

Appendix E - UNIVERSITY HONORS PROGRAM
SENIOR PROJECT - APPROVAL

Name: Matthew R. Mills

College: Arts & Science Department: Political Science and History

Faculty Mentor: Dr. Anthony Nownes

PROJECT TITLE: Friends in the Bedroom: Amicus Curiae Briefs
at the United States Supreme Court and Their
Influence in the Lawrence v. Texas Case.

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Signed: Anthony J. Nownes, Faculty Mentor

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Name: Matthew R. Mills

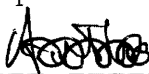
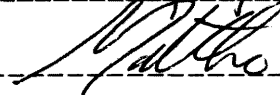
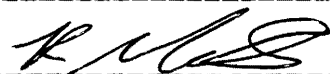
College: Arts & Sciences Department: Political Science and History

Faculty Mentor: Dr. Anthony Nunn

PROJECT TITLE: Friends in the Bedroom: Amicus Curiae Briefs at the United States Supreme Court and their influence in the Lawrence v. Texas Sodomy Case.

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Signed: Anthony Nunn, Faculty Mentor

Date: 4/14/04

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In this study, I will examine the influence of *amicus curiae* briefs on the United States Supreme Court in the *Lawrence v. Texas* case. This case was selected because of the large number of briefs that were filed. Additionally, the number of briefs filed for each side was almost equal. This study will examine one case in particular, *Lawrence v. Texas*. A broad generalization concerning the effectiveness of *amicus curiae* briefs cannot be made from the examination of one case. However, I believe that a study of this case and the *amicus* briefs that influenced the decision of the Court can show that certain types of *amicus* briefs are effective in Supreme Court litigation.

I will start with a detailed literature review examining recent studies concerning the influence of *amicus curiae* briefs by law professors and political science professors. After researching the major schools of thought on this issue, I will examine the majority, concurring, and dissenting opinions of the case to determine what, if any, *amicus curiae* briefs were used in the decision-making process. Once I have determined which briefs were influential, I will examine the arguments put forth in the *amicus curiae* briefs and attempt to establish their importance to the decisions. Finally, I will conclude by examining my findings pertaining to the influence of *amicus curiae* briefs in light of the current research.

Friends in the Bedroom:

Amicus Curiae Briefs at the
United States Supreme Court
and their influence in the
Lawrence v. Texas Sodomy
Case

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Greater than the tread of mighty armies is an idea
whose time has come.
-Victor Hugo

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Introduction

An Overview of the *Lawrence v. Texas* study

Stare decisis is not an inexorable command; rather it is a principle of policy and not a mechanical formula of adherence.

- Payne v. Tennessee 501 U.S. 808

In this study, I will examine the influence of *amicus curiae* briefs on the United States Supreme Court in the *Lawrence v. Texas* case. This case was selected because of the large number of briefs that were filed. Additionally, the number of briefs filed for each side was almost equal. This study will examine one case in particular, *Lawrence v. Texas*. A broad generalization concerning the effectiveness of *amicus curiae* briefs cannot be made from the examination of one case. However, I believe that a study of this case and the *amicus* briefs that influenced the decision of the Court can show that certain types of *amicus* briefs are effective in Supreme Court litigation.

I will start with a detailed literature review examining recent studies concerning the influence of *amicus curiae* briefs by law professors and political science professors. After researching the major schools of thought on this issue, I will examine the majority, concurring, and dissenting opinions of the case to determine what, if any, *amicus curiae* briefs were used in the decision-making process. Once I have determined which briefs were influential, I will examine the arguments put forth in the *amicus curiae* briefs and attempt to establish their importance to the decisions. Finally, I will conclude by examining my findings pertaining to the influence of *amicus curiae* briefs in light of the current research.

In order to deem a brief influential, I will look at two aspects. A brief will be viewed as influential if it is explicitly cited by Justice Kennedy in his majority opinion. A direct citation to an *amicus* brief is clear evidence that it was influential. Similarly, paraphrased arguments from *amicus* briefs in conjunction with the same citations will be used as evidence for influence.

In this study, my goal is to show that the *amicus* briefs were influential because they were able to offer a different perspective that the parties' briefs did not or could not. The decision reached in this case was surprising to many because of the broad, sweeping character of Justice Kennedy's opinion. This case could have turned on the much narrower legal question of equal protection because of the Texas statutes differentiation between same-sex couples and heterosexual couples. However, Justice Kennedy went much farther in his judgment. Kennedy declared that such a law was a violation of the Due Process clause of the U.S. Constitution. Kennedy held that persons' right to liberty under the Due Process clause gave them full rights to engage in private conduct without the intervention of the government. The reasoning for this judgment is to be found not in the briefs of the petitioners. It is to be found in four *amicus curiae* briefs submitted to the Court.

Chapter One

***Amicus Curiae* Briefs at the United States Supreme Court**

Most cases that come before the Court involve matters that affect far more people than the immediate record parties. I think the public interest and judicial administration would be better served by relaxing rather than tightening the rule against amicus curiae briefs.

-Justice Hugo Black

What is an *Amicus Curiae* Brief?:

Black's Law Dictionary states that an *amicus curiae* brief is a brief filed by "a person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter."¹ *Amicus curiae* briefs can play an important role in the decision-making process of the United States Supreme Court. They are important because they can bring legal arguments to the Supreme Court's attention that are important, yet not mentioned in the respondent's or petitioner's briefs. Such briefs may also demonstrate the potential effects of a court ruling.²

Function of an *Amicus Curiae* Brief:

Reagan William Simpson believes that an *amicus* brief can have one or more of six different functions in the judicial process. It is important to understand these six functions since briefs that fulfill one of these roles will be found to be most effective by the Supreme Court. First, an *amicus* brief may address policy issues. When larger social or policy issues are at stake, it is left up to the *amicus* party to bring those issues before the court. This function falls to the *amicus* party because the actual parties in the case are not permitted to raise issues that are not part of the appellate record. Second, an *amicus* party may also provide, what Simpson calls, a more attractive litigant. For example, in 1997 the American Civil Liberties Union (ACLU) filed an *amicus* brief in support of the Nazi Party's right to hold a parade in Skokie, Illinois.³ Third, an *amicus* brief might serve the purpose of increasing the chances that the Supreme Court will grant a *writ of*

¹ *Black's Law Dictionary*, 7th ed., s.v. "*amicus curiae*."

² Kermit L. Hall et al., eds., *The Oxford Companion to the Supreme Court of the United States* (New York: Oxford University Press, 1992), 31.

³ Reagan Wm. Simpson, *The Amicus Brief: How to Write It and Use It Effectively* (Washington DC: Tort and Insurance Practice Session, American Bar Association, 1998), 18.

certiorari to hear a case.⁴ Fourth, *Amicus* briefs may also attempt to strengthen a weakness in the party's brief, address issues that the party decided not to emphasize because of space limitation, provide further insight on a particular issue, or make arguments deemed too controversial by party counsel.⁵ Fifth, *Amicus* briefs may also be filed simply to endorse or show support for one party in a case.⁶ Finally, a party may use a brief to "correct, limit, publish, or 'de-publish' a decision."⁷

Who May File an *Amicus Curiae* Brief?

Amicus curiae briefs from private parties may only be filed after both parties in the case give permission. If permission is denied, the party seeking to file the *amicus curiae* brief may petition the Supreme Court for permission.⁸ The Supreme Court rarely refuses a party's request to file an *amicus* brief. Between 1969 and 1981, the Court received 832 motions seeking permission to file an *amicus* brief and only 91 of these were rejected.⁹ However, the Solicitor General on behalf of the United States, federal agencies, and states do not have to obtain permission to file an *amicus curiae* brief in a case.¹⁰ The Supreme Court may also invite the United States government, represented by the Solicitor General, to file an *amicus curiae* brief.¹¹

History of *Amicus Curiae* Briefs at the United States Supreme Court:

Although the use of *amicus curiae* briefs is most well known when discussing the modern-day United States Supreme Court, they have been used as far back in history as

⁴ Simpson, 18-19.

⁵ *Ibid.*, 19-20.

⁶ *Ibid.*, 20-21.

⁷ *Ibid.*, 21.

⁸ *Federal Civil Judicial Procedure and Rules*, "Rules of the Supreme Court of the United States: Rule 37.3(a-b)." (New York: The West Group, 2003), 576.

⁹ Gregory A. Caldeira and John R. Wright, "*Amicus Curiae Before the Supreme Court: Who Participates, When, and How Much?*," *Journal of Politics* 52(3) (August 1990): 785.

¹⁰ *Federal Civil Judicial Procedure and Rules*, 576.

¹¹ Hall, 31.

ancient Rome. The *amicus curiae* brief made its first appearance in the common law judicial system in the seventeenth century.¹² Regan Wm. Simpson states that the original role of the *amicus curiae* in common law litigation was “to inform or remind the judge of relevant opinions, to prevent any manifest error. The *amicus curiae* had the further role of informing the judge about a relevant fact, such as a party’s death or the collusive or fraudulent nature of a suit.”¹³ The first *amicus curiae* brief filed in the United States Supreme Court was filed in 1823. In the case of *Green v. Biddle*, the Supreme Court requested that Henry Clay file a brief to aid them in determining whether the commerce clause applied to a land grant between Kentucky and Virginia.¹⁴

Recent History of *Amicus Curiae* Filings:

By the 1940s, the Supreme Court took a view that *amicus* participation was increasing too rapidly. Supreme Court Justice Frankfurter wrote in 1949 that “although he had started out with an easy-going hospitality towards all briefs...[s]uch a latitudinarian view now seems...undesirable.”¹⁵ Nevertheless, the view of fellow Justice Hugo Black triumphed. Black stated, “Most cases that come before the Court involve matters that affect far more people than the immediate record parties. I think the public interest and judicial administration would be better served by relaxing rather than tightening the rule against *amicus curiae* briefs.”¹⁶ Interested parties have been spurred on in their participation in litigation by such views. *Amicus curiae* briefs have now become a method of third-party representation. The number of *amicus* briefs filed in the past half-

¹² Michael Rustad and Thomas Koenig, “The Supreme Court and Junk Social Science,” *North Carolina Law Review* 72 (1993): 91, 97.

¹³ Simpson, 2.

¹⁴ “*Green v. Biddle*,” 21 U.S. (8 Wheat.) 1 (1823).

¹⁵ Caldeira and Wright, 784.

¹⁶ *Ibid.*, 785.

century has increased dramatically.¹⁷ Bruce Ennis, a partner at Jenner & Block in Washington DC, has conducted a study in the increasing frequency of *amicus* filings. Ennis found that during the 1965-1966 Supreme Court term only 35 percent of the cases were accompanied by an *amicus* brief. By the 1980-1981 term, 71 percent of the cases had at least one *amicus* brief filed with them. The percentage skyrocketed to 90 percent by the 1995-1996 Supreme Court term.¹⁸ In addition to the increase in the number of cases that include at least one *amicus* brief, there has also been an increase in the total number of *amicus* briefs filed with each case. In *Webster v. Reproductive Health Services*,¹⁹ a case concerning state restrictions on abortion, there were 85 *amicus* briefs filed.²⁰

Amicus curiae briefs are briefs filed by parties interested in a case yet not actually involved in the case. These briefs are written to serve a variety of functions at the Supreme Court. Generally, *amicus* parties may file a brief after being granted permission by the actual parties in the case. The Supreme Court may also request that a certain party file a brief. The first *amicus curiae* brief was filed in the early 19th century and their use has increased exponentially since the 1940s.

¹⁷ Alexander Wohl, "Friends with Agendas: *Amicus Curiae* Briefs May Be More Popular Than Persuasive," *American Bar Association Journal* 82 (November 1996): 46.

¹⁸ *Ibid.*

¹⁹ 492 U.S. 490 (1989)

²⁰ Wohl, 46.

Chapter Two

From Texas To Triumph: The History of *Lawrence v. Texas*

Bowers was not correct when it was decided and it is not correct today. It ought not to remain binding precedent. Bowers v. Hardwick should be and not is overruled.

-Justice Anthony Kennedy

Background of the Lawrence v. Texas Case

Before beginning this study of the *Texas v. Lawrence* case, it is necessary that the background of the case be examined in order to provide the reader with a thorough understanding of the arguments presented in the *amicus* briefs. The present case arose after officers from the Harris County, Texas, Police Department responded to a suspected weapons violation. Upon forcibly entering the apartment, the officers observed John Geddes Lawrence, the resident of the apartment, and Tyson Garner involved in a sexual act. The two men were arrested, held in custody over night, and convicted the next day by a Justice of the Peace.²¹ According to the officers' complaint, the two men engaged in "deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." Texas law stated, "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."²² The Texas Penal Code described deviate sexual behavior as "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or anus of another person with an object."²³

In response to their conviction, the two men exercised their right to a trial *de novo*²⁴ in the Harris County Criminal Court. In this trial, they claimed that the Texas statute they were being charged under was a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and the similar provision

²¹ Justice Anthony Kennedy, Majority Opinion in *Lawrence v. Texas*, 123 S.Ct. 2472 (2003), 2476.

²² Tex. Penal Code Ann. §21.06(a)(2003).

²³ Tex. Penal Code Ann. §21.01(1)(2003).

²⁴ Trying a trial *de novo* means that the trial conducted as if the previous trial had not occurred. At such a trial, new issues may be raised. See Black's *Law Dictionary*, 7th ed., s.v. "*de novo*."

under Article 1, Section 3 and 3(a) of the Texas Constitution.²⁵ The Harris County Criminal Court rejected these arguments and the petitioners were fined \$200 and assessed court fees of \$141.25 after pleading *nolo contendere*.²⁶ After being convicted, the petitioners appealed to the Court of Appeals for the Texas Fourteenth District claiming that their rights had been denied protection under the Due Process and Equal Protection Clauses of the United States Constitution because the statute violated state and federal equal protection guarantees by discriminating in regards to sexual orientation and gender.²⁷ The Appeals Court, hearing *en banc*, affirmed the convictions of the two men. The court considered the Supreme Court Decision in *Bowers v. Hardwick*²⁸ to be controlling precedent in the case. Quoting *Bowers v. Hardwick*, the court stated, “the position that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable.”²⁹ The petitioners then appealed to the United States Supreme Court.

The United States Supreme Court granted the *writ for certiorari* stating that it wished to consider three questions:

- (1) Whether Petitioners’ criminal convictions under the Texas “Homosexual Conduct” law – which criminalizes sexual intimacy by same-sex couples – violates the Fourteenth Amendment guarantee of equal protection of the laws?
- (2) Whether Petitioners’ criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?

²⁵ Petitioner’s Brief, Brief to the United States Supreme Court petitioning for a *writ of certiorari*.

²⁶ Kennedy, 2476.

²⁷ *Lawrence v. State*, (41 S.W. 3d 349, 350), March 12, 2001.

²⁸ The United States Supreme Court held in 1986 that there was no constitutional protection for acts of sodomy and that states could legally outlaw such acts. Justice White, writing for the majority, stated that protection of acts of sodomy was not a right “implicit in the concept of ordered liberty” nor was it “deeply rooted in the Nation’s history and tradition.” Please see Justice White’s majority opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986).

²⁹ *Lawrence v. State*, 360.

- (3) Whether *Bowers v. Hardwick*, 478 U.S. 186 (1986), should be overruled?³⁰

The Decision in the *Lawrence v. Texas* case:

After holding oral arguments, the United States Supreme Court held that the Texas “Homosexual Conduct” statute violated the Due Process Clause of the Constitution. Justice Anthony Kennedy wrote for the six-member majority.³¹ Justice Scalia, Justice Thomas, and Chief Justice Rehnquist all dissented in the case. In his majority opinion, Kennedy wrote that the Court must reconsider its holding in *Bowers v. Hardwick*. It was his opinion that the issue in *Bowers* and in *Lawrence* was more extensive than whether sodomy is protected by the Constitution. Kennedy wrote, “The liberty protected by the Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their own private lives and still retain their dignity as free persons.”³²

When *Bowers* was decided in 1986, the majority stated, “Proscriptions against that conduct [homosexual sodomy] have ancient roots.”³³ However, Kennedy believed that the Court misinterpreted the history of such laws. Rather than forbidding consensual homosexual acts, the laws were enacted to prohibit nonprocreative sex between people regardless of gender. Additionally, the laws were not enforced against consenting adults acting in private; prosecutions often involved acts of sexual predation against minors. Kennedy concludes this portion of his argument by stating, “In all events we think that our laws and traditions in the past half century are of most relevance here.”³⁴ The

³⁰ Petition for writ of certiorari to the United States Supreme Court, *Lawrence v. Texas*, i.

³¹ Justice Kennedy, Justice Stevens, Justice Souter, Justice Ginsburg, Justice Breyer, and Justice O’Connor, who filed a concurring opinion, made up the six-member majority.

³² Kennedy, 2476-2478.

³³ Justice Byron White, Majority Opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986), 192.

³⁴ Kennedy, 2480.

majority believed that it was more important to evaluate this case according to society's current beliefs, not the beliefs of the past.

Justice Kennedy emphasizes that *Bowers* should be reversed because the views of the states and their citizens had advanced to the point that far fewer states criminalized consensual sodomy and homosexual conduct. When *Bowers* was decided, 25 states had laws criminalizing sodomy. The Court in *Bowers* also pointed to this fact as a basis for their reasoning. Justice White wrote, "[petitioner] insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 states should be invalidated on this basis."³⁵ However, by the time that *Lawrence* reached the court:

The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances.³⁶

The Court also decided two cases preceding *Lawrence* that necessitated that *Bowers* be overruled. *Planned Parenthood of Southeastern Pa. v. Casey*³⁷ reaffirmed the view that "matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."³⁸ Kennedy reasoned that the ruling in *Bowers* denied persons in homosexual relationships equality with heterosexual persons when such choices regarding personal and private conduct were being made. The second case

³⁵ White, 196-197.

³⁶ Kennedy, 2481.

³⁷ 505 U.S. 833 (1992).

³⁸ Justice O'Connor, Justice Kennedy, and Justice Souter, Majority Opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), 851.

decided post-*Bowers* that Kennedy pointed to when deciding to strike down the Texas statute was *Romer v. Evans*.³⁹ In *Romer*, the Court invalidated a Colorado law that specifically singled out homosexuals as a class of people. Kennedy also looks abroad for confirmation that the decision reached in *Bowers* is no longer valid. Citing precedents from the European Court of Human Rights, Kennedy explained that “Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct....The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.”⁴⁰ The central holding of *Bowers* was called into question by the two subsequent cases and the holdings of the international courts.

Kennedy also refers to Justice Stevens' dissenting opinion in *Bowers*. In *Bowers*, Stevens argued that the mere fact that Georgia believed a particular practice to be immoral was not a sufficient reason for criminalizing that practice. Second, Justice Stevens argued that decisions regarding intimate relations, even if they would not lead to procreation, were a form of liberty protected by the Due Process Clause.⁴¹ After taking into account these arguments, Kennedy held that the Texas statute violated the petitioners' rights under the Due Process Clause of the Constitution and that the reasoning of Justice Stevens should have been the controlling opinion in 1986. Kennedy concluded, “the Due Process Clause gives them [petitioners'] the full right to engage in private conduct without government intervention....The Texas statute furthers no legitimate state interest which can justify its intrusion into the individual's personal and

³⁹ *Romer v. Evans*, 517 U.S. 620 (1996).

⁴⁰ Kennedy, 2483.

⁴¹ Justice John Paul Stevens, Dissenting Opinion in *Bowers v. Hardwick*, 478 U.S. 186, 213-220.

private life.”⁴² He declared, “*Bowers* was not correct when it was decided, is not correct today, and is hereby overruled.”⁴³

The *Amicus Curiae* Briefs in *Lawrence v. Texas*:

In the *Lawrence* case, 29 *amicus curiae* briefs were filed.⁴⁴ Sixteen briefs⁴⁵ were filed on the petitioners’ behalf while thirteen were filed on behalf of the respondents.⁴⁶ Of the twenty-nine briefs, Justice Kennedy explicitly cited four *amicus curiae* briefs in his majority opinion. Justice Scalia does not refer to any *amicus curiae* briefs in his dissenting opinion nor does Justice Thomas in his dissenting opinion. Justice Kennedy specifically refers to the *amicus curiae* briefs of the American Civil Liberties Union and the ACLU of Texas, the Cato Institute, Mary Robinson and Amnesty International, et al., and the Professors of History, George Chauncey, et al. in his majority opinion. Kennedy also makes mention of additional *amici* in reference to an argument that he rejects. Kennedy rejects the petitioners’ claim that the Texas statute is a violation of the Equal Protection Clause of the Constitution. The briefs presented by the American Bar Association, Cato Institute, and the Republican Unity Coalition and Alan K. Simpson

⁴² Kennedy, 2484.

⁴³ Ibid.

⁴⁴ Clerk of the Supreme Court of the United States, *Docket for 02-102*, 22 October 2003 [online]; available from <http://www.supremecourtus.gov/docket/02-102.htm>; Internet; accessed 30 October 2003.

⁴⁵ The Alliance of Baptists, et al., American Bar Association; American Civil Liberties Union and ACLU of Texas; American Psychological Association, et al.; American Public Health Association, et al.; Cato Institute; Constitutional Law Professors, Bruce Ackerman, et al.; Human Rights Campaign, et al.; Institute for Justice; Log Cabin Republicans and Liberty Education Reform; National Lesbian and Gay Law Association, et al.; National Organization for Women (NOW) Legal Defense and Education Fund; Professors of History, George Chauncey et al.; Mary Robinson, Amnesty International, et al.; Republican Unity Coalition and Alan K. Simpson; and the Stonewall Law Association, et al. were the 16 filers of the *amicus curiae* briefs on behalf of the petitioners’.

⁴⁶ The American Center for Law and Justice; American Family Association, Inc., et al.; Center for Arizona Policy and Pro-Family Network; Center for Law and Justice International; Center for the Original Intent of the Constitution; Concerned Women for America; Family Research Council, et al.; Liberty Counsel; Public Advocate of the United States, et al.; States of Alabama, South Carolina, and Utah; Texas Eagle Forum, et al.; Texas Legislators, et al; and Texas Physicians Resource Council, et al. were the 13 filers of *amicus curiae* briefs on behalf of the respondents’.

argued that the Texas “Homosexual Conduct Statute” was a violation of the Equal Protection Clause of the Constitution. Although ultimately rejected because Kennedy feared that the statute could be reconstructed to apply equally to both homosexual persons and heterosexual persons, these arguments were influential enough that Justice Kennedy took note of them.⁴⁷ Further examination of the arguments of these four briefs and their impact on the Court’s decision will take place in chapter 2.

This case arose after report of a disturbance was filed in Harris County, Texas. Upon entering the residence and discovering two males engaged in a homosexual activity, they were arrested and charged under a Texas statute. After appealing through the Texas court system, the case reached the United States Supreme Court. Upon hearing the case, the Supreme Court ruled that the decision in *Bowers v. Hardwick* was incorrect and that the Texas statute was unconstitutional. Of the *amicus curiae* briefs filed in this case, four are explicitly mentioned in the majority opinion.

⁴⁷ Kennedy, 2484.

Chapter Three

The Past and Present of *Amicus Curiae* Scholarship

There has been a major transformation in Supreme Court practice; the extent to which non-parties participate in the Court's decision-making process, through the submission of amicus curiae, or friend-of-the-court, briefs.

-Joseph D. Kearney and Thomas W. Merrill

The area of *amicus curiae* research has been a fairly well studied area. Several studies have been conducted since the 1970s. Throughout this continued research, scientists have been unable to decide conclusively whether such briefs have an influence on the United States Supreme Court. These results range from no influence to influence in only certain types of cases. The most recent research finds that briefs which approach the case from an alternate angle or that add information not presented in the briefs are most influential.

Effectiveness and Empirical Studies

Stephen Puro conducted the first empirical study undertaken in the area of *amicus curiae* briefs in 1971. Puro examined the success rate of filers from the 1920 term until the 1960 term. His strategy consisted of a success rate computed by taking “the number of cases in which an entity files an *amicus* brief supporting the prevailing party divided by the total number of *amicus* filings by that entity.”⁴⁸ Puro discovered that parties had a success rate of 55% in their filings.⁴⁹ Donald Songer and Reginald Sheehan attempted their own empirical study using different methods. Songer and Sheehan studied, over the course of a twenty-year period (1967-1987), cases in which *amicus* parties supported one party while the other was not supported by any *amicus* parties. After examining 132 cases, they concluded that *amicus curiae* briefs have little influence. They wrote:

Overall, the *amici* appeared to have little impact. The differences in the success rates of litigants who received *amicus* support and those who did not was trivial....[w]hile there may be particular cases in which the arguments presented by groups appearing as *amici* decisively influenced the Court’s thinking, there is no general pattern which suggests that a

⁴⁸ Joseph D. Kearney and Thomas W. Merrill, “The Influence of Amicus Curiae Briefs on the Supreme Court,” *University of Pennsylvania Law Review* 148 (2000): 769.

⁴⁹ Kearney and Merrill, 769-770.

litigant's chances for success depend on whether or not an *amicus curiae* brief is filed on the litigant's behalf.⁵⁰

Later studies that have used multivariate regression analysis have discovered that *amicus curiae* briefs can have a positive effect on the outcome of a case. Kevin McGuire, a scholar who has published in this area, has conducted two studies. One examined what factors influence the outcome in obscenity cases and the other dealt with whether lawyers with Supreme Court litigation experience influence the outcome of the trial. McGuire discovered, "that the probability of success was significantly related to the level of *amicus curiae* support for a party."⁵¹ For comparing the findings of these studies, it is clear that there is no clear answer as to whether parties that are supported by *amicus curiae* briefs are more likely to find success at the United States Supreme Court. A recent study published in the University of Pennsylvania Law Review describes the view that I believe best describes the four briefs studied in this thesis. The authors wrote, "*Amicus curiae* briefs matter insofar as they provide legally relevant information not supplied by the parties to the case—information that assists the Court in reaching the correct decision as defined by the complex norms of our legal culture."⁵² This supplemental brief will now be examined along with the supplemental aspects of the briefs being studied.

The Supplemental Brief

Amicus Curiae briefs that simply restate the merit briefs of the petitioner and respondent will have little influence on the Supreme Court. Mary-Christine Sungaila states, "in cases presenting issues of vast public or social importance, there is a great

⁵⁰ Donald R. Songer and Reginald S. Sheehan, "Interest Group Success in the Courts: Amicus Participation in the Supreme Court," *Political Research Quarterly* (46):350-351.

⁵¹ Kearney and Merrill, 772.

⁵² *Ibid.*, 830.

temptation for organizations to weigh in at the merits stages with *amicus* briefs that say little more than ‘me too’”⁵³ In this case, there were 29 *amicus curiae* briefs filed. Sixteen were filed in support of the petitioners while 13 were filed on behalf of the respondents. After examining the *amicus* briefs in this case, it was determined that the vast majority of them simply restated the argument put forth in the briefs of the parties. However, four briefs filed in support of the petitioner’s did bring new perspectives to the case. The briefs for the ACLU, Cato Institute, Professors of History, and Mary Robinson, et al. will be discussed in the context of Justice Kennedy’s majority opinion in the next chapter. Sungaila explains:

A helpful and useful *amicus* brief generally accomplishes one (or both) of two things. First, the *amicus* amplifies points made only briefly or summarily in the party’s brief. Second, it emphasizes the broad policy implications of various potential rulings, often by introducing extra-record evidence, usually in the form of social science data.⁵⁴

Bruce J. Ennis, an active Supreme Court litigator and author, also believes that *amicus curiae* briefs play an effective and influential role at the Supreme Court. Part of their influence arises from the constraints placed on the two main parties in the case. He explains, “[b]ecause of page limits, or considerations of tone and emphasis, parties are frequently forced to make some of the points they wish to make in a rather abbreviated form.”⁵⁵

Ennis provides an example of such a case where the case was greatly affected by the views but forth by an *amici*: the Toll v. Moreno case. For example, the Supreme Court held on the grounds of the Supremacy Clause that state statutes that placed alien

⁵³ Mary-Christine Sungaila, “Effective Amicus Practice Before the United States Supreme Court: A Case Study,” *Southern California Review of Law and Women’s Studies* 8 (1999): 188.

⁵⁴ Sungaila, 190.

⁵⁵ Bruce J. Ennis, “Symposium on Supreme Court Advocacy: Effective *Amicus* Briefs,” *Catholic University Law Review* 33: (1984): 606.

college students at a disadvantage were unconstitutional.⁵⁶ This view was not expressed in the party briefs; it was only expressed in the *amicus curiae* brief filed by the World Bank.⁵⁷ A similar result occurred when in the groundbreaking *Roe v. Wade* case. Ennis states, “[the court’s opinion] expressly referred to positions urged by amicus groups, and relied heavily on historical, social, and crucial medical data presented to the Court by *amicus* groups.”⁵⁸

In the case at hand, the four *amicus curiae* briefs each contributed a different perspective to the case. The briefs for the ACLU, Cato Institute, and the Professors of History paint a more accurate picture of the historical background regarding prosecution for consensual sodomy and societal views for same-sex relations in general. This research had a tremendous influence on the case. Such a large portion of the population has accepted the historical aspects put forth in the *Bowers v. Hardwick* that they are now viewed as the truth. This is where the information provided by the professors of gay and lesbian studies made a difference. Their specialization added something that no other group or the petitioners could have provided. Rick Perstein of the Washington Post wrote, “the practitioners of what some called “queer history” were hard at work, undertaking one of the hardest and most valuable tasks that historians can do -- examining a set of assumptions so taken for granted, so apparently timeless, that they didn't seem to have histories at all.”⁵⁹

While the ACLU and Cato Institute briefs contained less information regarding the repudiation of the historical view put forth in *Bowers*, they were no less important.

⁵⁶ Ennis, 606.

⁵⁷ Ibid.

⁵⁸ Ibid., footnote 7.

⁵⁹ Rick Perlstein, “What Gay Studies Taught the Court,” *Washington Post*, July 13, 2003, p. B3.

The brief for the Cato Institute provides information regarding the statutory history of sodomy statutes. A large amount of space is devoted to providing the Justices with historical legal statutes and texts that demonstrate that laws dealing with sodomy have only recently been directed at same-sex relations and consensual relations. William Eskridge, the John A. Garver Professor of Jurisprudence at Yale Law School, was the principal author of the brief for the Cato Institute. Eskridge has spent years working in this area. A Yale Law School interview shows:

In researching *Gaylaw* [his most recent scholarly publication in this area], he [Eskridge] read every single sodomy prosecution reported in the United States up to the 1990s and traveled around the United States to read police reports. He also ‘gained an understanding of the nineteenth century criminal law and [law of] evidence and procedure. . . . It seems to me, you can't understand the cases without understanding where they fit into criminal law as it evolved in the nineteenth century,” [states Eskridge]”⁶⁰

The brief for the American Civil Liberties Union and the ACLU of Texas examines the historical background of sodomy prosecutions and the development of American legal statutes from their English precedents. The ACLU brief along with the Cato Institute and the brief for the History Professors attempted to correct what the ACLU and Laurence Tribe, the brief’s author called a “a cramped understanding of our nation’s history [which] lies at the heart of *Bowers v. Hardwick*.”⁶¹

Similarly, the brief filed for Mary Robinson, et al, provided the United States Supreme Court with information that may have been neglected had it not been brought to the Supreme Court’s attention through an *amicus curiae* brief. This brief, written by Yale Law School faculty members Harold Hongju Koh, Gerard C. and Bernice Latrobe Smith

⁶⁰ YLS Scholarship Contributes to Supreme Court Decision in Lawrence v. Texas, *Yale Law School: A Compendium of Events and Programs*. October 24, 2003. Available at: http://www.law.yale.edu/outside/html/Public_Affairs/413/yls_article.htm. Accessed: March 10, 2004.

⁶¹ Brief for the ACLU, Available at: http://supreme.lp.findlaw.com/supreme_court/briefs/02-102/02-102.mer.ami.aclu.pdf. Accessed on March 11, 2004, 3.

Professor of International Law, and Kenji Yoshino, professor of law, showed the Supreme Court that the *Bowers* decision had not been in line with the rest of western civilization in its thinking. Additionally, Yoshino notes that the use of this brief was important for multiple reasons. He explains “This is the first time that the United States Supreme Court has cited a European Court of Human Rights decision in text. I think...this is a huge advance....It does at least open the door to have United States norms be informed by external norms.”⁶² Professor Koh also explains his interest in this case by stating, “[m]y academic work has been about internalization of international norms into domestic law. In particular, there are interpretations of the Constitution to which international rules are relevant.”⁶³

The first study on *amicus curiae* briefs was conducted in 1971. Stephen Puro concluded that filers of *amicus* briefs had a success rate of 55%. Other scholars in this area found that such briefs had little influence on the Supreme Court. Studies in more recent years have found evidence to the contrary. In one of the most recent studies published in the University of Pennsylvania Law review, the authors found that briefs that offer a new perspective or new information have an influence on a case. The four briefs studied in this case fall into this category of supplemental briefs.

⁶² YLS Scholarship Contributes to Supreme Court Decision in *Lawrence v. Texas*, *Yale Law School: A Compendium of Events and Programs*. October 24, 2003. Available at: http://www.law.yale.edu/outside/html/Public_Affairs/413/yls_article.htm. Accessed: March 10, 2004.

⁶³ Profs. Koh and Yoshino Submit Brief to the Supreme Court on *Lawrence v. Texas*, *Yale Law School: A Compendium of Events and Programs*. January 22, 2003. Available at http://www.law.yale.edu/outside/html/Public_Affairs/334/yls_article.htm. Accessed March 10, 2004.

Chapter Four

Briefs of Substance: Four That Helped Change History

We judges should be assiduous to bar the gates to amicus curiae briefs that fail to present convincing reasons why the parties' briefs do not give us all the help we need for deciding the appeal.

-Chief Judge Posner

In order to understand completely the impact of the *amicus curiae* briefs on the Lawrence v. Texas decision, I find it necessary first to explain the reasoning put forth by Justice Kennedy in his majority opinion. To explain the arguments of the *amici* in a vacuum would allow the reader to gain an understanding of each individual argument but the true understanding of their use in the majority opinion would be lacking. Therefore, I will provide a thorough overview of Justice Kennedy's opinion. While due respect should be given to the concurring opinion of Justice O'Connor and the dissenting opinion of Justice Scalia, their opinions are not relevant to the discussion at hand because there is no evidence of influence by the *amici* in those opinions. In his majority opinion, Justice Kennedy specifically cites four *amicus curiae* briefs: the American Civil Liberties Union and the ACLU of Texas, the Cato Institute, the Professors of History, and Mary Robinson in association with Amnesty International USA, Human Rights Watch, Interights, The Lawyers Committee for Human Rights, and the Minnesota Advocates for Human Rights. Before examining the issue at hand and the *amicus curiae* briefs, I would first like to examine the interest of each of these *amici* in this court case.

American Civil Liberties Union and the ACLU of Texas

The American Civil Liberties Union (ACLU) is one of the most prominent filers of *amicus curiae* briefs at the United States Supreme Court level. The ACLU, whose mission is self-described as to “work daily in courts, legislatures and communities to defend and preserve the individual rights and liberties guaranteed to every person in this country by the Constitution and laws of the United States.”⁶⁴ They also state “we work also to extend rights to segments of our population that have traditionally been denied

⁶⁴ The American Civil Liberties Union, *The ACLU: Who We Are and What We Do*. No Date Given. Available at: <http://www.aclu.org/about/aboutmain.cfm>. Accessed March 11, 2004.

their rights, including Native Americans and other people of color; lesbians, gay men, bisexuals and transgendered people; women; mental-health patients; prisoners; people with disabilities; and the poor.”⁶⁵ Through the combination of these two principles, a specific interest in the *Lawrence v. Texas* case emerged. The ACLU’s statement of interest as *amici* that was filed with the Clerk of the Supreme Court explains “The ACLU has long opposed both discrimination based on sexual orientation and government efforts to regulate sexual intimacy between consenting adults within the privacy of the home.”⁶⁶ Thus, the organization submitted a brief to the United States Supreme Court supporting the petitioners.

The Cato Institute

The Cato Institute is a non-profit public policy research foundation. It’s mission is self-described as:

The Cato Institute seeks to broaden the parameters of public policy debate to allow consideration of the traditional American principles of limited government, individual liberty, free markets and peace. Toward that goal, the Institute strives to achieve greater involvement of the intelligent, concerned lay public in questions of policy and the proper role of government.⁶⁷

The statement of interest provided to the Clerk of the Supreme Court by the Cato Institute states “Cato’s Center for Constitutional Studies was established in 1989 to help restore those constitutional rights, both enumerated and unenumerated, that are the foundation of individual liberty.”⁶⁸ This case is of particular interest

⁶⁵ The American Civil Liberties Union, *The ACLU: Who We Are and What We Do*. No Date Given. Available at: <http://www.aclu.org/about/aboutmain.cfm>. Accessed March 11, 2004.

⁶⁶ Brief for the ACLU, 1.

⁶⁷ About Cato, *Cato’s Mission*. No Date Given. Available at: <http://www.cato.org/about/about.html>. Accessed 03/08/04.

⁶⁸ Brief for the Cato Institute, 1.

to the Cato Institute because it focuses on the right of free association, privacy, and equal protection under the law.⁶⁹

Professors of History

This group unlike the first two is a loose collaboration of individuals rather than an organized group with a political agenda. The individuals who filed this brief characterize themselves as “professors and scholars who teach and write about history and are knowledgeable about the history of treatment of lesbians and gay men in America.”⁷⁰ Their expertise in this area arises from the fact that they have “taught, conducted research, and published in the fields of the history of sexual regulation, including the history of sodomy laws; the history of discrimination based on sexuality...and American social and cultural history from the colonial period through the twentieth century.”⁷¹ This brief attempts to redefine the view of history pertaining to sodomy laws and sodomy prosecutions that the court relied on in *Bowers v. Hardwick* decision in 1986.

Mary Robinson, et al.

The filers of this case self-identify themselves as “an individual and five nongovernmental organizations dedicated to the promotion of freedom worldwide.”⁷² Mary Robinson is the former United Nations Commissioner for Human Rights as well as senator and President of the Republic of Ireland. Amnesty International is a human rights organization that was founded to protect

⁶⁹ Brief for the Cato Institute, 1.

⁷⁰ Brief for Professors of History, Available at: http://supreme.lp.findlaw.com/supreme_court/briefs/02-102/02-102.mer.ami.hist.pdf. Accessed on March 11, 2004, 1.

⁷¹ Brief for Professors of History,, 1.

⁷² Brief for Mary Robinson, et al., 1.

the rights guaranteed by the Universal Declaration of Human Rights. An additional filer, the Human Rights Watch was established to report worldwide human rights violations. Interlights is a similar, UK-based organization that seeks to provide legal protection for human rights. The Lawyers Committee for Human Rights is a New York based organization that hopes to advance justice and respect for the rule of law. Finally, the Minnesota Advocates for Human Rights is a firm that does international human rights work.⁷³

A Misinterpretation of the History in *Bowers v. Hardwick*

Of the four *amicus curiae* briefs under examination, three attempted to refute one of the key elements of the *Bowers v. Hardwick* ruling. In *Bowers*, the Court held that there was no constitutional protection for acts of sodomy and that states were free to outlaw such acts. This judgment was based in part on the Court's view that homosexual sodomy acts had long been outlawed. Justice White wrote "Proscriptions against that conduct have ancient roots...Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws."⁷⁴

However, the amicus briefs of the ACLU, Cato Institute, and the Professors of History persuaded the court to reexamine the historical issue. Justice Kennedy states "the following considerations counsel against adopting the

⁷³ Ibid.

⁷⁴ White, 196.

definitive conclusions upon which Bowers placed such reliance.”⁷⁵ Kennedy begins this refutation by stating that there is no long-standing history of laws being directed at homosexual conduct specifically. He continues by explaining that that “beginning in colonial times there were prohibitions of sodomy derived from the English criminal laws...[this] prohibition was understood to included relations between men and women as well as relations between men and men.”⁷⁶ The *amicus curiae* brief filed by the Cato Institute further clarifies “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.”⁷⁷ Thus, the explanation for the origination of the American sodomy statutes is similar between the majority opinion and the brief cited by Justice Kennedy as reference. As further evidence, Kennedy cites four sources in the paragraph containing the above statement. Of those four sources, three of them are cited as references for the above quotation taken from the Cato Institute brief.⁷⁸ The editions of the books cited by Kennedy and the Cato Institute are not identical; however, after examining the texts it is evident that there is very little change in the editions.

Kennedy explains the lack of specific prohibitions against homosexual conduct by stating that “the concept of homosexual as a distinct category of

⁷⁵ Kennedy, 2478.

⁷⁶ Ibid.

⁷⁷ Brief for the ACLU, 9.

⁷⁸ The Cato Institute cites Joseph Chitty, *A Practical Treatise on Criminal Law* *49 (1847); Robert Desty, *A Compendium of American Criminal Law* 143 (1887); and John May, *The Law of Crimes* §210, at 223 (1881). Justice Kennedy cites Joseph Chitty, *A Practical Treatise on Criminal Law* 47-50 (5th Am. Ed. 1847); Robert Desty, *A Compendium of American Criminal Law* 143, (1882); and John May, *The Law of Crimes* §203 (2d ed. 1893).

person did not emerge until the late 19th century.”⁷⁹ The *amicus curiae* brief filed by the Professors of History contains a similar statement. Their brief states “It was only in the late nineteenth century that the very concept of the homosexual as a distinct category of person developed. The word “homosexual” appeared for the first time in a German pamphlet in 1868, and was introduced to the American lexicon only in 1892.”⁸⁰ The source cited in this brief for the above information is the same monograph as the one cited by Justice Kennedy.⁸¹ Also interesting to note is the similarity in the language used in both documents. The phrases “concept of homosexuality” and “distinct category of person” are both used by the authors.

As Kennedy digresses through his opinion, he next notes that sodomy prosecutions have rarely involved consenting adults in private quarters. He clarifies:

Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private. A substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against those who could not or did not consent, as in the case of a minor or a victim of an assault.⁸²

In the History Professors brief, they demonstrate this exact position. The brief states “sodomy laws have almost always been applied in cases involving children, the use of force, public sex, or prostitution...states have very rarely applied laws

⁷⁹ Kennedy, 2479.

⁸⁰ Brief for Professors of History,,11.

⁸¹ The reference cited for both statements is as follows: Katz, Jonathan, *The Inventing of Heterosexuality* (New York: Dutton Press), 10.

⁸² Kennedy, 2479.

banning sodomy, fornication, or adultery to consenting adults in private.”⁸³

Kennedy notes that of the surviving records of sodomy prosecutions, there are few prosecutions for consensual sodomy. The History Professor’s brief contains a detailed examination of this fact. For instance, the state of Arkansas noted in a 2002 case that that one person had been tried under the sodomy statute for private, consensual conduct in over 50 years.⁸⁴ The Attorney General for the state of Tennessee stated, “all recorded arrests for violation of the sodomy law involved ‘public activity’ or a ‘juvenile.’”⁸⁵ Similar statements were found concerning Puerto Rico, Maryland, Montana, and Texas. A further examination of court records shows that the prosecutions for private consensual intercourse are virtually nonexistent.⁸⁶ It is possible, that Justice Kennedy could have arrived at this conclusion upon his own. However, it has been shown that Kennedy has relied on the amicus briefs cited in his opinion for information. Therefore, it can be concluded that Justice Kennedy used to information provided in this brief to draw the conclusion that people were rare arrested for private, consensual conduct.

Justice Kennedy continues by making the argument that it should have been apparent to the Supreme Court in 1986 that society’s views were changing and becoming more tolerant of homosexuality. Kennedy points to the reforming

⁸³ Brief for Professors of History, 11

⁸⁴ *Jegley v. Picado*, 80 S.W. 3d 332, 337 (Ark. 2002)

⁸⁵ *Campbell v. Sundquist*, 926 S.W. 2d 250, 255 (Tenn. 1996)

⁸⁶ See footnote 18, Brief for Professors of History, Available at:

http://supreme.lp.findlaw.com/supreme_court/briefs/02-102/02-102.mer.ami.hist.pdf. Accessed on March 11, 2004, 14-15.

of the Model Penal Code in 1955 as an example of this increasing tolerance.

Kennedy's opinion states:

In 1955 the American Law Institute promulgated the Model Penal Code and made it clear that it did not recommend or provide for "criminal penalties for consensual sexual relations conducted in private...." It justified its decision on three grounds: (1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws are arbitrarily enforced and thus invited the danger of blackmail.⁸⁷

This argument is put forth in the brief provided to the United States Supreme Court by the Cato Institute. The brief claims, "the American Law Institute ("ALI") joined expert commissions in the United Kingdom, New Jersey, New York, Illinois, California, and other jurisdictions to urge decriminalization of private sodomy between consenting adults."⁸⁸ The footnote used by the Cato Institute as reference for this material is the same quotation used by Justice Kennedy in his opinion.⁸⁹ Kennedy closes this portion of his opinion by stating that Illinois changed its laws to reflect the suggestions of the Model Penal code.⁹⁰ The Cato Institute brief also uses Illinois as an example of state changing its view on sodomy. The brief states "Illinois decriminalized it [consensual sodomy] in 1961 Ill. Laws 2004" of the Illinois code.⁹¹ After comparing the information put forth by Justice Kennedy in his opinion and the information provided to the justices by the Cato Institute, similarities are noticed. As previously noted in this

⁸⁷ Kennedy, 2480.

⁸⁸ Brief for the Cato Institute, Available at: http://supreme.lp.findlaw.com/supreme_court/briefs/02-102/02-102.mer.ami.ci.pdf. Accessed on March 11, 2004, 15.

⁸⁹ Footnote 24 on page 15 of the Cato Institute brief reads: See Eskridge, *1946-1961*, *supra* note 21, at 773-83 (detailed explanation 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).

⁹⁰ Kennedy, 2480.

⁹¹ Brief for the Cato Institute, 15.

paper, Justice Kennedy may have arrived at these conclusions on his own but I believe that this opinion was written after taking full advantage of the information provided to him and not in a vacuum. The similarities including specific quotations and exact citations Kennedy's opinion in conjunction with the explicit reference stating "Brief for Cato Institute as *Amicus Curiae* 15-16."⁹²

The Use of International Law and Court Rulings

Cases very similar to the *Lawrence* case have arisen in courts across the globe. However, the majority of these courts did not reach the same conclusion as the United States Supreme Court in 1986. For example, in 1981, "the European Court of Human Rights decided *Dudgeon v. United Kingdom*...which struck down the laws in Northern Ireland prohibiting all sexual activity between men."⁹³ This case was significant because "the *Dudgeon* judgment now binds all of the European continent and protects the 800 million residents of the 44 member states of the Council of Europe."⁹⁴ The *amicus curiae* brief for Mary Robinson, et al. states that the "European Court of Human Rights held by a 15-4 vote that laws barring male-male sexual conduct in the home violated Article 8 of the European Convention on Human Rights."⁹⁵ After examining this ruling, the Amicus Curiae Brief for Mary Robinson, et al. concluded that the *Bowers* decision was in "stark contrast" to other foreign and international decisions.⁹⁶

In his opinion, Justice Kennedy follows this same line of thought by examining the *Dudgeon* case. He writes "[t]he court held that the laws proscribing the conduct

⁹² Kennedy, 2481.

⁹³ Brief for Mary Robinson, et al., 10.

⁹⁴ Ibid.

⁹⁵ Ibid., Article 8 of the European Convention on Human Rights states "[e]veryone has the right to respect for his private and family life, his home, and his correspondence. See page 10 of the Amicus curiae brief for Mary Robinson, et al.

⁹⁶ Ibid.

were invalid under the European Convention on Human Rights...Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western Culture.”⁹⁷ Although Justice Kennedy most likely would have been knowledgeable about the *Dudgeon* case, he still refers to the Mary Robinson brief in this portion of the argument.

Justice Kennedy maintains this global focus as he concludes his argument. In the *Bowers* case, Chief Justice Rehnquist wrote, “[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization.”⁹⁸ However, Justice Kennedy turns to the Brief for Mary Robinson, et al. and its discussion of international legal precedents to refute his argument. As he begins his argument he notes “To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere.”⁹⁹ Rehnquist had argued that the larger worldview was in line with the *Bowers* decision. However, the brief for Mary Robinson, et al., shows that the worldview did not agree and was moving in the opposite direction. After the *Bowers* was released in 1986, the European Court of Human Rights reaffirmed the principles that had been established in *Dudgeon*. The brief for Mary Robinson, et al., states, “[s]ince *Bowers*, the European Court of Human Rights has twice reaffirmed the *Dudgeon* decision: in *Norris v. Ireland* (1988) and *Modinos v. Cyprus* (1993).”¹⁰⁰ These cases are referenced in Justice Kennedy’s opinion

⁹⁷ Kennedy, 2481.

⁹⁸ *Bowers v. Hardick*, 478 U.S. 186 at 197.

⁹⁹ Kennedy, 2483.

¹⁰⁰ Brief for Mary Robinson, et al., 11.

following a quote similarly phrased to the previously cited one. He writes, “the European Court for Human Rights has not followed *Bowers* but its own decision in *Dudgeon v. United Kingdom*.”¹⁰¹ As further evidence that the *amicus curiae* briefs influenced Justice Kennedy, he directs the reader to the brief for Mary Robinson, et al. for further examples of international court cases.¹⁰² Each of the four cited *amicus curiae* briefs played a significant roll in the majority opinion of Justice Anthony Kennedy. This is evident from the numerous citations to the briefs and the similarities between the content of the briefs and the content of the opinion. A further analysis of this influence will occur in chapter 4.

Justice Kennedy explicitly cited the briefs of the ACLU, the Cato Institute, the Professors of History, and Mary Robinson, et al., in the majority opinion. These briefs added supplemental information that was not included in the briefs of the parties. The issues raised by these four briefs include the misinterpretation of history in *Bowers v. Hardwick* and the use of international law and the rulings of international courts. In writing his majority opinion, Justice Kennedy partially bases his decision on these issues.

¹⁰¹ Kennedy, 2483.

¹⁰² Justice Kennedy writes “See Brief for Mary Robinson, et al. as *Amici Curiae* 11-12.

Chapter Five

Conclusion

If there was ever a case of a law where the fit is egregiously improper and insufficient to justify the law under the rational basis test, this would be such a case.

-Paul M. Smith, Oral Argument Transcript

When John Geddes Lawrence and Tyson Garner were arrested in the home of Mr. Lawrence by the local police after the neighbors reported that a “black man was going crazy next door,” few realized that the case would result in the eventual recognition of the right to engage in loving, consensual activities without fear of government intervention. When the case was first tried in the Harris County, Texas, Criminal Court, the petitioner’s were convicted and fined \$200.00. On appeal to the Texas Court of Appeals, the Texas Court held, hearing the case en banc, that the Texas statute did not violate the equal protection portion of the Texas Equal Rights Amendment and that the statute did not violate privacy guarantees of the constitution. Upon hearing this decision, the petitioners in the case filed a writ of certiorari with the United States Supreme Court. The United States Supreme Court granted certiorari on December 2, 2002.

The Petitioner’s brief attempted to demonstrate that the Texas statute violated both the equal protection and fundamental liberties portion of the Fourteenth Amendment. Petitioner’s claimed that the United States Supreme Court has established a doctrine of fundamental liberty claims in intimate relationships, bodily integrity, and the sanctity of the home.¹⁰³ This portion of their argument rested on view that Texas acted without rational basis and that the statute allowed for an unjustified invasion into the home that the Fourteenth Amendment forbids. The historical information that was the basis of the *Bowers v. Hardwick* case is not questioned in the petitioners’ brief that was provided to the Supreme Court. Chief Justice Rehnquist’s assertion that the *Bowers* decision was inline with current thought in western society is also free from attack. The second argument put forth by the petitioners’ brief dealt with the Equal Protection clause

¹⁰³Petition for writ of certiorari to the United States Supreme Court, *Lawrence v. Texas*, 9.

of the Fourteenth Amendment. Petitioners argued that the Homosexual Conduct Law created classes of people by holding the same acts illegal for people dependent upon the participants.

Twenty-nine *amicus curiae* briefs were submitted in this case. Sixteen briefs were submitted in support of the petitioners while thirteen were submitted in support of the respondents. After a close examination of the *amicus* briefs, no briefs filed in support of the respondents were quoted by the majority, concurring, or dissenting opinions. Thus, no further analysis of the respondent's *amicus* briefs was conducted. However, four *amicus* briefs filed in support of the petitioners' were quoted in the majority opinion written by Justice Anthony Kennedy. These briefs are the basis of the preceding study.

The arguments put forth in these briefs can consist of two main areas that were not included in the party briefs. The briefs for the ACLU, Cato Institute, and Professors of History all deal with the misconception of history that the decision in *Bowers v. Hardwick* relied on. In the previous decision, Justice White wrote that there had been a long-standing proscription against same-sex sexual odds for the entirety of western civilization's history as well as laws against such conduct in this country since colonial days. However, these three briefs show that the information relied on in the previous case was incorrect. Justice Anthony Kennedy bases a majority of his decision to reverse the previous holding in *Bowers* on the historical information provided in these three briefs.

The other brief filed by Mary Robinson, et al., deals with international court rulings that demonstrate the exact opposite of the reasoning put forth in Chief Justice Rehnquist's concurring opinion in *Bowers*. Rehnquist stated that there was a long history

of other western societies disallowing protection of same-sex sexual relations. However, this brief disproves that by showing that the reasoning of *Bowers* had been rejected in numerous countries. Justice Kennedy uses the argument put forth in the brief to show that the world community had overwhelmingly reached the opposite conclusion. No other brief submitted to the Supreme Court contained such an argument. It was only to be found in the *amicus curiae* brief submitted by Mary Robinson, et al.

Although it can never be said with one-hundred percent certainty what factors influenced the Justices in their decisions, I believe the fact that the majority opinion relies so heavily on arguments that were available to the Supreme Court only in the *amicus curiae* briefs is powerful evidence that the Court considered them in the decision-making process. Additionally, Justice Anthony Kennedy repeatedly cites the briefs by name in his opinion. Third, Justice Anthony Kennedy takes quotations and references straight from the four *amicus* briefs. In conclusion, the four *amicus curiae* studied in this case had an influence on the Supreme Court because they were able to offer a view not given by the briefs of the parties.

Bibliography

About Cato, *Cato's Mission*. No Date Given. Available at: <http://www.cato.org/about/about.html>. Accessed 03/08/04.

American Civil Liberties Union, *The ACLU: Who We Are and What We Do*. No Date Given. Available at: <http://www.aclu.org/about/aboutmain.cfm>. Accessed March 11, 2004.

Black's Law Dictionary, 7th ed.

Bowers v. Hardwick, 478 U.S. 186 (1986).

Brief for the ACLU, Available at: http://supreme.lp.findlaw.com/supreme_court/briefs/02-102/02-102.mer.ami.aclu.pdf. Accessed on March 11, 2004.

Brief for the Cato Institute, Available at: http://supreme.lp.findlaw.com/supreme_court/briefs/02-102/02-102.mer.ami.ci.pdf. Accessed on March 11, 2004.

Brief for Professors of History, Available at: http://supreme.lp.findlaw.com/supreme_court/briefs/02-102/02-102.mer.ami.hist.pdf. Accessed on March 11, 2004.

Caldeira, Gregory A. and John R. Wright. "Amicus Curiae Before the Supreme Court: Who Participates, When, and How Much?" *Journal of Politics* 52(3) (1990).

Campbell v. Sundquist, 926 S.W. 2d 250 (1996).

Ennis, Bruce J. "Symposium on Supreme Court Advocacy: Effective Amicus Briefs" *Catholic University Law Review* 33 (1984).

Federal Civil Judicial Procedure and Rules. New York: The West Group, 2003, 576.

Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823).

Hall, Kermit L., et al. eds. *The Oxford Companion to the Supreme Court of the United States*. New York: Oxford University Press, 1992.

Jegley v. Picado, 80 S.W. 3d 332 (2002).

Kearney, Joseph D. and Thomas W. Merrill. "The Influence of Amicus Curiae Briefs on the Supreme Court." *University of Pennsylvania Law Review* 148 (2000).

Lawrence v. State, 41 S.W. 3d 349 (2001).

Lawrence v. Texas, 123 S.Ct. 2472 (2003).

Perlstein, Rick. "What Gay Studies Taught the Court," *Washington Post*, July 13, 2003, p. B3.

Petition for writ of certiorari to the United States Supreme Court, *Lawrence v. Texas*.

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

Profs. Koh and Yoshino Submit Brief to the Supreme Court on *Lawrence v. Texas*, *Yale Law School: A Compendium of Events and Programs*. January 22, 2003.
Available at http://www.law.yale.edu/outside/html/Public_Affairs/334/yls_article.htm. Accessed March 10, 2004.

Romer v. Evans, 517 U.S. 620 (1996).

Rustad, Michael and Thomas Koenig. "The Supreme Court and Junk Social Science." *North Carolina Law Review* 72 (1993).

Simpson, Reagan William. *The Amicus Brief: How to Write It and Use It Effectively*. Washington DC: Tort and Insurance Practice Session, American Bar Association, 1998.

Songer, Donald R. and Reginald S. Sheehan. "Interest Group Success in the Courts: Amicus Participation in the Supreme Court" *Political Research Quarterly* (46).

Sungaila, Mary-Christine. "Effective Amicus Practice Before the United States Supreme Court: A Case Study." *Southern California Review of Law and Women's Studies* 8 (1999).

Tex. Penal Code Ann. §21.06(a)(2003).

Tex. Penal Code Ann. §21.01(1)(2003).

Webster v. Reproductive Health Services, 492 U.S. 490 (1989).

Wohl, Alexander. "Friends with Agendas: *Amicus Curiae* Briefs May Be More Popular Than Persuasive." *American Bar Association Journal* 82 (1996):

YLS Scholarship Contributes to Supreme Court Decision in *Lawrence v. Texas*, *Yale Law School: A Compendium of Events and Programs*. October 24, 2003.
Available at: http://www.law.yale.edu/outside/html/Public_Affairs/413/yls_article.htm. Accessed: March 10, 2004.