One of the landmark decisions of the Supreme Court’s 2002 Term was Lawrence v. Texas. The Court held that the Due Process Clause precluded the states from criminalizing consensual sodomy between consenting adults in private places. Because some states enforced consensual sodomy laws only against gay defendants and relied on those laws to justify rules discriminating against lesbian and gay people, Lawrence is an important gay rights decision. It may even assume an importance for gay people that Brown v. Board of Education has had for people of color.

To invalidate consensual sodomy laws, the Lawrence Court overruled a 1986 precedent, Bowers v. Hardwick, which had held that states could make “homosexual sodomy” a felony without violating the Due Process Clause. Bowers was a controversial decision. No decision of the Supreme Court upholding a statute against constitutional attack has been subject to the immediate and overwhelming criticism that Bowers was. Among the most influential critiques were pieces written for The Yale Law Journal or by Yale law professors.¹

Even a superficial examination of the Lawrence appeal reveals that the overruling of Bowers v. Hardwick was a Yale Law School seminar. The lower court litigation was conducted by the Lambda Legal Defense & Education Fund, Inc., under the leadership of its legal director, Ruth Harlow ’86, and Susan Sommer ’86. Representing appellants Lawrence and Garner at oral argument was eminent Supreme Court advocate Paul Smith ’79. Smith and William Hohengarten ’94 teamed up with Harlow and Sommer to write the brief for the appellants.

Under the supervision of a committee chaired by Mark Agrast ’85, the American Bar Association filed an amicus brief urging the overruling of Bowers. Other important amicus briefs were filed by Professor Harold Koh and the Yale Law School’s Allard K. Lowenstein International Human Rights Law Clinic for several international human rights groups; Paul R.Q. Wolfson ’87 for various medical and psychological associations; Pamela Karlan ’84 for eighteen professors of constitutional law, including Yale Law School Professors Bruce Ackerman ’67, Jack Balkin, and Kenji Yoshino ’96; and myself for the Cato Institute.

The various Yale Law School materials were clearly helpful to the Court. Justice Anthony Kennedy’s opinion for the Court cited and relied on Koh’s International Brief and my Cato Brief. Justice Antonin Scalia’s dissenting opinion cited and relied on my book, Gaylaw: Challenging the Sexpertise of the Closet, while Justice Kennedy’s opinion cited and relied on a law review article I wrote that became chapter four of Gaylaw.

Like the best law school seminar, the one the Yale Law School hosted for the Court was not as much interested in a particular result as in thinking more broadly about constitutional theory, methodology, and principle. In this regard, the Yale influence was more subtle and potentially more important in the long run.

As the various Yale briefs emphasized, constitutional precedents ought not be lightly overruled. Even controversial precedents must be understood in light of history, practice, and constitutional principle. Many academics believe that Lawrence v. Texas was one of the Supreme Court’s more satisfying opinions, because the overruling of precedent was soberly and persuasively justified, without the overstatement or law office history often found in Supreme Court opinions. We believe its virtues were deeply informed by the Yale Law School briefs filed in that case.
One of the landmark decisions of the Supreme Court’s 2002 Term was *Lawrence v. Texas*. The Court held that the Due Process Clause precluded the states from criminalizing consensual sodomy between consenting adults in private places. Because some states enforced consensual sodomy laws only against gay defendants and relied on those laws to justify rules discriminating against lesbian and gay people, *Lawrence* is an important gay rights decision. It may even assume an importance for gay people that Brown v. Board of Education has had for people of color.

To invalidate consensual sodomy laws, the *Lawrence* Court overruled a 1986 precedent, *Bowers v. Hardwick*, which had held that states could make “homosexual sodomy” a felony without violating the Due Process Clause. *Bowers* was a controversial decision. No decision of the Supreme Court upholding a statute against constitutional attack has been subject to the immediate and overwhelming criticism that *Bowers* was. Among the most influential critiques were pieces written for *The Yale Law Journal* or by Yale law professors.1

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William N. Eskridge, Jr.
John A. Garver Professor of Jurisprudence

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**Bowers v. Hardwick and the Overruling of Bowers v. Hardwick**

*Bowers* ruled that there was no fundamental privacy interest in people’s engaging in “homosexual sodomy,” because this conduct was an established crime when the Fourteenth Amendment was adopted in 1868. My Cato Brief demonstrated that this was factually and normatively questionable. Most states in 1868 made it an offense to commit the “crime against nature,” but none targeted “homosexual sodomy.” The word “homosexual” was not in the English language until the 1890s, and the statutes regulated conduct without regard to the sex (or even species) of the partners. Thus, the crime against nature could be committed by a man against a woman or animal as well as by a man against a man—but not by a woman with a woman.

If crime-against-nature laws were not aimed at “homosexual sodomy,” what was their object? By examining the state codes as well as criminal law treatises of the period, the Cato Brief established that the primary object of such laws was nonconsensual sexual assault not covered by rape and seduction laws of the period. Almost all the reported nineteenth-century sodomy prosecutions involved sexual assault by powerful adult men against women, other men, girls, boys, and animals. None involved consensual relations within the home. A secondary purpose of crime-against-nature laws...
the word “homosexual” was not in the English language until the 1890s, and the statutes regulated conduct without regard to the sex (or even species) of the partners.

By going out of its way to disrespect “homosexual sodomy,” Bowers was not only ignoring American libertarian traditions, but was also reinforcing more recent tendencies of some states to discriminate against gay people. In Romer v. Evans, the Court had ruled that antigay laws reflecting animus violate the equality guarantee of the Fourteenth Amendment. The Lawrence Court invoked Romer, perhaps as a suggestion that Texas’s “Homosexual Conduct Law” reflected antigay animus rather than a neutral message about morality—a notion reflected in Justice O’Connor’s opinion concurring in the Lawrence judgment. As amici had argued, the state decree value of Bowers was undermined by the difficulty in reconciling that precedent with Romer. Yale-trained brief-writers also demonstrated how even a misdemeanor sodomy statute uniformly among our people is not merely a historical tradition, but a necessary in light of their many problems, and salutary in light of the productive contributions made to those societies by their lesbian, gay, bisexual, and transgendered citizens.

Justice Kennedy agreed that foreign precedents can help American judges evaluate the consistency of American laws with fundamental constitutional principles. The renunciation of sodomy laws abroad deepened concerns the majority had about the harmfulness as well as the incorrectness of Bowers. Lawrence is the first time the Supreme Court has relied on foreign case law as a basis for overruling an American constitutional precedent. It will surely not be the last. Such a prospect troubled the Lawrence dissenters. Quoting Justice Clarence Thomas “34, Justice Scalia warned against imposing “foreign modes, fads, or fashions on Americans. This point is well taken. The Justices should not follow international precedents that are badly reasoned or misplaced in an American context. Anticipating this point, the International Brief quoted another Scalia dissent (in Thompson v. Oklahoma: “The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniformly among our people is not merely a historical accident, but rather so ‘implicit in the concept of ordered liberty that it occupies a place not merely in our mores but, text permitting, in our Constitution as well.

The Interconnection of Liberty and Equal Citizenship

Both the Cato Brief and the International Brief emphasized that constitutional protection of liberty and equality are interconnected. In the Appellants’ Brief, Hohengarten, Harlow, Sommer, and Smith developed this idea as a further reason to believe that Bowers was an unfortunate precedent. Justice Kennedy agreed: “Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”

was sexual behavior in public. Indeed, as the Cato Brief showed, when the crime against nature involved a consensual adult with no third party present, the rules of evidence required acquittal.

These historical materials helped persuade the Court that “the historical grounds relied upon in Bowers are more complex than the majority opinion...and at the very least, are overstated.” But that alone did not require the overruling of Bowers, which had assumed that the Due Process Clause only protects liberties affirmatively established in 1868. The Cato Brief and Mark Agrast’s ABA Brief further argued that the traditional liberties protected by substantive due process must be understood in light of the purposes of the Fourteenth Amendment—a neutral operation of law for the autonomy of the person in making [intimate, personal] choices. Moreover, Justice Kennedy emphasized the Fourteenth Amendment norms—especially the libertarian and anticaste norms—in coming to rest on a proper understanding of what the Framers’ words mean in the context of modern society.

The Relevance of International Precedent

As amici also urged, the Court did not deliberate about liberty in the abstract. Justice Kennedy examined normative standing of what the Framers’ words mean in the context of American traditions of liberty as an evolving concept. These historical materials helped persuade the Court that constitutional protection of liberty and equality are not only “homosexual sodomy,” Bowers was not only ignoring American libertarian traditions, but was also reinforcing more recent tendencies of some states to discriminate against gay people. In Romer v. Evans, the Court had ruled that antigay laws reflecting animus violate the equality guarantee of the Fourteenth Amendment. The Lawrence Court invoked Romer, perhaps as a suggestion that Texas’s “Homosexual Conduct Law” reflected antigay animus rather than a neutral message about morality—a notion emphasized in Justice O’Connor’s opinion concurring in the Lawrence judgment. As amici had argued, the state decree value of Bowers was undermined by the difficulty in reconciling that precedent with Romer. Yale-trained brief-writers also demonstrated how even a misdemeanor sodomy law, ostensibly regulating conduct, contributed to state treatment of gay people as an outcast. In Texas and other states, sodomy laws have routinely been invoked as a basis for denying lesbian and gay parents custody of their biological children, refusing to consider gay people for state employment, and exclusion of gays from state licenses needed for professional work. In some states, gays convicted of consensual sodomy would have to register as sex offenders. Justice Kennedy agreed that these were reasons to reconsider Bowers v. Hardwick; “its continuance as precedent depletes the lives of homosexual persons.” Several larger points are suggested by a Yale Law School reading of the Kennedy and O’Connor opinions in Lawrence. One is that the fourth Amendment’s commitment to equal citizenship entails not only a close examination of our nation’s most historically divisive classifications, such as race and sex, but also a careful look at more recent classifications, such as sexual orientation ones. Such a careful look is most appropriate when state classifications involve criminal liability or other important disadvantages to the objects of the discrimination. A more ambitious Yale spin on Lawrence would focus on the ways in which nonconforming conduct remains a basis for disadvantage for minority classes. I think lower court judges will read Lawrence to disallow state discrimination against gay people because of their presumed conduct, sodomy. But many will not read Lawrence to protect gay men against discrimination because they are campy, or to protect lesbians against discrimination because they marry women, or to protect transgendered people against discrimination because they crossdress, or to protect people of color against discrimination because they behave in ways not acceptable to mainstream culture. How should judges treat nonconforming conduct characteristic of a minority class? Focusing on conduct inside the bedroom, Lawrence does not solve these problems. Harvard’s Justice Marshall’s sliding scale approach, for instance, was a major theme of the Appellants’ Brief, the Cato Brief, and the Law Professor’s Brief in particular.

This was the argument of YLS’s Law Professor’s Brief, which elaborates on an approach to equal protection pioneered by Justice Thurgood Marshall in the era of Brown v. Board of Education. One is that the Court’s double standard of hard-pat取证 Arstis and Hardwells national bias review has effectively been replaced by a cautious version of Justice Marshall’s sliding scale approach.

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duct one’s own affairs, and to enjoy one’s home without state interference, and avoidance of laws tending to create social castes.

Following these amici, Justice Kennedy’s opinion in Lawrence viewed American traditions of liberty as an evolving understanding of what “respect the Constitution demands for the autonomy of the person in making [intimate, per-
sonal] choices.” Moreover, Justice Kennedy emphasized the Fourteenth Amendment norms – especially the libertarian and anticaste norms–in coming to rest on a proper understanding of what the Framers’ words mean in the context of modern society.

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As amici also urged, the Court did not deliberate about lib-
erty in the abstract. Justice Kennedy examined normative materials developed by the American Law Institute and the United Kingdom’s Wolfenden Committee. Further, the Court considered the experience at the state level. In traditionalist states like Arkansas, Georgia, Kentucky, Montana, and Tennessee, defendants represented by Ruth Harlow and Lambda had persuaded judges of all perspectives that consensual sodomy laws were antithetical to a neutral understanding of personal liberty or equality.

Harold Koh’s International Brief urged the Court to con-
sider sodomy precedents from other countries. Just as the Declaration of Independence announced that the decision to revolt against England was reached in a process that accorded “a decent respect to the opinions of mankind,” so the modern Court should consider traninational materials when reaching momentous decisions. The experience of other countries provides both factual and normative feedback that can be valuable. The International Brief demonstrated that all the nations of Europe had abandoned their consensual sodomy laws, after mature reflection about the same libertarian and equality principles that are embodied in the Fourteenth Amendment. And the abandon-
ment of sodomy laws was universally hailed in those coun-
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gendered citizens.

Justice Kennedy agreed that foreign precedents can help American judges evaluate the consistency of American laws with fundamental constitutional principles. The renuncia-
tion of sodomy laws has been driven by the growing recognition by a substantial number of persons that the sodomy laws had about the harmfulness as well as the incorrectness of Bowers. Lawrence is the first time the Supreme Court has relied on foreign case law as a basis for overturning an Ameri-
can constitutional precedent. It will surely not be the last.

Such a prospect troubled the Lawrence dissenters. Quoting Justice Clarence Thomas ‘74, Justice Scalia warned against imposing “[f]oreign minds, fads, or fashions on Americans.” This point is well-taken. The Justices should not follow inter-
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stream culture. How should judges treat nonconforming conduct characteristic of a minority class? Focusing on inside the bedroom, Lawrence does not solve these riddles. Harlon Dalton ’73 and Kenji Yoshino, my Yale faculty colleagues, have initiated an important academic conversa-
tion about these issues. In some future cases, ideas incubated at the Yale Law School will surely help the Supreme Court grapple with these issues.