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Tribe

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TRIBE

Kenji Yoshino*

I met Larry Tribe in 1997 at a dinner party in Cambridge, Massachusetts. To introduce me to her colleagues, Harvard Professor Martha Minow asked me which of the University's scholars I would like to invite to my ideal dinner. As a newly minted professor, it took me a moment to realize this was not an interview question, but her characteristically generous attempt to construct a guest list. I asked for Larry Tribe and Helen Vendler. I had been lucky enough to take a seminar on modern poetry with Vendler as an undergraduate at Harvard. But neither Vendler nor I had met Tribe before.

At one point in the evening, someone mentioned Vendler's book on the odes of John Keats.¹ Tribe mused aloud about who John Keats might have grown up to be if he had lived past the age of twenty-six. (This off-hand reference to how old Keats was when he died was my first experience of Tribe's intellectual range and photographic memory.) "I think he would have grown up to be James Merrill," Vendler replied. I saw Tribe look up at her as she issued this extraordinary pronouncement. James Merrill, after all, was still alive. I thought each recognized a kindred spirit. She was forging the literary canon as he was forging the legal one. I felt I was in the presence of greatness.

Ten years later, that feeling has ripened into certainty. I am honored and humbled to have this chance to discuss some aspect of Tribe's achievement in constitutional law. Fortunately, Tribe has done foundational work on the relationship between liberty and equality, a relationship that is on the front part of my brain these days. Moreover, he has elaborated this relationship through his tireless advocacy of gay rights, of which I, as a gay man, have been a direct beneficiary. My purpose in this essay is to show how Tribe has theorized liberty and equality in this context, and to provide a new defense of that theory.

For many years, Tribe has argued that liberty and equality intertwine to form a hybrid claim that he has recently branded the "double helix."² I will call this hybrid claim "dignity," as Tribe sometimes does himself.³ As the "double helix" image suggests, Tribe believes liberty and equality to be co-equal and interdependent values.⁴ In his academic writing, Tribe generally gives the impression that it does not much

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1. Helen Vendler, *The Odes of John Keats* (Harvard U. Press 1983).

2. Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893, 1898 (2004).

3. *Id.*

4. *See id.*

matter whether the Court protects an individual's dignity by foregrounding its liberty aspect or its equality aspect.⁵ But in his litigation in the gay-rights context, Tribe has consistently led with liberty. I defend that litigator's intuition here.

The natural starting point for a summary of Tribe's contributions to gay rights is *Bowers v. Hardwick*.⁶ According to plaintiff Michael Hardwick's account,⁷ the case arose when a police officer named K.R. Torick made Hardwick the target of an anti-gay vendetta.⁸ Hardwick worked as a bartender at a gay bar, an occupation which, in Atlanta in the 1980s, effectively "outed" him as a gay man.⁹ When Hardwick threw out a bottle of beer into a trash can outside his bar, Torick ticketed him for drinking in public.¹⁰ Due to a reasonable misreading of the ticket, Hardwick missed his hearing.¹¹ Two hours after he was due in court, Torick was at Hardwick's house with a warrant for his arrest.¹² Hardwick paid a fifty-dollar fine, thinking this would end the matter.¹³ But about a month later, Torick returned to Hardwick's home with the same warrant.¹⁴ He was admitted into the house by a houseguest and entered Michael Hardwick's bedroom.¹⁵ He discovered Hardwick having oral sex with another man and arrested him for violating Georgia's sodomy statute.¹⁶

When Tribe agreed to argue *Bowers* in the Supreme Court, he had to decide whether to foreground liberty or equality.¹⁷ Another sodomy case, *Baker v. Wade*,¹⁸ was winding its way up the federal courts. Tribe had to determine whether to move to consolidate *Baker* with *Bowers*. The primary difference between the cases was that *Baker*'s sodomy statute prohibited only same-sex sodomy,¹⁹ while *Bowers*'s sodomy statute prohibited both same-sex and cross-sex sodomy.²⁰ A consolidation of the cases would squarely present the equality challenge. Arguing *Bowers* alone would press the Court to focus on the liberty challenge.

In an inspired move, Tribe decided to argue *Bowers* by itself. The Georgia statute stated that "[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another"

5. See e.g. *id.*

6. 478 U.S. 186 (1986). To my knowledge, no one has documented all of Tribe's contributions to gay rights, and I would welcome an essay that did so in a more comprehensive manner than I am able to do here.

7. See Peter Irons, *The Courage of Their Convictions* 392–403 (Free Press 1988) (discussing first-person interviews with various Supreme Court plaintiffs, including the first-person account proffered by Michael Hardwick).

8. See *id.* at 394.

9. *Id.*

10. *Id.*

11. *Id.*

12. Irons, *supra* n. 7, at 394.

13. *Id.*

14. *Id.* at 395.

15. *Id.*

16. *Id.* at 395–96 (referring to Ga. Code Ann. § 16-6-2 (1984)).

17. See *Bowers*, 478 U.S. at 193–94.

18. 553 F. Supp. 1121 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985) (en banc), *cert. denied*, 478 U.S. 1022 (1986).

19. Tex. Penal Code Ann. § 21.06(a) (2003) ("A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.").

20. Ga. Code Ann. § 16-6-2.

and that “[a] person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years.”²¹ Under the statute, a heterosexual married couple engaged in oral sex in their bedroom could be arrested for sodomy and, if convicted, imprisoned for up to two decades.²² The sodomy statute invaded the privacy of every adult in Georgia.

During oral argument, the state tried to rewrite the statute.²³ Michael J. Hobbs, the Senior Assistant Attorney General of Georgia, cast the Georgia statute as proscribing only same-sex sodomy.²⁴ In the first line of his argument, he framed the question as “whether or not there is a fundamental right under the Constitution of the United States to engage in consensual private homosexual sodomy.”²⁵ Over the course of his argument, Hobbs mentioned the word “homosexual” and its variants no less than eight times.²⁶

Of course, “oral sex” in the statute was no more “homosexual sex” than “oral argument” in the Supreme Court Rules was “homosexual argument.” Yet while Hobbs misread the statute, he did not misread the Court. He realized that the Justices wanted reassurance that the statute had nothing to do with them. When asked whether the statute had ever been applied to a married couple, Hobbs stated that it had not.²⁷ Questioned if it *could* be applied to a married couple, he responded that it could not, citing the 1965 case of *Griswold v. Connecticut*.²⁸ *Griswold* had indeed secured the right to use contraception only for married couples.²⁹ But in 1972, *Eisenstadt v. Baird*³⁰ extended that protection to unmarried couples.³¹ In *Eisenstadt*, the Court pivoted away from the relational and zonal conceptions of privacy embodied in the “marital bedroom[],”³² and toward the decisional conception of privacy embodied in the “right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”³³ For Hobbs to cite *Griswold* without citing (much less distinguishing) *Eisenstadt* was either ingenuous or disingenuous.

In contrast to Hobbs, Tribe challenged the Georgia statute before the Court, rather than the Texas statute he had kept off the Court’s docket. Tribe opened with the observation that “[t]his case is about the limits of governmental power.”³⁴ He mentioned

21. *Id.*

22. *See id.*

23. Oral Argument Transcr. at **1–16, *Bowers*, 478 U.S. 186.

24. *Id.* at *1.

25. *Id.*

26. *See id.* at *1, *3, *5, *7, *9, *10, *14.

27. *Id.* at *1.

28. Oral Argument Transcr. at **5–6, *Bowers*, 478 U.S. 186 (citing *Griswold v. Conn.*, 381 U.S. 479 (1965)).

29. *Griswold*, 381 U.S. 479.

30. 405 U.S. 438 (1972).

31. *Id.*

32. *Griswold*, 381 U.S. at 485.

33. *Eisenstadt*, 405 U.S. at 453. For an analysis of the relational, spatial, and decisional conceptions of privacy, see Kendall Thomas, *Beyond the Privacy Principle*, 92 Colum. L. Rev. 1431 (1992).

34. Oral Argument Transcr. at *15, *Bowers*, 478 U.S. 186.

the word “homosexual” only once, and not in the context of describing the statute.³⁵ He kept steadily visible that the statute violated the liberty rights of straights and gays alike.³⁶ He observed that “The power invoked here . . . is the power to dictate in the most intimate and, indeed, I must say, embarrassing detail how *every* adult, married or unmarried, in *every* bedroom in Georgia will behave in the closest and most intimate personal association with another adult.”³⁷

The transcript makes good reading. Tribe’s nimbleness (his immediate and personalized responses to the Justices), his integrity (his statement that he could not state with any certainty where the physical zone of privacy ended), his wit (his arch statement about Justice Harlan), and his magisterial command of the law (his every other sentence) are all on display. As his client Michael Hardwick stated: “I’ve never seen any person more in control of his senses than he was. When he got done, everyone was very much pre-victory. They were *sure* I would win.”³⁸

That certainty was misplaced. On June 30, 1986, a bare majority of the Court upheld the Georgia statute.³⁹ Writing for the Court, Justice Byron White accepted the state’s argument that this case was about “homosexual sodomy.”⁴⁰ Both Justice Stevens’s acid dissent⁴¹ and subsequent academic commentary⁴² have pointed out the illogic of reading homosexuality into the statute. But once that move was made, the majority could make quick work of the constitutional claim. The Court stated that its prior precedents in this area had to do with “family, marriage, or procreation.”⁴³ It found that the claim that homosexual sodomy should be protected alongside those other substantive due process rights was, “at best, facetious.”⁴⁴

Tribe made one mistake in *Bowers*. He assumed the statute, which threatened straights and gays alike, would draw the Justices and Michael Hardwick together. But many Justices seemed to take umbrage at the idea that heterosexual relationships could have anything to do with homosexual ones. Tribe’s error was to assume that the Justices possessed his own capacity for empathy. But as Hardwick himself understood, Tribe was more unique than rare in this regard. In describing his immediate reaction to the opinion, Hardwick offered two telling sentences about his lawyer: “I called Laurence Tribe. I think he was more devastated than I was.”⁴⁵

On October 18, 1990, Justice Powell, who was the swing vote in the 5–4 opinion in *Bowers*, admitted error.⁴⁶ While speaking at the New York University School of Law,

35. *Id.* at *39.

36. *Id.* at **15–16, 30–33.

37. *Id.* at **15–16 (emphasis added).

38. Irons, *supra* n. 7, at 399.

39. *Bowers*, 478 U.S. 186.

40. *See id.* at 191 (“[R]espondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.”).

41. *Id.* at 215–20 (Stevens, Brennan, & Marshall, JJ., dissenting).

42. *See e.g.* Janet E. Halley, *Reasoning about Sodomy: Act and Identity in and after Bowers v. Hardwick*, 79 Va. L. Rev. 1721 (1993).

43. *Bowers*, 478 U.S. at 191.

44. *Id.* at 194.

45. Irons, *supra* n. 7, at 400.

46. John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.* 530 (Charles Scribner’s Sons 1994).

he was asked to reconcile his opinions in *Roe v. Wade*⁴⁷ and *Bowers*.⁴⁸ He answered that he had probably made a mistake in *Bowers*.⁴⁹ When a reporter called him to confirm this statement, he stood his ground. “When I had the opportunity to reread the opinions a few months later,” he said, “I thought the dissent had the better of the arguments.”⁵⁰

As described in John Jeffries’s biography of Justice Powell, Tribe responded with generosity. “I think it’s an admirable thing,” Tribe said to the *National Law Journal*, “All of us make mistakes, and not all of us are willing to admit them.”⁵¹ Tribe also sent Powell a missive on this topic: “Should you be willing to reply to this letter, my wife and I would count your response among our most cherished mementos.”⁵² Powell did not rise to the occasion. “I had forgotten that you argued *Bowers*,” he answered in a letter dated November 20, 1990.⁵³ “I did think the case was frivolous as the Georgia statute had not been enforced since 1935. The Court should not have granted *certiorari*.”⁵⁴ Hardwick died of AIDS seven months later, at the age of thirty-seven.⁵⁵

Tribe’s next major contribution to gay rights was in *Romer v. Evans*,⁵⁶ where he filed an amicus brief for a group of constitutional law professors.⁵⁷ At issue in *Romer* was an amendment to the Colorado state constitution:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.⁵⁸

The Caption of the Amendment put it more crisply: “No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation.”⁵⁹ The Amendment prohibited the state or any subdivision of the state from enacting any legal protections for gay people.⁶⁰

Tribe’s *Romer* brief eschewed the two most obvious equal protection challenges to Amendment 2. The brief did not argue that sexual orientation was a suspect classification worthy of heightened scrutiny. Nor did it argue, as the Supreme Court of Colorado had found below,⁶¹ that Amendment 2 violated the “rights” strand of the Equal

47. 410 U.S. 113 (1973).

48. 478 U.S. 186.

49. Jeffries, *supra* n. 46, at 530.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. Jeffries, *supra* n. 46, at 530.

55. Joyce Murdock & Deb Price, *Courting Justice: Gay Men and Lesbians v. The Supreme Court* 344 (Basic Bks. 2001).

56. 517 U.S. 620 (1996).

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

58. Colo. Const. art. II, § 30b.

59. *Id.*

60. *See id.*

61. *Evans v. Romer*, 854 P.2d 1270, 1276–86 (Colo. 1993).

Protection Clause.⁶² The rejection was self-conscious. The brief stated that Amendment 2 “involves a prior and more basic question” than “its impact on fundamental rights or its use of suspect classifications.”⁶³

That “prior and more basic question” was whether a state could “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, however invidious and unwarranted[.]”⁶⁴ So posed, the question answered itself—a state could not make a group of individuals into literal outlaws. As the brief noted, “[o]utlawry may be consistent with some regimes, but it is not consistent with the regime contemplated by the Fourteenth Amendment.”⁶⁵

Unlike his *Bowers* argument, Tribe’s *Romer* argument was doctrinally based in the Equal Protection Clause. It may seem odd then, for me to say he “led with liberty” in *Romer*. But if we look beyond the doctrinal categories to the conceptual ones, the matter becomes clear. Consider the two arguments available to Tribe at the time he took *Bowers*:

Equality Claim: “Gays have the right to sexual intimacy because straights have it.”

Liberty Claim: “All individuals have the right to sexual intimacy.”

Now consider the two arguments on offer in *Romer*:

Equality Claim: “Gays must have protection because straights have it.”

Liberty Claim: “All individuals have the right not to be made outlaws.”

In both cases, Tribe focused on the liberty claim. Under his *Romer* analysis, it did not matter that Amendment 2 targeted gays. One could, for instance, substitute fishermen or firemen in for “gays” in Amendment 2, and the analysis would be the same, even though we do not think of fishermen or firemen as historically subordinated minorities.

The Supreme Court struck down Amendment 2 on May 20, 1996.⁶⁶ Justice Kennedy adopted much of Tribe’s argumentation in his majority opinion. He observed that Amendment 2 was “at once too narrow and too broad.”⁶⁷ It singled out “persons by a single trait and then denie[d] them protection across the board.”⁶⁸ Kennedy understood that the harm was tantamount to outlawry: “A State cannot so deem a class of persons a stranger to its laws.”⁶⁹ As my colleague Akhil Amar has pointed out, Kennedy’s analysis sounded in the Constitution’s guarantee that individuals not be subjected to bills of attainder.⁷⁰ But that guarantee, of course, is a liberty right held by us all, not an equality right asserted by a group.

The Court handed down *Romer* the year I graduated from Yale Law School. I had

62. *Id.* at 1276–86.

63. Br. of Laurence Tribe et al., as Amici Curiae in Support of Respts. at *3, *Romer*, 517 U.S. 620.

64. *Id.*

65. *Id.* at **10–11.

66. *Romer*, 517 U.S. 620.

67. *Id.* at 633.

68. *Id.*

69. *Id.* at 635.

70. Akhil Reed Amar, *Attainder and Amendment 2: Romer’s Rightness*, 95 Mich. L. Rev. 203, 208 (1996).

read *Bowers* repeatedly during law school. I found it an odd aspect of law that I would have to keep revisiting a text I reviled—I had not, after all, spent my undergraduate years as an English major returning to one terrible poem.⁷¹ To this day, *Bowers* is the only case whose citation—“478 U.S. 186 (1986)” —I know by heart, because it was the case that said that the Constitution did not protect me from being designated a criminal. *Romer* was, to put it mildly, a welcome antidote.

As so often happens, though, I only felt the full force of *Romer* through a later, seemingly unrelated event. Some years ago, the LGBT group at Yale Law School decided to rename itself “Outlaws.” I understood why—the alphabet soup of “LGBT” was already cumbersome, and more groups—individuals who self-identified as queer, or who chose not to label their sexuality, or who were questioning it, or who were intersexed—were on the horizon. The name “Outlaws” stressed what members retained in common—they were all law students who had to come out of their various closets. But I had a twinge of frustration when I heard of this name, because it seemed like an unself-conscious return to the status of outlawry that had only so recently been overcome. That was the first of many times Larry Tribe renovated the meaning of a word for me.

As we all know, the third and final (so far) act of Tribe’s crusade for gay rights was *Lawrence v. Texas*.⁷² In that 2003 case, the Supreme Court struck down a Texas sodomy statute (which was, incidentally, the statute at issue in *Baker*) and overruled *Bowers*.⁷³ Having internalized the lessons of *Romer*, Justice Anthony Kennedy wrote an extraordinary sentence: “Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”⁷⁴ In the first clause, Kennedy maintained that equality and liberty were interrelated. In the second, he maintained that the Court should—and would—emphasize the liberty aspect of the hybrid claim. In the most pragmatic sense, that emphasis was warranted by the fact that of the thirteen sodomy statutes still on the books in 2003, four were sex-specific,⁷⁵ while nine were not.⁷⁶ An equality analysis would invalidate only the four sex-specific statutes, while a liberty analysis would invalidate all thirteen.⁷⁷ In a curative turn, then, *Lawrence* read “homosexual” out of a sex-specific statute just as *Bowers* had read “homosexual” into a sex-neutral one.

Tribe did not argue *Lawrence*. But the animating genius of the liberty-based dignitary argument was his. One can trace the genealogy of that argument from his

71. See J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 Harv. L. Rev. 963, 976–77 (1998) (observing that legal canons, unlike many other canons, require us to read reviled texts).

72. 539 U.S. 558 (2003).

73. *Id.*

74. *Id.* at 575.

75. Kan. Stat. Ann. § 21-3505 (1995); Mo. Rev. Stat. § 566.09 (1999); Okla. Stat. tit. 21, § 886 (2002); Tex. Penal Code Ann. § 21.06.

76. Ala. Code § 13A-6-65 (West 2005); Fla. Stat. § 800.02 (2007); Idaho Code Ann. § 18-6605 (Lexis 2004); La. Stat. Ann. § 14:89 (2004); Miss. Code Ann. § 97-29-59 (Lexis 2006); N.C. Gen. Stat. § 14-177 (Lexis 2005); S.C. Code Ann. § 16-15-120 (2003); Utah Code Ann. § 76-5-403 (Lexis 2003); Va. Code Ann. § 18.2-361 (Lexis 2004).

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

initial argument in *Bowers*, to his brief in *Romer*, to his participation in the litigation effort in *Lawrence* itself. It was reported that Tribe was in the audience with tears in his eyes when Justice Kennedy read out the opinion.⁷⁸ I like to think of him sitting there, listening to arguments he made seventeen years earlier returned to him as the law of the land.

As Tribe has recognized in his post-*Lawrence* scholarship, Justice Kennedy's move in *Lawrence* is a hopeful one for progressives.⁷⁹ While Tribe insists on the hybrid nature of the dignitary claim, he seems agnostic in his scholarship about whether the Court should lead with liberty or equality.⁸⁰ As I have shown, however, Tribe has been anything but agnostic on this issue in his gay-rights litigation. I want to defend that litigator's intuition.

I am currently at work on a piece titled *The New Equal Protection*, in which I argue that a liberty-based dignity jurisprudence is, and should be, replacing traditional equality jurisprudence.⁸¹ The article argues that over the past few decades, the Court has closed down traditional equal protection jurisprudence in three ways—by closing the canon of heightened scrutiny classifications,⁸² by foreclosing disparate impact claims,⁸³ and by imposing greater constraints on Congress's section 5 power to enact civil-rights legislation.⁸⁴ I maintain that the Court has retreated from traditional equal protection jurisprudence because of a pluralism anxiety spawned by perceived and actual increases in the diversity of American society.⁸⁵ Faced with an increasing array of groups clamoring for its solicitude, the Court has become gun-shy about picking and choosing among groups.

Increasing pluralism is an irreversible trend in American society. If group-based protection under the equal protection guarantees of the Constitution were the only way to protect disempowered groups, the future of constitutional civil rights would be grim. Fortunately for progressives, squeezing the law is often like squeezing a balloon—the foreclosure of certain legal arguments has the effect of causing the Court's substantive commitments to erupt in a collateral area of doctrine. (Think, for instance of the foreclosure of the Privileges or Immunities Clause of the Fourteenth Amendment in the *Slaughterhouse Cases*,⁸⁶ which did not cause the Court to surrender its commitment to unenumerated rights, but simply to protect those rights under the Due Process Clause of the Fourteenth Amendment.) Even as the Court has closed one equal protection door

78. Morning Edition, *Analysis: Final Day of the Supreme Court Term* (NPR June 27, 2003) (radio broad., transcr. available in Westlaw, 2003 WL 16700913) (stating that Tribe had tears in his eyes as the opinion was read).

79. See Tribe, *supra* n. 2, at 1951.

80. *Id.* at 1943.

81. Kenji Yoshino, *The New Equal Protection* (forthcoming) (copy on file with author).

82. As I demonstrate, the Court has only accorded heightened scrutiny to five classifications—race, national origin, alienage, sex, and illegitimacy. *Id.* The last of these classifications to be granted heightened scrutiny was illegitimacy, in 1976. *Id.*

83. See e.g. *Personnel Administr. of Mass. v. Feeney*, 442 U.S. 256 (1979); *Wash. v. Davis*, 426 U.S. 229 (1976).

84. See e.g. *U.S. v. Morrison*, 529 U.S. 598 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

85. Yoshino, *supra* n. 81.

86. 83 U.S. 36 (1873).

after another, it has simultaneously expressed its commitment to dignitary values by pushing the liberty door further open.

Lawrence and *Tennessee v. Lane*⁸⁷ are two recent instances of this liberty-inflected dignity analysis. As noted, the *Lawrence* Court decided to vindicate the claims of gays through its substantive due process jurisprudence. In doing so, it struck the shackles of history from liberty jurisprudence, suggesting that liberty would no longer be defined with reference to rights⁸⁸ that were “deeply rooted in this Nation’s traditions and history.”⁸⁹ This important move paves the way for the recognition of other, hitherto unrecognized rights under the due process clause.

What *Lawrence* accomplished for gays with respect to section 1 of the Fourteenth Amendment, *Lane* accomplished for individuals with disabilities under section 5. The *Lane* Court considered whether Congress had the power to force the states to make their courthouses accessible to individuals in wheelchairs.⁹⁰ In answering in the affirmative, the Court did *not* hold that Congress could enact Title II pursuant to its power to enforce the equal protection guarantee for individuals with disabilities. That move had effectively been foreclosed by an earlier case.⁹¹ Instead, the Court stated that Congress could use its section 5 power to enforce the due process right of *all* individuals, disabled or not, from accessing the courts.⁹²

This focus on rights has permitted the Court to avoid the “too many groups” problem posed by the United States pluralism explosion. The Court’s recognition of rights like the right to sexual intimacy or the right to access the courts does not evoke pluralism anxiety because the rights are held by all. Of course, this focus on liberties raises slippery slope problems of its own—moving the Court from the “which groups?” slope to the “which rights?” slope. But for reasons I describe in the longer paper, the judiciary is much more institutionally competent to negotiate the rights-based slippery slope than it is to negotiate the group-based one.

Even this sketch of my argument should show that the institutional role of the judiciary in an age of explosive pluralism provides a strong normative justification for framing constitutional civil rights—where possible—as liberty-based dignitary claims. This vindicates Tribe’s decisions to frame *Bowers*, *Romer*, and *Lawrence* as he did. It also lights the way forward. It suggests, for instance, that same-sex marriage should be framed in the courts not as the right of gays to be equal to straights, but about the right of all individuals to marry the one person they love.⁹³

My argument about the “new equal protection” has already been criticized for leaving equality behind.⁹⁴ That objection is misplaced. My argument is not that we should move from equality *to* liberty, but rather that we should move from equality

87. 541 U.S. 509 (2004).

88. *Lawrence*, 539 U.S. at 571–72.

89. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

90. 541 U.S. at 530–31.

91. *Bd. of Trustees v. Garrett*, 531 U.S. 356 (2001).

92. *Lane*, 541 U.S. at 531–33.

93. See Tribe, *supra* n. 2, at 1950–51.

94. See Yoshino, *supra* n. 81.

toward liberty.⁹⁵ We should first recognize that liberty and equality are intertwined values, and then lead with liberty claims in the courts to take maximum advantage of their institutional competence. That, of course, does not mean that we cannot continue to lead with equality claims in other fora, such as the political branches or in grassroots activism. In fact, we *must* continue to do so. *Lawrence* and *Lane* would never have come before the Court if there had not been a gay-rights movement or a disability-rights movement.

This is the final, and most important lesson Tribe has taught me (so far). I have already mentioned that Tribe changed the meaning of the word “outlaw” for me. I could say the same of other words, like “equality,” “liberty,” and “dignity.” But he has burnished one word above all others, in part because I have come to associate it with all the others. That word is “tribe.”

In making the claim for dignity, Tribe has never argued that he could, or should, transcend group-based identity politics. To the contrary, his decades of advocacy show consistent fealty to a group. Knowing there is real evil in the world, we should not wish to spread our sympathies too broadly. To fight for gay rights is to join one tribe in a culture war against another.

At the same time, however, Tribe has always challenged himself, and us, to think about the exact nature of the group he is standing with and for, rather than taking existing categorical definitions for granted. We think we are fighting for gay rights, but then Tribe tells us we are fighting for the right of all individuals to have sexual privacy, to have intimacy, or to find love. We think we are fighting for the rights of animals, but Tribe shows us that the term “animals” is underspecified, given that we, as human beings, are also animals.⁹⁶ Tribe has used dignity and liberty as hammers to shatter many traditional notions of what a group is in American society. What remains in the aftermath is not the absence of all groups, but groups defined along different lines. Although Michael Hardwick was not a lawyer, he saw this long before I did: “I called Laurence Tribe. I think he was more devastated than I was.”⁹⁷ As Hardwick intuited, Tribe was not litigating the claim of some different, pre-defined, hated minority. He was litigating on his own behalf against a totalitarian statute that was just as obnoxious to him as it was to any gay person.

Progressives are in trouble in this country. The old ways of defining groups—race, national origin, religion, sex, class, orientation, disability, and citizenship—are increasingly under fire. In thinking about tribes in the twenty-first century, we need to focus on liberty and dignity claims—not because such claims will unify us completely, but because they will force us to identify across traditional group boundaries. The only state to have defeated a state constitutional amendment defining marriage as between one man and one woman was able to do so because heterosexual unmarried couples made common cause with gays.⁹⁸ We need to think about liberty-based tribes and dignity-

95. *Id.*

96. Laurence H. Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us about the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 *Animal L.* 1 (2001).

97. Irons, *supra* n. 7, at 400.

98. Monica Davey, *Liberals Find Rays of Hope on Ballot Measures*, 156 *N.Y. Times* P16 (Nov. 9, 2006).

based tribes that cut across the traditional equality-based tribes that have so colonized American civil-rights discourse.

More than any lawyer I know, except Harold Hongju Koh (and I would say this is a tie), Tribe has stepped up to the challenge of thinking about the nature of who we mean when we say “we.” The questions of tribe are among the deepest questions we can be called to answer. In answering them with such consistent courage and compassion, Tribe has filled his name with magic, and so we honor him.

In the fall of 2006, voters in Arizona rejected an amendment defining marriage in the state Constitution as between a man and a woman. This was “the first rejection in 28 statewide votes . . . since 1998.” Opponents of the state marriage amendment “had focused attention on what they said would be its effects on all unmarried couples, not just same-sex ones.” *Id.*

