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## Lawrence's Republic

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# LAWRENCE'S REPUBLIC

James E. Fleming\*

## I. INTRODUCTION

I am delighted and honored to participate in this symposium critiquing and celebrating the remarkable scholarship of Frank Michelman. I was a student of Frank—but of course we all are students of Frank. I also have had the good fortune to be a colleague of Frank—he has been a distinguished visiting professor at Fordham and has generously participated in a number of our conferences there. The only problem I had in preparing for the symposium is that Frank's scholarship is so rich and wide-ranging that it was difficult to decide what to write about. I initially planned to write a paper on Frank's famous arguments for constitutional welfare rights.<sup>1</sup> Next, my paper was to be about Frank's reflections in his Storrs Lectures at Yale Law School on "constitutional containment" and his musings in recent work on the thinness of constitutional law as compared with our richer commitments to justice.<sup>2</sup> Then, I was tempted to write about "Michelman and Democracy"—to assess his book, *Brennan and Democracy*,<sup>3</sup> and his articles developing a liberal republicanism.<sup>4</sup> I also thought of invoking a term Frank used to describe Justice Brennan—"super liberal"<sup>5</sup>—and writing about "The

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\* I prepared this article for the Legal Scholarship Symposium on The Scholarship of Frank I. Michelman, University of Tulsa College of Law, October 9-10, 2003. I want to thank Paul Finkelman for inviting me to take part in the symposium and congratulate him and the College of Law on establishing this wonderful series of symposia. I also want to thank the participants in the symposium as well as Rick Carnell, Linda McClain, and Ben Zipursky for helpful comments, and Devon Filas for helpful research assistance.

1. See e.g. Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 Wash. U. L.Q. 659 [hereinafter Michelman, *Welfare Rights*]; Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. Pa. L. Rev. 962 (1973); Frank I. Michelman, *Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969) [hereinafter Michelman, *Protecting the Poor*].

2. See e.g. Frank I. Michelman, *Ida's Way: Constructing the Respect-Worthy Governmental System*, 72 Fordham. L. Rev. 345 (2003) [hereinafter Michelman, *Ida's Way*]; Frank I. Michelman, *Populist Natural Law (Reflections on Tushnet's "Thin Constitution")*, 34 U. Rich. L. Rev. 461 (2000) [hereinafter Michelman, *Reflections*]; Frank I. Michelman, *Constitutional Containment and Democracy* (unpublished Storrs Lectures, Yale L. Sch. Spring 2000) (copy on file with *Tulsa Law Review*) [hereinafter Michelman, *Storrs Lectures*].

3. Frank I. Michelman, *Brennan and Democracy* (Princeton U. Press 1999).

4. See *id.*; Frank I. Michelman, *Law's Republic*, 97 Yale L.J. 1493 (1988) [hereinafter Michelman, *Law's Republic*]; Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 Harv. L. Rev. 4 (1986) [hereinafter Michelman, *Traces*].

5. See Frank I. Michelman, *Super Liberal: Romance, Community, and Tradition in William J. Brennan, Jr.'s Constitutional Thought*, 77 Va. L. Rev. 1261 (1991).

Superliberalism of Frank Michelman.” Or, focusing on the two intellectual giants who have most influenced Frank’s work, I thought of doing a paper called “Rawls versus Habermas: The Struggle for the Soul of Frank Michelman.”<sup>6</sup> But I finally settled on “*Lawrence’s Republic*.”

Let me explain my title. One of Frank’s greatest works is his article, “Law’s Republic.”<sup>7</sup> It is a classic work in the so-called revival or reconstruction of civic republicanism in constitutional theory—or, in the case of Frank, the synthesis of liberalism and republicanism. But it is also a powerful, and profoundly wise, critique of *Bowers v. Hardwick*,<sup>8</sup> the infamous Supreme Court decision upholding a statute outlawing sodomy as applied to homosexuals on the ground that the Due Process Clause does not protect the right of homosexuals to privacy.<sup>9</sup> Frank constructively pointed out what was missing in the Court’s opinion in *Bowers*, and what the civic republican strain of discourse might offer in justifying a right of privacy for homosexuals.<sup>10</sup>

The first time Frank came to Fordham, I asked him, “If you could overrule any one decision of the Supreme Court, what would it be?” Given Frank’s fame as a tireless and creative proponent of constitutional welfare rights, you might think he would say *San Antonio Independent School District v. Rodriguez*,<sup>11</sup> the deplorable decision holding that the Equal Protection Clause does not protect a right to an equal education and more generally shutting down the expansion of both the fundamental rights strand and the suspect classifications strand of equal protection analysis.<sup>12</sup> But no, Frank said *Bowers v. Hardwick*.

Well, as we all know, the Supreme Court itself overruled *Bowers* last summer, in *Lawrence v. Texas*.<sup>13</sup> Justice Kennedy’s opinion of the Court in *Lawrence* held that the Due Process Clause *does* protect the right of homosexuals to privacy or autonomy; in doing so, it thoroughly criticized *Bowers*. I am going to assess the Court’s opinion in *Lawrence* in light of Frank’s critique of *Bowers* in “Law’s Republic.” Hence my title: “*Lawrence’s Republic*.” I won’t exactly ponder what I think Frank thinks or should think about *Lawrence*. He can tell us that himself. But I will consider to what extent Kennedy’s opinion in *Lawrence* reflects or can be interpreted to map onto arguments and concerns of the sort Frank put forward in “Law’s Republic.” I want to make clear, though, that I have no illusions that the Court is on the verge of a more general adoption of a liberal republicanism.

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6. The examples of Michelman’s engagement with Rawls’s thought are legion. For examples of Michelman’s engagement with Habermas’s thought, see Frank I. Michelman, *Modus Vivendi Postmodernus? On Just Interpretations and the Thinning of Justice*, 21 *Cardozo L. Rev.* 1945 (2000); Frank I. Michelman, *Morality, Identity and “Constitutional Patriotism,”* 76 *Denv. U. L. Rev.* 1009 (1999); Frank I. Michelman, *Family Quarrel*, 17 *Cardozo L. Rev.* 1163 (1996).

7. See Michelman, *Law’s Republic*, *supra* n. 4.

8. 478 U.S. 186 (1986), overruled, *Lawrence v. Tex.*, 123 S. Ct. 2472 (2003).

9. Michelman, *Law’s Republic*, *supra* n. 4, at 1494-99 (critiquing *Bowers*, 478 U.S. 186).

10. *Id.* at 1532-37.

11. 411 U.S. 1 (1973).

12. *Id.* at 54-59.

13. 123 S. Ct. 2472 (2003).

I assume that some readers had the same initial response as I did upon reading *Lawrence* for the first time. I was not simply relieved, excited, and hopeful for the future. I just could not imagine a better opinion coming from the Rehnquist Court than the one Kennedy issued. Note, I did not say I could not imagine a better opinion, period. I said I could not imagine a better opinion coming from the Rehnquist Court, given its incumbents and characteristic themes. I grant, though, that some readers have argued that an equal protection holding would have been superior to a due process holding.<sup>14</sup> And some have expressed fear of backlash akin to the backlash against *Roe v. Wade*.<sup>15</sup> In any event, after the initial sighs of relief and celebrations, it is worth assessing *Lawrence* in the crucible of Frank's analysis in "Law's Republic."

## II. MICHELMAN'S CRITIQUE OF *BOWERS* IN "LAW'S REPUBLIC"

What was Frank's critique of *Bowers* in "Law's Republic"? I am going to put the criticisms more bluntly and reductively than Frank did. But I believe I will be faithful to the general lines of his critique.

Most importantly, Frank criticized the authoritarianism of *Bowers*. To appreciate the significance of this criticism, we need to recall that Justice White, in *Bowers*, and champions of *Bowers* like Bork<sup>16</sup> and Scalia<sup>17</sup> present it as a restoration of democracy over authoritarianism. They celebrate it as a repudiation of the authoritarianism of the judicial tyranny running from *Lochner v. New York*<sup>18</sup> through *Griswold v. Connecticut*<sup>19</sup> and *Roe*. Here I'll briefly sketch Bork's and Scalia's view. On their view, *Bowers* fends off liberal perversion of the Constitution in the name of fabricated fundamental rights to liberty and privacy. It permits democratic majorities to rule for no reason other than that they are majorities. Majorities properly are permitted to enact their moral disapproval of folks at the margins like homosexuals for no better reason than that "they are majorities"<sup>20</sup> and have the votes to do so. Such persons are rightly, as Bork says, "at the mercy of legislative majorities."<sup>21</sup> What is more, *Bowers* cabins generative (or to use Frank's term, "jurisgenerative"<sup>22</sup>) principles of liberty and equality—

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14. See e.g. Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage* (John M. Olin L. & Econ. Working Paper No. 196 (2d Ser.) Sept. 2003) (available at <<http://www.law.uchicago.edu/Lawecon/index.html>>).

15. 410 U.S. 113 (1973). See e.g. Jeffrey Rosen, *Kennedy Curse: On Sodomy, the Court Overreaches, New Republic* 15 (July 21, 2003) (available at <<http://www.tnr.com/doc.mhtml?i=20030721&s=rosen072103>>) (asserting that "in terms of its unnecessary breadth, *Lawrence* is worse than *Roe*").

16. See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 116-26 (Free Press 1990).

17. See *Lawrence*, 123 S. Ct. at 2488-98 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting); *Romer v. Evans*, 517 U.S. 620, 636-53 (1996) (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

18. 198 U.S. 45 (1905).

19. 381 U.S. 479 (1965).

20. Bork, *supra* n. 16, at 139.

21. *Id.* at 49 (quoting *Lochner*, 198 U.S. at 59). "Being 'at the mercy of legislative majorities' is merely another way of describing the basic American plan: representative democracy." *Id.*

22. Michelman, *Law's Republic*, *supra* n. 4, at 1502, 1513-14. Michelman conceives constitutional interpretation as "jurisgenerative," a form of "self-revisionary normative dialogue." *Id.* at 1493. He

principles that might constrain democratic majorities—through conceiving “this Nation’s history and tradition”<sup>23</sup> as nothing more than a deposit of our concrete historical practices.<sup>24</sup> According to Bork and Scalia, all this is as it should be.

But according to Frank, all this is what is wrong with *Bowers*. What is wrong with *Bowers* coheres around its authoritarianism and how that ultimately figures in its very conception of democracy. What is wrong with *Bowers* is its view of the Constitution and law as the deposit of external authority and its hidebound refusal to engage in what Frank calls jurisgenerative constitutional interpretation.<sup>25</sup> I want to break out three interrelated aspects of *Bowers*’s authoritarianism.

First, the authoritarianism of *Bowers*’s originalism in general. *Bowers*’s originalism presupposes that if the founders did not specifically enumerate a right, it is not a constitutional right.<sup>26</sup> It also presupposes that fidelity to the Constitution requires following the rules laid down by, or giving effect to the relatively concrete original understandings of, the framers and ratifiers. *Bowers*’s originalism suffers from several dispositive flaws, one of which I will emphasize here. The authoritarianism of its originalism is a massive insult to the dignity of both the founders and us; it attributes arrogance to the authors of the norms of the Constitution (the founders) and subservience to the subjects of those norms (us). To add further insult, its proponents (including White, Bork, and Scalia) serve this authoritarianism up to us in the name of democracy!<sup>27</sup>

Second, the authoritarianism of *Bowers*’s conception of “this Nation’s history and tradition” in particular. To capture this aspect, there is no better place to begin than with Justice Blackmun’s argument in dissent:

Like Justice Holmes, I believe that “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”<sup>28</sup>

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writes: “Jurisgenerative political debate among a plurality of self-governing subjects involves the contested ‘re-collection’ . . . of a fund of public normative references conceived as narratives, analogies, and other professions of commitment. Upon that fund those subjects draw both for identity and, by the same token, for moral and political freedom.” *Id.* at 1513 (footnote omitted). He adds that

the idea of such a fund, together with that of the persuasive process of its contested recollection, seems all but indistinguishable from . . . Ronald Dworkin’s linked notions of law “as integrity,” of law as the medium of the community’s constitutive commitment to “consistency in principle” in its treatments of its members, and of law as the “personification” of the community itself . . . .

*Id.* at 1514 (citing Ronald Dworkin, *Law’s Empire* (Harv. U. Press 1986)).

23. *Bowers*, 478 U.S. at 192 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)) (internal quotations omitted).

24. See James E. Fleming, *Constructing the Substantive Constitution*, 72 *Tex. L. Rev.* 211, 270-71 (1993) (criticizing *Bowers*, 478 U.S. at 192-94).

25. Michelman, *Law’s Republic*, *supra* n. 4, at 1494-99, 1532-37.

26. See 478 U.S. at 191-95.

27. See James E. Fleming, Lecture, *Are We All Originalists Now? I Hope Not!* (Princeton U., Sept. 19, 2002) (copy on file with *Tulsa Law Review*).

28. *Bowers*, 478 U.S. at 199 (Blackmun, Brennan, Marshall & Stevens, JJ., dissenting) (quoting O.W. Holmes, *The Path of the Law*, 10 *Harv. L. Rev.* 457, 469 (1897)).

Frank's primary objection here is to *Bowers's* ossification of law, history, and tradition: its resolutely anti-jurisgenerative cast. On *Bowers's* view, the meaning of the Constitution—including that of “this Nation's history and tradition”—is given to us as an historical fact of the matter and determined by external authority: not only that of the founders through their understandings or expectations but also that of the legislatures who wrote the statutes and the judges who developed the common law that make up the background historical deposit at particular points in history (e.g., the ratification of the Fourteenth Amendment in 1868).

To invoke a distinction that I have drawn elsewhere between two conceptions of tradition, *Bowers* views tradition not as abstract *aspirational principles* to be elaborated and realized over time, but as concrete *historical practices* to be discovered and preserved.<sup>29</sup> Abstract aspirational principles are the principles to which we as a people aspire and for which we as a people stand, whether or not we have realized them in our concrete historical practices, statute books, and common law. On *Bowers's* view, fidelity to the Constitution entails *following* our concrete historical practices rather than *honoring* our abstract aspirational principles (by elaborating them so as to make them the best that they can be).

Third and finally, the authoritarianism of *Bowers's* majoritarianism: that is, the authoritarianism of its very conception of democracy. *Bowers's* conception of democracy itself is authoritarian. For again, it assumes that majorities may enact their moral disapproval of minorities (e.g., “the presumed belief of a majority in . . . Georgia that homosexual sodomy is immoral”<sup>30</sup>) for no better reason than that they are majorities. As Bork puts it, minorities are “at the mercy” of majorities, and that is our system.<sup>31</sup> Cass Sunstein has aptly characterized this feature of Bork's authoritarianism as a form of “might makes right.”<sup>32</sup> This entails that *Bowers's* conception of democracy is authoritarian in a “moral majoritarian” sense. Frank's analysis brings out that *Bowers's* conception of democracy is also authoritarian in a classical republican sense: it exalts the morality (or supposed moral and civic virtue) of the citizens in the center to the exclusion of the outliers or barbarians at the margins, in this case, homosexuals.<sup>33</sup> Hence, in *Bowers*, what Frank calls the obnoxious, solidaristic side of republicanism prevails over the jurisgenerative side of republicanism that he seeks to reconstruct.<sup>34</sup> *Bowers* resolutely refuses to bring homosexuals, as Frank puts it, “from [the] margins”<sup>35</sup> to the “center”<sup>36</sup> as enjoying the status of free and equal citizenship. White refuses to

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29. See James E. Fleming, *Securing Deliberative Autonomy*, 48 Stan. L. Rev. 1, 56-59 (1995); Fleming, *supra* n. 24, at 268-73.

30. *Bowers*, 478 U.S. at 196.

31. Bork, *supra* n. 16, at 49.

32. Cass R. Sunstein, *The Partial Constitution* 107-10 (Harv. U. Press 1993).

33. See Michelman, *Law's Republic*, *supra* n. 4, at 1495-96.

34. See *id.* at 1493, 1496.

35. See *id.* at 1529.

36. See *id.*

accord homosexuals a right of privacy as an aspect of citizenship. He denies that homosexual intimate association “bears any resemblance”<sup>37</sup> to that of heterosexuals.<sup>38</sup> And he rudely asserts that it would be “facetious” to hold that principles of liberty and privacy extend to protect homosexual intimate association.<sup>39</sup>

How would Frank justify the opposite result in *Bowers*? First, through a jurisgenerative—rather than authoritarian—approach to constitutional interpretation. Second, through a jurisgenerative—rather than narrowly positivistic, historicist, and traditionalist—conception of law, history, and tradition. Finally, through a liberal republican—rather than authoritarian—conception of democracy and self-government. Frank constructs a process-based liberal republican theory that would secure the right of privacy for homosexuals as an aspect of their citizenship in law’s republic.<sup>40</sup> I want to point out that, unlike some other modern civic republicans,<sup>41</sup> Frank labors under no theoretical compulsion to eschew privacy for equal protection, or to recast privacy rights as equal protection rights. For Frank, developing a process-based liberal republican theory does not mean neglecting or forsaking privacy in favor of equality.

To what extent does Kennedy’s opinion in *Lawrence*, both in its critique of *Bowers* and its justification of its holding, resemble or parallel Frank’s analysis? Is it jurisgenerative rather than authoritarian? Is it republican as well as liberal? I shall proceed in three stages. One, I will consider to what degree Kennedy’s opinion, like Frank’s critique, repudiates the authoritarianism of *Bowers* in favor of a jurisgenerative approach to constitutional interpretation. Two, I will differentiate the “liberal” from the “republican” strains of Kennedy’s opinion justifying the right of homosexuals to privacy or autonomy and see how well they accord with Frank’s liberal republican conception of privacy. And three, I will ponder whether there is anything significant missing from Kennedy’s opinion that Frank’s analysis would give us.

### III. KENNEDY’S OPINION IN *LAWRENCE* IN LIGHT OF MICHELMAN’S CRITIQUE OF *BOWERS*

Kennedy’s opinion in *Lawrence*, like Frank’s critique of *Bowers*, strikingly repudiates the authoritarianism of *Bowers* in favor of a more jurisgenerative approach. I shall sketch three respects in which it does so. First, Kennedy’s is decidedly not an originalist opinion. In other work, I have distinguished between the old, narrow originalism and the new, broad originalism.<sup>42</sup> Many critics of

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37. *Bowers*, 478 U.S. at 190.

38. *Id.* at 190-91.

39. *Id.* at 194.

40. Michelman, *Law’s Republic*, *supra* n. 4, at 1526, 1532-37.

41. See Fleming, *supra* n. 24, at 273-78 (criticizing Sunstein’s form of liberal republicanism for taking a flight from privacy to equal protection, or recasting privacy rights as equal protection rights, or leaving them out altogether).

42. See James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 *Fordham L. Rev.* 1335, 1336-37 (1997); Fleming, *supra* n. 27.

*Bowers*—not Frank—have been styled as new, broad originalists.<sup>43</sup> What is new or broad about their originalism is that they conceive the original understanding to which they claim fidelity is owed at a considerably higher level of abstraction than do the old, narrow originalists. *Bowers* is an old, narrow originalist opinion. Might *Lawrence* be seen as a new, broad originalist opinion? Thus, might the story of *Bowers* and *Lawrence* be a tale of two originalisms? In a word, no.

*Bowers* indeed is a tale of the old, narrow originalism. Recall especially White's worry about the specter of *Lochner*, on the understanding that what was wrong with *Lochner* was that it protected "unenumerated" fundamental rights through the Due Process Clauses.<sup>44</sup> And bear in mind that White's conception of "this Nation's history and tradition" is a precursor to Scalia's conception of the due process inquiry in *Michael H. v. Gerald D.*,<sup>45</sup> which conceives tradition as concrete *historical practices* as opposed to abstract *aspirational principles*.<sup>46</sup>

But *Lawrence* emphatically and strikingly is not a tale of the new, broad originalism. What would a new, broad originalist justification of *Lawrence* look like? It would say something like:

The founders knew the value of privacy of the home. They knew the value of privacy or autonomy in making certain fundamental decisions about one's destiny. Whether or not they specifically contemplated that privacy or autonomy protected homosexual intimate sexual conduct and relationships, the value they enshrined—translated from their world to our world—extends to protect such conduct and relationships.

Perhaps it would close with an exhortation: "For the founders, given the choice between liberty and enforced conformity, chose liberty."

Such a move is utterly absent from Kennedy's opinion. Kennedy does not invoke the authority of the founders, even abstractly. He elaborates principles of liberty, privacy, and autonomy without feeling compelled to run his elaborations through an account of the founders' abstract intentions, understandings, or meanings. The founders appear on stage, or rear their heads, only in the very last paragraph of the opinion. I quote that paragraph in its entirety:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to

43. Examples of critiques of *Bowers* by constitutional theorists who are sometimes styled "broad originalists" include: Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 Mich. L. Rev. 203 (1996); Bruce Ackerman, *Liberating Abstraction*, 59 U. Chi. L. Rev. 317, 342-48 (1992); and Michael J. Perry, *The Constitution in the Courts: Law or Politics?* 174-79 (Oxford U. Press 1994).

44. See *Bowers*, 478 U.S. at 194-95.

45. 491 U.S. 110 (1989) (plurality). It is well to note, however, that White dissented in *Michael H.* itself. *Id.* at 157 (White & Brennan, JJ., dissenting). For a sympathetic interpretation of White's privacy jurisprudence, which is nonetheless critical of his opinion in *Bowers*, see David D. Meyer, *Justice White and the Right of Privacy: A Model of Realism and Restraint*, 52 Cath. U. L. Rev. 915 (2003).

46. See Fleming, *supra* n. 24, at 270-72 (analyzing White's opinion in *Bowers* as a precursor to Scalia's conception of the appropriate methodology for interpreting the Due Process Clauses set forth in *Michael H.*, 491 U.S. at 127 n. 6 (endorsed only by Justice Scalia and Chief Justice Rehnquist)).



have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.<sup>47</sup>

Thus, Kennedy, unlike the narrow originalists, does not attribute arrogance and authoritarianism to the founders: “They did not presume” to enumerate specifically the components of constitutionally protected liberty. This passage underscores that the Court conceives the Constitution as an abstract scheme of principles to be elaborated over time—in a “search for greater freedom”—not as a specific code of detailed rules and enumerated rights, or as a deposit of the founders’ intentions, understandings, or meanings to be discovered and preserved.

If Kennedy does not claim to ground the right of privacy or autonomy in original understanding, conceived abstractly, in what does he ground it? In the line of privacy or autonomy cases beginning with *Griswold* and running through *Eisenstadt v. Baird*,<sup>48</sup> *Carey v. Population Services International*,<sup>49</sup> *Roe*, and *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>50</sup> (along with *Romer v. Evans*,<sup>51</sup> which is grounded in equal protection),<sup>52</sup> and in an understanding of tradition as evolving consensus, not just in “this Nation” but in a wider, western civilization.<sup>53</sup>

Kennedy’s opinion, in not claiming to embrace any form of originalism, resembles its twin pillars, the joint opinions in *Casey* and *Romer*. These twin pillars are decidedly not originalist, old or new, narrow or broad. Recall especially the last paragraph of the joint opinion in *Casey*:

Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution’s written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents. We invoke it once again to define the freedom guaranteed by the Constitution’s own promise, the promise of liberty.<sup>54</sup>

And recall that Kennedy’s opinion of the Court in *Romer* similarly does not invoke the authority of the founders and original understanding. The closest it comes is to proclaim: “It is not within our constitutional tradition to enact laws of this sort.”<sup>55</sup> In sum, *Lawrence* can be seen as a combination of *Casey* and *Romer*, and as not having an originalist bone in its body.

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47. *Lawrence*, 123 S. Ct. at 2484.

48. 405 U.S. 438 (1972).

49. 431 U.S. 678 (1977).

50. 505 U.S. 833 (1992).

51. 517 U.S. 620 (1996).

52. *Lawrence*, 123 S. Ct. at 2476-77, 2481-82.

53. *Id.* at 2480-83.

54. 505 U.S. at 901.

55. *Romer*, 517 U.S. at 633.

Second, Kennedy's opinion does not conceive history and tradition in an authoritarian way, but in a jurisgenerative way. In general, Kennedy conceives tradition not as a positivist, historicist, or traditionalist deposit of "millennia of moral teaching"<sup>56</sup> (to quote Burger's concurring opinion in *Bowers*), but as an evolving consensus about how best to realize liberty (and by implication equality). This evolving consensus reaches beyond "this Nation's history and tradition" to that of a wider, Western civilization. Furthermore, Kennedy carefully scrutinizes history to determine what the statutes, common law, and historical practices actually prohibited.<sup>57</sup> He concludes that they actually prohibited sodomy generally, not same-sex sodomy as such or even nonprocreative sexual conduct. In this respect, his opinion is markedly different from White's and Burger's opinions in *Bowers*, and more like Stevens's dissenting opinion there.<sup>58</sup> The Court practically accepts the very unauthoritarian notion of "[t]he [i]nvention of [h]eterosexuality,"<sup>59</sup> and thus the invention of homosexuality, as against the idea that it is just there as a natural and moral fact of the matter and that it has been condemned through millennia of Judeo-Christian moral teaching.

In particular, what exactly is the role of history in Kennedy's opinion? The Court does not use history affirmatively to support the right of homosexuals to privacy or autonomy. Instead, it critiques *Bowers's* invocation of history as an obstacle to recognizing that right, which principled elaboration of the precedents protecting privacy or autonomy (mentioned above) would lead one to recognize. That is, the Court clears away White's and Burger's use of history in *Bowers* as representing "millennia of moral teaching" precluding recognizing the right. So, Kennedy analyzes history to debunk their monolithic and traditionalist claims about history. Thus, the Court uses history negatively to show that history does not foreclose a just interpretation of our Constitution to protect the right of homosexuals to privacy or autonomy. I guess you could call that jurisgenerative if jurisgenerative includes clearing away the brush that stands in the way of elaborating abstract constitutional principles. This would especially be true if you see the Court as clearing away the concrete historical practices and presuppositions that stand in the way of recognizing a right that is essential to according respect and dignity to, rather than demeaning the existence of, homosexual persons.

What is the Court's conception of tradition? Let's distinguish three available conceptions. First, tradition as abstract aspirational principles (e.g., Brennan's dissenting opinion in *Michael H.*<sup>60</sup>)—principles to which we as a people aspire and for which we as a people stand, whether or not we have always realized them in

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56. *Bowers*, 478 U.S. at 197 (Burger, C.J., concurring). Burger also specifically characterized that moral teaching in terms of "Judeo-Christian moral and ethical standards." *Id.* at 196.

57. *Lawrence*, 123 S. Ct. at 2478-81.

58. See 478 U.S. at 214-16 (Stevens, Brennan & Marshall, JJ., dissenting).

59. See *Lawrence*, 123 S. Ct. at 2478-79.

60. 491 U.S. at 141 (Brennan, Marshall & Blackmun, JJ., dissenting). For Michelman's analysis of Brennan's conception of tradition, see Michelman, *supra* n. 3, at 99-112; Michelman, *supra* n. 5, at 1312-20.

our historical practices, statute books, or common law. Second, tradition as concrete historical practices (e.g., Scalia's plurality opinion in *Michael H.*<sup>61</sup>)—liberty includes whatever liberties were protected specifically in the statute books or recognized concretely in the common law when the Fourteenth Amendment was adopted in 1868. And third, tradition as a “rational continuum” and a “living thing” (e.g., Harlan's dissenting opinion in *Poe v. Ullman*<sup>62</sup>)—liberty is a “rational continuum,” a “balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.”<sup>63</sup>

Above, I suggested that White's conception of tradition in *Bowers* was a precursor to Scalia's *Michael H.* conception of tradition as concrete historical practices. In *Casey*, the Court explicitly set its face against that conception;<sup>64</sup> it implicitly did so in *Lawrence* as well. What conception does *Lawrence* express? Does it reflect what I have called a Brennan-like notion of tradition as aspirational principles? Or is it better seen as reflecting a Harlan-like notion of tradition as a “living thing”? Under the latter view, we have regard for the traditions from which we have broken—here, the Court looks at the states' evolving repudiation of statutes outlawing sodomy differently than White did in *Bowers*<sup>65</sup>—as well as the traditions we carry forward. Kennedy's opinion in *Lawrence* practically implies that, on a proper understanding of tradition as a living thing, the pattern of repeal of laws proscribing sodomy between 1961 and 1986 should have supported the opposite holding in *Bowers*.<sup>66</sup> Others have made this argument before.<sup>67</sup> I suspect that Kennedy would come out more like Harlan than like Brennan, to the extent that Brennan's conception of tradition is more abstract, aspirational, and liberal, and Harlan's conception is more conservative (in the sense of what I have elsewhere called a *preservative conservatism* as distinguished from a *counter-revolutionary conservatism*<sup>68</sup>): that of a common law constitutionalist conservatively elaborating our traditions.

How does all this compare with Frank's analysis? Kennedy's opinion, all in all, is indeed quite jurisgenerative rather than authoritarian, though it should come as no surprise if the content of Kennedy's jurisprudence were to turn out to be more conservative than Frank's (and for that matter Brennan's). More later in connection with Kennedy's attempt to bracket the implications of his opinion for same-sex marriage.

61. 491 U.S. at 127 n. 6 (plurality).

62. 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting).

63. *Id.* at 542.

64. See 505 U.S. at 847-48.

65. See *Lawrence*, 123 S. Ct. at 2480-81.

66. *Id.*

67. See e.g. Charles Fried, *Order and Law: Arguing the Reagan Revolution—A Firsthand Account* 81-85 (Simon & Schuster 1991); Laurence H. Tribe & Michael C. Dorf, *On Reading the Constitution* 76-79, 116-17 (Harv. U. Press 1991).

68. See Fleming, *supra* n. 29, at 60.

The third manner in which Kennedy's opinion in *Lawrence* adopts a more jurisgenerative approach is that it does not conceive democracy in the authoritarian way that *Bowers* does. *Bowers* regarded enacting the majority's moral disapproval of homosexual intimate conduct as unquestionably and unproblematically a legitimate governmental interest.<sup>69</sup> Kennedy's opinion in *Romer* treated this instead as reflecting unconstitutional animus against a politically unpopular group (in violation of the Equal Protection Clause).<sup>70</sup> Kennedy's opinion in *Lawrence* makes the same move, though it grounds its holding in the Due Process Clause rather than equal protection.<sup>71</sup> Hence, *Lawrence* and *Romer* entail that in our form of democratic self-government, establishing a legitimate governmental interest requires conceiving public regarding reasons that do not reflect animus against politically unpopular groups. This jives with Frank's liberal republican concerns to bring such groups "from the margins" to the "center."<sup>72</sup>

#### IV. KENNEDY'S OPINION IN *LAWRENCE*: LIBERAL, REPUBLICAN, OR A SYNTHESIS?

To what extent does Kennedy's opinion in *Lawrence*, like Frank's liberal republican conception, reflect a synthesis of republicanism and liberalism? Not surprisingly, Kennedy's opinion lends itself to a number of interpretations, for instead of reflecting one coherent theory it weaves together elements of several theories. Let's do "a Sandel" on Kennedy's opinion. That is, let's go through it and single-mindedly differentiate the liberal strains from the republican strains. Doing this will oversimplify somewhat but, for our purposes, it may be illuminating. I have coined this term—"a Sandel"—with the greatest appreciation and respect for Michael Sandel.<sup>73</sup>

In doing a Sandel, let's say that the liberal elements bespeak concern for choice, autonomy, toleration, and bracketing moral arguments and disagreement, while the republican elements bespeak concern for justifying freedoms on the basis of substantive moral arguments about the goods or virtues they promote, or on the basis of their significance for citizenship.<sup>74</sup>

An aside about the way Frank would see this: Unlike Sandel, he would not feel obliged to sort out the arguments between liberalism and republicanism in

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69. See 478 U.S. at 196.

70. See 517 U.S. at 633-35.

71. See 123 S. Ct. at 2482.

72. See Michelman, *Law's Republic*, *supra* n. 4, at 1529.

73. See e.g. Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* 4-8, 91-119 (Harv. U. Press 1996) [hereinafter Sandel, *Democracy's Discontent*]; Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 Cal. L. Rev. 521 (1989). For a critique of Sandel's form of civic republican constitutional theory, see James E. Fleming & Linda C. McClain, *In Search of a Substantive Republic*, 76 Tex. L. Rev. 509 (1997).

74. See e.g. Sandel, *Democracy's Discontent*, *supra* n. 73, at 103-08.

this manner.<sup>75</sup> And he would see as republican (or liberal republican) some arguments that Sandel would see as liberal (e.g., arguments in Blackmun's dissent in *Bowers* about homosexual relationships).<sup>76</sup> To some extent, this reflects the differences between Sandel's yearning for a thicker civic republicanism and Frank's liberal republicanism.<sup>77</sup> To some extent, it reflects different understandings of the form republican constitutional theory should take in the face of reasonable moral pluralism. Sandel goes for thicker substantive moral arguments than would likely be made within a Rawlsian political liberalism that is congenial to Frank.<sup>78</sup> Frank, by contrast, is quite taken with arguments for thinning down a Rawlsian conception.<sup>79</sup> That is what I thought about pondering when I considered writing about Frank's reflections on "constitutional containment" and the thinness of constitutional law.<sup>80</sup>

#### A. *The Liberal Strains of Kennedy's Opinion in Lawrence*

1. *Mill's Harm Principle*: Kennedy evokes or echoes John Stuart Mill's "harm principle"—"That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others"<sup>81</sup>—in the following passage: "This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries *absent injury to a person* or abuse of an institution the law protects."<sup>82</sup> Or again, Kennedy deems it significant to note that the present case involves conduct in private by consenting adults: "It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused."<sup>83</sup> Rather, "[t]he case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle."<sup>84</sup> These passages may lend some credence to Randy Barnett's interpretation of Kennedy's opinion as libertarian.<sup>85</sup>

2. *"Sweet-Mystery-of-Life" Liberalism*: Kennedy's opinion in *Lawrence*, quoting from the joint opinion in *Casey*, proclaims that decisions about sexual conduct and relationships involve "the most intimate and personal choices a

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75. Compare *id.*: at 99-100 with Michelman, *Law's Republic*, *supra* n. 4, at 1494-99 (clearly contemplating that liberalism is not fundamentally at odds with republicanism, but that a synthesis of liberalism and republicanism provides the best account of our constitutional order).

76. See Michelman, *Law's Republic*, *supra* n. 4, at 1535.

77. See Fleming & McClain, *supra* n. 73, at 548-49.

78. *Id.*

79. See Frank I. Michelman, *Rawls on Constitutionalism and Constitutional Law*, in *The Cambridge Companion to John Rawls* 394 (Samuel Freeman ed., Cambridge U. Press 2003); Michelman, *Ida's Way*, *supra* n. 2; Michelman, *Reflections*, *supra* n. 2; Michelman, *Storrs Lectures*, *supra* n. 2.

80. See *supra* n. 2 and accompanying text.

81. John Stuart Mill, *On Liberty* 9 (Elizabeth Rapaport ed., Hackett Publ. 1978).

82. *Lawrence*, 123 S. Ct. at 2478 (emphasis added).

83. *Id.* at 2484.

84. *Id.*

85. See Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, in *Cato Supreme Court Review 2002-2003*, at 21 (Cato Inst. 2003).

person may make in a lifetime, choices central to personal dignity and autonomy.”<sup>86</sup> He continues: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”<sup>87</sup> In dissent, Scalia ridicules Kennedy’s invocation of what he calls this “sweet-mystery-of-life passage”<sup>88</sup> from *Casey*. Sandel no less than Scalia would cringe at these passages, and he would see them as exalting choice itself, without regard to the good of what is chosen.<sup>89</sup> Sandel also argues that these passages reflect a liberal conception of the unencumbered, freely choosing voluntarist self.<sup>90</sup>

3. *Liberal Privacy or Autonomy*: Kennedy’s opinion emphasizes privacy as autonomy to make certain decisions fundamentally affecting one’s destiny and the like.<sup>91</sup> This is the more rationalist as opposed to voluntarist or existentialist interpretation of passages like those derided by Scalia. Sandel commends *Griswold*, which he views as resting upon the “old privacy”: (1) the privacy of the home and (2) the goods or virtues of protecting the institution of marriage or the marital relationship.<sup>92</sup> He, like Mary Ann Glendon, contends that *Eisenstadt* took a fateful wrong turn to the “new privacy”: namely, individual autonomy to make certain decisions.<sup>93</sup> Sandel at first glance might see *Lawrence* as being similar to *Eisenstadt* in this respect. Yet *Lawrence*, like *Griswold*, emphasizes (1) the privacy of the home in the sense that it observes that it is protecting private conduct rather than conduct in public and (2) (arguably) the goods of protecting and respecting homosexual intimate association and relationships by analogy to heterosexual intimate association and relationships.<sup>94</sup>

4. *Liberal Toleration*: Sandel, in his critique of liberal toleration arguments against *Bowers*, contended that such arguments actually demeaned homosexuals by bracketing the morality of homosexual intimate association.<sup>95</sup> He contended that these arguments take the form: what people do in private, even if we consider it an abomination, is no business of ours. We must live and let live, and we must tolerate people doing what we regard as abominable or demeaning behavior so long as they do it in private. Sandel also argues that such arguments win at best a “thin” and “fragile” or empty toleration; they fall far short of attaining the appreciation or respect that would be necessary to secure important freedoms.<sup>96</sup>

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86. 123 S. Ct. at 2481 (quoting *Casey*, 505 U.S. at 851).

87. *Id.* (quoting *Casey*, 505 U.S. at 851).

88. *Id.* at 2489 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

89. Sandel cringed at these passages when the joint opinion in *Casey* initially uttered them. See Sandel, *Democracy's Discontent*, *supra* n. 73, at 99.

90. *Id.*

91. *Lawrence*, 123 S. Ct. at 2477-78.

92. Sandel, *Democracy's Discontent*, *supra* n. 73, at 94-98.

93. *Id.* at 97-99. For Glendon’s similar analysis, see Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* 57 (Free Press 1991).

94. See 123 S. Ct. at 2482, 2484.

95. Sandel, *Democracy's Discontent*, *supra* n. 73, at 106-07.

96. *Id.* at 107.

Kennedy does not make this form of “empty” liberal toleration argument. To be sure, Kennedy notes the longstanding religious and moral disapproval of homosexual intimate conduct and relationships.<sup>97</sup> And he quotes the passage from *Casey*: “Our obligation is to define the liberty of all, not to mandate our own moral code.”<sup>98</sup> Sandel might think that in these passages Kennedy embraces or at least flirts with the foregoing type of liberal toleration argument. But Kennedy pointedly argues in several places that it “demeans” the lives or existences of homosexual persons not to accord them a right to privacy or autonomy analogous to that accorded heterosexual persons.<sup>99</sup> He emphasizes that homosexuals are entitled to respect. So, if Kennedy makes or presupposes a liberal toleration argument, it is not an “empty toleration” argument, but a “toleration as respect” argument (to invoke a distinction drawn by Linda McClain).<sup>100</sup>

*B. The Republican Strains of Kennedy’s Opinion in Lawrence*

Is *Lawrence* republican (or liberal republican) in ways that accord with Frank’s analysis? Strikingly, Kennedy’s opinion, like Frank’s analysis, does not eschew privacy for equality: it squarely grounds its holding in the Due Process Clause rather than the Equal Protection Clause.<sup>101</sup> The equal protection route certainly was available to Kennedy, given *Romer’s* grounding in equality<sup>102</sup> (and, of course, O’Connor urges this route in concurrence in *Lawrence*<sup>103</sup>). Sandel might see this privacy holding as evidence of liberalism, but Frank might view it in a republican light. Frank, after all, highlights the political significance of privacy.<sup>104</sup> From the standpoint of Frank’s analysis, we can see that Kennedy’s privacy holding evinces an understanding that free and equal citizenship is a status due to all. Let me work up to this claim through a discussion of five points: (1) “demeans”; (2) analogies; (3) the “homosexual agenda”; (4) the “invention of heterosexuality”; and (5) the goods and virtues of relationships, not just individual choices.

1. *Demeans*: What are we to make of Kennedy’s arguments that it “demeans the lives”<sup>105</sup> of homosexuals to respect the right of heterosexuals to autonomy without respecting an analogous right for them?<sup>106</sup> Should we view these arguments as liberal or republican? On one reading, these passages simply reflect a liberal principle of appreciation, respect, and dignity, as distinguished from a liberal principle of “empty” toleration. But on the best reading, I believe

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97. *Lawrence*, 123 S. Ct. at 2480.

98. *Id.* (quoting *Casey*, 505 U.S. at 850).

99. *Id.* at 2478, 2482, 2484.

100. See Linda C. McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond “Empty” Toleration to Toleration as Respect*, 59 Ohio St. L.J. 19 (1998).

101. *Lawrence*, 123 S. Ct. at 2482.

102. See *Romer*, 517 U.S. at 634-36.

103. 123 S. Ct. at 2484-85 (O’Connor, J., concurring in the judgment).

104. See Michelman, *Law’s Republic*, *supra* n. 4, at 1532-37.

105. *Lawrence*, 123 S. Ct. at 2482.

106. See *id.* at 2478, 2482, 2484.

“demeans” also connotes a recognition of a status of free and equal citizenship due to all. The Court packs such a notion into its due process analysis, through its recognition that homosexual intimate association is analogous to heterosexual intimate association (rather than, say, to the “traditional ‘morals’ offenses”<sup>107</sup> on Scalia’s parade of horrors). This brings us to the next point.

2. *Analogies*: Kennedy’s opinion recognizes that homosexual intimate association is analogous to heterosexual intimate association rather than, as Scalia would have it, to bestiality and the like.<sup>108</sup> Kennedy’s opinion is certainly the opposite of White’s opinion in *Bowers* in this regard: White said that none of the rights recognized in precedents from *Meyer v. Nebraska*<sup>109</sup> through *Griswold*, *Eisenstadt*, and *Roe* “bears any resemblance” to the right asserted in *Bowers*.<sup>110</sup> In dissent, Scalia castigates Kennedy’s opinion for putting the Court on a slippery slope leading to “the end of all morals legislation.”<sup>111</sup> If, said Scalia, states may not enact their moral disapproval of homosexual sodomy, they may not in principle enact their disapproval of “bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity.”<sup>112</sup> For him, homosexuals’ intimate sexual conduct is analogous to such traditional morals offenses, not to heterosexuals’ autonomy regarding intimate associations. Not so Kennedy: again, his recognition of the analogy itself suggests recognition that homosexuals, like heterosexuals, are due the status of free and equal citizenship.

3. *“Homosexual Agenda”*: Scalia complains that Kennedy’s opinion “has largely signed on to the so-called homosexual agenda.”<sup>113</sup> Scalia writes: “One of the most revealing statements in today’s opinion is the Court’s grim warning that the criminalization of homosexual conduct is ‘an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.’”<sup>114</sup> He continues: “It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed.”<sup>115</sup> I can envision this passage launching a thousand liberal and progressive fundraising ships. Just imagine fundraising solicitations from gay and lesbian rights organizations quoting Scalia’s formulation and retorting “We have an agenda”: to establish that homosexuals are people, too, and to secure the status of free and equal citizenship for gays and lesbians. Kennedy’s opinion in *Lawrence*, like his opinion in *Romer* rejecting the idea that gays and

107. *Id.* at 2490 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

108. Compare *id.* at 2482 (majority) with *id.* at 2490 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

109. 262 U.S. 390 (1923).

110. 478 U.S. at 190-91.

111. *Lawrence*, 123 S. Ct. at 2495 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

112. *Id.* at 2490.

113. *Id.* at 2496.

114. *Id.* at 2496-97 (quoting *id.* at 2482 (majority)).

115. *Lawrence*, 123 S. Ct. at 2497 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).



lesbians were seeking “special rights,”<sup>116</sup> recognizes the significance of such a status in protecting gays and lesbians against discrimination.

4. *“Invention of Heterosexuality”*: I never thought I would see the day when I could go on Westlaw, enter the Supreme Court cases file, and search for and actually find the phrase “invention of heterosexuality,” and by implication the idea of the invention of homosexuality, much less find the Court practically embracing the idea. Well, that day has come. Kennedy writes: “The absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century,”<sup>117</sup> citing a book entitled *The Invention of Heterosexuality*.<sup>118</sup> Here, Kennedy’s opinion shows that it is implicitly jurisgenerative rather than authoritarian: it recognizes that homosexuality is not simply an historical given and a moral fact of the matter but is socially and legally constructed. Recognizing this helps clear the path to an argument for securing the status of free and equal citizenship for homosexuals along with heterosexuals (rather than treating them as outcasts or second-class persons by nature).

5. *The Goods and Virtues of Relationships, Not Just Individual Choices*: Does Kennedy’s opinion make (or at least point toward) substantive moral arguments about the goods or virtues fostered through protecting homosexual intimate conduct and relationships that even a civic republican like Sandel could acknowledge or praise? There is no doubt that Kennedy does not make such arguments as fully, thickly, and explicitly as Sandel would. And Sandel might say that just goes to show the limits of privacy arguments and indeed indicates why the opinion stops short of implicitly embracing same-sex marriage. Still, there are notions of goods or virtues implicit in Kennedy’s acceptance of the analogy between homosexual intimate association and heterosexual intimate association.<sup>119</sup> Moreover, Kennedy sees not merely analogies of choice but also analogies regarding relationships.<sup>120</sup> He sees that *Lawrence* is not simply about the right to homosexual sodomy any more than *Griswold* was simply about the right to heterosexual intercourse.<sup>121</sup> More generally, as stated above, Kennedy’s opinion signals a return from the “new privacy” of *Eisenstadt* to the “old privacy” of *Griswold* in two respects: (1) concern for privacy of the home (in the sense of protecting private conduct rather than conduct in public) and (2) concern for protecting not only choices but also relationships. Finally, as argued above, there is implicit in Kennedy’s passages about how *Bowers* “demeans the lives” of homosexual persons a concern for securing their status as free and equal citizens: these passages are not simply about permitting choice and autonomy.

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116. See *Romer*, 517 U.S. at 631.

117. *Lawrence*, 123 S. Ct. at 2478-79.

118. *Id.*; see Jonathan Ned Katz, *The Invention of Heterosexuality* 10 (Dutton 1995).

119. See *Lawrence*, 123 S. Ct. at 2482.

120. See *id.* at 2478.

121. *Id.*

V. IS THERE ANYTHING SIGNIFICANT MISSING FROM  
KENNEDY'S OPINION IN *LAWRENCE* THAT MICHELMAN'S  
ANALYSIS OF *BOWERS* WOULD PROVIDE?

Still, is there anything significant missing from Kennedy's opinion in *Lawrence* that Frank's analysis of *Bowers* would give us? Nothing? If so, have I pulled off a feat with Kennedy's opinion comparable to what Frank is sometimes (mistakenly) thought to have done, for example, with Rehnquist's opinion of the Court in *National League of Cities v. Usery*<sup>122</sup> (evidently deriving welfare rights from Rehnquist's analysis of the traditional roles and functions of state governments)?<sup>123</sup> That is, have I engaged in such a generous elaboration of what Frank (following Roberto Unger) calls "deviationist doctrine"<sup>124</sup> and "internal development"<sup>125</sup> that there is little more to be said outside Kennedy's opinion? Maybe so.

Is Kennedy's opinion less robustly jurisgenerative than Frank's analysis would be? Probably so. Is Kennedy's opinion thinner in its republicanism (or liberal republicanism) than the analysis that Frank would give us? Again, probably so. Put another way, does *Lawrence* give us as full an explication of the political significance of privacy as an aspect of free and equal citizenship as Frank would? Surely not. For example, Frank's analysis presumably would lead all the way to endorsing same-sex marriage. Speaking of which, what are we to make of Kennedy's disclaimer regarding same-sex marriage?<sup>126</sup> Does it show that his opinion is ultimately more liberal than republican, as Sandel might suspect? Does it show that the opinion is insufficiently republican in the sense that its implications concerning the goods or virtues of homosexual intimate association—and the analogies between homosexual intimate association and heterosexual intimate association—are too liberal and too thin? When all is said and done, do they reach only to protecting the intimate sexual conduct and the relationships that individual homosexuals themselves choose, not all the way to securing legal recognition of their relationships through the institution of marriage?

Most charitably, the Court was careful to make clear that it was not deciding the question of same-sex marriage because it was not before the Court. For example, the Court may have thought that it was enough to drop one bomb at a time: prudence requires such a disclaimer. Perhaps the Court, reading the evolving consensus of this nation—and that of a wider, Western civilization—

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122. 426 U.S. 833 (1976).

123. See Frank I. Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 Yale L.J. 1165 (1977).

124. See Michelman, *Law's Republic*, *supra* n. 4, at 1529 (drawing a parallel between his own approach to interpreting cases and Unger's conceptions of "deviationist doctrine" and "internal development" and citing Roberto Mangabeira Unger, *The Critical Legal Studies Movement* 15-19 (Harv. U. Press 1986)).

125. See *id.*

126. See *Lawrence*, 123 S. Ct. at 2488.

thought that this is as far as we have come right now.<sup>127</sup> This would be like Bill Clinton, the most pro-gay and lesbian rights president in American history, advocating toleration and even respect for gays, while at the same time signing the Defense of Marriage Act<sup>128</sup> (defining marriage as a union of one man and one woman). Presumably, Clinton did so because he thought that it was where public opinion was at the time. And presumably, Clinton thought that it would be harmful to the Democratic Party not to sign the bill, given the backlash that he feared would ensue if he vetoed it. In the terms that Scalia disparagingly used in dissent in *Lawrence* and *Romer*, the view might be that proponents of the “homosexual agenda”<sup>129</sup> have not entirely succeeded in their project of moving from “grudging social toleration”<sup>130</sup> to “full social acceptance”<sup>131</sup> of homosexuality.

But indeed the principles underlying *Lawrence*, elaborated through a jurisgenerative approach to constitutional interpretation, should lead ultimately to recognizing same-sex marriage. That is not to say, however, that Scalia is right in warning that those principles have put the Court on a slippery slope leading to “the end of all morals legislation.”<sup>132</sup> For there are moral distinctions between homosexual intimate association, on the one hand, and the “traditional ‘morals’ offenses” on Scalia’s slippery slope.

#### VI. CONCLUSION: THE JURISGENERATIVE QUEST FOR HAPPY ENDINGS

In concluding, I want to discuss Frank’s pursuit of what Sandy Levinson has called “happy endings” in constitutional interpretation.<sup>133</sup> This is his version of Henry Monaghan’s “perfect Constitution” critique of certain normative constitutional theories.<sup>134</sup> They and others have expressed skepticism about constitutional theories like Dworkin’s and Frank’s (and my own) on the ground that they always seem to lead to happy endings: that the Constitution, properly interpreted, requires the result that our political theories recommend. Basically, the implication is that a constitutional theory has no serious claim on our attention unless the theorist putting it forward suffers some pain by acknowledging that the Constitution does not secure everything that she or he would protect in a perfect Constitution.<sup>135</sup>

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127. *But see Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003) (holding that limiting the benefits of marriage to heterosexual couples violated the Massachusetts Constitution); Linda Greenhouse, *Supreme Court Paved Way for Marriage Ruling with Sodomy Law Decision*, 153 N.Y. Times A24 (Nov. 19, 2003).

128. Pub. L. No. 104-199, 110 Stat. 2419 (1996).

129. *Lawrence*, 123 S. Ct. at 2496 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

130. *Romer*, 517 U.S. at 646 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

131. *Id.*

132. *Lawrence*, 123 S. Ct. at 2495 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

133. See Colloquy, *Fidelity as Integrity*, 65 Fordham L. Rev. 1357, 1358 (1997).

134. See Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353 (1981).

135. For the formulation of Monaghan’s “perfect Constitution” critique as a “no pain, no claim” test, see Christopher L. Eisgruber, *Justice and the Text: Rethinking the Constitutional Relation between Principle and Prudence*, 43 Duke L.J. 1, 7 (1993).

Remarkably, when Sandy put the “happy endings” or “perfect Constitution” challenge to Dworkin when reviewing the manuscript of Dworkin’s book, *Freedom’s Law*,<sup>136</sup> Dworkin basically pleaded: Not guilty, you must think I am Frank Michelman. Dworkin’s reply in essence was: I don’t believe our Constitution is perfect. For example, while I do believe that justice requires welfare rights, I do not believe that our Constitution protects such rights. He continued in essence: Your challenge applies to Frank Michelman—not me—because he—not I—believes that our Constitution does protect welfare rights.<sup>137</sup> I can understand that Frank might be puzzled or even irked that Dworkin pointed the finger at him in this way. But I would urge him instead to wear this as a badge of honor. For there is no shame in having even more normative kick to your constitutional theory than Dworkin has in his.

In 1996, we held a conference at Fordham on the idea of fidelity in constitutional interpretation.<sup>138</sup> There came a moment of great dismay for me. Larry Lessig was waxing eloquent about his notions of fidelity as translation and of constitutional change. Dramatically, he suggested that Frank’s arguments for constitutional welfare rights, even if plausible in 1969, are off the wall now.<sup>139</sup> At our next Fordham conference on constitutional theory, “The Constitution and the Good Society,” Willy Forbath opened a dialogue with Frank on welfare rights by criticizing Lessig’s remarks.<sup>140</sup> I am on Forbath’s side.

I want to use this incident to bring my paper to a hokey conclusion. I am going to take a page out of the movie *It’s a Wonderful Life* and muse about the wonderful life and scholarship of Frank Michelman. One of the wonderful things about Frank is that he courageously, creatively, and tirelessly argues for justice, happy endings, and other good things. But imagine that at a crucial point in his life as a constitutional theorist—say, the day the Supreme Court handed down *Dandridge v. Williams*,<sup>141</sup> or *San Antonio Independent School District v. Rodriguez*,<sup>142</sup> or *National League of Cities v. Usery*,<sup>143</sup> or *DeShaney v. Winnebago County Department of Social Services*<sup>144</sup>—he had come upon Larry Lessig. What if Larry had persuaded him that his arguments for welfare rights were no longer

136. See Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* 36 (Harv. U. Press 1996). In colloquy with Dworkin at the Fordham conference on *Fidelity in Constitutional Theory*, Levinson revealed himself to be the reviewer who had raised this question or challenge of Dworkin’s manuscript. Colloquy, *supra* n. 133, at 1358.

137. See Dworkin, *supra* n. 136, at 36 (citing Michelman, *Protecting the Poor*, *supra* n. 1).

138. See Symposium, *Fidelity in Constitutional Theory*, 65 Fordham L. Rev. 1247 (1997).

139. See Colloquy, *Fidelity as Translation*, 65 Fordham L. Rev. 1507, 1509-10 (1997) (“Here is Frank Michelman . . . [.]” pointing to Frank. “In 1969, he writes a piece [Michelman, *Protecting the Poor*, *supra* n. 1] that simply doesn’t live in this world anymore.”); J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 Fordham L. Rev. 1703, 1732-33 (1997) (noting that the idea of welfare rights may now seem “off the wall”).

140. William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 Fordham L. Rev. 1821, 1824-26 (2001).

141. 397 U.S. 471 (1970).

142. 411 U.S. 1 (1973).

143. 426 U.S. 833 (1976).

144. 489 U.S. 189 (1989).

professionally respectable but were off the wall? And what if Frank had become demoralized and had *not* continued making the arguments for which we honor and love him? Indeed, what if Frank had said, "I must give up the quest for justice and instead conform myself to our increasingly imperfect world"?

Frank might have written rather different articles, with rather different titles. Instead of writing "Foreword: On Protecting the Poor through the Fourteenth Amendment,"<sup>145</sup> Frank might have written "Foreword: On Protecting the Rich through the Fourteenth Amendment." Instead of "Welfare Rights in a Constitutional Democracy,"<sup>146</sup> he might have written "The Impossibility of Finding Welfare Rights in a Plutocracy."<sup>147</sup> Instead of "Foreword: Traces of Self-Government,"<sup>148</sup> he might have written "Afterword: The Lost Traces of Self-Government." And finally, to come full circle, instead of "Law's Republic," Frank might have written "Law's Authoritarianism."

And we wouldn't be celebrating the wonderful life and scholarship of Frank Michelman!

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145. Michelman, *Protecting the Poor*, *supra* n. 1.

146. Michelman, *Welfare Rights*, *supra* n. 1.

147. I deliberately echo the title of Bork's critique of Michelman. See Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 Wash. U. L.Q. 695.

148. Michelman, *Traces*, *supra* n. 4.