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# LARRY AND LAWRENCE

Heather K. Gerken\*

## I. INTRODUCTION

There are many things to be said in praise of Larry Tribe. But it is always hard to find the right moment to say them. I am thus intensely grateful to the University of Tulsa College of Law for giving all of us that right moment today.

Today I speak more from the perspective of a lawyer than that of an academic. One of the things I find most inspiring about Larry is his ability to integrate his academic commitments with his life as a practicing lawyer. I have never figured out how to do it, and I am amazed by his ability to inhabit both worlds simultaneously given how far apart they seem to me.

The subject of my speech is Larry and *Lawrence*, a topic inspired by Larry's tireless efforts to fight the good fight for gay rights, and one that has been an integral part of his life as an academic and a lawyer.<sup>1</sup> I will focus on the central question raised by *Lawrence v. Texas*<sup>2</sup>—whether the fight for gay rights should be waged on the terrain of equal protection or substantive due process—in order to offer a friendly critique of Larry's work on the subject. My argument is that equality, not liberty, is the most promising framework for future gay rights litigation. Perhaps I offer only a friendly amendment, as Larry has written as a scholar about the relationship between liberty and gay rights and thus has not explicitly addressed the tactical question I consider here. Offering a critique, even a friendly one, seems like an odd thing to do at an event celebrating someone's career. But academics are a strange tribe. The gift that we give to one another is to engage with each other's ideas. Larry has spent his life questioning the fundamental premises that undergird legal analysis. It would be passing strange not to

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\* Professor of Law, Yale Law School. For helpful comments on the article, I would like to thank Bruce Ackerman, Dick Fallon, Jennifer Nou, Casey Pitts, Ben Sachs, Larry Tribe, and Kenji Yoshino. Excellent research was provided by Sarah Burg, Scott Grinsell, Dara Purvis, and Ari Weisbard. I also owe great thanks to Larry Tribe for his unfailing and generous support throughout my academic career. Though I had never met Larry before joining the Harvard faculty in 2000, he showered kindnesses upon me from the moment I stepped foot on campus. He read and commented on my work, promoted my ideas in public, bullied people into inviting me to symposia, and treated me with the personal and intellectual warmth that has been the hallmark of his career. One never expects the Great Ones to pay attention to small things. But Larry always has, and that is what makes him special.

1. Larry's involvement has ranged from arguing *Bowers v. Hardwick*, 478 U.S. 186, 187 (1986) before the Supreme Court, to penning the comment on *Lawrence* in the Harvard Law Review Supreme Court issue. Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893 (2004).

2. 539 U.S. 558 (2003).

respond in the same cadence.

My observations will be loosely organized around a single theme, inspired entirely by Larry's work<sup>3</sup>—what is the right level of generality to address the question of gay rights? Larry was wrestling with that question at the moment I first directly encountered Larry, the practitioner. I was a law clerk for the Supreme Court during the year *Romer v. Evans*<sup>4</sup> was decided. Larry, Kathleen Sullivan, John Hart Ely, and several others famously filed a brief in that case arguing that the challenged Colorado amendment was a per se violation of the Equal Protection Clause.<sup>5</sup> This was not Larry's first or last effort to convince the Supreme Court to protect the rights of the lesbian, gay, bisexual, and transsexual (LGBT) community, but it was rightly one of the briefs people mention when they discuss Larry's work before the Court. While we often praise a brief for being convincing, perhaps even elegant, we generally do not remember a brief the way we do an article or a book or a poem. Yet I remember that brief vividly. It engaged the Court at the level of both theory and doctrine. It framed the question in a way that no one else had and yet was grounded in a set of intuitions that could appeal to any judge. I do not think it in any way reveals something inappropriate about the Court's inner workings to say that I read it, as did just about every intellectually engaged law clerk in the building. We knew it was something different, something special.

## II. LEVELS OF GENERALITY AND SUBSTANTIVE DUE PROCESS

Larry's *Romer* brief is a sensible starting place for this speech because the brief—and ultimately, the Court's opinion<sup>6</sup>—rested on the idea that Colorado's ill-fated amendment was both too general and too specific. Larry has, of course, written extensively about levels of generality, both their role in constitutional law generally<sup>7</sup> and substantive due process in particular.<sup>8</sup>

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3. See generally e.g. Laurence H. Tribe, *American Constitutional Law* § 15-21, 1421-35 (2d ed., Foundation Press 1988); Laurence H. Tribe & Michael C. Dorf, *On Reading the Constitution* (1991); Laurence H. Tribe, *Reflections on Unenumerated Rights*, 9 U. Pa. J. Const. L. 483 (2007); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. Chi. L. Rev. 1057 (1990). For other efforts to think about *Lawrence v. Texas* in terms of levels of generality, see e.g. William N. Eskridge, Jr., *Lawrence's Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 Minn. L. Rev. 1021, 1048 (2004); Pamela S. Karlan, *Foreword: Loving Lawrence*, 102 Mich. L. Rev. 1447, 1451-52 (2004).

4. 517 U.S. 620 (1996).

5. Br. of Laurence H. Tribe et al., as Amici Curiae in Support of Respts., *Romer v. Evans*, 1995 WL 17008432 (U.S. June 9, 1995). At the level of constitutional theory, the brief argued that the challenged amendment presented a question prior to the typical equal protection analysis because it "set some persons apart by declaring that a personal characteristic that they share may not be made the basis for any protection pursuant to the state's laws from any instance of discrimination." *Id.* at \*3 (emphasis in original). But Larry and his coauthors were not the sort of lawyers to forget the lessons of Brandeis. So the brief also dropped the level of analysis to a much lower level of generality by giving concrete examples of Amendment 2's consequences. The brief noted, for instance, that the LGBT community was "worse off than hot dog vendors, optometrists, [and] left-handed people." *Id.* at \*4-\*6 n. 2. As Kenji Yoshino rightly points out, the *Romer* argument had strong liberty dimensions. See Kenji Yoshino, *Tribe*, 42 Tulsa L. Rev. 961 (2007); see also Akhil R. Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 Mich. L. Rev. 203 (1996) (comparing *Romer* analysis to bill-of-attainder doctrine).

6. *Romer*, 517 U.S. at 632-33 (rejecting the amendment because it "has the peculiar property of imposing a broad and undifferentiated disability on a single named group" and is thus "at once too narrow and too broad").

7. See generally *supra* n. 3.

8. See generally *supra* nn. 1, 3.

It is not surprising that someone who is of two worlds—the world of the academy and the world of practice—would be acutely sensitive to these questions. Both worlds relentlessly focus on levels of generality. The tradition of what some scholars call “framing” reaches back to the Legal Realists, with their modern heirs ranging in their sensibilities from Duncan Kennedy to Daryl Levinson.<sup>9</sup>

The world of practice similarly moves up and down the generality scale—the whole trick is to articulate the general principle that links a range of factual scenarios. But the practice of law generally works at a lower range than the academy, as Judge Reinhardt noted in his speech.<sup>10</sup> It focuses not just on facts, but on principles that are sufficiently narrow to constitute manageable judicial standards. Lawyers are always on the hunt for conceptual tools—canons of construction, legislative history, past precedent—that will narrow down the range of possibilities and give shape to a question. It is easy to see why. Anyone who has thought about the problem of statutory construction or constitutional interpretation knows how difficult it is to move from broad, abstract principles to a decision in a specific case. That is why I am always a bit flummoxed when I read, say, Ronald Dworkin on campaign finance. At one moment he is writing under the grand heading “What is Democracy?”<sup>11</sup> A few pages later, he is speaking authoritatively on the constitutionality of contribution limits, the fairness doctrine, and must-carry rules.<sup>12</sup> In reading through such transitions, I get the same queasy feeling that I experience when a plane drops altitude too quickly.

### III. LEVELS OF GENERALITY: THE RELATIONSHIP BETWEEN STYLE AND SUBSTANCE IN *LAWRENCE*

*Lawrence v. Texas*, both stylistically and substantively, was a case about picking the right level of generality. It is an exceedingly tricky opinion to pin down. Like the Colorado amendment challenged in *Romer*, it is at once too general and too specific, its language too capacious and too narrow for one to be confident of its contours. Part of the reason for that is idiosyncratic to its author, Justice Kennedy, whose penchant for abstraction leads him to write opinions that are a little long on stirring phrases and a little short on doctrinal analysis. Part of the reason is a problem inherent in substantive due process analysis. As Larry emphasizes,<sup>13</sup> the level of generality at which the Court speaks will usually determine who wins.

You are all aware of the facts.<sup>14</sup> John Geddes Lawrence was engaged in consensual sodomy with another man when the police conducted a legal raid on his home.<sup>15</sup> The Texas statute banning consensual sodomy under which he was convicted

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9. E.g. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976); Daryl Levinson, *Framing Transactions in Constitutional Law*, 111 Yale L.J. 1311 (2002).

10. Stephen Reinhardt, *Tribute to Professor Laurence Tribe*, 42 Tulsa L. Rev. 939 (2007).

11. Ronald Dworkin, *Free Speech and the Dimensions of Democracy in If Buckley Fell* 63, 70–72 (J. Rosenkranz ed., Century Foundation Press 1999).

12. *Id.* at 88–92.

13. See e.g. Tribe, *supra* n. 3, at 1427–28; Tribe, *supra* n. 1, at 1904, 1934; Tribe & Dorf, *supra* n. 3, at 1065–67; see generally *supra* nn. 1, 3.

14. I draw these facts from the Court’s opinion in *Lawrence*, 539 U.S. 558.

15. *Id.* at 562–63.

was challenged on various grounds, mostly notably substantive due process (the ban on sodomy) and equal protection (the fact that the Texas statute banned only same-sex sodomy).<sup>16</sup> Justice Kennedy, writing for the majority, invalidated the statute on substantive due process grounds and, in doing so, overruled *Bowers v. Hardwick*<sup>17</sup> a scant seventeen years after it was decided.<sup>18</sup> Even more remarkably, Justice Kennedy termed *Bowers*—which several of his colleagues on the bench had joined—a stigma that “demeans the lives of homosexual persons.”<sup>19</sup> In reaching this striking result, *Lawrence* seemed to abandon the traditional trappings of substantive due process, including identification of the right as fundamental and the application of strict scrutiny.<sup>20</sup>

The crucial move in the reasoning was to recast the right to privacy found in *Griswold*<sup>21</sup> and *Roe*<sup>22</sup> as a liberty interest. In doing so, the opinion wrapped three distinct but intertwined strands of substantive due process (zonal, decisional, and relational<sup>23</sup>) into a single concept: liberty. In many ways, the opinion bore a striking resemblance to the analytic framework that Larry himself has developed, though Larry has been a good deal more attentive to the doctrinal niceties than Justice Kennedy was. Indeed, in rereading Larry’s work before this symposium, I was startled by how prescient it was. I kept flipping back to the first page of the article just to check the date of publication. In some ways, Larry is *Lawrence*’s ghost writer.

I would like to spend a minute talking about the opinion as an exercise in judicial craftsmanship before turning to its doctrinal status. I do so not only because the differences between the majority and dissenting opinions are so pronounced, but because I think the stylistic differences between the two opinions map on to their substantive disagreement. Both have to do with the level of generality at which they are cast.

#### IV. JUSTICE KENNEDY AND THE ALLURE OF ABSTRACTION

In the wake of *Romer*, it was perhaps inevitable that Justice Kennedy would write this opinion. In some ways, he was the right choice. If the Court was going to overrule *Bowers* and accord gays and lesbians the dignity of formal constitutional recognition, it needed to cloak the opinion in language that was in keeping with the Court’s high

16. *Id.* at 564.

17. 478 U.S. 186 (1986).

18. *Lawrence*, 539 U.S. at 578.

19. *Id.* at 575.

20. If anything, *Lawrence* has made it even more difficult to figure out what is protected, for it abandons the criteria for recognizing a substantive due process right articulated in *Washington v. Glucksberg*; history and proof that the right is “implicit in the concept of ordered liberty.” 521 U.S. 702, 720–21 (1997) (quoting *Palko v. Conn.*, 302 U.S. 319, 325 (1937)). Indeed, at times *Lawrence* seems to place upon the *state* the burden to justify any legislation that can be said to infringe upon one’s liberty. The majority opinion similarly muddies the traditional levels of scrutiny, as its language dances around the terminology of strict scrutiny traditionally deployed in such cases. For other assessments of the doctrinal analysis, see e.g. Jane S. Schacter, *Lawrence v. Texas and the Fourteenth Amendment’s Democratic Aspirations*, 13 Temp. Pol. & Civ. Rights L. Rev. 733, 738 (2004) (arguing that the opinion is “cryptic and silent” on the standard of review and that Kennedy “never quite characterized the right as a fundamental one”); Nan Hunter, Panel Remarks, *Living With Lawrence* (Geo. U. Law, Mar. 17, 2005), in 7 Geo. J. Gender & L. 299, 310 (2006) (noting “the frustrations on the part of advocates” with the “magisterial language of *Lawrence v. Texas* and the question of what does it mean”).

21. *Griswold v. Conn.*, 381 U.S. 479 (1965).

22. *Roe v. Wade*, 410 U.S. 113 (1973).

23. Kendall Thomas, *Beyond the Privacy Principle*, 92 Colum. L. Rev. 1431, 1443–48 (1992).

purpose. But Justice Kennedy's penchant for abstraction conceals some analytic slippage that would have been evident had the opinion been written in the finest tradition of common law judging. In describing that tradition, Justice Souter once argued that "the judicial paradox, [is] that we have no hope of serving the most exalted without respecting the most concrete."<sup>24</sup> In doing so, he invoked the myth of Antaeus, the giant who drew his strength from contact with the earth and who could not be defeated in a wrestling match until Hercules had the wit to hold Antaeus aloft with his feet flailing uselessly in the sky.<sup>25</sup>

Justice Souter's observations about doctrinal analysis holds true of judicial rhetoric. I quote from the first paragraph of *Lawrence*: "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions."<sup>26</sup> It's lovely. But what on earth does it mean? The whole game here is to identify the "certain intimate conduct" that is protected, and the opinion never gives us the tools for doing so. One cannot help but long for the elegant specificity of a phrase like "separate . . . [is] inherently unequal."<sup>27</sup>

Moreover, the opinion's grand, sometimes grandiose prose is interrupted at the end of the opinion by the awkward phrasing of a technocrat. Just after the opinion states in remarkably stirring terms that *Bowers* was wrong the day it was decided,<sup>28</sup> the fluid prose comes to a sudden stop. We are told what this case is *not* about—it is not about pedophilia, it does not concern rape, it does not involve gay marriage.<sup>29</sup> The interruption is jarring. It reminds one of the passage in *Jane Eyre* that so vexed Virginia Woolf as she wrote *A Room of One's Own*—a vivid description of the heroine reflecting on the restlessness of talented women trapped within their gender roles. That passage is interrupted by the unforgivable transition, "When thus alone I not unfrequently heard Grace Poole's laugh."<sup>30</sup> Woolf argues that "[i]t is upsetting to come upon Grace Poole all of a sudden."<sup>31</sup> "[T]he woman who wrote those pages had more genius in her than Jane Austen," wrote Woolf, "but if one reads them over and marks that jerk in them . . . one sees that she will never get her genius expressed whole and entire."<sup>32</sup> *Lawrence*, too, never gets its genius expressed whole and entire.

Even setting aside the literary merits, the interruption is analytically puzzling. Any sophisticated reader knows the limits of stare decisis. So why tell us such things? The obvious answer is a judicial compromise, but it seems unlikely that the four justices who joined Justice Kennedy would seek such assurances. Perhaps Justice Kennedy sensed that he had not adequately identified the right he was recognizing. So this passage attempts to do so not by identifying the right's contours, but by describing the negative

24. David H. Souter, *Gerald Gunther*, 55 *Stan. L. Rev.* 635, 636 (2002).

25. *Id.*

26. *Lawrence*, 539 U.S. at 562.

27. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

28. *Lawrence*, 539 U.S. at 578.

29. *Id.*

30. Virginia Woolf, *A Room of One's Own* 120 (Harcourt, Brace & Co. 1929).

31. *Id.*

32. *Id.*

space around it.

I am less generous. I suspect that it is here in the opinion that Justice Kennedy's high-flown prose comes crashing down to the world of facts.<sup>33</sup> Call it the revenge of Antaeus. The fact that the opinion breaks down precisely when it moves from the general to the specific tells us something important about the potential shortcomings of the liberty paradigm as a litigation strategy. And that problem has something to do with the queasy feeling one gets when a plane drops too quickly.

#### V. JUSTICE SCALIA AND THE CULT OF THE CONCRETE<sup>34</sup>

If Justice Kennedy is too abstract in his judicial prose, perhaps Justice Scalia is too concrete.<sup>35</sup> One wonders whether Justice Scalia has a macro in his computer, an "alt t" for "trouble." He presses the button in every case about sex, and dire warnings about legalizing bigamy, incest, masturbation, and bestiality spill onto the page, as they did in *Barnes v. Glen Theater, Inc.*,<sup>36</sup> *Romer*,<sup>37</sup> and now *Lawrence*.<sup>38</sup>

It is in part Justice Scalia's groundedness that makes him the wittiest dissenter in cases involving sex, for everything funny about sex lies in our discomfort with the gap between the particular and the abstract. Justice Scalia deflates grand invocations of the First Amendment by describing 60,000 naked Midwesterners exposing themselves in the Hoosier Dome.<sup>39</sup> The power of Justice Scalia's dissent in *Lawrence* stems from his confident, pragmatic rhetoric, which mocks what he calls *Casey's*—and now *Lawrence's*—"sweet-mystery-of-life passage."<sup>40</sup> The contrast with Scalia's own description of the case could not be more stark. He never lets us imagine two men in a relationship. He never lets us imagine two men, to use a common abstraction, "making love." He insists we remember at every point that sodomy is the act at issue.

The thrust of Justice Scalia's attack is that the right to engage in sodomy is not a fundamental right, and it is *here* that style meets substance in both opinions. The real fight in substantive due process cases—as Larry argues<sup>41</sup>—concerns the level of generality at which one casts that argument. The tension between abstraction and precision, evident in the *style* of the two opinions, is thus at the heart of the *doctrinal* debate. If the right is the right to sodomize, *Lawrence* will lose. If the right is the right to form a "personal bond," *Lawrence* will win.

33. Bill Eskridge offers another interpretation of this passage, arguing that it conveys "the tone of both tolerance and moral distance." Eskridge, *supra* n. 3, at 1066.

34. The phrase is borrowed from Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 *Stan. L. Rev.* 787, 824 (1989).

35. Scalia, of course, has argued that judges should identify a right at the most specific level possible. *Michael H. v. Gerald D.*, 491 U.S. 110, 127–28 n. 6 (1989). For a vigorous response, see Tribe & Dorf, *supra* n. 3; see also Bruce Ackerman, *Liberating Abstraction*, 59 *U. Chi. L. Rev.* 317, 318–19 (1992) (rebuking Justice Scalia for insisting on specificity when ruling on fundamental rights, but relying on abstract and general propositions when dealing with structural questions).

36. 501 U.S. 560, 575 (1991) (Scalia, J., concurring).

37. 517 U.S. 620, 644–48 (1996) (Scalia, J., dissenting).

38. 539 U.S. at 590 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

39. *Barnes*, 501 U.S. at 575 (Scalia, J., concurring).

40. *Lawrence*, 539 U.S. at 588 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

41. See *supra* n. 13.

Because of the level of generality Justice Scalia uses—the “alt t” for trouble—this was an easy case for him. What was at stake was whether there existed a fundamental right to engage in a particular type of sex act. As to whether *that* right existed, Justice Scalia was scathingly confident. Like the king described by John Updike in *Gertrude and Claudius*, Justice Scalia was all answer, no question.<sup>42</sup>

The debate between the majority and the dissent also illustrates why substantive due process retains such a strange place in the constitutional canon. It is reviled for its lack of precision, the difficulties involved in moving from principle to application. Yet it fits with a deeply intuitive sense that some parts of our lives must be beyond the state’s reach, an idea that is difficult to encase in anything but vague generalities. Substantive due process is a topic better suited for religious scholars or philosophers than pragmatic lawyers. In a sense, the majority and dissent are both right. The majority is right that morality alone cannot possibly justify all legislation that treads upon the vague notion we term autonomy. And the dissent is right that the majority fails to identify why *this* autonomous act, in particular, is protected.

#### VI. LIBERTY V. EQUALITY

In the wake of *Lawrence*, Larry—along with many others, including symposium contributor Kenji Yoshino<sup>43</sup>—has argued that the liberty paradigm is the right framework for thinking about gay rights. In some ways, I have no quarrel with this claim. The advocate in me is far from unhappy that *Lawrence* was cast in substantive due process terms. It obviously worked. Not only did it work, but the substantive due process ruling allowed the Court to overrule *Bowers*, which is no small miracle in my eyes.

Nonetheless, if Robert Post is correct that *Lawrence* is the Court’s “opening bid” in this debate,<sup>44</sup> I would urge the Court to act like any good bridge player and consider playing in a different suit. In contrast to Larry, I believe that equal protection is the right frame for most future questions—not the formal and cramped sort of equal protection analysis we see in Justice O’Connor’s opinion,<sup>45</sup> but a robust form of equal protection that recognizes the possibility of stigma even when people are nominally being treated the same. The rhetoric of the Fourteenth Amendment seems sufficiently capacious to describe the right being conveyed, yet it brings with it a well-established doctrine for grounding the analysis. Equal protection is a well-worn tool that slips easily into a judge’s hand.

My argument comes with two caveats. First, by arguing for the path of equal protection, not substantive due process, I do not mean to make a foolishly broad claim here. As *Romer* itself makes clear,<sup>46</sup> questions about the level of generality are embedded in equal protection debates as well. Any invocation about equality raises two

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42. John Updike, *Gertrude and Claudius* 59 (Alfred A. Knopf 2000).

43. See Yoshino, *supra* n. 5; see also Kenji Yoshino, *The New Equal Protection* (forthcoming 2008).

44. Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 Harv. L. Rev. 4, 104 (2003).

45. *Lawrence*, 539 U.S. at 579–85 (O’Connor, J., concurring).

46. *Romer*, 517 U.S. at 620; *supra* n. 5.



questions: “Equality with respect to what?” and “equality with respect to whom?” There is always a danger in expecting too much from what Peter Westen has termed “the empty idea of equality.”<sup>47</sup> Nonetheless, equal protection seems pitched roughly at the right level of generality in these cases—it captures what we are fighting about. And to the extent that the Court must decide “with respect to what and to whom,” equal protection writes against a tradition that gives those questions shape and form.

Second, I do not mean to set up a false dichotomy. Equality and liberty—despite the fights of many a philosophy graduate student—are plainly intertwined in every case, including *Lawrence*.<sup>48</sup> Larry’s work is utterly convincing on this point. As Larry pointed out at the symposium, “equality must be inflected with something to have any oomph.”<sup>49</sup> Without basic notions of liberty to “fill in” what equality means, we might well end up with what Larry correctly dismisses as the “empty idea of equality,”<sup>50</sup> with Justice O’Connor’s formalistic opinion being a good example. My claim here is not that liberty talk will not infuse equality talk. It is about where the conversation begins.<sup>51</sup> Does the Court begin its next gay rights decision with the phrase “separate is inherently unequal” or the sentence “liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct”?

Larry, perhaps the academy’s most elegant doctrinalist, finds it easy to toggle between liberty and equality when he writes about substantive due process. Like Justice Brandeis, he is the “master . . . of both microscope and telescope.”<sup>52</sup> In the parts of his work where Larry connects the Court’s liberty decisions—*Skinner*, *Meyer*, *Pierce*, *Troxel*, *Yoder*, *Boy Scouts*, *Griswold*, *Eisenstadt*, *Carey*, *Rose*, *Casey*, *Loving*, *Zablocki*, *Turner*<sup>53</sup>—he shows us constellations where the rest of us saw only a random collection of stars.<sup>54</sup> In other parts of his work, he offers us a granular view, describing the relationship between liberty and equality as a “double helix.”<sup>55</sup> Larry is able to sketch

47. Peter Westen, *The Empty Idea of Equality*, 95 Harv. L. Rev. 537 (1982).

48. Many have noted how much overlap there is between the language of liberty and the vocabulary of equal protection in Justice Kennedy’s opinion. See e.g. Eskridge, *supra* n. 3, at 1021 (weaving together equal protection and liberty strands of Court opinion as part of “A Jurisprudence of Tolerance”); Karlan, *supra* n. 3, at 1449 (noting that “the *Lawrence* Court’s discussion of liberty would be incoherent without some underlying commitment to equality among groups”); Tribe, *supra* n. 1, at 1902 (discussing the “blend of equal protection and substantive due process themes”); Hunter, *supra* n. 20, at 1123–34 (arguing that liberty and equality were the opinion’s major and minor chords, and describing it as upholding a principle of “equal liberties”). This analytic overlap may be especially likely to occur in the context of gay rights. See Karlan, *supra* n. 3, at 1457 (noting that “homosexuality straddles the line between conduct and status in a way that makes it hard to apply conventional constitutional doctrine”).

49. Heather K. Gerken, Presentation, *Larry and Lawrence* (Tulsa L. Rev. 6th Annual Legal Scholarship Symposium Honoring Laurence Tribe, Apr. 9, 2007) (Laurence Tribe made this comment during the “question and answer” segment of the author’s symposium presentation).

50. Westen, *supra* n. 47.

51. Kenji Yoshino, Presentation, *Tribe* (Tulsa L. Rev. 6th Annual Legal Scholarship Symposium Honoring Laurence Tribe, Apr. 9, 2007).

52. Alexander M. Bickel, *The Least Dangerous Branch* 237 (2d ed., Yale U. Press 1962).

53. Larry cites and discusses each of these cases in Tribe, *supra* n. 1, at 1937, and Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 Pepp. L. Rev. 641, 662–65 (2001).

54. Consistent with his long-standing work on the subject, Larry emphasizes that these decisions are connected precisely because the Court described “the protected liberties at higher levels of generality than any ‘protected activities’ catalog could plausibly accommodate.” Tribe, *supra* n. 1, at 1934.

55. *Id.* at 1898.

the “vistas”<sup>56</sup> *Lawrence* opens for us. And yet he can describe with the precision of a watchmaker the ways in which the gears of liberty and equality interlock and move one another.

What I am worried about, however, is not *Lawrence* and Larry, but *Lawrence* and litigation. If we all possessed Larry’s vision—his mastery of the microscope and the telescope—I would not worry about the choice between equality and liberty for the future of gay rights litigation. But for those of us who lack Larry’s vision, doctrinal analysis starts with doctrinal categories. If one thinks, as I do, that doctrinal categories give shape to court decisions, it seems inevitable that Larry’s double helix will be split. And if courts must choose one of these admittedly intertwined paths to take, I suspect we will get closer to Larry’s “vistas” if we follow the path of equal protection, not liberty.

Indeed, when what remains of the practitioner in me begins to think through what a litigation strategy premised on liberty claims would look like in the world of litigation, not Larry, I wonder whether it could possibly prove wholly satisfying. Even as the liberty paradigm pushes towards universalism, it seems to require members of the LGBT community to litigate pieces of their humanity, one by one. First they assert their right as human beings to have intimate relations with another person. Then they assert the right to marry or to have a family. To work. To serve their country. These are all fine things. But it seems to me they do not capture the essence of what is at stake in these debates, which is to recognize not the parts of personhood that we all share—though that is plainly necessary for equality—but to acknowledge the entire person before us whether we share anything or not.

To put this more concretely, what is really at stake in these debates is not whether all humans should enjoy a right, but whether gays and lesbians, in particular, should do so, and *that* idea is better captured by the equal protection paradigm.<sup>57</sup> Somewhere between Justice Kennedy’s high-flown right to intimate relations and Justice Scalia’s down-and-dirty discussion of sodomy is the status of the LGBT community. Equal protection analysis *begins* with that issue.

The liberty paradigm, in contrast, requires us to start in a more abstract way. We have to talk about the right to autonomy or self-governance. Or, moving a bit down the generality scale, we start by talking about the right to be intimate or to work or to have a family or to serve in the military. If this is our starting point, judges and lawyers must either remain high in the realm of abstraction, never acknowledging that the law in question denies the right to a particular group. Or they must move from the abstract to the particular, from the grand rights of humanity to the fight on the ground about who gets them. It is the move from the abstract to the particular, of course, that tripped up Justice Kennedy in that ugly transition in *Lawrence*.<sup>58</sup> And perhaps it is only because I have been on four planes in twenty-four hours that I still worry about that drop.

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56. *Id.*

57. See Karlan, *supra* n. 3, at 1456–57 (“The real question in *Lawrence* was whether gay people should be included in the idea of ‘everyone’ . . . . [T]he fact that the law explicitly targets behavior and not persons does not mean that it is not also class legislation.”).

58. See *supra* nn. 25–29 and accompanying text.

## VII. TOO MANY GROUPS OR TOO MANY INDIVIDUALS?

Further, if we think in terms of comparative institutional *practice*—what courts actually do in the world—it is not clear to me that American courts are particularly practiced at deciding what human beings need. Courts do not often decide *what* people should have. That is, after all, mostly what philosophers theorize about and what legislatures do. But U.S. courts are at least reasonably practiced in telling legislatures when they must extend the *what*—the goods they have created—to someone else. Courts, in other words, are practiced at telling us *who* gets the good. The idea that legislatures are charged with deciding *what* one gets and courts determine *who* gets it, of course, fits neatly with Ely's views about the division of labor between courts and legislatures<sup>59</sup>—substantively freighted, of course, as Larry himself has shown.<sup>60</sup>

Some worry, though, that the Supreme Court has tired of thinking about the “who’s”—that it worries so much about creating another protected class that the equal protection path is a dead end for gay rights litigation.<sup>61</sup> This is what Kenji Yoshino calls the “too many groups” problem,<sup>62</sup> and he may well be right.

The “too many groups” problem, however, inheres in the liberty analysis as well, though it takes a slightly different form—call it the “too many individuals” problem. Recognizing a vibrant liberty interest—the sort that Larry writes about—requires the Court to extend liberty’s protections to many, many people (including the poor and people with disabilities, the very groups that make the Court edgy about extending suspect class status to gays and lesbians). I have trouble seeing why a Court worried about extending a right to “too many groups” would have no qualms about extending the same right to *everyone*. For this reason, my worry is that the Court will be nervous about adopting a robust liberty jurisprudence because, to use a Seuessian phrase, it would give the “what” to too many “who’s.” If that is right—if a vibrant liberty interest would give the what to too many who’s—then the tactical danger associated with the liberty strategy is that the Court will limit its rulings to practices largely acceptable to the majority.<sup>63</sup> The risk is that we end up only with cases like *Boddie v. Connecticut*<sup>64</sup> or *Tennessee v. Lane*.<sup>65</sup> Neither, it seems to me, gets us to the vistas that Larry has described.

To put this more concretely, the Court must always figure out how to cabin the rights it recognizes. It can do so by recognizing one group at a time, as it has in its equality jurisprudence. Or it can do so by recognizing one right at a time, as it has in its liberty jurisprudence. Yoshino and others have rightly pointed out that there are many attractions to the “one right at a time” strategy. It casts the issue of gay rights in the language of universalism—the right of *all* people to have sex, to forge relationships, to marry. But equal protection arguments do that as well, at least if you have a lawyer as

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59. John H. Ely, *Democracy and Distrust* (Harvard U. Press 1980).

60. See Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L.J. 1063 (1979).

61. See Yoshino, *supra* n. 5.

62. *Id.*

63. See Dale Carpenter, *Is Lawrence Libertarian?* 88 Minn. L. Rev. 1140, 1141 (2004); Karlan, *supra* n. 3, at 1460.

64. 401 U.S. 317 (1971).

65. 541 U.S. 509 (2004).

good as Larry writing your brief.

Moreover, the “one group at a time” strategy has an advantage when we move from abstract rhetoric to concrete consequences, from Kennedy’s terrain to Scalia’s. If the Court starts to worry about just how much of the world it is going to turn upside down, “one group at a time” seems like the safest route for anything but the most modest of rights. Even if a ruling recognizing gays and lesbians as a protected class means extending several new rights to that group, it nonetheless seems narrower than a ruling recognizing a liberty interest that grants everyone a right to work or to marry or to serve in the military. I think Cass Sunstein is exactly right to anticipate the ways in which the Court would feel pressured to cabin a liberty interest and to note that equal protection provides a more natural framing device for the gay marriage debate<sup>66</sup> (though I suspect he is attracted to a narrower vision of equal protection than I would prefer).

One might well be dissatisfied with an equal protection framework precisely because it narrows the range of possibilities—because it may be good for gays and lesbians but not good for humanity. But, still aiming for Larry’s vistas, I am reminded of Louis Menand’s description of Holmes: “[H]e had not given up the hope of . . . a glimpse of the infinite. He narrowed himself in order better to expand.”<sup>67</sup> Equal protection is the narrowing strategy that promises some glimpse of the infinite.

#### VIII. EQUALITY AND ESSENTIALISM

In arguing that equality is the most promising path for gay rights litigation, the issue I worry most about is essentialism. By casting these issues in equal protection terms, we risk attributing traits to a group that is not really a group. It is indeed troubling that gays and lesbians must show that they are different from straights in order to be treated similarly, that they must establish their specificity in order to invoke the law’s grand generalities.

I nonetheless think equal protection is the right path. Justice Scalia describes the liberty interest at stake in *Lawrence* as the right to engage in sodomy. Justice Kennedy describes it as the right to engage in intimate relations. But what was really at stake in that case was the ability of homosexuals to do both of those things.

We are dealing, in short, with the politics of (mis)recognition. The first response to that harm is likely to take the form of a group-based demand for recognition—an equal protection claim—even if that strategy raises all of the dangers that many scholars have described in writing about the relationship between essentialism and equal protection.<sup>68</sup> Moreover, the dangers of essentialism lurk in the liberty frame as well.<sup>69</sup>

66. See generally e.g. Cass R. Sunstein, *The Right to Marry*, 26 Cardozo L. Rev. 2081 (2005); Cass R. Sunstein, *Liberty After Lawrence*, 65 Ohio St. L.J. 1059 (2004); Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 S. Ct. Rev. 27.

67. Louis Menand, *The Metaphysical Club* 59 (Farrar, Straus & Giroux 2001).

68. It would be impossible to do justice to this scholarship in a footnote, as its authors range in their sensibilities from Kenji Yoshino to Charles Taylor, from Martha Minow to Janet Halley, from Iris Manion Young to Richard Ford.

69. As Pam Karlan notes, “gay people in the United States do form a social group whose membership extends beyond their engaging in specific sexual acts.” Karlan, *supra* n. 3, at 1458; cf. Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 Colum. L. Rev. 1399 (2004). For a thoughtful comparative piece on these and other issues, see Ariela R. Dubler, *From McLaughlin v. Florida to Lawrence v.*

If, as some think, what was at stake in Texas was a blend of conduct and status—what went on inside the bedroom and who you were outside of it—then the liberty paradigm may place undue emphasis on the conduct/inside-the-bedroom dimension of the problem.<sup>70</sup>

The genius of Justice Kennedy's decision is that it makes one important connection between the abstract and the particular—the vague notion we call love with its concrete, physical manifestation, sex. But it fails to make a different connection between the abstract and particular—it fails to recognize that *Lawrence* is not about the right of all humans to love one another, but about the right of gays and lesbians, specifically, to do so. In arguing that it was demeaning to suggest that homosexuality was only about sodomy, in insisting on the right to form a personal bond that is more enduring, Justice Kennedy was recognizing the right to be gay. Every sentence in this description is, of course, inflected with the values of liberty. But the equal protection paradigm describes those liberty values with the right level of specificity . . . at least in the world of litigation, not Larry.

Indeed, my assumption is that the many gay and lesbian lawyers who wept openly in the courtroom when *Lawrence* was handed down did so not because sodomy is now legal in every state, nor did they do so because we are all now entitled to love one another. They did so because *Bowers*—as Justice Kennedy observed, using the concrete language of equal protection—blessed laws that imposed a “stigma” on gays and lesbians.<sup>71</sup> Equal protection is where the rhetoric and the reality of *Lawrence* coincide.

It may well be that none of this would matter if the Court were writing on a blank slate, if we lived in the world of Larry, not litigation. But if one thinks about the kinds of issues at stake—employment, adoption, military service—it is clear that equality jurisprudence has already fostered conversations about those issues whereas the liberty doctrine has not. Both equality and liberty are in some senses “empty” concepts that require reference to the other to fill them in. But we have made a good deal more progress “filling in” what equality means in this society. I think it is difficult to start an opinion with the phrase “separate is inherently unequal” and end it by upholding a ban on gay marriage. It is harder to predict how an opinion beginning with the claim that “liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct”<sup>72</sup> would conclude.

My instincts on these matters may simply stem from the fact that there are many more equality cases on the books than there are liberty decisions. Larry may well be right that these cases all pose the same question. But one set of answers to that question has a long and distinguished history behind it. In the world of litigation and not Larry, I

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Texas: *Sexual Freedom and the Road to Marriage*, 106 Colum. L. Rev. 1165 (2006).

70. See e.g. Franke, *supra* n. 69 (raising concerns about the emphasis on domestic intimacy in *Lawrence* and its potential effects on the gay rights movement); Karlan, *supra* n. 3, at 1457–58 (exploring the relationship between liberty/conduct and equality/status distinctions).

71. *Lawrence*, 539 U.S. at 575.

72. Should Justice Kennedy be in the position of swing justice when these cases are litigated, however, abstraction may have its uses. As I have argued elsewhere, Justice Kennedy may be more open to a robust vision of equal protection if it is developed through less direct means than I suggest here. See Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, \_\_\_ Harv. L. Rev. \_\_\_ (forthcoming 2007).

would rather see gay rights cases stand with *Brown* than with *Roe*.<sup>73</sup> The lawyer left in me finds it easier to see the contours of the argument, to find the fit in the Court's equal protection jurisprudence.

Perhaps this is an unbearably conservative view. I must confess that after rereading Larry's work on the subject, I became the opposite of John Updike's king—all question and no answer. After all, my instinct is like that of Virginia Woolf's about women authors. In *A Room of Her Own*, where she complained about Charlotte Bronte, Woolf noted how difficult it is for someone to write without a tradition behind her.<sup>74</sup> I have argued that when the jurisprudence of gay rights gets written, it will be easier to write it with a tradition behind us. But I may be quite wrong about that, for reasons that Woolf herself identifies. Woolf, after all, also argued that it was a mistake for women to use what she termed "a man's sentence"<sup>75</sup> (speaking of essentialism!), noting that even Charlotte Bronte "with all her splendid gift for prose, stumbled and fell with that clumsy weapon in her hands" and that "George Eliot committed atrocities with it that beggar description."<sup>76</sup> Woolf told us that the genius of Jane Austen was that she "looked at [that man's sentence] and laughed at it and devised a perfectly natural, shapely sentence proper for her own use."<sup>77</sup> She argued that women turned to the novel precisely because the tradition had shut them out of other forms. "The novel alone was young enough to be soft in her hands," Woolf writes.<sup>78</sup>

Perhaps the same is true of the new liberty jurisprudence that we see in its inchoate form in *Lawrence*. It is a new tradition, young enough to be soft in our hands. If that is the case, then I will close simply by wishing that Larry is always with us to give it shape.

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73. To be fair to Larry, he does not believe that *Lawrence* must stand or fall with *Roe*. See Tribe, *supra* n. 1, at 1931. To the contrary, he terms *Lawrence* the "*Brown v. Board of gay and lesbian America*." *Id.* at 1895.

74. Woolf, *supra* n. 30, at 133.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 134.

