IN THE

Supreme Court of the United States

No. 02-102

JOHN GEDDES LAWRENCE and TYRON GARNER,
Petitioners,

v.

THE STATE OF TEXAS,
Respondent.

BRIEF *AMICUS CURIAE* OF THE CENTER FOR THE ORIGINAL INTENT OF THE CONSTITUTION IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS IN THIS CASE[*]

The Center for the Original Intent of the Constitution (COIC) operates under the auspices of Patrick Henry College. The COIC contends that the interpretation of the Constitution according to the original intent of the Founders provides the only sure safeguard for the preservation of limited government and individual rights. The

[*] All parties have consented to the submission of this brief through letters filed with the Clerk of the Court. Amicus states that no portion of this brief was authored by counsel for a party and that no person or entity other than amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

COIC exists to systematically research and advocate constitutional interpretation according to the principle of original intent.

Our Founders established a federal government with limited and enumerated powers. The limits on federal power were originally intended to protect both the authority of the states and the liberties of the people.

Our interest is to preserve the blessings of liberty for ourselves and our posterity. U.S. CONST. pmbl. We seek to do this by holding the federal government to the terms of our original social contract: the Constitution. Faithful adherence to the original intent of the Founders is essential, not only because of their place in our nation's history, but also because of their position as the elected representatives of the people. We preserve self-government by elevating the written will of those elected officials who wrote and ratified the Constitution over the opinions of unelected judges.

SUMMARY OF ARGUMENT

The central purpose of this brief is to respond to various historical arguments raised in three *Amici Curiae* briefs filed on behalf of Petitioners by the American Civil Liberties Union ("ACLU Brief"), the Cato Institute ("Cato Brief"), and the Brief of Professors of History ("Historians Brief").

Contrary to the imaginative arguments contained in these briefs, the history of this country reflects a deep conviction that sodomy is criminally punishable conduct and not a constitutionally protected activity. The history of both state legislation and court decisions support the view adopted by this Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986), namely that neither the Bill of Rights nor the Fourteenth Amendment limit the authority of the states to punish homosexual sodomy.

Petitioners' *amici* inaccurately suggest that there was a de facto rule protecting consensual same-sex sodomy since the early days of the Republic. The proof of this argument is to be found, they contend, in a number of cases where sodomy convictions were reversed because they had been based on nothing more than the testimony of the accomplice—that is, the willing partner in the alleged sexual activity. However, even a cursory review of these cases reveals that the reason for the dismissal was found in a simple rule of evidence that is equally applicable to cases involving horse thieves or perjurers. Many states had the rule that a criminal conviction could not be sustained upon the testimony of an accomplice alone. If the testimony was corroborated, then the conviction could stand. This was a rule of evidence governing all crimes giving no more rise to a claim of constitutional protection for sodomy than it does for horse theft.

The Texas law is grounded on a moral judgment. There is nothing irrational or arbitrary about such a judgment upon which to base a valid Equal Protection claim. Those who wish to legalize sodomy have been quite successful, in the years since *Bowers*, in in repealing these laws. This Court should decline to constitutionalize an issue that belongs in the state legislatures.

I.

THE HISTORIC AUTHORITY OF THE STATES TO CRIMINALIZE SODOMY IS WELL-SETTLED

The historical evidence clearly shows that state legislatures have always possessed a broad authority to outlaw private, consensual sex, and that they also prohibited same-sex sodomy specifically since the earliest days of American history. Enactment

of the Bill of Rights in 1791 and the Fourteenth Amendment in 1868 did not alter that state legislative authority.

This Court has frequently looked to the Constitution's "text, history and precedent" to determine its meaning. *Eldred v. Ashcroft*, ___ U.S. ___, 123 S.Ct. 769, 777 (2003). As this Court recently reiterated in *Eldred v. Ashcroft*, "a page of history is worth a volume of logic." *Id*., quoting *New York Trust Company v. Eisner*, 256 U.S. 345, 349 (1921); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 790 (1995) ("Against this historical background, we viewed the Convention debates as manifesting the Framers' intent that the qualifications in the Constitution be fixed and exclusive.").

It is a settled constitutional principle within our federal republic that states possess general police powers. Inherent within these powers lies the duty to regulate the "health, safety, and morals" of their members. *Barnes v. Glen Theater*, 501 U.S. 560, 569 (1991) (referencing public indecency statutes which were designed to protect morals and public order). States have used this police power to promote marriage and direct the sexual activities of their citizens into marriage by criminalizing a wide variety of nonmarital sex acts, such as polygamy, rape, fornication, adultery, prostitution and incest. While crimes such as rape and incest are not consensual, adultery, prostitution, polygamy and fornication are private acts between consenting adults that have been regulated throughout our nation's history. As we shall demonstrate, states have possessed and properly exercised the authority to regulate deviate sexual conduct including sodomy at all relevant times in our nation's history.

The historical briefs filed by Petitioners' *Amici Curiae* erect numerous straw men by referencing Senator Joseph McCarthy,[1]

[1] Historians Brief at 16; Cato Brief at 13; ACLU Brief at 20 & n. 39.

using phrases like "same-sex couples"[2] and "Homosexual Conduct Law",[3] and generally discussing everything except the text of the Texas statute at issue.[4] The Historians Brief, in particular, shines the spotlight on Hollywood (p. 15), employment law (pp. 17, 25), medicine (p. 21), the Senate (pp. 15-16), modern religious denominations (pp. 21-22), child custody (p. 25), and other "recent historical scholarship" (p. 29). We confine our analysis to the sources this Court has consistently employed for constitutional analysis and avoid irrelevant, albeit entertaining, issues like the treatment of homosexuality by Hollywood.

Five arguments from the historical briefs warrant specific refutation: 1) the prohibition of same-sex sodomy is a creation of the recent past with no true roots in historical or religious tradition; 2) there is no historical support for the prohibition of sodomy because statutory language has changed; 3) case law reveals our nation has traditionally protected sodomy between "consenting adults acting privately"; 4) the lack of enforcement of sodomy laws and a "national trend" of liberalization warrant this Court's extension of a fundamental privacy right to same-sex sodomy; and 5) the Equal Protection Clause prohibits the states from banning same-sex sodomy.

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[2] Historians Brief at 11; Cato Brief at 18 ("gay [male-male] couples"); ACLU Brief at 28.

[3] Historians Brief at 1; Cato Brief at 1.

[4] Only the Cato Brief uses language from the statute (p. 1) and cites the statute (p. 28). Neither the text of the statute nor the citation appear in the other two historical briefs.

A. Proscriptions Against Sodomy Have Deep Religious, Political, and Legal Roots.

Sodomy was considered a heinous crime under common law. [5] Blackstone's writings are widely recognized as the best embodiment of English common law. His *Commentaries* were the standard legal textbook in the early days of our nation, and that work was frequently cited by early American courts. In this work, Blackstone discussed the "infamous crime against nature" and referenced the royal edicts prescribing its punishment.[6] Blackstone

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[5] "Buggery is . . . committed by carnall knowledge against the ordinance of the Creator and order of nature, by mankind with mankind, or with brute beast, or by womankind with bruite beast." Edward Coke, *The Third Part of the Institutes of the Laws of England* 58-59 (1641). Thus, the term included anal intercourse between two men. *See also Stafford's Case*, 12 Co. Rep. 36, 37, 77 Eng. Rep. 1318 (1607).

[6] Blackstone referred to the "infamous crime against nature" as "a crime not fit to be named; '*peccatum illud horribile, inter christianos non nominandum.*'" 4 *Commentaries* *215-16. Under Henry VIII, English law punished "buggery" in this fashion:

> Forasmuch as there is not yet sufficient and condign punishment appointed and limited by the due course of the Laws of this Realm for the detestable and abominable Vice of Buggery committed with mankind or beast: It may therefore please the King's Highness with the assent of the Lords Spiritual and the Commons of this present parliament assembled, that it may be enacted by the authority of the same, that the same offence be from henceforth adjudged Felony and that such an order and form of process therein to be used against the offenders as in cases of felony at the Common law. And that the offenders being herof convict by verdict confession or outlawry shall suffer such pains of death and losses and penalties of their goods chattels debts lands tenements and hereditaments as felons do according to the Common Laws of this Realme. And that no person offending in any such offence shall be admitted to his Clergy, And that Justices of the Peace shall have power and authority within the limits of their commissions and Jurisdictions to hear and determine the said offence, as they do in the cases of other felonies.

described the offense itself as one of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature," and "a crime not fit to be named." 4 W. Blackstone, *Commentaries* *215. The common law of England, including its prohibition of sodomy, provided the basis for the original state sodomy laws.

In early America, the Bible served as the source for many criminal laws. Early colonial statutes often quoted the Biblical passages of Leviticus 18:22 ("Thou shalt not lie with mankind as he lieth with womankind; it is an abomination.") and 20:13 when establishing prohibitions against sodomy.[7] States not using the Leviticus language referred to prohibited conduct as the "crime against nature." The phrase "crime against nature," which appears in Blackstone's *Commentaries* and numerous state statutes, harkens back to the Apostle Paul's condemnation in Romans 1:26-27 of those who "change the natural use into that which is against nature,"[8] as other *amici* have noted. Historians Brief at 5. However, their brief incorrectly concludes that Paul did not consider the phrase to apply to same-sex behavior. *Id*.

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25 Henry VIII, ch. 6 (1553). After a brief repeal by Queen Mary I, Queen Elizabeth I reenacted the punishment and made it permanent. 5 Eliz. ch. 17 (1562).

[7] *See, e.g.*, Connecticut, *Public Statute Laws of the State of Connecticut,* 1808 tit. LXVI (66), Chap. 1 § 2, p. 295; Massachusetts, *Perpetual Laws of the Commonwealth of Massachusetts*, 1780-1789, p. 187, Act of Mar. 3, 1785; New Hampshire, *of New Hampshire*, 1784-1792, ch. 42, at 596 (enacted Feb. 8, 1791).

[8] "For this cause God gave them up unto their vile affections for even their women did change the natural use into that which is against nature: And likewise also the men leaving the natural use of the woman, burned in their lust one toward another; men with men working that which is unseemly, and receiving in themselves of their error which was meet." Romans 1:26-27 (KJV).

Contrary to the assertion in the Historians Brief at 5, Paul's lack of reference to Sodom does not negate his condemnation of what we now term sodomy.[9] The Leviticus prohibition against sodomy made no reference to the destruction of the city of Sodom, but the command was clear nevertheless. Those who drafted early state and colonial laws drew on this Biblical background as the best means to express what was otherwise deemed unspeakable.[10]

The Historians Brief at 4, argues that states are "strikingly inconsistent in their definition of the acts encompassed by the term [sodomy]." The Historians Brief at 5. It then proceeds to discuss the variety of definitions for "unnatural acts" presented in "Latin theology, canon law, and confessional practice." Although the scope of prohibited "unnatural acts" may have varied from generation to generation, until very recent times, same-sex sodomy has been included in virtually every state's list of prohibited sexual acts.

Thomas Jefferson, the primary author of the Declaration of Independence, is one of the Founders who saw no inconsistency between the principles of individual liberty and the state prohibition of sodomy. In a letter to Edmund Pendleton dated August 26, 1776, Jefferson discussed his opinions on proper penalties for criminal activity. At the time of the Revolution, most states punished sodomy by death.[11] According to Jefferson, however,

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[9] Although the Apostle Paul did not refer to Sodom and Gomorrah in Romans 1: 26-27 (the "crime against nature" passage); later in the same epistle, Paul referenced the towns of Sodom and Gomorrah in an obviously negative light. *See Romans* 9:29.

[10] *See* Part I.C, *infra*.

[11] Connecticut, *Public Statute Laws of the State of Connecticut*, 1808 tit. LXVI (66), ch. 1 § 2, at 295 (enacted Dec. 1, 1642); Massachusetts, *Perpetual*

> Punishments I know are necessary, & I would provide them, strict & inflexible, but proportioned to the crime. Death might be inflicted for murder & perhaps for treason if you would take out of the description of treason all crimes which are not such in their nature. Rape, buggery &c—punish by castration.[12]

Although Jefferson recommended a different punishment, he still believed that sodomy was a criminal offense.

As commander of the Continental Army in 1778, George Washington dishonorably discharged Lieutenant Enslin for attempting to commit sodomy with another soldier, John Monhort. In his military order, Washington stated his deep disdain for the crime of sodomy:

> His Excellency the Commander in Chief approves the sentence and with abhorrence and detestation of such infamous crimes orders Lieut. Enslin to be drummed out of camp tomorrow

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Laws of the Commonwealth of Massachusetts, 1780-1789, at 187 (enacted Mar. 3, 1785); New Hampshire, *Laws of New Hampshire*, 1784-1792, ch. 42, at 596 (enacted Feb. 8, 1791); New York, 2 *Laws of New* York 1777-1789, ch. XXI (21), at 45 (enacted Feb. 14, 1787); North Carolina, 1 *The Revised Statutes of the State of North Carolina*, Passed by the General Assembly at the Session of 1836-7, at 293, 297-98 (enacted Oct. 16, 1749); Rhode Island, *Public Laws of the State of Rhode Island and Providence Plantations,* 1798, § 8, p. 586; South Carolina, 2 *Statutes of South Carolina* at 465, 493 (enacted Dec. 12, 1712); Virginia, 9 *Hennings Statutes of Virginia* 1775-1778, ch. V (5) § VI, at 127 (enacted May 1776).

[12] Thomas Jefferson, *Writings* 756-57 (Merrill D. Peterson ed., Library Classics of the U.S. 1984).

morning by all the drummers and fifers in the Army never to return.[13]

James Wilson, both a signer of the Declaration and the Constitution and one of the original Justices of this Court, wrote a commentary on American law. James Wilson, 2 *The Works of James Wilson* (1967) (from lectures given in 1790 and 1791). When the subject turned to sodomy, Wilson refused even to discuss the details of the act: "The crime not to be named [sodomy], I pass in a total silence." *Id.* at 656.

These examples from some of early America's key statesmen demonstrate the cultural atmosphere at the time of our nation's founding. It is clear that none of them ever envisioned a day when the federal Constitution would be used as a tool to overturn the decisions of elected state representatives concerning the punishment of sodomy.

B. The History of State Legislation Reveals That Same-Sex Sodomy Was Uniformly Condemned.

States freely prohibited same-sex sodomy throughout America's history, as well as other nonmarital sexual activity, such as polygamy, adultery, fornication and prostitution. The legislatures perceived no restraint on their power to do this by either the Bill of Rights or the Fourteenth Amendment. Since the passage of these Amendments, state laws have varied, but this fact simply supports the conclusion that this area of law was entirely in the hands of the states. No connection can be established between either the adoption of the Bill of Rights or the Fourteenth Amendment and alterations in sodomy statutes. An examination of

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[13] George Washington, *The Writings of Washington*, John C. Fitzpatrick, ed. (Washington, D.C.: U.S. Government Printing Office, 1932), Vol. XI, pp. 83-84, from General Orders at Valley Forge on March 14, 1778.

the history of sodomy statutes does not lend credence to the contention by several briefs that sodomy statutes were rarely, if ever, enforced following the passage of the Bill of Rights. ACLU Brief at 11, 12; Historians Brief at 7.

At the time of the passage of the Bill of Rights in 1791, ten of the states clearly banned same-sex sodomy. At that time, twelve of the thirteen original states prohibited sodomy either by statute or by their adoption of the English common law.[14] Two of these prohibitions do not explicitly define the crime, but the other ten states specifically prohibited same-sex sodomy. Five of the states banned same-sex sodomy by statute, and the other five prohibited same-sex sodomy because of their adoption of English common law[15] In 1776, for example, Maryland had adopted its Declaration

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[14] Georgia is the only state not to have clearly adopted English common law or a sodomy statute by 1791. However, Georgia did adopt such a statute later, showing that its Legislature did not believe the new Bill of Rights limited its authority to criminalize sodomy. Georgia certainly *punished* sodomy – in 1734, a man received 300 lashes for engaging in sodomy. 3 *Detailed Reports on the Salzburger Emigrants Who Settled in America . . . Edited by Samuel Urlsperger* 314 (William H. Brown, trans., Athens, GA: Univ. of Georgia Press, 1972). In 1743, another man received the death penalty. 2 *The Journal of William Stephens* 1743-1745 3 (E. Merton Coulter, ed., Athens, GA: Univ. of Georgia Press, 1958-59).

[15] Five states had statutory provisions against same-sex sodomy: Connecticut, *Public Statute Laws of the State of Connecticut*, 1808 tit. LXVI (66), ch. 1 § 2, at 295 (enacted Dec. 1, 1642); Massachusetts, *Perpetual Laws of the Commonwealth of Massachusetts*, 1780-1789, at 187 (enacted Mar. 3, 1785); New Hampshire, *Laws of New Hampshire*, 1784-1792, ch. 42, at 596 (enacted Feb. 8, 1791); New York, 2 *Laws of New* York 1777-1789, ch. XXI (21), at 45 (enacted Feb. 14, 1787); North Carolina, 1 *The Revised Statutes of the State of North Carolina*, Passed by the General Assembly at the Session of 1836-7, at 293, 297-98 (enacted Oct. 16, 1749). Five states adopted English common law with its explicit prohibition of same-sex sodomy: Delaware, *Laws of the State of Delaware* 1797, ch. 22a § 5, at 67 (enacted 1719); Maryland, *Maryland Laws, Thomas Sim Lee, Esq., Governor,* ch. LVII (57), art 10; New Jersey, *Acts of the*

of Rights which incorporated the English common law along with its sodomy prohibition.[16] Six years prior to the passage of the Bill of Rights, Massachusetts enacted a law that prohibited sodomy. The application of that law continued after the ratification of the Bill of Rights.[17] Earlier in the same year the Bill of Rights was ratified, New Hampshire revised its 1679 sodomy law to a same-sex sodomy statute which was still on the books in 1805.[18] Importantly, none of the states viewed the ratification of the Bill of Rights as limiting or removing the power of the legislatures to ban sodomy, including same-sex sodomy.

At the time of the Fourteenth Amendment's ratification, eight states specifically prohibited same-sex sodomy, including five of the original states which retained their earlier sodomy laws.[19] At

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General Assembly, ch. DC (600) § 7, at 93 (enacted Mar. 18, 1796); South Carolina, 2 *Statutes of South Carolina* at 465, 493 (enacted Dec. 12, 1712); Virginia, 9 *Hennings Statutes of Virginia* 1775-1778, ch. V (5) § VI, at 127 (enacted May 1776). Two states had general sodomy statutes: Rhode Island, *Public Laws of the State of Rhode Island and Providence Plantations,* 1798, § 8, p. 586; and Pennsylvania, *Statutes at Large of Pennsylvania,* 1682-1801 vol. 13, (1682-1801), p. 511, chap. MDXVI (1516) (enacted Apr. 5, 1790).

[16] *See* Part I.A. *infra.*

[17] *Perpetual Laws of the Commonwealth of Massachusetts*, 1780-1789, at 187 (enacted Mar. 3, 1785).

[18] *Laws of New Hampshire* 1784-1792, ch. 42, at 596 (enacted Feb. 8, 1791).

[19] Five original states retained their laws with only minor changes: New Hampshire, *Public Laws of New Hampshire June* 1812 5-6 § 6 (enacted June 19, 1812); New Jersey, *A Digest of the Laws of New Jersey* 162 § 9 (enacted Apr. 16, 1846); New York, *Revised Statutes of the State of New York*, at 46 (enacted Dec. 10, 1828); South Carolina, *Laws of South Carolina* 1868-1871 175 (enacted Feb. 4, 1869); Virginia, *The Code of Virginia. Second Edition, Including Legislation to the Year* 1860 (enacted Mar. 19, 1860). Georgia

least two more state courts explicitly applied the same-sex definition of common law sodomy.[20] For example, New Hampshire's 1812 same-sex sodomy law remained in effect after 1868, with only the penalty altered.[21] And New Jersey's prohibition of same-sex sodomy was in force both before and after the ratification of the Fourteenth Amendment.[22] At least twenty-two of the remaining states outlawed sodomy, although the definition of the crime also included acts committed by members of the opposite sex.[23] Although sodomy was not universally

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clarified its law, *see* note 9, *infra*. Two states admitted after 1791 prohibited same-sex sodomy by adopting Virginia's law: Kentucky, 1 *Digest of Kentucky Statute Law* 36 § 8 (Littell & Swigert, eds., Frankfort, KY: Kendall & Russell, 1822) (incorporating English common law through Virginia law); 2 *Digest of the Statute Laws of Kentucky of a Public and Permanent Nature* 1265 § 4 (Frankfort: Albert G. Hodgen, 1834) (lowering the penalty, but retaining the criminal statute); West Virginia, *West Virginia Const.,* art. XI § 8 (1863) (incorporating English common law through Virginia law).

[20] "Sodomy is a connection between two human beings of the same-sex – the male – named from the prevalence of the sin in Sodom." *Ausman v. Veal*, 10 Ind. 355 (May Term 1858) (defining the term "sodomy" as used in a slander case); *Coburn v. Harvey*, 18 Wis. 147 (Jan. Term 1864) (Wisconsin Supreme Court construed the history of Wisconsin as having adopted the common law of England, thus incorporating its same-sex sodomy law).

[21] *Public Laws of New Hampshire* June 1812 5-6 § 6 (enacted June 19, 1812).

[22] *A Digest of the Laws of New Jersey* 162 § 9 (enacted Apr. 16, 1846). Interestingly, New Jersey also added sodomy to the list of crimes that would support a death sentence in a felony-murder conviction. *Id.* At 161 § 3.

[23] Alabama, *Ala. Rev. Code* 3604 (1867); Arkansas, *Ark. Stat.*, ch. 51, Art. IV, 5 (1858); California, Statutes 1850, ch. 99, § 48, p. 99; Connecticut, *Conn. Gen. Stat.*, Tit. 122, ch. 7, 124 (1866); Delaware, *Del. Rev. Stat.*, ch. 131, 7 (1893); Florida, *Fla. Rev. Stat.*, div. 5, 2614 (passed 1868) (1892); Illinois, *Ill. Rev. Stat.*, div. 5, 49, 50 (1845); Louisiana, *La. Rev. Stat.*, Crimes and Offences, 5 (1856); Maine, *Me. Rev. Stat.*, Tit. XII, ch. 160, 4 (1840); Maryland, 1 *Md.*

proscribed, all thirty-one states that prohibited sodomy necessarily included same-sex sodomy in their definitions. No state viewed the Fourteenth Amendment as limiting their authority to enact statutes prohibiting same-sex sodomy.

C. The Records of Appellate Courts Do Not Support the Claim That the States Avoided Prosecuting or Condemning Same-Sex Sodomy.

The historical briefs[24] contend that shadows indicating the right of consensual sodomy can be discovered in the fact that enforcement efforts appear to be sparse on the record found in appellate decisions. Several historical and logical fallacies underlie this argument.

First, appellate case law is not the best source for accurate social science research, concerning either current law or more distant history. Generally, many convictions are not appealed.

Second, and more importantly, the *amici* making this argument, particularly the ACLU, concede that a great majority of the reported cases contain factual situations that they deem

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Code, Art. 30, 201 (1860); Massachusetts, *Mass. Gen. Stat.*, ch. 165, 18 (1860); Michigan, *Mich. Rev. Stat.*, Tit. 30, ch. 158, 16 (1846); Minnesota, *Minn. Stat.*, ch. 96, 13 (1859); Mississippi, *Miss. Rev. Code*, ch. 64, LII, Art. 238 (1857); Missouri, 1 *Mo. Rev. Stat.*, ch. 50, Art. VIII, 7 (1856); North Carolina, *N.C. Rev. Code*, ch. 34, 6 (1855); Oregon, *Laws of Ore.*, *Crimes - Against Morality, etc.*, ch. 7, 655 (1874); Pennsylvania, *Act of Mar. 31, 1860*, 32, *Pub. L.* 392, in 1 *Digest of Statute Law of Pa*. 1700-1903, p. 1011 (Purdon 1905); Rhode Island, *R. I. Gen. Stat.*, ch. 232, 12 (1872); Tennessee, *Tenn. Code*, ch. 8, Art. 1, 4843 (1858); Texas, *Tex. Rev. Stat.*, Tit. 10, ch. 5, Art. 342 (1887) (passed 1860); Vermont, *Acts and Laws of the State of Vt*. (1779).

[24] The three *amicus* briefs are those by the ACLU, Cato, and the Historians.

"unclear."[25] Reasoning from silence is always dangerous. This is especially true when, as here, there is a documented revulsion which led to a disinclination to discuss the details of these sexual crimes.

The ACLU reads these allegedly "unclear" cases through the skewed vision of twenty-first century Americans who are accustomed to hearing explicit and graphic depictions of sexual activity. Such was not the case in the early days of America, especially if the subject was same-sex sodomy. Cultural values in those times made people, even judges, highly reluctant to record the particular facts of a case involving consensual sodomy.

The lack of explicit factual detail does not indicate any lack of definitional clarity. Sodomy prosecutions were not unknown. In *Smith v. State*, 150 Ark. 265, 234 S.W. 32, 33 (1921), the court said in one sodomy prosecution, "The evidence is revolting in detail, and it could therefore serve no good purpose to set forth." Moreover, a nineteenth century state court noted, "Every person of ordinary intelligence understands what the crime against nature with a human being is."[26]

Thus, given the reluctance of the courts to provide details, it cannot be said with any certainty that prosecutions for "private sodomy" were out of the ordinary. In fact, some courts expressly indicated that privacy was not a factor in sexual crimes.[27] Others

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[25] Using the ACLU Brief's calculations, approximately 73 Texas cases and 79 cases from other states were "unclear." ACLU Brief at 14 ns. 17 & 18.

[26] *People v. Williams*, 59 Cal. 397, 398 (1881).

[27] *See State v. Gage*, 116 N.W. 596 (Iowa 1908) (ruling that sodomy could be established by witnesses or circumstantial evidence); *Sweenie v. Nebraska*, 80 N.W. 815 (Neb. 1899) (holding that adultery and fornication were crimes

equated "sodomy," or the "crime against nature," with crimes where consent or privacy were irrelevant.[28]

Third, *amici's* assertion that societal approbation for consensual acts of same-sex sodomy can be found in the silence of the appellate records is simply not true. Insofar as appellate courts are the correct measure of societal acceptance of consensual sodomy, it is beyond reasonable dispute that such acts were severely condemned.

In the period immediately following the adoption of the Fourteenth Amendment, appellate court decisions continued to echo the historical revulsion for the act of sodomy and the understanding that consent was no defense. *See, e.g.*, *Commonwealth v. Poindexter*, 118 S.W. 943, 943 (Ky.App. 1909) ("The acts charged against the appellees are so disgusting that we refrain from copying the indictment in the opinion."); *Herring v. State*, 46 S.E. 876, 881-82 (Ga. 1904.) ("After much reflection, we are satisfied that, if the baser form of the abominable and disgusting crime against nature—*i.e.*, by the mouth—had prevailed in the days of the early common law, the courts of England could well have held that that form of the offense was included in the current definition of the crime of sodomy."); *Kelly v. People*, 61 N.E. 425, 426 (Ill. 1901) ("We did not say the definition of the crime was 'generic,' but did hold that, because of the abominable nature of the crime, it was not necessary to set forth in detail the manner in which it was committed").

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regardless of privacy); *Hutchinson v. State,* 24 Tenn. 142 (1844) (holding that adultery is an offense no matter how privately the intercourse is carried on).

[28] *See, e.g,, Bartholomew v. Illinois*, 104 Ill. 601 (1882) (listing sodomy with burglary, robbery, incest, larceny, forgery, bigamy and others).

Several appellate court decisions have established that consensual activity was clearly prosecutable, and that the existence of consent served only to differentiate evidence requirements. In the context of a case involving incest, the Texas Court of Appeals quotes an authority which is applied to consensual sodomy:

> But alike in adultery and, it is believed, in fornication and in incest, where the crime consists in one's unlawful carnal knowledge of another, it is immaterial whether the other participated under circumstances to incur guilt or not, --just as sodomy may be committed either with a responsible human being, or an irresponsible one, or a beast. [I]t must be considered that in sodomy cases, the question of consent of the party with whom the act is committed, is not a material one. The crime is complete in either case if the act be committed.

Mercer v. State, 17 Tex. Ct. App. 452, 464 (1885) (internal quotation marks omitted).

In *Medis v. State*, 11 S.W. 112 (Tex.Ct.App. 1889), the Texas appellate court discussed the issue of consent, clarifying that the testimony of a third party would be required if both parties consented to the act. In *People v. Hickey,* 41 P. 1027 (Cal. 1897) the California appellate court ruled that "it was not an element in the offense where the act is done or attempted with the consent of the other party." 41 P. at 1028. Consent provided no immunity in a sodomy prosecution.

In *Honselman v. People*, 48 N.E. 304 (Ill. 1897) the Illinois court ruled that uncorroborated evidence alone, given by a consenting partner, was sufficient to convict both parties of sodomy. Citing *Gray v. People,* 26 Ill. 344 (1861), concerning the difficulty of proof, the Illinois court stated, "The offense should be clearly proved, but it is one committed in secrecy and ordinarily

not capable of being otherwise proved than by the testimony of a participant, and the law is, that the uncorroborated testimony of an accomplice is legally sufficient to sustain a conviction." *Honselman*, 48 N.E. at 305. Unlike several other state courts, the Illinois court ruled that corroborating evidence submitted by a third party was not required for the conviction of private, consensual sodomy.

Finally, in *State v. Gage*, 116 N.W. 596 (Iowa 1908), the Iowa court ruled that either third-party testimony or circumstantial evidence of penetration would be sufficient for conviction in a sodomy case. Once again, we see an example of state courts applying sodomy statutes to private, consensual activity. Although some states had higher evidence requirements for conviction, all states cited above clearly held consensual sodomy to be criminally actionable.

D. *Amici* for Petitioners Confuse a General Rule of Evidence with a Constitutional Right.

The Cato Brief places significant weight on a rule of evidence which supposedly created a de facto "immunity for sodomy within the home between consenting adults." Cato Brief at 11. Some states have or had a general rule of evidence that the uncorroborated testimony of one accomplice was not sufficient evidence for conviction.[29] This rule applied to crimes generally, not just sodomy or other sexual crimes where notions of privacy

[29] *See, e.g., State v. Carey*, 122 P. 868 (Nev. 1912) (noting the requirement that an accomplice must be corroborated by other evidence), *People v. Deschessere*, 74 N. Y. Supp. 761 (1902) (same); *People v. Hickey*, 41 P. 1027 (Cal. 1895) (same); *Medis v. State*, 11 S.W. 112 (Tex.Ct.App. 1889) (same).

might arguably play some role.[30] From this rule, the Cato Brief illogically derives the principle that any action between consenting adults within the home was immune from prosecution merely because the testimony of one partner was insufficient evidence.

Even if this were an accurate statement, it would be improper to infer a quasi-constitutional rule of privacy from a mere rule of evidence that was intended to ensure the truth of courtroom testimony, *see e.g. Hicks v. State*, 156 Tenn. 359 (1912) (explaining accomplice rules). There are many cases in which convictions were upheld when there was evidence beyond that supplied by the accomplice.[31]

The requirement of corroborating testimony was not a rule of common law. Several state courts explicitly refused to follow the rule in absence of a statutory provision. *See, e.g., Republic of Hawaii v. Edwards*, 11 Haw. 571 (1898) ("no statute in Hawaii requires that on a charge of sodomy, the testimony of an accomplice should be corroborated by other evidence"); *Honselman v. Illinois*, 48 N.E. 304 (Ill. 1897) ("the law is that the uncorroborated testimony of an accomplice is legally sufficient to sustain a conviction").

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[30] *See, e.g., State v. Hull*, 26 Iowa 292 (1868) (rule requiring corroboration for the testimony of accomplice in a case involving two horse thieves); *Anderson v. State*, 20 Tex.App. 312 (1886) (rule applied in a perjury case).

[31] *See, e.g., Jones v. State*, 101 S.W. 1012 (Tex. Crim. App. 1907) (upholding conviction on the testimony of only one witness); *Territory v. Mahaffrey*, 3 Mont. 112 (1878) (convicting upon corroborating testimony); *Commonwealth v. Snow*, 111 Mass. 411 (1873) (same).

Moreover, none of the cases cited by the *amici* regarded consent as an affirmative defense to the charge.[32] The Cato Brief's "consent" argument deduces incorrectly that the primary function of the sodomy laws prior to this century was "filling a regulatory gap as regards non-consensual sexual activity." Cato Brief at 11. Carrying this argument to its logical extreme, their rationale would lead to the conclusion that the Framers also intended the Bill of Rights and the Fourteenth Amendment to prohibit laws against fornication or adultery because those laws forbid private, consensual sex. This is ludicrous. No objective reader of fornication or adultery statutes can conclude that "consent" was a mitigating factor or defense for the crime. Rape statutes provided sufficient grounds for the prosecution of "non-consensual" sex. The evidence indicates that adultery, fornication, and sodomy statutes served the additional purpose of preserving the moral and legal standard that sex was reserved for traditional marriage.

E. Nothing in the History or Text of the Equal Protection Clause Supports a Different Result from This Court's Due Process Clause Decision in *Bowers v. Hardwick*.

A new law is usually intended to change an old law. This is just as true with regard to constitutional amendments as it is with ordinary legislation, with one critical exception. The Bill of Rights was designed to preserve the rights which the founding generation considered to be their natural inheritance.

Thus, the Framers of the Bill of Rights did not purport to "create" rights. "Rather, they designed the Bill of Rights to prohibit our Government from infringing rights and liberties

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[32] "It must be considered that in sodomy cases, the question of consent of the part with whom the act is committed, is not a material one. The crime is complete in either case if the act be committed. . . ." *Foster v. State,* 1 Ohio C.D. 261, 1886 WL 2557 at *4 (Ohio Cir. Ct. 1886).

presumed to be pre-existing." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 288 (1990) (Brennan, J., dissenting). "The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors." T. Cooley, *Constitutional Limitations*, ch. X (4th ed. 1878), quoted in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 34 (1991) (Scalia, J., concurring).

However, the Fourteenth Amendment, like the Thirteenth and Fifteenth, was intended to change the law. The core purpose of the Fourteenth Amendment was to overturn those state laws that failed to guarantee equal protection and due process to black Americans. This Court's "suspect classification" doctrine closely approximates this intention. With regard to race, all laws existing at the time of the ratification of the Amendment should have been considered presumptively unconstitutional. While this Court has built a complex system of suspect, intermediate, and rational classifications for Equal Protection analysis, it has never held that the Equal Protection Clause was designed to eliminate all state laws which make distinctions between people and their conduct.

> The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection. Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit Congress to prohibit every discrimination between groups of people. On the other hand, the Civil War Amendments were unquestionably designed to condemn and forbid every distinction, however trifling, on account of race.

Oregon v. Mitchell, 400 U.S. 112, 127 (1970)(opinion of Black, J.).

This Court has been reluctant to expand the "suspect classification" to include every group seeking the protection of this constitutional status. *See, e.g., San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) (wealth is not a suspect class); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (mental retardation is not a "quasi-suspect" classification). Lawyers lack no diligence in mining the phrases employed by this Court over the decades when endeavoring to argue that their clients should be included in this or another "protected" category. It is the words and phrases of the Framers of the Fourteenth Amendment that must be dispositive if the principle of republicanism—*we elect the rulers who make the law*—is to retain any meaning.

The essence of the Equal Protection Clause prohibits arbitrary treatment of people. *See, e.g., Central State University v. American Ass'n of University Professors,* 526 U.S. 124, 129 (1999) (Ginsburg, J., concurring). Racial discrimination is presumptively arbitrary. But any arbitrary, irrational treatment of people is prohibited. The debate about classifications and levels of scrutiny at times obscures reality; it is only arbitrariness that can possibly explain the outcomes of this Court's Equal Protection jurisprudence. Distinctions based on time-honored standards of law should be accorded some deference, but in the end arbitrary classifications cannot stand.

Texas outlawed same-sex sodomy because it views the practice as immoral. Petitioners' Opening Brief at 37. As this brief fully documents, this position is absolutely consistent with the time-honored traditions of this nation. Unless this Court is prepared to say that the moral traditions of this nation and western civilization are categorically arbitrary, it must affirm the decision below.

This Court has already settled this crucial question in *Bowers*. "The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." 478 U.S. 186, 196 (1986). It cannot be seriously contended that there is a difference between the Due Process Clause and the Equal Protection Clause insofar as these clauses affect the ability of a state to base its law on moral judgments.

Romer v. Evans, 517 U.S. 620 (1996), has done nothing to change this principle. *Romer* is based on the principle that no group should be limited in its ability to employ the political process for its own protection. *Romer* is fundamentally about political rights, not homosexual rights. States are still free to enact whatever moral judgments they wish regarding homosexual behavior. The briefs supporting Petitioners demonstrate only that those who support the legalization of sodomy have been very successful in moving the legislatures to adopt their moral views.

Moral judgments underlie every law. Disputes about moral choices belong to the legislative arena where the views of the people ultimately have control. This Court simply does not have the constitutional mandate to substitute its judgment for that of the elected representatives of the people on matters that boil down to nothing more than moral judgments.

II.

THIS COURT SHOULD FOLLOW THE ORIGINAL INTENT OF THE FRAMERS AND DECLINE PETITIONERS' INVITATION TO LEGISLATE FROM THE BENCH

A. In a Republic, Laws Are Created Only by Legislatures.

Petitioners and their *amici* have urged this Court to radically rewrite the criminal laws of this nation. Sodomy once was considered a crime so unspeakable that courts declined to describe the behavior in any detail.[33] Now this very reluctance caused by moral revulsion is asserted as a basis for the anti-historical contention that the Framers of the Constitution intended to protect consensual sodomy.

The briefs filed by those who support the legalization of same-sex sodomy demonstrate that they have made significant progress toward their political goals. Far fewer states punish sodomy now than at earlier times in our nation's history.[34] However, unsatisfied with the pace of change, these political advocates ask this Court to finish the process in one swift judicial act. Their argument is cloaked in supposed historical analysis and constitutional

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[33] *See, e.g., Honselman v. Illinois*, 48 N.E. 304, 305 (Ill. 1897) ("The existence of such an offense is a disgrace to human nature. The legislature has not seen fit to define it further than by the general term, and the records of the courts need not be defiled with the details of different acts which may go to constitute it."); *Cross v. State*, 17 Tex. Ct. App. 476, 1885 WL 6739 at *2 (1885) ("the crime of sodomy is too well known to be misunderstood, and too disgusting to be defined further than by merely naming it. I think it unnecessary, therefore, to lay the *carnaliter cognovit* in the indictment.").

[34] Cato Brief at 17, 26, Historians Brief at 29; ACLU Brief at 21-24.

reasoning. In reality, these submissions contain wishful thinking presented as accurate history, and political rhetoric thinly disguised as constitutional analysis.

Elected officials in Congress proposed the Fourteenth Amendment. Elected officials in the states ratified the Fourteenth Amendment. If the meaning of the language of the Fourteenth Amendment is twisted from that intended by those who drafted and ratified it, we will witness not an act of social progress but one of judicial tyranny.

John Locke wrote:

> Nor can any edict of anybody else, in what form soever conceived, or by what power soever backed, have the force and obligation of a law which has not its sanction from that legislative which the public has chosen and appointed; for without this the law could not have that which is absolutely necessary to its being a law, the consent of the society, over whom nobody can have a power to make laws but by their own consent and by authority received from them; and therefore all the obedience, which by the most solemn ties any one can be obliged to pay, ultimately terminates in this supreme power, and is directed by those laws which it enacts.[35]

Locke quotes Richard Hooker, *Of the Laws of Ecclesiastical Polity* (1593), to demonstrate the tyrannical nature of laws created by any other process.

> The lawful power of making laws to command whole politic societies of men, belonging so properly unto the same entire societies, that for any prince or potentate, of what kind soever

[35] John Locke, *Second Treatise on Civil Government* 74 (Prometheus Books 1986) (1690).

> upon earth, to exercise the same of himself, and not by express commission immediately and personally received from God, or else by authority derived at the first from their consent, upon whose persons they impose laws, it is no better than mere tyranny. Laws they are not, therefore, which public approbation hath not made so.[36]

Locke understood the important role of republican governmental principles for the preservation of liberty. Those who fancy the term "civil libertarian," and yet seek to change the law through the judiciary, seek not liberty, but an act that is "no better than mere tyranny."

It is not the role of this Court to inquire into the social policy ramifications of anti-sodomy laws. A ruling based on an examination of such matters would be exactly the sort of judicial legislation that this Court condemned in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 650 (1943). In that case, this Court held: "The framers of the Constitution denied such legislative powers to the federal judiciary . . . [and] did not grant to this Court supervision over legislation." Rather, this Court should consider only those arguments founded on analysis which is truly legal in character.

B. Legislative Trends Do Not Create New Constitutional Rights.

Each of the historical briefs filed in this case notes a "national trend" toward repealing or altering sodomy statutes. State legislatures have indeed made changes to sodomy laws, broadening, narrowing, or abolishing them. However, it does not follow that the alteration or repeal of sodomy statutes in some

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[36] *Id.*

states enshrines sodomy as a fundamental right guaranteed by the Bill of Rights and the Fourteenth Amendment. The fact that some states have changed or repealed their sodomy laws provides no support for the thinly veiled request for this Court to act as a "super-legislature."[37] Defining the criminality of certain forms of sexual conduct, such as same-sex sodomy, is a policy issue that has historically and properly been left to the state legislatures.

Prior to her appointment to this Court, Justice Ginsburg criticized the Supreme Court for imposing the broad holding of *Roe v. Wade*, 410 U.S. 113 (1973), on the states. She noted "in my judgment, *Roe* ventured too far in the change it ordered." Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 381 (1985). She further observed that the national trend "toward liberalization of abortion statutes" (also noted by this Court in *Roe*) quickly ended when the Court greatly restricted the states' authority to regulate abortion. *Id.* at 379-80; *see also* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1205 (1992) ("*Roe v. Wade* . . . invited no dialogue with legislators. Instead, it seemed entirely to remove the ball from the legislators' court.
In 1973, when *Roe* was issued, abortion law was in a state of change across the nation.").

As in *Roe*, this Court has received a request to constitutionalize a divisive and highly visible political issue. Public respect for the rule of law is diminished whenever unelected officials remove the ability of the public to settle moral and political issues in the legislative chamber. Contrast the public reaction to *Bowers v.*

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[37] *See Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) ("Our recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare.").

Hardwick, 478 U.S. 186 (1986), with that to *Roe*. Those disappointed with the *Bowers* decision have successfully petitioned many legislative bodies for change. Opponents of *Roe* march on this Court since there is no other realistic venue for relief.
This Court should stay out of this public policy dispute and leave it to the state legislatures to decide. [38]

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[38] Additionally, this Court should dismiss the cert petition as improvidently granted due to the deficient record. This case does not provide the facts for this Court to address the significant issues raised in the Questions Presented involving the constitutionality of private sex acts engaged in by consenting adults. The record in this case only shows that the Petitioners were adult males who engaged in "anal sodomy." Pet. App. 129a. & 141a.

Under the record of this case, the factual possibilities exist that one of Petitioners lacked capacity to consent, that the sodomy was forced, or that Petitioners engaged in commercial prostitution, or performed their act in public view or before an audience. Petitioners have not presented evidence refuting those factual alternatives. It is Petitioners' burden to prove that these facts do not exist in a case, in order to give this Court a clean vehicle to rule on the substantive legal questions. At best, all Petitioners can do is make a facial challenge to the Texas law, which means this Court should apply the standard articulated in *U.S. v. Salerno*, 481 U.S. 739, 745 (1987) (a party seeking facial invalidation of a statute "must establish that no set of circumstances exists under which the Act would be valid").

This Court should not reexamine a major Constitutional question, and also overturn an earlier decision when it is unclear that the facts of this case present an opportunity for this Court to rule on such a question *Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers Unions v. Denver Milk Producers, Inc.*, 334 U.S. 809 (1948) (per curiam) ("Because of the inadequacy of the record, we decline to decide the Constitutional issues involved.").

CONCLUSION

The Texas law prohibits conduct – sodomy between individuals of the same gender – as many other states and their courts have historically done. There is no fundamental right "deeply rooted in this Nation's history and traditions" to engage in same-sex sodomy. *Bowers*, 478 U.S. at 192-193. The Texas Court of Appeals decision should be affirmed.

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APPENDIX 1

State Sodomy Laws in 1791

Connecticut

> That if any man shall lie with mankind, as he lieth with womankind, both of them have committed abomination, they both shall be put to death; except it shall appear that one of the parties was forced, or under fifteen years of age; in which case the party forced, or under the age aforesaid, shall not be liable to suffer the said punishment.

The Public Statute Laws of the State of Connecticut, 1808 title LXVI (66), ch. 1, § 2, p. 295.

Delaware

> That if any person or persons shall commit sodomy, or buggery, or rape or robbery, . . . he or they so offending, or committing any of the said crimes within this government, their counsellors, aiders, comforters and abettors, being convicted thereof, as above-said, shall suffer as felons, according to the tenor, direction, form and effect of the several statutes in such cases respectively made and provided in Great Britain; any act or law of this government to the contrary in any wise not withstanding.

Laws of the State of Delaware, 1797, ch. 22a, § 5, p. 67 (passed in 1719).

Maryland

Maryland had no sodomy statute in 1791, but the Declaration of Rights of Maryland, section 3, a portion of the Maryland State Constitution passed in 1776 said "that the inhabitants of Maryland are entitled to the common law of England. . . ." Sodomy was a crime under the common law (see section on North Carolina).

> Every person duly convicted of the crime of sodomy, shall be sentenced to undergo a similar confinement for a period not less than one year nor more than ten years, under the same conditions as are herein after directed.

Maryland Laws, ch.. CXXXVIII (138), art. IV, § 8.

Massachusetts

> That if any man shall lay with mankind as he layeth with a woman, or any man or woman shall have carnal copulation with any beast or brute creature, and be thereof duly convicted, the offender, in either of those cases, shall be adjudged guilty of felony, shall be sentenced to suffer the pains of death, and the beast shall be slain, and every part thereof burned. And be it further enacted by the authority aforesaid, that such order and form of process shall be had and used, in trial of such offenders, and such judgment given, and execution done, upon the offender, as in cases of murder.

Perpetual Laws of the Commonwealth of Massachusetts, 1780-1789, p. 187, Act of March 3, 1785.

New Hampshire

> That if any man shall carnally lie with a man, as a man carnally lieth with a woman, or if any man or woman shall have carnal copulation with any beast, or brute creature, and be thereof convicted, the offender in either of those cases before mentioned, shall suffer death, and the beast shall be slain and burned.

Laws of New Hampshire, 1805, p. 267 (passed February 8, 1791).

New Jersey

> That sodomy, or the infamous crime against nature, committed with mankind or beast, shall be adjudged a high crime and misdemeanor, and be punished by fine and solitary imprisonment at hard labour, for any term not exceeding twenty-one years.

Acts of the General Assembly, March 18, 1796, ch. DC, § 7, p. 93.

New York

> That the detestable and abominable vice of buggery, committed with mankind, or beast, shall be from henceforth adjudged felony; and such order and form of process therein shall be used against the offenders, as in cases of felony at the common law; and that every person being thereof convicted, by verdict, confession, or outlawry, shall be hanged by the neck, until he or she shall be dead.

Laws of New York, ch.. 21, p. 391 (passed February 14, 1787).

North Carolina

When the Bill of Rights was ratified in 1791, North Carolina had adopted the English common law statute of Henry VIII which was the basis for the common law's crime of buggery (see section on South Carolina):

> Forasmuch as there is not yet sufficient and condign punishment appointed and limited by the due course of the Laws of this Realm, for the detestable and abominable vice of Buggery committed with mankind or beast: It may therefore please the King's Highness, with the assent of his Lords spiritual and temporal, and the Commons of this present Parliament assembled . . . That the same offense be from henceforth adjudged Felony . . . And that the offenders being hereof convict . . . shall suffer such pains of death and losses and penalties of their goods, chattels, debts, lands, tenements and hereditaments, as Felons be accustomed to doe [sic] according to the order of the Common-laws of this Realm. And that no person offending in any such offense, shall be admitted to his Clergy, And that Justices of Peace shall have power and authority, within the limits of their Commissions and Jurisdictions, to hear and determine the said offense, as they do use to doe [sic] in cases of other Felonies . . .

25 Henry VIII, ch. 6.

Pennsylvania

> That the pains and penalties hereinafter mentioned shall be inflicted upon the several offenders who shall from and after the passing of this act commit and be legally convicted of any of the offences hereinafter enumerated and specified, in lieu of the pains and penalties which by law have been heretofore

> inflicted; that is to say, every person convicted of robbery, burglary, sodomy or buggery or as accessory thereto before the fact shall forfeit to the commonwealth all and singular the lands and tenements, goods and chattels whereof he or she was seized or possessed at the time the crime was committed and at any time afterwards until conviction and be sentenced to undergo a servitude of any term or time at the discretion of the court passing the sentence not exceeding ten years in the public gaol or house of correction of the county or city in which the offence shall have been committed and be kept at such labor and fed and clothed in such manner as is herein after directed.

The Statutes at Large of Pennsylvania, 1682-1801, vol. 13, (1682-1801), p. 511, ch. MDXVI (1516).

Rhode Island

> That every person who shall be convicted of sodomy, or of being accessary [sic] thereto before the fact, shall, for the first offence [sic], be carried to the gallows in a cart, and set upon said gallows, for a space of time not exceeding four hours, and thence to the common gaol, there to be confined for a term not exceeding three years, and shall be grieviously fined at the direction of the Court; and for the second offence [sic] shall suffer death.

The Public Laws of the State of Rhode Island and Providence Plantations, 1798, § 8, p. 586, "An Act to Reform the Penal Laws."

South Carolina

> Forasmuch as there is not yet sufficient and condign [sic] Punishment appointed and limited by the due Course of the

> Laws of this Realm, for the detestable and abominable Vice of Buggery committed with the Mankind or Beast: (2) It may therefore be enacted, That the same offence be from henceforth adjudged felony, and such Order and Form of Process therein to be used against the Offenders as in Cases of Felony at the Common Law; (3) and that the Offenders being hereof convict [sic] by Verdict, Confession, or Outlawry, shall suffer such Pains of Death, and Losses and Penalties of the Goods, Chattels, Debts, Lands, Tenements and Hereditaments, as Felons be accustomed to do, according to the Order of the Common Laws of this Realm; (4) and that no Person offending in any such Offence, shall be admitted to his Clergy; (5) and that Justices of Peace shall have Power and Authority, within the Limits of their Commissions and Jurisdictions, to hear and determine the said Offence, as they do use to do in Case of other Felonies.

Public Laws of the State of South Carolina, 1790, p. 49.

The English common law statute banning sodomy issued by Henry VIII reads:

> Where in the Parliament begun at London the 3d Day of November in the 21st Years of the late King of most famous Memory, King Henry the Eighth, and after by Prorogation holden at Westminster in the 25th Year of the Reign of said late King, there was one Act and Statute made, entitled, An Act for the Punishment of the Vice of Buggery, whereby the said detestable Vice was made Felony, as in the said Estatute [sic] more and large it doth and may appear: (2) Forasmuch as the said Statute concerning the Punishment of the said Crime and Offence of Buggery standeth at this present repealed and void by Virtue of the Statute of Repeal made in the 1st Year of the Reign of the late Queen Mary: Sithence which Repeal so had

> and made divers evil disposed Persons have been the more bold to commit the said most horrible and detestable Vice of Buggery aforesaid, to the high Displeasure of Almighty God.
>
> II. Be it enacted, That the said Statute before mentioned, made in the 25th Year of the said late King Henry the 8th, for the Punishment of the said detestable Vice of Buggery, and every Branch, Clause, Article and Sentence therein contained, shall from and after the 1st Day of June next coming be revived, and from thenceforce shall stand, remain, and be in full Force, Strength and Effect for every, in such Manner, Form and Condition, as the same Statue was at the Day of the Death of the said late King Henry the Eighth, the said Statute of Repeal made in the said 1st Year of the said late Queen Mary or any Words general or special therein contained, or any other Act or Acts, Thing or Things, to the contrary notwithstanding.

Public Laws of the State of South Carolina, 1790, p. 65.

Virginia

Before 1792, Virginia relied on the English common law which made sodomy a punishable crime (see *Hennings Statutes of Virginia,* vol. 9, 1775-1778, ch. V, § VI, p. 127). Virginia passed a specific sodomy ban in 1792:

> That if any do commit the detestable and abominable vice of buggery, with man or beast, he or she so offending, shall be adjudged a felon, and shall suffer death, as in case of felony, without the benefit of clergy.

Virginia Statutes at Large, 1835, p. 113.

State Sodomy Laws in 1868

Alabama

> Crimes against nature, either with mankind or any beast, are punishable by imprisonment in the penitentiary not less than two or more than ten years.

Alabama Code, 1852, § 3235, p. 583.

Arkansas

> Every person convicted of sodomy, or buggery, shall be imprisoned in said jail and penitentiary house, for a period not less than five, nor more than 21 years.

Statutes of Arkansas, 1858, ch. 51, Art. IV, § 5, p. 335 (passed in 1838).

California

> The infamous crime against nature, either with man or beast, shall subject the offender to be punished by imprisonment in the State Prison for a term not less than five years, and which may extend to life.

Statutes 1850, ch. 99, § 48, p. 99.

Florida

> Whoever commits the abominable and detestable crime against nature, either with mankind or with any beast, shall be punished by imprisonment in the State penitentiary not

exceeding twenty years.

Florida Laws 1868, ch. 1637, Subchap. 8, § 17, p. 98.

Georgia

Sodomy and bestiality shall be punished by hard labour in the penitentiary, during the natural life or lives of person or persons convicted of these detestable crimes.

Lamar's of Georgia, 1810-1819, § 35, p. 571.

Illinois

The infamous crime against nature, either with man or beast, shall subject the offender to be punished by imprisonment in the penitentiary for a term not less than one year, and may extend to life.

Revised Statutes of 1844-45, ch. 30, Div. 5, § 50, p. 158.

Kansas

Every person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or with beast, shall be punished by confinement and hard labor not exceeding ten years.

Art. 7, ch. 31, § 249, *General Statutes* of 1868 (found at vol. 2, p. 340, *Statutes of Kansas*, 1897).

Kentucky

> Whoever shall be convicted of the crime of sodomy or buggery with man or beast, he shall be confined in the penitentiary not less than two nor more than five years.

Revised Statutes of 1852, ch. 28, Art. IV, § 11, p. 381.

Louisiana

> Whoever shall be convicted of the detestable and abominable crime against nature, committed with mankind or beast, shall suffer imprisonment at hard labor for life.

Revised Statutes of Louisiana, 1856, "Crimes and Offences," § 5, p. 136.

Maine

> Whoever commits the crime against nature, with mankind or with a beast, shall be punished by imprisonment not less than one, nor more than ten years.

Revised Statutes of 1857, ch. 124, § 3, p. 684.

Michigan

> Every person who shall commit the abominable and detestable crime against nature, either with mankind or with any beast, shall be punished by imprisonment in the State prison not more than fifteen years.

Compiled Laws of 1857, § 5871, p. 1543.

Minnesota

> Every person who shall commit sodomy, or the crime against nature, either with mankind or any beast, shall be punished by imprisonment in the territorial [sic] prison, not more than five years, nor less than one year.

Minnesota Statutes 1858, ch. 96, § 13, p. 729.

Mississippi

> Every person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or with a beast, shall be punished by imprisonment in the penitentiary for a term not more than ten years.

Laws of 1857, ch. 64, Art. 238, § 52, p. 611.

Missouri

> Every person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or with beast, shall be punished by imprisonment in the penitentiary not less than ten years.

Revised Statutes 1855, ch. 50, § 7, p. 624.

Nevada

> The infamous crime against nature, either with man or beast, shall subject the offender to be punished by imprisonment in the state prison for a term not less than five years and which may extend to life.

The Compiled Laws of Nevada in Force from 1861-1900, § 4699, sec. 45, p. 915 (approved November 26, 1861).

Oregon

> If any person shall commit sodomy or the crime against nature either with mankind or beast, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one year, nor more than five years.

Oregon Organic and General Laws, *1845-64*, ch. 48, § 639, p. 560 (passed October 19, 1864).

Tennessee

> Crimes against nature, either with mankind or any beast, are punishable by imprisonment in the penitentiary not less than five nor more than fifteen years.

Code of Tennessee, 1858, § 4843, p. 868.

Texas

> If any person shall commit with mankind or beast the abominable and detestable crime against nature, he shall be deemed guilty of sodomy, and on conviction thereof, he shall be punished by confinement in the penitentiary for not less than five nor more than fifteen years.

Penal Code of the State of Texas, 1879, art. 342, p. 46 (passed on February 11, 1860).

Vermont

Vermont had no criminal sodomy statute until 1937, although Vermont courts recognized sodomy as a crime at common law, which could be punished. See *State* v. *La Forrest*, 71 Vt. 311, 45 A. 225 (1899). This is the text of the Vermont criminal sodomy statute passed in 1937:

> A person participating in the act of copulating the mouth of one person with the sexual organ of another shall be imprisoned in the state prison not less than one year nor more than five years.

Vermont Statutes of 1947, ch. 370, § 8480, p. 1593.

West Virginia

> If any person shall commit the crime of buggery, either with mankind or with any brute animal, he shall be confined in the penitentiary not less than one nor more than five years.

Code of West Virginia—1870, ch. 149, § 12, p. 694 (passed in 1868).

Wisconsin

> Every person who shall commit sodomy, or the crime against nature, either with mankind or beast, shall be punished by imprisonment in the state prison, not more than five years nor less than one year.

Revised Statutes of Wisconsin, 1858, ch. 170, § 15, p. 975.

After 1868

Indiana

Indiana did not have a criminal sodomy law at the time of the passage of the 14th Amendment, but passed the following law in 1881:

> Whoever commits the abominable and detestable crime against nature, by having carnal knowledge of a man or beast, or who, being a male, carnally knows any man or any woman through the anus, and whoever entices, allures, instigates, or aids any person under the age of twenty-one years to commit masturbation or self-pollution--is guilty of sodomy, and, upon conviction thereof, shall be imprisoned in the State prison not more than fourteen years nor less than two years.

Revised Statutes of Indiana—1897, ch. 5, art. 5, § 2118, p. 338.

Iowa

Iowa did not have a criminal sodomy law at the time of passage of the 14th Amendment, but later passed the following law in 1892:

> Any person who shall commit sodomy, shall be imprisoned in the penitentiary not more than ten years nor less than one year.

Annotated Code of Iowa, 1897, § 4937, p. 1941, passed 24 General Assembly, ch. 39.

Ohio

Ohio did not have a criminal sodomy law in 1868, at the time of ratification of the Fourteenth Amendment. The Ohio Legislature later passed a criminal sodomy statute in 1885:

> Sec. 1 That whoever shall have carnal copulation against nature, with another human being or with a beast, shall be deemed guilty of sodomy, and shall, on conviction thereof, be imprisoned in the penitentiary not more than twenty years.

Ohio Laws 1885, p. 241 (passed May 4, 1885).

Nebraska

Nebraska had a criminal sodomy law while it was a territory, but not for a few years after it became a state. The Statutes of the Nebraska Territory of 1866 had a criminal sodomy statute at § 47, "Offenses Against Persons," p. 599. Nebraska had no criminal sodomy law at the time the states ratified the Fourteenth Amendment in 1868. The Nebraska State Legislature later passed such a law in 1875, using the exact language of the earlier territorial sodomy law.

> That infamous crime against nature either with man or beast, shall subject the offender to be punished by imprisonment in the penitentiary for a term not less than one year, and my [sic] extend to life.

Compiled Statutes, 1881, § 245, p. 805.