Tulsa Law Review

Volume 42
Number 4 *The Scholarship of Laurence Tribe*

Volume 42 | Number 4

Summer 2007

Law and Topology

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I. INTRODUCTION: THE ARC OF AN INTRADISCIPLINARY CAREER

Interdisciplinary legal scholarship—law and history, law and economics, law and sociology and the like—surely has much to offer, but its increasing dominance in the legal academy should not be permitted to obscure the extraordinary challenge and beauty of *intra*disciplinarity in law. Law is itself a discipline, not simply a hologram or pastiche of other disciplines. Law is a discipline by virtue of its rich set of texts and its complex set of institutional arrangements. Together these texts and institutions structure and regulate the social order in a way distinct from markets, cultures, or faiths.

Law is also a discipline by virtue of its distinctive interpretive techniques and its particular modes of practice, engrained through repetition and expanded through improvisation, as in music or sport. And as with musical or athletic performance, mastery is a lot harder than it looks.

Laurence H. Tribe is the greatest living *intra*disciplinary scholar of constitutional law—and perhaps simply the greatest such scholar ever. No one else has combined the roles of constitutional scholar, constitutional advocate, constitutional policy adviser, constitutional drafter, and constitutional commentator with the breadth, depth, and brilliance of Larry Tribe. He is not simply a constitutional scholar *and* these other personae. He is a constitutional scholar *by virtue of* these other personae. His scholarship distinctively draws on the *intra*disciplinary perspective that he gains from inhabiting, inhaling, and encompassing a breathtaking range of constitutional law. To assess such scholarship from an external or *inter*disciplinary perspective would be a little bit like watching Tiger Woods not for the beauty of his game but the torque of his swing, or Roger Federer for the biochemistry enabling such agile cross-court coverage.

Consider the sheer sweep of the subject matter in the some thirty-five cases Larry has argued before the Supreme Court: He has made the case for gay people not to be rousted from their bedrooms[1] or fired from their jobs as public school teachers.[2] He has defended the authority of city governments to reserve the benefits of their capital

* Stanley Morrison Professor of Law and Former Dean, Stanford Law School.

1. In *Bowers v. Hardwick*, 478 U.S. 186 (1986), Larry argued on behalf of a plaintiff challenging the constitutionality of the Georgia sodomy statute.

2. In *Bd. of Educ. v. Natl. Gay Task Force*, 470 U.S. 903 (1985), Larry successfully defended a lower court decision holding unconstitutional an Oklahoma statute that provided for dismissal or suspension of teachers for speaking in ways that could be construed as advocating homosexuality. *See Natl. Gay Task Force v. Bd. of Educ.*, 729 F.2d 1270, 1272 (10th Cir. 1984).

investments for their own residents[3] and to enforce rent control as an aspect of the social contract rather than a conspiracy in restraint of trade.[4] He has vindicated the power of state government to slow the development of nuclear power,[5] to take property for public benefit less tangible than physical use,[6] and to entertain certain suits against cigarette companies.[7] He has extended free speech rights by gaining press access to criminal trials,[8] and has sought to extend free speech rights to the distribution of government resources—whether the open spaces of a state fair[9] or the allocation of federal family planning funds.[10] He held at bay for some time the imposition of new substantive due process limits on the size and scope of punitive damages.[11] He prevented government exaction of payments for generic advertising from mushroom growers[12]—although not, alas from beef producers,[13] preventing any victory celebration complete with *tournedos Rossini*. He helped limit the effects of asbestos class settlements on future claimants.[14] He sought to enable terminally ill patients to obtain physician assistance in controlling the circumstances of death.[15] Oh, and there was something about a contested election—I think it was in Florida . . . .[16]

Larry's remarkable constitutional law practice was a natural outgrowth of the

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3. In *White v. Mass. Council of Const. Workers*, 460 U.S. 204 (1983), Larry successfully argued on behalf of the Mayor of Boston that the dormant Commerce Clause did not forbid an executive order requiring all construction projects funded in whole or in part by city funds to be performed by a work force at least half of whose members were city residents.

4. In *Fisher v. City of Berkeley*, 475 U.S. 260 (1986), Larry successfully defeated, largely on federalism grounds, an antitrust challenge to a city ordinance imposing ceilings on rents for residential properties.

5. In *P. Gas & Elec. v. St. Energy Resources Conserv. & Dev. Commn.*, 461 U.S. 190 (1983), Larry successfully argued that federal law did not preempt a California statute conditioning the construction of nuclear power plants on findings by the state that adequate means of storing and disposing of spent nuclear fuel were available.

6. In *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984), Larry successfully argued that the public use requirement of the Takings Clause did not bar the taking of lands for transfer to homeowners under the Hawaii Land Reform Act of 1967, which was enacted to reduce the concentration of land ownership in Hawaii.

7. In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), Larry successfully argued that federal law did not preempt state law claims against cigarette manufacturers.

8. In *Richmond Newsps. v. Va.*, 448 U.S. 555 (1981), Larry successfully argued that the press may not be barred from a criminal trial absent an overriding interest articulated in findings.

9. In *Heffron v. Intl. Socy. for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), Larry argued that the First Amendment barred enforcement against Hare Krishna devotees of a state fair rule prohibiting the sale or distribution of printed or written material or the solicitation of funds except from a fixed, rented booth.

10. In *Rust v. Sullivan*, 500 U.S. 173 (1991), Larry argued on behalf of plaintiffs challenging the constitutionality of funding conditions that prohibited recipients of certain federal funds from engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning.

11. In *TXO Prod. Corp. v. Alliance Resources*, 509 U.S. 443 (1993), Larry successfully argued that a $10 million punitive damage award in a slander of title case with a compensatory damage award of $19,000 did not violate due process.

12. In *U.S. v. United Foods*, 533 U.S. 405 (2001), Larry successfully argued on behalf of a mushroom producer that an assessment of funds under the Mushroom Promotion, Research, and Consumer Information Act violated the First Amendment.

13. In *Johanns v. Livestock Mktg. Assn.*, 544 U.S. 550 (2005), Larry argued against similar mandatory contributions to a beef advertising fund.

14. In *Anchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997), Larry argued on behalf of plaintiff who sought to bring actions against an asbestos manufacturer despite failing to timely opt out of a class settlement.

15. In *Vacco v. Quill*, 521 U.S. 793 (1997), Larry argued on behalf of physicians challenging a New York statute making it a crime to aid a person in committing suicide or attempting to commit suicide.

16. *See Bush v. Gore*, 531 U.S. 70 (2000).

publication in 1978 of his unique, magisterial treatise;[17] his first arguments came soon after and as a direct result. The treatise also made him a sought-after drafter of constitutions—including those of the Marshall Islands, South Africa, and the Czech Republic. It made him a sought-after constitutional witness before Congress, where he has given prepared testimony—each statement itself a noteworthy work of scholarship—some thirty-three times, a record of appearances that has reportedly led Senator Ted Kennedy to call him the 101st Senator. It has made him a sought-after commentator in the media. And it has woven his analysis into the very fabric of constitutional law, as judges worldwide have cited the treatise with remarkable frequency. As former Harvard Law School Dean Erwin Griswold once famously stated, "It may well be that no book, and no lawyer not a member of the Court, has ever had a greater influence on the development of American constitutional law."[18]

Larry's broad constitutional experience and multiple constitutional roles cannot be separated from his constitutional scholarship. Two key features of Larry's work flow from his being the closest thing we have to the compleat constitutional lawyer. The first is his skepticism of any overarching form of consequentialism in constitutional law. He mistrusts the application of an external metric to constitutionalism that asks, for example, whether a decision advances representative democracy, economic efficiency, or democratic legitimacy. The second is his development of "structural," "constitutive," and "relational" theories that conceive constitutional law as operating in a kind of architecture that not only connects different structural elements but also takes account of the spaces and interstices between them. If Larry's scholarship had to be given a "law and" label, it perhaps would be "law and topology"—a fitting moniker, as advanced geometry was in fact his first academic passion. These twin features of Larry's work are explored in the sections that follow.

II. STRUCTURE BEFORE FUNCTION: THE REJECTION OF A SINGLE AXIS

Larry's skepticism of consequentialism in constitutional law helps to explain his extended disagreements with certain estimable colleagues, including John Hart Ely,[19] Frank Easterbrook,[20] and Bruce Ackerman.[21] Larry's critique of Dean Ely argued that no theory of judicial review could be irreducibly procedural. In Ely's view, judicial intervention is justified when it improves the process of democratic representation by clearing the channels of political change or assisting those who are systematically disadvantaged in politics.[22] In contrast, Larry argued that hard cases always require irreducibly substantive normative judgments,[23] without which we cannot distinguish the

17. *See* Laurence H. Tribe, *American Constitutional Law* (Foundation Press 1978).

18. Jeffrey Toobin, *Supreme Sacrifice: Laurence Tribe May Never Be on the Supreme Court But Then He Doesn't Really Need to Be*, New Yorker 43–47 (July 8, 1996).

19. The late Stanford Law School dean and constitutional law scholar.

20. Chief Judge of the United States Court of Appeals for the Seventh Circuit and former University of Chicago law professor.

21. Yale Law School professor and constitutional law scholar.

22. *See generally* John Hart Ely, *Democracy and Distrust* (Harvard U. Press 1980).

23. *See generally* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L.J. 1063 (1980).

equal protection rights of gay people from those of burglars or the privacy right to abortion from that to feticide.[24]

Larry's critique of Judge Easterbrook treated as misguided the use of instrumental economic rationality, or cost-benefit analysis, in constitutional decision-making.[25] This critique rejects any approach to constitutional law that takes political interests as fixed and exogenous to constitutional self-government rather than as shaped by the very process of self-government itself. "Professor Easterbrook thus fails," Larry contends, "to recognize the *constitutive* dimension of constitutional decisions: the fact that constitutional choices affect, and hence require consideration of, the way in which a polity wishes to *constitute* itself."[26]

Finally, Larry's critique of Professor Ackerman contested the claim that extra-constitutional history can justify a reinterpretation of constitutional text and structure. Larry objected, for example, to Professor Ackerman's claim that a longstanding practice of congressional acquiescence in the practice of executive agreements by mere majority vote could legitimate departure from the constitutional requirement of a treaty formally executed with a supermajority of the Senate.[27]

While each of these critiques is rich and textured in ways that cannot be fully explored here, they all share one meta-feature in common: In each of these critiques, Larry rejects any single, consequentialist axis along which to decide constitutional cases. In his critique of Dean Ely, Larry rejects the notion that the Constitution operates simply in the service of democracy—especially democracy as defined by a particular, contingent, 1950s brand of pluralism that sees democratic institutions as a marketplace for the trading of pre-existing interests. In his critique of Judge Easterbrook, Larry rejects any reduction of the Constitution to the service of social welfare, denying that citizens have fixed tastes, preferences, or ends that political institutions should help gratify in the most efficient allocation possible. And in his critique of Professor Ackerman, Larry again rejects the idea that the Constitution is simply an instrumental tool to achieve certain ends of pragmatism or efficiency, or that sufficient democratic legitimacy may arise from an evolving "We the People" that can take many protean rather than Philadelphian forms by which surrogate procedures serve as adequate functional substitutes for those the Constitution prescribes.[28]

For Ely, Easterbrook, and Ackerman, as Larry sees them, democratic or economic function is prior to the Constitution. For Larry, the Constitution must always be prior to any democratic or economic function. Consider the following passage, illustrating the point vividly: Larry quotes Professors Ackerman and David Golove[29] as asking, in rhetorical support of their claim that executive agreements are an adequate functional substitute for treaties, "Efficacy, democracy, legitimacy: who can ask for anything

24. *See id.* at 1075–76.

25. *See generally* Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency*, 98 Harv. L. Rev. 592 (1985).

26. *Id.* at 595.

27. *See generally* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221 (1995).

28. *See generally* Bruce Ackerman, *We the People: Foundations* (Harvard U. Press 1991).

29. New York University School of Law professor and constitutional law scholar.

more?" Larry answers, somewhat indignantly,

> Who? Anybody who takes text and structure and, for that matter, history, seriously—that's who. If the Constitution is law, and if we are trying to interpret that law, then the claim that a particular governmental practice, domestic or international, is efficacious, is consistent with democratic theory, and is in some popular or moral sense "legitimate" just doesn't cut much ice when the question before us is whether that practice is constitutional.[30]

In each of these celebrated sparring matches, Larry the *intra*disciplinarian rebels at the *inter*disciplinary perspective. In his view, constitutional scholarship should not take an Archimedean vantage point outside the constitutional system from which to assess it for allocative efficiency in the satisfaction of pre-existing interests through exchange in political or economic markets. To do so, in his view, is to ignore the fact that the discipline of constitutional law creates its own practice and we are inside it constituting it as we practice it. That practice, as he sees it from deep experience, is irreducibly complex, drawing upon an eclectic mix of values and sources. Accordingly, constitutional decision-making cannot be properly assessed along any single axis or in relation to any single function.

III. LAW AND TOPOLOGY: A MULTIDIMENSIONAL APPROACH

Larry's virtuoso qualities as a constitutional intradisciplinarian has affirmative consequences that are the flip side of the above critiques. The chief affirmative consequence is his structural or relational approach to constitutional law. Rather than see law through the lens of economics or positive political science, Larry sees it through the lens of his first academic love: algebraic geometry. Larry was interested in topology before he was interested in constitutional law—he famously abandoned a prodigious career in mathematics in order to go to Harvard Law School. As he once compared the two disciplines:

> If you see some wonderful connection between a multidimensional homotopy space—in fact, my senior thesis in mathematics related to the equivalence between two different definitions under which a multidimensional, closed loop in space would be equivalent to another seemingly different multidimensional, closed loop in space—when you see a connection like that, the attempt to translate it into ordinary conversation is bound to be futile.[31]

He is just as excited to see parallel structural connections in law, but part of his genius as a teacher, advocate, and public commentator in this field is his ability indeed to translate those insights into ordinary (and often extraordinary) conversation.

Larry is occasionally explicit about his topological metaphors: In his critique of Ackerman and Golove, for instance, he states that "[t]he government established by the Constitution has a particular architectural configuration, with a definite shape that

30. Tribe, *supra* n. 27, at 1302 (quoting Bruce Ackerman & David Golove, *Is NAFTA Constitutional?* 108 Harv. L. Rev. 799, 916 (1995)).

31. Toobin, *supra* n. 18.

prescribes the resulting framework of official authority," [32] and thus concludes it is a mistake to make donuts out of spheres. Three examples help to illustrate this topological aspect of Larry's work.

A. Three-Dimensional Rights

Larry is fond of saying that the Constitution is "not Flatland." He objects to rights reductionism—the characterization of "sodomy" as a collision of body parts rather than an expression of intimacy, of assisted suicide as the taking of a pill as opposed to controlling the circumstances of one's death, of abortion as the killing of a fetus rather than the decision not to be a mother—these rights do not pertain, he insists to "flattened-out collections of private acts."[33] As he memorably put it, "It's not the sodomy. It's the relationship!"[34] He rejects the notion of liberty as a rational continuum that merely connects the dots in a two-dimensional scatter diagram. And he even rejects the notion of liberty as a series of penumbras and emanations from the Bill of Rights because he thinks this approach—that of Justice Douglas in *Griswold v. Connecticut*[35]—fails to explain what casts the light. Rather the metaphor he uses, in celebrating cases like *Planned Parenthood v. Casey*[36] and *Lawrence v. Texas*,[37] is that of "a more complex architecture, centrally concerned with the ways we have determined that government must not dictate the kinds of people we may become or the kinds of relationships we may form."[38]

This three-dimensional approach to rights animates Larry's constitutional advocacy too. In his brief for the respondent in *Vacco v. Quill*,[39] for example, Larry argued that the right of terminally ill patients suffering unbearable pain to assisted suicide "involves a constellation of interests . . . each one of which is of constitutional dimension."[40] Larry identified as composing this constellation an "interest in bodily integrity,"[41] an "interest in freedom from pain and suffering,"[42] and "the right to define one's own concept of existence."[43] Larry reminded the Court that "the liberty to make protected decisions is a two-way street"[44] and thus the "strength of an asserted liberty is the same whether [it] requires the state to respect the patient's wish to be free of medical intervention . . . or to respect the patient's wish to seek a physician's assistance."[45]

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32. Tribe, *supra* n. 27, at 1239.
33. Laurence H. Tribe, Lawrence v. Texas: *The Fundamental Right that Dare Not Speak its Name*, 117 Harv. L. Rev. 1893, 1932 (2004).
34. *Id.* at 1904.
35. 381 U.S. 479, 484–86 (1965).
36. 505 U.S. 833 (1992).
37. 539 U.S. 558 (2003).
38. Tribe, *supra* n. 33, at 1932.
39. 521 U.S. 793 (1997).
40. Br. for Respt. at 24, *Vacco*, 521 U.S. 793.
41. *Id.* at 25.
42. *Id.*
43. *Id.* at 26.
44. *Id.* at 30.
45. Br. for Respt. at 29, *Vacco*, 521 U.S. 793.

Rather than reduce the issue to "the right to hasten death,"[46] or even "the right to die with dignity,"[47] Larry embraces the multiple dimensions of the interests at issue.

B. *Pyramid Pastel:*[48] *Structural Inferences from Tacit Postulates*

Larry derives constitutional principles not just from the skeleton and sinews of structural features, but also from the spaces in between them. In an essay on the transformation of the right of interstate travel,[49] he states, "The Court allows rights that help fill out the constitutional landscape to be derived by structural inference from the borders and lines of authority that map that landscape."[50] By structural inferences, he means "the interactions among, and the spirit behind, constitutional provisions, the basic presuppositions that gave life to those provisions, and the overarching themes that can be gleaned from the architecture of the founding document as a whole."[51] In his critique of Ackerman and Golove, he states, "Like any blueprint of a complex architectural edifice, moreover, the whole constituted by [the Constitution's Articles I-III] is plainly more than the sum of its parts. There is no way to avoid at least some reading between the lines if one is to make coherent sense of the edifice in its entirety."[52]

Larry's *Saenz* essay in particular celebrates the Supreme Court's reaffirmation of the *Shapiro v. Thompson*[53] line of cases under the new guise of structural principles of federalism rather than basic necessities of life—a result he contributed to in the course of the litigation of *Saenz v. Roe*[54] and before that, *Anderson v Green.*[55] Here, Larry extends ideas about structural inferences from the Constitution from the realm of separation of powers to the realm of individual rights.[56] He notes with approval the use

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46. *Vacco*, 521 U.S. at 806 (the Court rejected a right to "hasten death").

47. *Wash. v. Glucksberg*, 521 U.S. 702, 790 (1997) (Breyer, J., concurring) (holding, in a companion case to *Vacco*, that the right to assisted suicide is not protected by the Due Process Clause).

48. Larry is an accomplished artist as well as constitutional scholar. In one beautiful pastel, he depicts three pyramids floating off a desert in three dimensions, aloft in the air, seemingly held up by an invisible force. *See* Kathleen M. Sullivan, *Tribute to Laurence H. Tribe*, 59 N.Y. U. Annual Survey Am. L. 15, 17 (2004).

49 *See* Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?* 113 Harv. L. Rev. 110 (2000).

50. *Id.* at 158.

51. *Id.* at 110.

52. Tribe, *supra* n. 27, at 1236.

53. 394 U.S. 618 (1969); *see e.g. Zobel v. Williams*, 457 U.S. 55 (1982).

54. 526 U.S. 489 (1999).

55. 513 U.S. 557 (1995). The author was lead counsel in this case.

56 *See generally* Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* (Louisiana St. U. Press 1969) (arguing for a structural approach to interpreting the Constitution). Structural inferences in constitutional law are as old as the Marshall Court. In *McCulloch v. Maryland*, 17 U.S. 316 (1819), for example, the Court relied on the structure of the federal government to hold that Congress could form a federal bank and went on to hold that, since prior to the Constitution the states had no pre-existing power to tax the federal government, the Tenth Amendment could not reserve that power. Chief Justice Marshall wrote about the Constitution that "[i]ts nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves." *Id.* at 407. In rejecting a state power to impose term limits on members of Congress in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), Justice Stevens's opinion for the Court echoed Chief Justice Marshall in arguing that, "[w]ith respect to setting qualifications for service in Congress, no such right existed before the Constitution was ratified," and "the Framers envisioned a uniform national system, rejecting the notion that the Nation was a collection of States, and instead creating a direct link between the National Government and the people of the United States." *Id.* at 803.

of structural inference in *Saenz* to generate support for an individual right to migrate among states without carrying the legal baggage of one's previous state residence. He sees this approach as a useful offset to the Court's narrowing of other methods of announcing fundamental rights: "[C]laims of individual rights are most likely to have power and ultimately to prevail if they can be convincingly expressed through the language, and clearly understood through the logic, of such concretely architectural features of the Constitution as the separation of powers or, more to the point here, the federal system of separate, equal, and semi-autonomous states."[57] He describes *Saenz* as setting forth the principle that "those benefits of living in a given state that are constitutive of state citizenship and that may accordingly be restricted to the state's own citizens may not be still further restricted so that some citizens, based solely on the duration or pedigree of their citizenship, are in effect treated as 'more equal than others.'"[58]

But he chastises both sides of the Court for failing to be equal opportunity structuralists. He faults the liberals for failing to acknowledge some force in the tacit postulates of federalism, but takes sharper aim at the states' rights conservatives for failing to see tacit structural postulates invisibly undergirding the guarantees of individual rights: Although the Court willingly employs structural inference to find federalism-based rights, he notes, "it paradoxically proceeds as though rights that are valued in themselves as constitutive elements of the human personality in a non-totalitarian regime may not be similarly derived; rather, these individual rights must be located, if at all, only in specific text or tradition."[59] He laments that "those same Justices seem too often to lose sight of the subsurface foundations that give shape and meaning to the very freedoms that those institutional structures are understood indirectly to preserve."[60] And he concludes, "there is no difference in principle between a right one posits in order to make sense of the institutional design and a right one posits in order to make sense of the deeper postulates of a self-governing polity of self-governing persons."[61] In other words, in his view, justices who find structures of state sovereignty implicit in the interstices of the Constitution should also find structures of a right of privacy there—and *vice versa*.

C. Mobius Strips

Larry has increasingly insisted that two seemingly disparate concepts can in fact be continuous with one another—like the topological form known as a mobius strip. A mobius strip is defined as a surface that may appear to have two sides but which mathematically is a surface with only one side and one boundary component—picture a ribbon of paper with one half twist in the middle and the two ends conjoined.

Larry's latest mobius strip is his work suggesting the continuity of the principles of liberty and equality. In a letter composed to Justice Stephen Breyer and later published

57. Tribe, *supra* n. 49, at 140.
58. *Id* at 149–50.
59. *Id.* at 158.
60. *Id* at 168.
61. *Id.*

more widely, for example, Larry explained why he declined to complete the third edition of his treatise. He noted with approval a series of decisions he located in "a complex that draws its design simultaneously from liberty . . . and equality."[62] Commenting on *Lawrence*,[63] Larry uses a slightly different metaphor: "Due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix. It is a single unfolding tale of equal liberty and increasingly universal dignity. This tale centers on a quest for genuine self-government of groups small and large."[64]

Larry reads *Lawrence* as sounding in liberty but motivated less by the goal of conferring individual freedom to have sex than the goal of elevating a class of persons from a stigmatized or subordinated status to a position of equal citizenship. This is much like his reading of *Planned Parenthood v. Casey*[65] as having rewritten *Roe v. Wade*[66] to protect abortion access less for the sake of any woman's individual freedom to end a pregnancy than for the sake of women's collective elevation as a class to a status of citizenship in which they are able to control their civic destiny on a par with men. It is crucial for Larry that these rights involve not individual decisions in isolation, but rather decisions of individuals embedded in complex social webs: "*Lawrence*, more than any other decision . . . both presupposed and advanced an explicitly equality-based and relationally situated theory of substantive liberty . . . not of atomistic individuals . . . but of people as they relate to and interact with one another."[67]

This move from an individualistic and libertarian conception to a wholistic and egalitarian conception is written into the very sequence with which Justice Kennedy closes out the opinion of the Court in *Lawrence*:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.[68]

This technique, of construing liberty as a backstop to equality, is the mirror image of an earlier technique, of construing equality as a backstop to liberty, that was perhaps most clearly expressed by Justice Jackson in *Railway Express Agency, Inc. v. New*

62. Laurence H. Tribe, *The Treatise Power*, 8 Green Bag 2d 291, 301 (2005) (noting in particular *Romer*, *Saenz*, and *Lawrence*).

63. 539 U.S. 558.

64. Tribe, *supra* n. 33, at 1898.

65. 505 U.S. 833.

66. 410 U.S. 113 (1973).

67. Tribe, *supra* n. 33, at 1898.

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

York.[69]

Larry is a master of this mobius strip, with the half twist the other way. As he argued in his amicus brief in *Romer v. Evans*,[70] which involved a challenge to a Colorado state constitutional amendment limiting the application of state antidiscrimination laws to gay men and lesbians: "When Amendment 2 explicitly creates, for selected persons, a unique hole in the state's fabric of existing and potential legal protections against that admitted wrong, it provides a paradigm case of what it means for a state to structure its legal system so as to 'deny' to 'person[s] within its jurisdiction the equal protection of the laws.'"[71] This was a jujitsu move on the Court's previous decision denying a privacy right to engage in gay sex, *Bowers v. Hardwick*,[72] because it bracketed the liberty claim. On Larry's argument in *Romer*, the Court did not have to approve of gamblers or smokers in order to know that equal protection forbids leaving an injured gambler or smoker lying by the side of the road foreclosed from calling 911. But the tacit understanding was that disarming the ability to stigmatize would increase the likelihood that pockets of liberty would flourish unimpeded.

IV. CONCLUSION: UNSOLVED EQUATIONS

In short, Larry has made a distinctive contribution to the constitutional literature by providing a way of seeing constitutional powers and rights as interconnected, and of using the interconnections to expand their scope within a bounded space. As he summed it up in his essay, the *Curvature of Constitutional Space*:

> Discerning the social meaning of a challenged practice—of a legal space shaped by certain acts juxtaposed with certain omissions—entails inquiry into how the practice affects the human geometry of the situation. Such inquiry in turn demands less an effort to uncover the hidden levers, gears or forces that translate governmental actions into objective effects, than an attempt to feel the contours of the world government has built—and to sense what those contours *mean* for those who might be trapped or excluded by them.[73]

Larry's approach increases the legitimacy of individual rights claims by grounding them in the architecture of the Constitution, while finding links in reverse between substantive due process and such seemingly disparate interests as states' rights.

Larry's unique structural approach leaves us with questions worthy of continued exploration. For example, is it a substantive or a procedural theory? Is the object of the analysis to direct decision-making to the right legal, political, or social subgroup but remain agnostic about the outcomes? While Larry's emphasis on structure seems to concern role allocation, a procedural matter, his increasing egalitarian emphasis seems

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69. 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring) ("Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."). *Cf. Skinner v. Okla.*, 316 U.S. 535, 538–39 (1942) (holding that Oklahoma's Habitual Criminal Sterilization Act, which would have authorized the sterilization for recidivism in ordinary theft but not for recidivism in embezzlement or other property crimes, violated the Equal Protection Clause).

70. 517 U.S. 620 (1996).

71. Br. of Laurence H. Tribe et al., as Amici Curiae in Support of Respts. at 2, *Romer*, 517 U.S. 620.

72. 478 U.S. 186.

73. Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 Harv. L. Rev. 1, 38 (1989).

inherently substantive. For example, Larry does not infer substantive due process rights for corporations despite the interconnected architecture of the takings and contract impairment clauses; indeed, he has been the nation's leading advocate in favor of allowing juries discretion to impose punitive damages. I pose such a riddle, however, only as an excuse to continue the conversation with my dear friend, mentor, and colleague, Larry Tribe, with whom I began a conversation twenty-eight years ago that changed my life and opened new worlds. It is a conversation I look forward to continuing till the last breath in us.