equal Protection or Privileges or Immunities Clauses of the Fourteenth Amendment. *Id.* at 201. This case requires the Court to reconsider this matter in light of the Fourteenth Amendment's core principles and a more sophisticated history of sodomy laws than the Court has seen in previous cases.

II. HISTORY: SODOMY STATUTES HAVE HISTORICALLY FOCUSED ON PREDATORY AND PUBLIC ACTIVITIES; CONSENSUAL "HOMOSEXUAL" ACTIVITIES BECAME THEIR FOCUS ONLY IN THE MID-TWENTIETH CENTURY.

Most accounts urging this Court to revisit *Hardwick* focus on the ways that American public and constitutional norms have evolved. Our focus is on how much sodomy policy, not constitutional principle, has changed—from state regulation of public or coercive sexuality in the nineteenth century to state campaigns to harass and stigmatize gay people. Although not originally inconsistent with Fourteenth Amendment principles, sodomy law's twentieth century intrusion into the private lives and homes of gay people is a regulatory expansion that violates the Constitution.

A. Nineteenth Century Sodomy Laws

In 1868, most state penal codes included the "crime against nature, committed with mankind or with beast." See Appendix 1. Yet sodomy laws as they were then understood and applied were largely consistent with the principles of the Fourteenth Amendment. To be sure, there were potential rule of law problems with such laws, because they did not define precisely what conduct was a "crime against nature," but the statutory terms had well-established common law meanings which supplied the necessary determinacy. Cf. *Wainwright v. Stone,* 414 U.S. 21 (1973). American courts and commentators followed the English decisions defining the crime as involving penetration by a male penis inside the rectum of an animal, a woman or girl, or another man or a boy.[11] Thus, oral sex was not a crime in any American state in 1868, nor

[11] 2 Joseph Chitty, *A Practical Treatise on Criminal Law* *49 (1847); Robert Desty, *A Compendium of American Criminal Law* 143 (1887); John May, *The Law of Crimes* § 210, at 223 (1881).

did any sodomy law before the twentieth century focus on "homosexual sodomy."[12] Likewise, sex between two women was not sodomy, but anal sex between a man and a woman was sodomy.[13] Indeed, the common law recognized sodomy as a crime that could be committed by husband and wife. E.g., Tenn. Comp. Laws part IV, tit. I, ch. 8, § 4843 (1873) (annotation).

If regulation of "homosexual conduct" was not the object of nineteenth century sodomy laws, what was their purpose? Based upon their statutory context, it can be deduced that sodomy laws served two kinds of admissible purposes.[14] One was protection of the community against public indecency. In state codes, sodomy laws were typically listed with crimes against "public morals and decency"—including bigamy and "open and notorious adultery"; printing or distributing obscene literature; public indecency; "lewd and vicious cohabitation" or fornication; blasphemy or cursing in public places; and incest.[15] Except for incest, the other crimes

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[12] See William Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 19-52 (1999) (tracing the origins of "homosexuality" as a legal concept in the twentieth century).

[13] Although state laws referred to the crime committed with "mankind" or "man," those terms were universally construed to include unnatural behavior of men with women under authority of *Regina v. Wiseman*, 92 Eng. Rep. 774 (K.B. 1716). See 2 Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 1028, at 731 (2d ed. 1859); 2 Chitty, *supra* note 11, at 47-50; Desty, *supra* note 11, at 143; May, *supra* note 11, § 210, at 223. It is possible, but not likely, that New Hampshire's law was limited to male-male conduct. *See* Appendix 1.

[14] Sodomy laws also served purposes that would not be admissible under the Constitution, namely, the instantiation of religious norms through the law, see *Edwards v. Aguillard*, 482 U.S. 578 (1987), and state insistence on rigid gender roles. See *Craig v. Boren*, 429 U.S. 190 (1976).

[15] See Ronald Hamowy, *Preventive Medicine and the Criminalization of Sexual Immorality in Nineteenth Century America*, in *Assessing the Criminal* 39-41 (Randy Barnett & John Hagel III eds. 1977).

involved actions outside the home that could be expected to roil the community. As we shall see (below), proof requirements for sodomy and incest made it unlikely that any of those crimes would be prosecuted if they were consensual within the home.

A second, and in practice the primary, purpose of nineteenth century sodomy laws was protection of children, women, and weaker men against sexual assault. Many codes listed sodomy as one of the "crimes against the person"—rape, carnal knowledge of a girl, assault, mayhem.[16] This suggests that sodomy laws were understood as filling in a regulatory gap as regards nonconsensual sexual activity; an adult male forcing himself anally on a woman, girl, boy, or animal could be prosecuted only under sodomy laws in 1868. All of the model sodomy indictments reproduced in 2 Chitty, *supra* note 11, at 48-50, involved allegations of predation by an older man against a minor girl or boy. Indeed, a man could not be convicted of sodomy based upon the testimony of a sexual partner who was his "accomplice"; conversely, the partner's testimony was admissible if she or he were an unwilling participant or a minor (incapable of giving consent).[17] This well-established proof requirement created an immunity for sodomy within the home between consenting adults.

Appendix 2, listing the reported sodomy decisions from the nineteenth century, demonstrates that sodomy defendants were typically accused of nonconsensual activity. Eliminating the cases where the sex (or indeed the species) of the participants is not disclosed, the reported nineteenth century

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[16] Arkansas, California, Georgia, Illinois, Kentucky, Louisiana, New York, and North Carolina most clearly fit the pattern in the text, but other states explicitly linked proof requirements for sodomy and rape. E.g., Ill. Gen. Laws ch. 30, div. V, § 38; Or. Gen. Laws ch. XLVIII, § 216.

[17] See Francis Wharton, *Treatise on the Criminal Law of the United States* 443 (2d ed. 1852); 1 Francis Wharton, *A Treatise on Criminal Law* 512 (8th ed. 1880).

cases fall into three roughly equal groups: (1) sex between adult men and animals; (2) sex between adult men and minors (girls as well as boys); and (3) sex between two adults, almost always involving force or potential status coercion (i.e., high-status man penetrates supervisee or ward). As a matter of both law and practice, consenting adults (male and female or male and male) engaged in sodomy within their own home were immune from prosecution, because there could be no witness to the crime. In *Medis v. State*, 11 S.W. 112 (Tex. Cr. App. 1889), for example, witnesses came upon three men entangled in one another but could not testify that the penis of defendants had penetrated the "victim," and so the court overturned the convictions for lack of evidence. This was the state of affairs in 1868, when the Fourteenth Amendment was adopted: No one would have been on notice that laws making the "crime against nature" illegal would have covered consensual activities between two adults in the sanctity of their home.

B. Expansion of Sodomy Laws, 1879-1969

In 1880, sixty-three prisoners were incarcerated for sodomy in the United States, almost all of them people of color and immigrants.[18] By 1921, hundreds of men were being arrested and imprisoned for the crime each year. This increase was made possible by the establishment of professional police forces in most American cities after the Civil War and by the expansion of sodomy laws beyond their traditional coverage. Whereas no state had defined sodomy to include oral sex before 1879, no fewer than thirty-one had done so by 1923.[19]

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[18] See Jonathan Ned Katz, *Gay American History* 57 (1976) (reprinting Census report).

[19] William Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 Iowa L. Rev. 1007, 1016-32 (1997).

State and municipal governments were responding to several concerns.[20] The main one was that city-dwellers were alarmed at public displays of indecency and sexual solicitation on their streets and in public restrooms. Thus, cities sought to drive male "fairies" from public spaces, usually through the same vice units that policed female prostitution. Another concern was with the sexuality of children. Although states adopted new laws to protect children against sexual molestation or predation, they also deployed sodomy laws to prosecute sex between men and children; almost half of the reported sodomy cases between 1896 and 1925 involved sex with minors. A final concern was rooted in moral eugenics. Many Americans fervently believed that "degenerate" classes of people were a social disease threatening the body politic. They urged the exclusion, suppression, incarceration, and later the castration and sterilization of "degenerate" classes of people. Moralist Anthony Comstock wrote to one "androgyne" that such "inverts are not fit to live with the rest of mankind. They ought to have branded on their foreheads the word 'Unclean,' and as the lepers of old, they ought to cry 'Unclean! Unclean!' as they go about." Earl Lind, *Autobiography of an Androgyne* 24-25 (1918). Consistent with these new concerns, a quarter of the published sodomy decisions between 1880 and 1925 involved apparently consensual activities between men, but usually in quasi-public places such as restrooms, parks, and bars.

"Homosexuals" became the scapegoats for a more brutal campaign of repression during the McCarthy era. State and national governments invested significant resources in episodic witch hunts to identify "homosexuals" so that they could be arrested and imprisoned, deported or debarred from entering the country, discharged from public employment,

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[20] See Eskridge, *Gaylaw*, *supra* note 12, at 19-49, 374-75.

expelled from the armed services, and exposed by the state as "sex perverts" to their families, employers, and communities.[21] Private oral and anal sex between consenting adults was lumped together with child molestation as a basis for widespread enforcement of sodomy laws against gay and bisexual men. For the first time in American history, large numbers of Americans were incarcerated for long periods of time because they engaged in oral or anal sex with consenting adults. Some were subjected to medical experimentation and torture as well.[22]

The reported cases ballooned. Although most reported convictions were still for sodomy with minors or forcible sodomy, an alarming number were for sodomy between consenting adults in private places. In one case, vice squad officers followed an interracial male couple back to their hotel room. *People v. Earl*, 31 Cal. Rptr. 76 (Dist. Ct. App. 1963). Peeking through a crack in the door, one officer witnessed the men embracing in bed. Assisted by a handhold from his colleague, the other officer looked through the glass transom above the door and observed the men engage in felonious oral sex. The officers broke into the room and arrested the couple. The defendants were convicted of oral copulation and certified as sexual psychopaths. As such, they were committed for indefinite sentences at Atascadero State Hospital. This was no isolated occurrence; other examples of

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[21] See John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970* (1983); Lillian Faderman, *Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America* (1991); William Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 Fla. St. U.L. Rev. 703, 708-66 (1997).

[22] See Eskridge, *Gaylaw, supra* note 12, at 354-55 (29 state laws requiring hospitalization of "sexual psychopaths"); Katz, *supra* note 18 (application of such laws to incarcerate and engage in medical experimentation on gay people).

police enforcement of state sodomy laws not only intruded into private spaces, but also entrapped gay men into the crime.[23]

The unprecedented application of sodomy laws to private consensual conduct generated immediate criticism from medical and legal authorities. The American Law Institute ("ALI") joined expert commissions in the United Kingdom, New Jersey, New York, Illinois, California, and other jurisdictions to urge the decriminalization of private sodomy between consenting adults.[24] Their arguments paralleled the principles undergirding the Fourteenth Amendment. The central point of the ALI and expert commission reports was that there was no secular harm from sodomy in private places between consenting adults—and therefore the state should abandon its innovative application of the old laws as inconsistent with the liberty principle. Moreover, because consensual sodomy was so widespread, the episodic state enforcement was at war with the legality and equality principles: The people who went to jail for the crime or were blackmailed tended to be the most vulnerable in society—people of color, closeted "homosexuals," and working class people. Based on these arguments, New York reduced consensual sodomy to a misdemeanor in 1950 N.Y. Laws ch. 525, and Illinois decriminalized it in 1961 Ill. Laws 2044.

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[23] E.g., Dale Jennings, *To Be Accused Is To Be Guilty*, One, Inc., Jan. 1953, at 11-12 (first-person account of police entrapment of "suspected homosexual"); see Eskridge, *1946-1961*, *supra* note 21, at 717-33 (detailed account of police practices designed to flush out "homosexuals" in Florida).

[24] See Eskridge, *1946-1961*, *supra* note 21, at 773-83 (detailed examination of the reports discussed in text). In drafting its Model Penal Code, the ALI voted in 1955 to decriminalize consensual sodomy, because such laws (1) undermined respect for the law by penalizing conduct many people engaged in, (2) regulated private conduct not harmful to others, and (3) were arbitrarily enforced and led to blackmail. ALI, *Model Penal Code*, Commentary 277-80 (Tent. Draft No. 4, 1955).

C. Sodomy Reform and Reformulation, 1969-2002

After the Stonewall riots of 1969, gay people engaged in political activism to protect their lives against police intrusion and to remove legal discriminations against them. They found allies in the legal profession, including the ABA, and the medical profession, which in 1973 resolved that homosexuality is not a mental or psychological defect and therefore was no basis for unequal treatment. Popular support for consensual sodomy laws was also waning. Between 1969 and 1976, eighteen states decriminalized consensual sodomy, consistent with the ALI's Model Penal Code ("MPC").

Although others followed, the 1970s saw a backlash: Arguing that sodomy reform would encourage "unnatural" conduct or "promote" homosexuality, family values activists opposed decriminalization. For example, after Idaho adopted the MPC, legislators accused of "promoting" homosexuality reinstated the outdated criminal code, 1972 Idaho Laws 844, 966-67. According to one senator, "[t]he code was repealed solely as the result of an emotional hysteria generated by some very right-wing church and political groups." See *Idaho Repeals New Consenting Adults Code*, The Advocate, May 10, 1972, at 3.[25] In contrast, when Kansas decriminalized consensual sodomy with someone of the opposite sex, it left same-sex consensual sodomy a misdemeanor. 1969 Kan. Laws ch. 180, § 21-3505. Texas's Homosexual Conduct Law followed the Kansas model, as did new laws in Montana (1973), Kentucky (1974), Missouri (1977), Nevada (1977), and Tennessee (1989). Like Idaho in 1971, Arkansas in 1975 adopted the MPC, which stimulated protests from some religious groups that sodomy decriminalization would

[25] The Moral Majority persuaded the House to veto the District of Columbia's sodomy repeal in 1981, based upon the same arguments. E.g., 127 Cong. Rec. 22,749 (Rep. Bliley), 22,762-63 (Rep. Crane) (1981).

open the state to "homosexuals." Unlike Idaho, Arkansas responded by recriminalizing only same-sex consensual sodomy. 1977 Ark. Acts 2118, 2118-19. The sponsor bragged that this move was "aimed at weirdos and queers who live in a fairyland world and are trying to wre[c]k family life." Petition for Certiorari, at 5, *Limon v. Kansas* (No. 02-583). Two states reached essentially the same legal rule through judicial opinions construing their consensual sodomy laws to be inapplicable to different-sex sodomy. *Post v. State*, 715 P.2d 1105 (Okla. Crim. App. 1986); *Schochet v. State*, 580 A.2d 176 (Md. 1990). Reformulating consensual sodomy laws to apply only to same-sex activities makes the existence of consensual sodomy laws more acceptable to straight people—but without addressing the arbitrary enforcement and libertarian problems with such laws and at a tremendous price of a formal discrimination against gay people.

This Court's opinion in *Hardwick* upheld a general sodomy law against due process attack but contained language focusing on "homosexual sodomy." That language was particularly unfortunate, as it was delivered at a point when judges in all parts of the country were coming to accept the propositions that consensual sodomy laws violate the liberty principle, and that same-sex sodomy laws violate the equality principle. After 1989, state court judges have decisively rejected sodomy laws that discriminate on the basis of sex or sexual orientation, such as the Texas law in the instant appeal. Soon after *Hardwick*, the Kentucky Supreme Court ruled in *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992), that its same-sex sodomy law violated the principles of legality, equality, and liberty of its state constitution. Nevada repealed its same-sex sodomy law in 1993, and the courts in other states have decriminalized same-sex sodomy (page 26 *infra*). States that still openly discriminate are Texas, Kansas, part of Missouri, and (by judicial construction) Oklahoma.

III. DOCTRINE: TEXAS'S HOMOSEXUAL CONDUCT LAW VIOLATES THE DUE PROCESS, EQUAL PROTECTION, AND PRIVILEGES OR IMMUNITIES CLAUSES OF THE FOURTEENTH AMENDMENT.

The evolution of state sodomy laws has taken them far away from the principles of the Fourteenth Amendment. The Texas statute at issue in this case may satisfy the notice requirement of the legality principle, but it does so at the cost of seriously violating the equality and liberty principles. The Homosexual Conduct Law is inconsistent with the Equal Protection Clause, as construed in *Evans*. The Court should also find the statute, and others regulating consensual sodomy without regard to the sex of the participants, inconsistent with the Due Process Clause, as construed in this Court's precedents, and with the Privileges or Immunities Clause, as understood by its Framers.

A. The Texas Homosexual Conduct Law Violates the Equal Protection Clause, as Construed in *Romer v. Evans*, For It Targets Gay People as an Outlaw Class Because of Antigay Animus.

Texas concedes that its law makes it a crime for lesbian (female-female) and gay (male-male) couples to engage in the "same act[s]" that straight (male-female) couples can engage in with impunity. Br. in Opp. at 18. Unless rationally justified, this discriminatory treatment violates the equality idea that "the democratic majority [must] accept for themselves and their loved ones what they impose on you and me." *Cruzan*, 497 U.S. at 300 (Scalia, J., concurring); accord, *The Federalist* No. 78, at 470 (Hamilton) (Clinton Rossiter ed., 1961). If the democratic majority finds consensual sodomy distasteful, the Equal Protection Clause requires that they impose penalties for it on themselves as well as upon minorities. Texas has not done that, and for this reason alone the law is invalid.

Evans supports this result. Indeed, the Homosexual Conduct Law seems almost tailor-made to fit the facts (and therefore the holding) of *Evans*. Like the Colorado initiative invalidated in *Evans*, the Texas law in this case singles out gay people for special disability.[26] As in *Evans*, the law's plain meaning and the context of its enactment suggest that it was motivated by antigay prejudice. If the statute's caption (singling out just "Homosexual Conduct" for criminality) is not proof enough, it is confirmed by the context of the law: In the early 1970s, states like Texas, Idaho, and Arkansas realized that consensual sodomy was so widespread that it made sense to decriminalize it, but such proposals were subject to the charge that they would tolerate or even promote "homosexuality." Idaho responded by reinstating its old law, but the more politically expedient course was that taken by Arkansas and Texas, to decriminalize only "heterosexual sodomy." The Arkansas measure targeted "weirdos and queers," and there is no reason to believe that the same motivations were not at work in Texas.

The animus evident on the face of the statute is reinforced by two other features of the Homosexual Conduct Law. "First, the [law] has the peculiar property of imposing a broad and undifferentiated disability on a single named group."

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[26] Texas maintains that its statute does not discriminate on the basis of sexual orientation, for it would apply to "heterosexuals." Br. in Opp. at 12. To deny that a statute whose caption holds out its coverage as limited to "Homosexual Conduct" is aimed at "homosexuals" is remarkable. "Homosexual sodomy" is "the behavior that defines the class." *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987); accord, *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980). Under *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886), a statute whose overwhelming application is against one class of people is a statute discriminating against that class (gay people) and on the basis of its identifying trait (homosexuality).

Evans, 517 U.S. at 632.[27] In this regard, the Texas law is worse than the Colorado one. Under the former, gay people can be arrested, jailed (as Lawrence and Garner were for 24 hours), and convicted of a criminal offense. Because most openly gay Texans can be presumed to commit sodomy with persons of the same sex, the Homosexual Conduct Law brands them as presumptive outlaws. Invoking this law, Texas courts hold that calling someone a "homosexual" is slanderous per se; the accusation of criminality is enough to establish damage. See *Head v. Newton*, 596 S.W.2d 209, 210 (Tex. App. 1980). The presumptive criminal activities of gay people have civil consequences, like those found troubling in *Evans*. Texas and nearby states have invoked the outlaw status of gay people to exclude them from hate crime and employment anti-discrimination laws, see Pet. at 14-16; to discriminate against them in hiring and promotion decisions for state or local employment, e.g., *Childers v. Dallas Police Dep't*, 513 F. Supp. 134 (N.D. Tex. 1981); to deny them custody of or even visitation with their own biological children, e.g., *Weigand v. Houghton*, 730 So.2d 581 (Miss. 1999); and to introduce antigay messages in sex or AIDS education programs, e.g., Tex. Health & Safety Code § 85.007(b)(2). See also *Alston v. State*, 1991 Tex. App. Lexis 2366, *5 n.3 (Sept. 25, 1991) (promiscuity of a minor is a defense to a charge of heterosexual sex with a minor, but not of homosexual sex with a minor).

"Second, [the law's] sheer breadth is so discontinuous with the reasons offered for it that the [law] seems inexplicable by anything but animus against the class that it affects." *Evans*, 517 U.S. at 632. Texas justifies the law as "protection of public morality." Br. in Opp. at 14-16. If the state is trying to protect "public morality," isn't it sufficient to criminalize

[27] And this is an "exceptional . . . form of legislation." *Evans*, 517 U.S. at 632. No state adopted a "Homosexual Conduct" sodomy law until 1969.

"Public Lewdness," Tex. Penal Code § 21.07, and "Indecent Exposure," *id.* § 21.08? Why is it necessary to criminalize private conduct that no one will ever see, unless the goal is to stigmatize gay people as outlaws? The Homosexual Conduct Law is excessive. It is also highly underinclusive: Most sodomy that goes on in Texas is between men and women, the class excluded from the criminal law. This is inexplicable, unless its aim is to stigmatize gay people. Indeed, this Court in *Evans* rejected a more cogent public morality argument. Colorado maintained that its initiative was justified as a signal by tolerant Coloradans that, although homosexual conduct was no crime in the state, they did not consider homosexuality a good thing either. Pet. Reply Br. at 15 & nn.24-25, *Evans* (No. 94-1039).[28] But even this tolerant public morality did not save Colorado's initiative, because it "classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else." *Evans*, 517 U.S. at 635.

The state's other justifications are worse. Texas maintains that "[h]omosexual conduct cannot lead to a biological reproduction, or occur within or lead to a martial relationship." Br. in Opp. at 18. This underscores the underinclusiveness of the law, for "heterosexual sodomy" cannot lead to reproduction either. And "homosexual sodomy" is frequently the basis for longterm committed gay relationships and families. See note 30 *infra*. The state's final point, that its statute is "consistent with the traditional and historical view that homosexual activity is *malum in se*," Br. in Opp. at 18, is false. As Part II.A of this brief shows, traditional condemnations of sodomy in nineteenth century America did not focus on "homosexual sodomy" and, indeed, did not focus on sodomy between

[28] See also Brief of *Amicus Curiae* Concerned Women for America, Inc. at 8-21, *Evans* (No. 94-1039) (making the same "Public Morality" argument Texas is making in this case).

consenting adults within the home. Far from saving Texas's Homosexual Sodomy Law, tradition condemns it as a pernicious novelty.

B. The Texas Homosexual Conduct Law Violates the Due Process Clause, as It Criminalizes Gay People's Most Private Activities; *Bowers v. Hardwick* Should Be Overruled.

Because it authorizes police intrusion into the home and into the intimate lives of gay people, Texas's Homosexual Conduct Law is also inconsistent with the liberty principle of the Fourteenth Amendment. Although at odds with *Hardwick*, this conclusion is supported by this Court's precedents interpreting the privacy features of the Due Process Clause (Part I.C). This Court has afforded strongest protection in cases where people's personal security, interpersonal relations, and security within the home are most implicated, specifically including (1) sexual relations within marriage (*Griswold*); (2) sexual relations posing risks of pregnancy outside of marriage (*Eisenstadt*, *Carey*); (3) control of one's own body (*Botsford*, *Cruzan*); (4) home use of obscene materials (*Stanley*); and (5) nonnuclear family living arrangements (*Moore*). This Court would not afford protection in cases where those fundamental privacy interests were not at stake, including (6) adultery; (7) incest; (8) forcible sex between adults; and (9) sex between an adult and a minor. This array of the Court's precedents reflects the Framers' liberty principle: People should be left alone by the state unless their conduct has third-party effects unrelated to "nosy preferences" (my preference to make you just like me).

Under that principle, John Lawrence and Tyron Garner's behavior would seem protected because they were doing no one any harm and were acting within the confines of Lawrence's home. In the foregoing array, their conduct fell closest to categories 2-4, as it involved their chosen deployment of their own bodies (*Botsford*) within the privacy of

their own home (*Stanley*), even if outside the context of procreative marriage (*Eisenstadt*). This is the view of constitutional privacy taken in the MPC and by the large majority of state court judges in the last seventeen years. Contrast Lawrence and Garner's secluded conduct, which harmed no one, with that outside the right of privacy (categories 6-9), for these have clearer third-party effects: adultery's violation of marriage vows to a partner; disruption of the family entailed in adultery and incest; and the consent problems with forcible sex and sex between adults and minors.

Hardwick limited the privacy precedents to a narrower principle—a "right to decide whether or not to beget or bear a child" (categories 1-2). This was an incomplete reading of the precedents, for it provided no account of *Botsford* and other cases assuring a right of bodily integrity outside of pregnancy (such as *Cruzan*). Moreover, this Court had extended the right of sexual privacy beyond this limit in *Stanley* (category 4).[29] *Hardwick*'s characterization also failed to account for *Moore* (category 5). Ultimately, the opinion in *Hardwick* had no robust positive theory of this Court's privacy cases and relied upon a defensive theory: The right of privacy should not be extended to "homosexual sodomy," which this Court felt had traditionally been regulated in Anglo-American law and not been left to individual decisionmaking, just like adultery and incest (categories 6-7). According to the Court's opinion, 478 U.S. at 192-94 & nn. 5-7, what Hardwick did—oral sex with a consenting adult in his bedroom—was illegal in thirty-two of the thirty-seven states when the Fourteenth Amendment was ratified.

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[29] *Hardwick* dismissed *Stanley* as a First Amendment case, but *Stanley* presented itself in privacy terms and relied critically on *Griswold* and Fourth Amendment privacy cases for the proposition that "a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." *Stanley*, 394 U.S. at 565.

The Court was misinformed. Part II.A of this brief demonstrates that no state in 1868 made oral sex a crime. No state made sex between women a crime. No state code focused only on sex between men. No law and no court decision and no legal treatise invoked the concept of "homosexual sodomy," a term that did not exist in 1868. No reported case in the United States between 1789 and 1868 clearly applied sodomy laws to conduct within the bedroom between consenting adults. *Hardwick* was correct to examine our American traditions of liberty, but was incomplete in its understanding of that history. The fundamental freedoms Americans enjoy have included choices involving the deployment of the body, intimate relationships, and the home. These are freedoms gay Americans enjoyed until the anti-homosexual repression of 1945-1969—an aberration in our history of liberty that this Court should now close forever.

Hardwick also found that the respondent had demonstrated "[n]o connection between family, marriage, or procreation, on the one hand, and homosexual activity, on the other." 478 U.S. at 191. Today it is clear that gay people form intimate relationships and households that (like different-sex marriages) are founded on a love that is sexual, self-giving, and nurturing.[30] The Due Process Clause protects families against state interference, including nontraditional families. E.g., *Troxel*, 530 U.S. at 98 (Kennedy, J., dissenting); *Moore*, 431 U.S. at 506 (plurality opinion); cf. *McLaughlin v. Florida*, 379 U.S. 184, 196 (1963) (invalidating law prohibiting people

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[30] See Philip Blumstein & Pepper Schwartz, *American Couples: Money, Work, Sex* (1983); Susan Johnson, *Staying Power: Long Term Lesbian Couples* (1990); Lawrence Kurdek, *Relationship Outcomes and Their Predictors: Longitudinal Evidence from Heterosexual Married, Gay Cohabiting, and Lesbian Cohabiting Couples*, 60 J. Marr. & Fam. 553 (1998). See also American Academy of Pediatrics, *Technical Report: Coparent or Second-Parent Adoptions by Same-Sex Parents*, 109 Pediatrics 341 (Feb. 2002) (no fewer than one million children have one or two gay parents).

from cohabiting with someone of a different race). Just as it would be constitutionally unthinkable for the state to arrest straight couples practicing contraception in their marital or relational beds, so it must now be recognized as constitutionally impermissible for the state to arrest lesbian and gay couples engaging in sodomy in their relational beds.

Commentators from different perspectives have considered *Hardwick* both an incorrect and unprincipled precedent.[31] There has been no Supreme Court decision upholding a law that has been subjected to such immediate and persistent criticism as *Hardwick*.[32] The dissenting Justices in *Evans* insisted that this recent precedent cannot be reconciled with *Hardwick*. 517 U.S. at 640-42 (Scalia, J., dissenting). They were correct. *Evans*' holding, that the desire "to make [gay people] unequal to everyone else" is not a legitimate state interest that can satisfy rational basis review under the Equal Protection Clause, *id.* at 636 (majority opinion), is inconsistent with *Hardwick*'s holding, that the "belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" is a legitimate state interest that can satisfy rational basis review under the Due Process Clause. *Hardwick*, 478 U.S. at 196. One of this Court's precedents must yield, and the Fourteenth Amendment's original principles suggest the answer: *Hardwick* should be overruled.

Stare decisis cannot protect a precedent inconsistent with other precedents of this Court, but even if there were not a conflict between *Hardwick* and *Evans* the former would be

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[31] For a small sample of the scholarship criticizing *Hardwick*, see, e.g., Charles Fried, *Order and Law—Arguing the Reagan Revolution* 81-84 (1991); Richard Posner, *Sex and Reason* 341-50 (1992); Anne Goldstein, *History, Homosexuality and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 Yale L.J. 1073 (1988).

[32] This Court's decisions in *Plessy* and *Korematsu* have been widely criticized, but they were not subject to the enormous amount of immediate criticism as *Hardwick*.

vulnerable to reconsideration. This Court has frequently been willing to reconsider its constitutional precedents, *Payne v. Tennessee*, 501 U.S. 808, 828-30 n.1 (1991) (collecting cases), especially when they have subsequently been called into serious question. *Id.* at 828-30. As a matter of prudence, the Court has also considered whether the precedent's central rule "could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society," and "whether the law's growth in the intervening years has left the precedent's central rule a doctrinal anachronism discounted by society." *Casey*, 505 U.S. at 855 (joint opinion). Not only do these additional considerations fail to save *Hardwick*, but they further undermine it.

State courts have been unimpressed with *Hardwick*'s expansive view of the government's police power. Typical is *Powell v. State*, 510 S.E.2d 18 (Ga. 1998), which struck down under the state constitution's protection of liberty the consensual sodomy law that *Hardwick* had upheld. "We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity." *Id.* at 24. Examining American traditions of liberty as to personal security, the home, and intimate relationships, other state courts have agreed. See *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997); *Campbell v. Sundquist*, 926 S.W.2d 250, 261-62 (Tenn. App. 1996) (appeal denied); *State v. Cogshill*, 997 S.W.2d 534 (Mo. App. 1999) (no appeal taken); *Williams v. State*, 1998 Extra Lexis 260 (Balt. Cir. Ct. 1999) (no appeal taken). Only the courts in Kansas, Louisiana, and Texas have followed *Hardwick*.

Majority opinions in this Court have shunned *Hardwick* as a pariah precedent. *Evans*, of course, ignored *Hardwick*. The Chief Justice's opinion in *Washington v. Glucksberg*, 521 U.S. 702, 705-36 (1997), which rejected a general due

process right to die, failed even to cite *Hardwick*, even though the opinion was applying a historical methodology refusing to recognize a broad substantive due process right.[33] Courts all over the world have refused to follow *Hardwick* and have reasoned that fundamental principles of liberty and equality in the modern state are inconsistent with criminalization of private sodomy between consenting adults.[34] No one who is a genuine student of our American traditions of liberty and equality would mourn the passing of consensual sodomy laws. The world has moved on to a more productive deployment of the criminal sanction. This Court ought to do the same. *Hardwick* should be overruled.

C. The Texas Homosexual Conduct Law Violates the Privileges or Immunities Clause.

Hardwick did not address the constitutionality of consensual sodomy laws under the Privileges or Immunities Clause. Although this Court has not developed a robust doctrine in this area, there is a surprisingly strong case for applying the Privileges or Immunities Clause to protect personal liberties. Recall from Part I.C that the Framers of the Constitution of 1789 and the Bill of Rights were keenly

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[33] Five Justices were open to a "constitutionally cognizable interest in controlling the circumstances of his or her imminent death." *Id.* at 736-38 (O'Connor, J.); see *id.* at 738-52 (Stevens, J.), 752-89 (Souter, J.), 789 (Ginsburg, J.), 789-92 (Breyer, J.).

[34] See, e.g., *National Coalition for Gay & Lesbian Equality v. Minister of Justice*, 1999 (1) SA 6 (Const'l Ct. South Africa, Oct. 9, 1998) (South Africa Constitution bars state from criminalizing consensual "sodomy' and "unnatural acts"); *Modinos v. Cyprus*, 16 Eur. Hum. Rts. Rep. 485 (1993) (consensual sodomy laws are inconsistent with the rules of the European Community); *Norris v. Ireland*, 13 Eur. Hum. Rts. Rep. 186 (1991) (same); *Toonen v. Australia*, U.N. Doc. CCPR/c/50/D/488/1992 (Tasmania's consensual sodomy law violated the privacy protections of the International Covenant on Civil and Political Rights, which the United States has also ratified).

interested in limiting the powers of government: We the People are sovereign; the state has only those powers We have given it; and We have withheld from the state "immunities" (those natural liberties the People retained) and have acquired "privileges" (the rights society has provided in lieu of natural rights). 1 Blackstone, *Commentaries* *129; U.S. Const. IX Am. Justice Washington and, after him, many of the anti-slavery theorists believed that Article IV's Privileges and Immunities Clause protected those rights "which are, in their nature, fundamental; which belong, of right, to citizens of all free governments." *Corfield*, 6 Fed. Cas. at 551. Other theorists read Article IV more narrowly, and *Dred Scott* confirmed their approach.[35]

Whatever the status of anti-slavery jurisprudence before the Civil War, it is today of legal significance because it was the philosophy of the leading Republicans who sponsored the Reconstruction Amendments.[36] Almost all the Republicans

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[35] A number of thoughtful scholars believe the abolitionist understanding was more faithful to the Framers' intent than *Dred Scott* was. E.g., Chester Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 Wm. & Mary L. Rev. 1 (1967); Michael Conant, *Antimonopoly Tradition under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 Emory L.J. 785 (1982).

[36] Anti-slavery thought was the primary influence on the Reconstruction Amendments. See Jacobus tenBroek, *Equal Under Law* 196-97 (1965) (originally published as *The Antislavery Origins of the Fourteenth Amendment*); Curtis, *No State Shall Abridge*, *supra* note 9, at 26-56; David A.J. Richards, *Conscience and the Constitution: History, Theory, and the Law of the Reconstruction Amendments* 217-32 (1993). Although moderate and conservative Republicans, with less connection to the abolition movement, were important to the Reconstruction Amendments, the key ideas for the Reconstruction Amendments—natural rights to be free from state invasions of liberties, rights of "national citizenship," the state's obligation to provide equal protection of the law to all persons—came from anti-slavery jurisprudence. E.g., Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 Yale L.J. 2003, 2003-05

(including "moderates" like Bingham) disagreed with *Dred Scott* root and branch, and most of them believed its narrow interpretation of Article IV was wrong. E.g., Cong. Globe, 39th Cong., 1st Sess. 430 (Rep. Bingham), 475 (Sen. Trumbull), 1833-36 (Rep. Lawrence) (1866); 38th Cong., 1st Sess. 1202 (1864) (Rep. Wilson). Within this normative context, the Privileges or Immunities Clause of the Fourteenth Amendment was intended to expand upon *Corfield* and to establish national rights of citizenship. This was the theme of Representative Bingham's presentation of his proposed amendment to the House of Representatives, Cong. Globe, 39th Cong., 1st Sess. 2542 (1866); Senator Howard's introduction of the proposed amendment to the Senate, *id.* at 2765-66; and the few recorded ratification debates, Curtis, *No State Shall Abridge*, *supra* note 9, at 145-51.

Precisely what those national rights of citizenship were to be was a matter left somewhat open-ended, but the Framers of the Fourteenth Amendment repeatedly invoked Blackstone's understanding of traditional liberties, privileges, and immunities. E.g., Cong. Globe, 39th Cong., 1st Sess. 1118-19 (Rep. Wilson), 1832-36 (Rep. Lawrence) (1866). As demonstrated in Part I.C, Blackstone's central theme was that Englishmen enjoyed natural rights to deploy their bodies and inhabit their properties, without state intrusion, so long as they were not themselves intruding upon the natural rights of third parties. These Blackstonian "immunities" would be directly applicable to John Lawrence and Tyron Garner: The state has no business intruding into Lawrence's private property and snooping into their private pursuit of happiness.

Unlike the earlier discussion in this part, this Court's precedents provide little guidance. *The Slaughter-House Cases*, 83 U.S. 36, 75-80 (1873), gave an exceedingly narrow

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(1999); Robert Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 NYU L. Rev. 863, 890. 940 (1986).

reading to the Privileges or Immunities Clause, essentially limiting it to rights to petition the national government and to travel and trade interstate. See *Twining v. New Jersey*, 211 U.S. 78, 97 (1908). After 1873, the Court was unresponsive to Privileges or Immunities Clause arguments, and litigants eventually stopped making them. To reverse the court below on the basis of the Privileges or Immunities Clause would require this Court to abrogate the *Slaughter-House* dicta.[37] That would be an appropriate course of action, not only because that dicta are plainly contrary to the original meaning of the Fourteenth Amendment, but also because they ignore the rich connection among the Declaration of Independence and the normative claims of the American Revolution, the Founding era's Constitution and Bill of Rights, and the Reconstruction Amendments.[38]

CONCLUSION

For the foregoing reasons, *amicus curiae* Cato Institute requests that this Court invalidate the Texas Homosexual Conduct Law and reverse the decision of the court below.

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[37] This Court would not have to overrule the holding of *The Slaughter-House Cases* here. The cases involved a challenge to a state-granted monopoly by New Orleans butchers. One could argue that the Court allowed the local law in part because of concerns that a proliferation of butcheries would create public nuisances harming third-party rights.

[38] Kimberly Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 Tex. Rev. L. & Pol'y 1 (1998). As most commentators agree, the *Slaughter-House* dicta are flatly wrong, e.g., Curtis, *No State Shall Abridge*, *supra* note 9; John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385 (1992); Philip Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round At Last?*," 1972 Wash. U. L.Q. 405, and this includes commentators who have themselves taken a narrow view of the Privileges or Immunities Clause. E.g., Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stan. L. Rev. 5 (1949).

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APPENDIX 1

STATE CRIME AGAINST NATURE, SODOMY, AND BUGGERY LAWS, 1868[1]

Penal Code of Alabama tit. I, ch. 5, § 63 (1866) ("Any person who commits the crime against nature, either with mankind, or with any beast . . ."'

Digest of Arkansas Statutes vol. I, ch. 51, part IV, art. IV, § 5 (1858) ("sodomy or buggery")

General Laws of California vol. I, § 1450 (1865) ("The infamous crime against nature, either with man or beast . . .")

Swift's Digest of Laws of Connecticut book V, ch. VII, § 1 (1862) ("carnal knowledge committed against the order of nature by man with man, or in the same unnatural manner with woman, or by man or woman in any manner with beast . . .")

Revised Statutes of Delaware tit. XX, ch. 131, § 7 (1852) ("crime against nature")

Manual or Digest of Statutory Law of Florida div. IV, tit. I, ch. VII, § 11 (1847) ("buggery, or sodomy with either human being or beast")

Code of Georgia vol. II, part IV, tit. I, div. 4, § 4286 (1867) ("Sodomy is the carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman . . .")

General Laws of Illinois art. XX, § 50 (1858) ("infamous crime against nature, either with man or beast")

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[1] We have compiled this list by examining the criminal codes in place for each state in 1868. (We did not examine territorial codes.) See also William Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* (1999) (app. A1); Ronald Hamowy, *Preventive Medicine and the Criminalization of Sexual Immorality in Nineteenth Century America*, in *Assessing the Criminal: Restitution, Retribution, and the Legal Process* 35-97 (Randy Barnett & John Hagel III eds. 1977).

General Statutes of Kansas ch. 31, art. VII, § 231 (1868) ("the detestable and abominable crime against nature, committed with mankind or with beast")

Revised Statutes of Kentucky ch. XXVIII, art. IV, § XI (1867) ("sodomy or buggery with man or beast")

Revised Statutes of Louisiana "Crimes & Offences—Offences Against the Person," § 5 (1856) ("the detestable and abominable crime against nature, committed with mankind or beast")

Revised Statutes of Maine tit. XI, ch. 124, § 3 (1857) ("the crime against nature, committed with mankind or with a beast")

Maryland Code art. 30, § 201 (1860) ("crime of sodomy")

General Statutes of Massachusetts part IV, tit. I, ch. 165, § 18 (1860) ("the detestable and abominable crime against nature, either with mankind or with any beast")

Compiled Laws of Michigan vol. II, tit. XXXVIII, ch. CLXXXV, § 16 (1857) ("the detestable and abominable crime against nature, either with mankind or with any beast")

Public Statutes of Minnesota vol. II, ch. 96, § XIII (1859) ("sodomy or the crime against nature, either with mankind or any beast")

Revised Code of Mississippi ch. 64, § LII, art. 238 (1840) ("the detestable and abominable crime against nature, committed with mankind or with a beast")

Revised Statutes of Missouri ch. L, art. VIII, § 7 (1856) ("the detestable and abominable crime against nature, committed with mankind or with beast")

General Statutes of New Hampshire tit. XXIX ("Crimes & Offenses") (1867) did not identify the crime against nature, sodomy, or buggery as a crime, nor did the Revised Statutes published in 1851 or 1843, but the Act of June 19, 1812, § 5, made it a crime if a "man lye with mankind." Cf. Leviticus

20:13. A reader of the New Hampshire criminal code in 1868 would not have known that "lyeing" was a crime, and a reader of the Act of 1812 would not have known exactly what conduct that statute would have penalized.

Digest of Laws of New Jersey "Crimes," § 9 (1868) (Act of April 4, 1846) ("Sodomy or the crime against nature, committed with mankind or beasts")

Revised Statutes of New York vol. II, part IV, ch. 1, tit. 5, § 20 (1867) ("the detestable and abominable crime against nature, committed with mankind or with a beast")

Revised Code of North Carolina ch. 34, § 6 (1855) ("the abominable and detestable crime against nature, with mankind or beast")

Organic and General Laws of Oregon "Criminal Code," ch. XLVIII, § 639 (1866) ("sodomy or the crime against nature, either with mankind or beast")

Pennsylvania, Act of March 31, 1860 ("sodomy or buggery")

Revised Statutes of Rhode Island tit. XXX, ch. 216, § 11 (1857) ("the detestable and abominable crime against nature, either with mankind or any beast")

Revised Statutes of South Carolina part IV, ch. CXXXIII, § 4 (1873) ("the abominable crime of buggery, whether with mankind or with beast")

Compilation of Statutory Laws of Tennessee vol. II, part IV, ch. 8, § 4843 (1858) ("crimes against nature, either with mankind or any beast")

Digest of the Laws of Texas "Criminal Code," tit. XII, § 2033 (1866) ("with mankind or beast, the abominable and detestable crime against nature")

General Statutes of Vermont tit. XXXIV ("Crimes and Punishments") (1863), did not identify the crime against nature, sodomy, or buggery a crime, but the Vermont Supreme Court

held in *State v. LaForrest*, 45 A. 225 (Vt. 1899), that Vermont's adoption of the English common law in 1779 included the law against "buggery."

Code of Virginia vol. II, tit. 54, ch. CXCVI, § 12 (1860) ("buggery, with mankind, or with any brute animal")

Code of West Virginia ch. CXLIX § 12 (1868) ("buggery, with mankind, or with any brute animal")

Revised Statutes of Wisconsin ch. 139, § 15 (1849) ("sodomy, or the crime against nature, with mankind or beast")

APPENDIX 2

REPORTED STATE SODOMY DECISIONS,
NINETEENTH CENTURY

Davis v. Maryland, 3 H. & J. 154 (Md. 1810) (defendant allegedly "with force and arms * * * did make an assault * * * beat, wound, and illtreat" a 19 year-old "youth")

Commonwealth v. Thomas, 3 Va. 307 (1812) (defendant convicted for sex with a mare)

Estes v. Carter, 10 Iowa 400 (1860) (slander case; decision does not describe parties or conduct)

State v. Campbell, 29 Tex. 44 (1867) (defendant, a "freedman of color," convicted for sex with a mare)

Fennell v. State, 32 Tex. 378 (1869) (decision does not describe parties or conduct)

Commonwealth v. Snow, 111 Mass. 411 (1873) (defendant convicted for seduction of a "boy")

Frazier v. State, 39 Tex. 390 (1873) (decision does not describe parties or conduct)

Territory v. Mahaffrey, 3 Mont. 112 (1878) (defendant convicted for seduction of a 14 year-old boy)

People v. Williams, 59 Cal. 397 (1881) (defendant convicted for assault, with intent to commit "the infamous crime against nature," on adult man who complained to authorities)

State v. Williams, 34 La. Ann. 87 (1882) (decision does not describe parties or conduct)

Ex parte Bergen, 14 Tex. App. 52 (1883) (habeas corpus case; decision does not describe parties or conduct)

Collins v. State, 73 Ga. 76 (1884) (defendant convicted for sex with an unnamed animal)

McAfee v. State, 17 Tex. Cr. App. 131 (1884) (defendant convicted for sex with a cow)

Cross v. State, 17 Tex. Cr. App. 476 (1885) (defendant convicted for sex with a mare)

Foster v. State, 1 O.C.D. 261 (Ohio Cir. 1886) (three defendants convicted for gang-raping a fourth man)

Lefler v. State, 23 N.E. 154 (Ind. 1889) (decision does not describe parties or conduct)

Medis v. State, 27 Tex. Cr. App. 194 (1889) (two defendants convicted for anal intercourse with a third man; convictions overturned because state witnesses did not corroborate testimony of consenting "accomplice" that there was anal penetration)

State v. Chandontette, 25 P. 438 (Mont. 1890) (decision does not describe parties or conduct)

State v. Frank, 15 S.W. 330 (Mo. 1891) (defendant convicted for sex with a dog)

Mascolo v. Montesanto, 23 A. 714 (Conn. 1891) (contract case involving validity of a contract not to sue on civil action for assault, buggery, communication of a loathesome disease to 12 and 15 year-old children)

People v. Hodgkin, 53 N.W. 794 (Mich. App. 1892) (decision does not describe parties or conduct)

Bradford v. State, 16 So. 107 (Ala. 1893) (defendant convicted for sex with a cow)

Prindle v. State, 21 S.W. 360 (Tex. Cr. App. 1893) (defendant convicted for oral sex with an adolescent boy; conviction overturned because oral sex was not the "crime against nature" under the common law)

State v. Place, 32 P. 736 (Wash. 1893) (defendant convicted for assault with intent to commit sodomy on a moving train)

People v. Moore, 37 P. 510 (Cal. 1894) (defendant convicted for assaulting an adult man; conviction overturned and new trial ordered)

Hodges v. State, 19 S.E. 758 (Ga. 1894) (defendant convicted for sodomy committed on a boy under 14 years old)

Commonwealth v. Dill, 36 N.E. 472 (Mass. 1894) (decision does not describe parties or conduct)

People v. Hickey, 41 P. 1027 (Cal. 1895) (defendant convicted for assaulting an adult man)

Williams v. Commonwealth, 22 S.E. 859 (Va. 1895) (decision does not describe parties or conduct)

Wright v. State, 35 Tex. Cr. App. 367 (1896) (defendant convicted for sex with a mule)

Lewis v. State, 36 Tex. Cr. App. 37 (1896) (defendant convicted for oral and anal sex with a woman)

Honselman v. People, 48 N.E. 305 (Ill. 1897) (defendant convicted for engaging in oral sex with a 14 year-old boy)

People v. Boyle, 48 P. 800 (Cal. 1897) (defendant convicted for oral sex with a minor; conviction overturned)

People v. Wilson, 51 P. 639 (Cal. 1897) (defendant convicted for assault with intent to rape an adult man)

State v. Brown, 139 Mo. 522 (1897) (decision does not describe parties or conduct)

State v. Smith, 38 S.W. 717 (Mo. 1897) (defendant, a police officer, convicted for raping a 16-year-old boy)

Darling v. State, 47 S.W. 1005 (Tex. Cr. 1898) (decision does not describe parties or conduct)

Hawaii v. Edwards, 11 Haw. 571 (1898), 12 Haw. 55 (1899) (decisions do not describe parties or conduct)

Hawaii v. Luning, 11 Haw. 390 (1899) (decision does not describe parties or conduct)

State v. Romans, 57 P. 819 (Wash. 1899) (defendant convicted for attempted rape of an adult man)

State v. La Forrest, 45 A. 225 (Vt. 1899) (decision does not describe parties or conduct)

State v. Vicknair, 28 So. 273 (La. 1900) (defendant convicted for sex with a 14 year-old boy)

In re King, 82 N.W. 423 (N.D. 1900) (decision does not describe parties or conduct)

Kelly v. People, 61 N.E. 425 (Ill. 1901) (defendant convicted for oral sex with a 6 year-old boy)