

Tribe's Trajectory & LGBTQ Rights

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I'm not sure I'll ever live it down. I actually said—out loud, to his face, a full ten minutes into our very first conversation—“Holy smokes, *you're* Larry Tribe!” I was in Cambridge that day as a newly admitted student. Somehow, inexplicably (it's not that big of a campus), I got lost. Very lost. Fortunately, a passerby professor took mercy and steered me to his office. In a bid to regain my composure, and to seem like a plausible future law student, I jumped straight to explaining why I was there: I wanted to be a civil rights lawyer. To prove it, I recounted a paper I'd just delivered, entitled “Sodomy and the Supremes.” I brightly added that the hero of this tale—a certain Larry Tribe—must be a colleague of his. “Oh,” he said gently, “that's me.” To which I replied . . . well, you already know.

In my defense, “holy smokes” is a justified reaction to Laurence H. Tribe. By virtually any measure, he ranks among the greatest and most influential legal scholars and advocates in U.S. history.¹ He has written constitutions into existence.² He has advised world leaders on matters of historic import.³ And, in exploring the U.S. Constitution, he has mapped “constellations where the rest of us saw only a random collection of stars.”⁴

Among his towering achievements—perhaps first among them, in my (admittedly biased) view—stand Tribe's contributions to the early and continuing progress of LGBTQ rights in the

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¹ See generally Stephen Reinhardt, *Tribute to Professor Laurence Tribe*, 42 TULSA L. REV. 939 (2007).

² *Laurence H. Tribe*, HARV. L. SCH., <https://perma.cc/EE86-7VE4>.

³ See, e.g., Carrie Johnson, *Prominent Harvard Law Professor Joins Justice Department*, WASH. POST (Feb. 26, 2010), <https://perma.cc/MFY5-7GMV>.

⁴ Heather K. Gerken, *Larry and Lawrence*, 42 TULSA L. REV. 843, 850 (2007).

United States. The story of that struggle is vast. Its cast of characters numbers in the millions: people from all walks of life who reshaped society from the top down and the bottom up and the closet out. As Tribe is quick to emphasize, most who have fought for LGBTQ rights lacked the privilege and security he enjoyed in doing so; some were literally fighting for their lives, their safety, their homes, or their jobs, while many others fought for the most basic opportunities to flourish and form families. It would be mistaken and reductionist to address this history without emphasizing the critically important role that so many people, of all sexual orientations and gender identities, played in the story.

Yet there is no denying the special significance of Tribe's role in the legal campaign for LGBTQ civil rights. From the outset, this has been one of his main projects as a scholar and advocate. And a review of his writings reveals a fascinating tale. At least as early as 1978, Tribe intuitively grasped the profound connection between same-sex intimacy and the realization of personal identity.⁵ He also perceived that the Constitution protected gays and lesbians from laws that made their existence a crime. But he recognized that a decisive majority of the Supreme Court lacked such vision. This tension drove decades of generative and intensely strategic advocacy. Tribe reached new heights of brilliance in articulating principles designed to persuade a conservative Court to protect the rights of LGBTQ people.⁶

By design, however, these frameworks lacked something essential: a grounding in the integrity and humanity of LGBTQ identity, experience, and relationships. Even as Tribe's deep reservoir of empathy powered this constitutional project—and shone through in his relationships with LGBTQ friends and students—he kept it carefully closeted in his legal filings. There, he adhered to broad, universal claims about the meaning of free speech, privacy, dignity, and equality. At stake were the rights of *all* Americans, he insisted, not just LGBTQ people and their allies (whose presence and collective stake in the outcome were downplayed in service of litigation strategy). Only after substantial judicial and popular evolution did Tribe finally adopt a different approach,

⁵ See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 941–48 (1st ed. 1978).

⁶ Much of Tribe's work from the 1970s through the early 2000s was focused more specifically on the scourge of discrimination against gays and lesbians; his more recent work has spanned the spectrum of LGBTQ-rights issues. But it is fair to say that many of the principles he championed even earlier in his career reflected a vision of constitutional protection that anticipated major premises of modern LGBTQ-rights advocacy.

submitting an amicus brief in *Lawrence v. Texas*⁷ that spoke in far more particularized, meaningful ways about the rights of LGBTQ people—and the constitutional sin that rendered them outlaws. This brief hearkened back to Tribe's earliest exploration of the rights of "homosexuals." It also marked a pivot toward his pathmarking exploration of the liberty/equality dyad that would drive the case for marriage equality through *United States v. Windsor*⁸ and *Obergefell v. Hodges*.⁹

In this short Essay, I'll survey Tribe's fight for LGBTQ rights, drawing on his early writings and several interviews with him conducted in March and April 2021.

I. THE TREATISE

The publication of *American Constitutional Law (ACL)* in 1978 forever transformed the field. Written mostly at night—in boiler rooms and basements where Tribe burned through up to a dozen typewriters per night (he didn't know how to replace the ribbons)¹⁰—*ACL* offered a staggeringly brilliant, creative, and comprehensive synthesis of constitutional law. In short order, it became a steady guide and standard reference for judges and advocates worldwide.¹¹ When Tribe decided decades later against publishing the second half of the third edition of *ACL*, the ensuing outcry led Tribe to publicly explain himself to Justice Stephen Breyer; those letters were then published by the *Green Bag*.¹²

ACL covered all the standard subjects in constitutional law—and also some less traditional topics, including "Life Plan or Style: Sex Preferences."¹³ Written over objections and outrage from his research assistants, who warned that it could dent his credibility, § 15-13 of *ACL* offered a dazzling, distinctly modern defense of the rights of "homosexuals."¹⁴ Tribe opened by meticulously collecting cases that could support attacks on anti-sodomy laws.¹⁵ He also elegantly distinguished Supreme Court authorities that might be

⁷ 539 U.S. 558 (2003).

⁸ 570 U.S. 744 (2013).

⁹ 576 U.S. 644 (2015).

¹⁰ Telephone Interview with Laurence H. Tribe, Carl M. Loeb Univ. Professor Emeritus, Harvard Univ. (Mar. 16, 2021).

¹¹ See Reinhardt, *supra* note 1, at 941–43.

¹² See generally Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2D 291 (2005).

¹³ See TRIBE, *supra* note 5, at 941–48.

¹⁴ See *id.*

¹⁵ See *id.* at 941 n.3; see also *id.* at 941–44.

invoked against such constitutional challenges.¹⁶ He then explained (in language that clearly foreshadows *Lawrence*) why anti-sodomy laws fail scrutiny:

The argument that consenting homosexuals whose intimacies offend no one who does not seek offense should be protected from governmental intrusion . . . should ultimately prevail in light of the further and crucial fact that the conduct proscribed is *central to the personal identities of those singled out* by the state's law. This is so by any defensible standard of centrality, and by any defensible definition of personal identity.¹⁷

In a remarkable full-page footnote, Tribe doubled down on the broad implications of his position, explaining that “[h]omosexuals also seem eminently to satisfy criteria of ‘suspectness’ recently articulated by the Supreme Court.”¹⁸ Here, Tribe provided a thorough review of the scientific literature as it stood in 1978 to prove that homosexuality is innate and “bears no relationship to the individual’s ability to participate in and contribute to society.”¹⁹ He then proceeded to describe as “thoroughly discredited” the “myth that homosexuality carries with it an innate inability to perform fully in society.”²⁰ Finally, Tribe affirmed that voluntary same-sex intimacy is “for many . . . expressive of innermost traits of being” and worthy of constitutional protection.²¹

As Judge Stephen Reinhardt later remarked, Tribe “took up gay rights decades before even mainstream liberals did.”²² In 1978—and he tells me he was inspired by his teaching notes from the early 1970s—he called for heightened scrutiny of classifications based on sexual orientation and attacked anti-sodomy laws for suppressing the personhood and innermost being of homosexuals.²³ For good measure, he also criticized “invidious” discrimination by public agencies that refused to employ homosexuals due

¹⁶ See *id.* at 943.

¹⁷ *Id.* at 943–44 (emphasis added).

¹⁸ TRIBE, *supra* note 5, at 944 n.17.

¹⁹ *Id.* (quoting *Mathews v. Lucas*, 427 U.S. 495, 505 (1976)). Tribe recalls that Harvard Law Professor Alan Stone may have guided him in this research. Telephone Interview with Laurence H. Tribe, *supra* note 10.

²⁰ *Id.*

²¹ *Id.*

²² Reinhardt, *supra* note 1, at 946.

²³ See TRIBE, *supra* note 5, at 944–46.

to their “private sexual conduct.”²⁴ And in assessing counterarguments, he stated simply that history alone could not justify discrimination based on “sexual practices and preferences of adults in our society”: “[A]ny such doctrine would turn on its head the axiom of heightened judicial solicitude for despised groups and their characteristic activities.”²⁵

Tribe wasn't the first scholar to write about LGBTQ rights. But for a young scholar to do so in the 1970s—and to make such personal, empathetic, innovative arguments in a treatise held out as authoritative—was simply astonishing. So, what led him to it?

Tribe does not recall knowing any openly LGBTQ people at the time he wrote the first edition of *ACL*.²⁶ But he does remember viscerally recoiling from the “meanness” of classmates in high school who derided as “fairies” those they believed to be gay.²⁷ He also recalls reading *Death in Venice* by Thomas Mann and feeling anguished at the hero's disintegration and death over loving someone of the same sex.²⁸ More broadly, Tribe was fixated in the 1960s and 1970s on ensuring that the law protected a liberal vision of autonomy and self-formation within the limits of consent and respect for the rights of others. This led him to champion a robust conception of privacy, which he saw as a safeguard and precondition for self-expression; indeed, he had nearly been fired by Justice Potter Stewart for insubordination in 1967 as the Court considered *Katz v. United States*,²⁹ where Tribe (as a law clerk) prevailed on a majority to expand constitutional privacy

²⁴ *Id.* at 941 n.3.

²⁵ *Id.* at 941, 946.

²⁶ The discussion here is based on conversations I conducted with Tribe in March and April 2021. Telephone Interview with Laurence H. Tribe, *supra* note 10.

²⁷ Telephone Interview with Laurence H. Tribe, *supra* note 10.

²⁸ Tribe was struck by his sense that in Mann's telling, it was Tadzio's gender rather than his youth that doomed the hero, Gustave von Aschenbach, to unrequited love and endless despair. Telephone Interview with Laurence H. Tribe, Carl M. Loeb Univ. Professor Emeritus, Harvard Univ. (Mar. 23, 2021).

²⁹ 389 U.S. 347 (1967).

protections.³⁰ Tribe had also been inspired by *Stanley v. Georgia*,³¹ which held that the state could not criminalize private possession of pornography in the home—a holding that he saw as recognizing a special sphere where people can figure out who they are, what they care about, what turns them on, and whom they love.³² Finally, Tribe’s outlook was shaped by the landmark ruling in *Roe v. Wade*³³ and its implications for the sexual autonomy of women. It seemed obvious to him that freedom in sexual intimacy and activity are preconditions of personal autonomy and social equality, and he looked skeptically on governmental efforts to control personhood by restricting contraception or abortion or how and with whom people had sex (subject to familiar limitations grounded in consent and coercive power imbalances).³⁴

Beyond this focus on the self, Tribe recognized that the subordination of gay people as a class was a historic wrong—one he felt personally called to remedy.³⁵ I can’t help wondering if Tribe’s background explains that sense of duty. He was born to the Eastern European Jewish diaspora in Shanghai just months before Japan bombed Pearl Harbor.³⁶ During the war, his father (who was of Byelorussian origin and had become a U.S. citizen) was imprisoned by the Japanese government, leaving young Tribe in

³⁰ Peter Winn, *Katz and the Origins of the Reasonable Expectations of Privacy Test*, 40 MCGEORGE L. REV. 1, 3 n.14 (2009). Professor David Sklansky has since argued that “neither the shape that *Katz* took nor the ramifications it had can be fully understood without taking account of the history of homosexuality and its policing.” David Alan Sklansky, “*One Train May Hide Another*”: *Katz*, *Stonewall*, and the Secret Subtext of *Criminal Procedure*, 41 U.C. DAVIS L. REV. 875, 877 (2008). He highlights that a practical achievement of *Katz* was to restrict the common practice of spying on men in toilet stalls to catch homosexuals. *See id.* at 886–87. In our conversations, Tribe celebrated that result and praised Sklansky’s work. He noted that he does not recall any personal awareness (or any discussion at the Court) of homosexuality as a subtext for the standard announced in *Katz*, but he was certainly concerned with ensuring protection for a sphere of sexual privacy. Telephone Interview with Laurence H. Tribe, Carl M. Loeb Univ. Professor Emeritus, Harvard Univ. (Apr. 21, 2021).

³¹ 394 U.S. 557 (1969).

³² Tribe recalls that Justice Stewart’s authorship of *Stanley* made him Tribe’s top choice for a clerkship. Telephone Interview with Laurence H. Tribe, *supra* note 30.

³³ 410 U.S. 113 (1973).

³⁴ Telephone Interview with Laurence H. Tribe, Carl M. Loeb Univ. Professor Emeritus, Harvard Univ. (Apr. 23, 2021).

³⁵ *Id.*

³⁶ *See* Paras D. Bhayani, *A Humble Start on the Path to Stardom*, HARV. CRIMSON (Oct. 18, 2006), <https://perma.cc/BL4K-JQUP>.

his mother's care.³⁷ After the war, his family moved to San Francisco, where Tribe forged his American identity.³⁸ As Tribe later recognized, these childhood experiences gave him "a powerful dose of what tyranny means."³⁹ They also left him committed to the defense of human dignity, the refutation of arbitrary power, and the pursuit of a humane legal project grounded in empathy. These aspects of Tribe's development and personal morality perhaps illuminate his early appreciation that homosexuals can find sanctuary in the Constitution—which protects their right to seek love, meaning, and self-realization through intimacy.

Whatever led him there, Tribe had by 1978 arrived at a firm conviction that the Constitution protects same-sex intimacy and safeguards homosexuals from invidious discrimination. He had written that vision into his magnum opus, anchoring it in precedent, science, and a clear-eyed recognition of the humanity of gays and lesbians. And he had made clear his willingness to advocate—openly and proudly—for homosexual rights.

II. NGTF, BOWERS, AND ROMER

Following the publication of *ACL*, it was only a matter of time before the emergent legal wing of the gay-rights movement came calling. In 1984, Tribe served as Supreme Court counsel in *Board of Education v. The National Gay Task Force (NGTF)*⁴⁰. Two years later, he served as Supreme Court counsel in *Bowers v. Hardwick*.⁴¹ And ten years after *Bowers*, he wrote an amicus brief in *Romer v. Evans*⁴² that powerfully shaped the Court's opinion. To call these briefs brilliant and important would be an understatement. Yet, despite their contribution to the gay-rights movement, these filings say almost *nothing* about LGBTQ people, their experiences, or their unique stake in the outcome. In that respect, they reflect a sharp deviation from the empathetic approach to homosexual rights in *ACL*—and from Tribe's own account of why he took these cases in the first place. Faced with a hostile Court and a divided public, Tribe and his co-counsel (including Kathleen Sullivan and many other preeminent LGBTQ lawyers) deliberately framed their positions in broad, universal terms, shifting

³⁷ See *id.*

³⁸ See *id.*

³⁹ Jeffrey Toobin, *Supreme Sacrifice*, NEW YORKER 43, 46 (July 8, 1996).

⁴⁰ 470 U.S. 903 (1985) (per curiam).

⁴¹ 478 U.S. 186 (1986).

⁴² 517 U.S. 620 (1996).

the focus away from LGBTQ people and toward claims about the constitutional rights of all Americans.⁴³

A. *NGTF*: Freedom of Speech for Public School Teachers

Tribe first deployed this strategy in *NGTF*. There, Oklahoma City had passed a law that authorized the firing of any school teacher who “advocat[ed], . . . encourag[ed], or “promot[ed] public or private homosexual activity” in a manner that might “come to the attention of school children or school employees.”⁴⁴ *NGTF* sued on behalf of teachers who wished to publicly advocate for gay rights but feared they might be fired for that political speech. The Tenth Circuit agreed with *NGTF* that Oklahoma City’s law violated the First Amendment: it menaced a great deal of fully protected speech (specifically, political advocacy for gay rights that did not run afoul of *Brandenberg v. Ohio*⁴⁵); it was not reasonably subject to a narrowing construction; and it had real and substantial chilling effects.⁴⁶ After the Supreme Court noted probable jurisdiction in October 1984, *NGTF* hired Tribe and Sullivan to defend the Tenth Circuit’s well-reasoned decision.

In his brief—and again at oral argument—Tribe framed *NGTF* as a case about the right of (presumptively) heterosexual teachers to publicly express views on controversial issues (including homosexuality) without risking the loss of their jobs if they veered from state-defined orthodoxy.⁴⁷ Tribe emphasized that Oklahoma already authorized the firing of unfit or disruptive teachers, and that its new law existed solely to impose “a regime of fear” aimed at censoring one viewpoint on an active public debate.⁴⁸ “[T]he suppression of ideas,” Tribe wrote, was Oklahoma City’s “deliberate aim.”⁴⁹ Citing *Brandenberg*—and gesturing at laws that had banned expressing support for interracial marriage (before *Loving v. Virginia*⁵⁰) or abortion rights (before *Roe v.*

⁴³ Given that this essay is about Tribe and that he served as lead counsel on each of the filings that will be discussed, I focus principally on his contributions and strategic judgments. That said, he of course engaged throughout these cases in important partnerships with many other lawyers—especially Sullivan.

⁴⁴ See Nat’l Gay Task Force v. Bd. of Educ. (*NGTF*), 729 F.2d 1270, 1274 (10th Cir. 1984) (quoting OKLA. STAT. tit. 70, § 6-103.15 (repealed 1990)).

⁴⁵ 395 U.S. 444 (1969).

⁴⁶ See *NGTF*, 729 F.2d at 1274.

⁴⁷ See Brief for Appellee at 12–15, *NGTF*, 470 U.S. 903 (No. 83-2030).

⁴⁸ *Id.* at 7.

⁴⁹ *Id.* at 9.

⁵⁰ 388 U.S. 1 (1967).

Wade) or even female suffrage (before the Nineteenth Amendment)—Tribe attacked the claim that Oklahoma could ban abstract advocacy of conduct merely because it was criminal (as homosexuality was at that time).⁵¹ In his closest gesture toward the special stakes of the case for LGBTQ people, Tribe wrote, “The advocacy of activities one generation calls criminal may well be a vehicle for profound political and social change in the next.”⁵² Yet, even here, Tribe’s strategy was to reframe the case. It was not about limits on governmental power to condemn and subordinate homosexuality by banning the spread of pro-homosexual notions. Instead, it concerned a universal principle of free speech as applied to public school teachers.

In retrospect, *NGTF* should have been an easy case. But Tribe worried that its gay rights aspect would destabilize the controlling legal principles. He was right: with their judgment impaired by fear and loathing of homosexuality, the justices could not muster a majority opinion. Justice Lewis Powell was out sick and the rest of the Justices split four to four, affirming the Tenth Circuit’s decision by an evenly divided Court.⁵³ Like Judge James Barrett below—whose heated dissent described advocacy of “sodomy” as worthy of *less* protection than “advocacy of violence, sabotage and terrorism”⁵⁴—Chief Justice Warren Burger seemed personally scandalized by Tribe’s position at oral argument. As one of Tribe’s colleagues remarked, “I had a distinct feeling that those nine judges had never seen a ‘queer’ before and were offended at having us in the courtroom.”⁵⁵ Looking back on the case, Tribe recalls emerging with a strong sense that the Court was hostile to LGBTQ people and indifferent to their rights. His diagnosis: “a clear lack of empathy.”⁵⁶ This episode cemented his wariness of centering LGBTQ experiences (and the implications of rulings for that community) in cases at the Court.

⁵¹ Brief for Appellee at 18, *NGTF*, 470 U.S. 903 (No. 83-2030).

⁵² *Id.* at 18. Later in his brief (and in his introductory remarks at oral argument), Tribe quoted California Supreme Court Justice Matthew Tobriner’s observation that “[t]he aims of the struggle for homosexual rights . . . bear a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities.” *Id.* at 21 (quoting *Gay L. Students Ass’n v. Pac. Tel. & Tel.*, 595 P.2d 592, 610 (Cal. 1979)). Tobriner had long been a mentor of Tribe’s, and this citation therefore carried special significance to him.

⁵³ See *NGTF*, 470 U.S. at 903

⁵⁴ See *NGTF*, 729 F.2d at 1277 (Barrett, J., dissenting). Judge Barrett bears no relation to now-Justice Amy Coney Barrett.

⁵⁵ JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 257 (2001).

⁵⁶ Telephone Interview with Laurence H. Tribe, *supra* note 10.

B. *Bowers*: Associational Intimacy and Privacy at Home

Lessons from *NGTF* powerfully shaped Tribe's approach two years later when he and Sullivan were asked to represent Michael Hardwick, a young gay man from Georgia. Hardwick's case tested Georgia's prohibition of "sodomy," defined as "any sexual act involving the sex organs of one person and the mouth or anus of another."⁵⁷ At an early meeting with the litigation team, Tribe cautioned that "[w]e're trying to move a conservative court beyond its instincts."⁵⁸ He therefore disfavored arguments grounded in the Equal Protection Clause that would focus the Court on "gay sex."⁵⁹ The "only hope of prevailing," he thought, was "to shift the Court's gaze from the same-sex applications of the statute to its opposite-sex applications."⁶⁰ Of course, this strategy presented risks of its own. As Tribe later wrote:

I was far less sanguine than my client, who thought that his salvation lay in making common cause with straight men who enjoyed having oral sex with straight women, and who let himself imagine that "[a]ll you gotta do . . . is make 'em realize it affects them, too" instead of thinking "sodomy is . . . some crazy, unnatural act." What that fond hope failed to take into account was the danger that, by implicitly stressing the *similarity* between what I assume most of the Court's members do occasionally in their own bedrooms and what they imagine gays and lesbians do all the time, we might be offending those on the Court who found the very thought of same-sex sodomy repulsive.⁶¹

But even recognizing these dangers, Tribe concluded (and co-counsel agreed) that the only viable path "was to highlight the scary reach of Big Brother's gaze and of his long, accusing arm into the most private of places and most intimate of relationships—relationships whose physical details I thought it best to leave out of the picture altogether."⁶²

⁵⁷ GA. CODE ANN. § 16-6-2 (1984).

⁵⁸ MURDOCH & PRICE, *supra* note 55, at 285; *see also* WILLIAM R. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 238–41 (2008).

⁵⁹ *Id.* at 285, 287.

⁶⁰ Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1951–52 (2004).

⁶¹ *Id.* at 1952–53 (alterations and emphasis in original) (quoting Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1681 n.169 (1993)).

⁶² *Id.* at 1953.

Constructing a legal argument on those premises was no easy task. In a display of his singular brilliance and creativity, Tribe crafted a compelling brief grounded in the First, Third, Fourth, and Fourteenth Amendments. He then framed the dispute in sweeping terms:

At issue in this case is whether the State of Georgia may send its police into private bedrooms to arrest adults for engaging in consensual, noncommercial sexual acts, with no justification beyond the assertion that those acts are immoral. . . . The statute applies to all persons, whether married or single heterosexual or homosexual, and to all the described acts, even when conducted in private between consenting adults.⁶³

Through the rest of the brief, Tribe focused relentlessly on privacy rights in the home (echoing his fascination with *Stanley v. Georgia*) and precedent shielding associational intimacies (including *Griswold v. Connecticut*,⁶⁴ *Carey v. Population Services International*,⁶⁵ *Eisenstadt v. Baird*,⁶⁶ and *Roe v. Wade*). At stake, Tribe insisted, was the Court's rule "that special sensitivity is required where, as here, government would intrude into the realm where the intimacy of human relationships and the privacy of the home intersect."⁶⁷ Adhering to Tribe's strategic vision, and lessons from *NGTF*, the brief said almost nothing at all about same-sex intimacy or the rights or experiences of homosexuals. As Professor William N. Eskridge Jr. has rightly remarked, "You had to read that document very carefully to realize that Hardwick had actually been arrested for homosexual sodomy, and you would not know from it . . . that he was a gay man."⁶⁸

Tribe took a similar tack at oral argument. "This case," he intoned, "is about the limits of governmental 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."⁶⁹ He added later, "It is not a characteristic of governments devoted to liberty that they proclaim the unquestioned authority of big brother [to] dictate every

⁶³ Brief for Respondent at 1–2, *Bowers*, 478 U.S. 186 (No. 85-140).

⁶⁴ 381 U.S. 479 (1965).

⁶⁵ 431 U.S. 678 (1977).

⁶⁶ 405 U.S. 438 (1972).

⁶⁷ Brief for Respondent, *supra* note 63, at 16–17.

⁶⁸ ESKRIDGE, *supra* note 58, at 241.

⁶⁹ Transcript of Oral Argument at 17–18, *Bowers*, 478 U.S. 186 (No. 85-140).

detail of intimate life in the home.”⁷⁰ Whereas Georgia’s lawyer tried to rewrite the statute from the podium, treating it solely as a ban on same-sex intimacy, Tribe highlighted its application to every adult. And in responding to questions, he made clear that “[t]he principle that we champion is a principle of limited government, it is not a principle of a special catalogue of rights.”⁷¹

Tribe’s presentation was masterful. Hardwick later noted, “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.”⁷² Eskridge echoes that account of the oral argument: “From their perspective Tribe had answered every question, made no mistakes, and surely persuaded Powell (perhaps also O’Connor) to affirm the Eleventh Circuit.”⁷³

In truth, the situation was far more fluid than it appeared. Four justices were open to Tribe’s position: Justice William Brennan, Justice John Marshall, Justice Harry Blackmun, and Justice John Stevens. At conference, Justice Brennan followed Tribe in arguing that *Bowers* was not about homosexuality “but about privacy and consenting adults.”⁷⁴ Three other Justices, however, disagreed: Chief Justice Burger, Justice William Rehnquist, and Justice Byron White. So too, in the end, did Justice Sandra Day O’Connor. One of her clerks had tried to “bring her around” by describing *Bowers* “as a case that did not have to be understood as a gay case,” but later described a “disappointed sense that Tribe’s pitch had been too much of a gay-rights argument to persuade the staid O’Connor.”⁷⁵ (As should now be clear, I find that description of Tribe’s argument hard to credit as an explanation for Justice O’Connor’s vote, which most likely reflected her fairly conservative disposition and her general wariness upon joining the Court of expanding its substantive due process precedents.)

This left Justice Powell, who struggled mightily with the case. On the one hand, as confirmed by his contemporaneous notes, Georgia’s law struck him as flawed criminal justice policy: it was “almost never enforced” and “police have more important

⁷⁰ *Id.* at 35–36.

⁷¹ *Id.* at 36–37.

⁷² PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS* 399 (1988).

⁷³ ESKRIDGE, *supra* note 58, at 242.

⁷⁴ LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY* 150 (2005).

⁷⁵ MURDOCH & PRICE, *supra* note 55, at 292, 302.

responsibilities than snooping around trying to catch people in the act of sodomy.”⁷⁶ On the other hand, Powell thought “a good deal can be said” for criminalizing sodomy, which might undermine “the perpetuation of the human race” if it became “sufficiently widespread.”⁷⁷ More fundamentally, Powell knew almost nothing about gay people, and thus utterly failed to grasp the social meaning or broader implications of the case. He told Justice Blackmun, “I’ve never known a homosexual in my life”—even though he unknowingly had gay clerks in 1980, 1981, 1983, and 1984, and in fact had a gay clerk while deciding *Bowers*.⁷⁸ Indeed, he had asked this (closeted) clerk, “why don’t homosexuals have sex with women,” though that conversation proved short, awkward, and unilluminating.⁷⁹ Lacking insight or empathy, Powell defaulted to prejudice. He found it “repellant” and “insensitive” for Tribe to equate “home”—“one of the most beautiful words in the English language”—with “homosexual conduct.”⁸⁰ Powell’s biographer has since described his “emotional recoil from an argument that seemed to place homosexual sodomy on a par with the sexual intimacy between man and wife.”⁸¹

Ultimately, while Powell found it “tempting to accept the very narrow argument made by Professor Tribe,” he could not endorse Tribe’s privacy rationale.⁸² That was not the end of the road, though. Hewing to his instinct that the basic flaw in Georgia’s statute involved its criminal dimension, Powell (with support from his clerk Bill Stuntz, who later joined Tribe on the faculty at Harvard Law School) found his way to an Eighth Amendment theory.⁸³ At conference, he confessed “mixed emotions” but stated that “sodomy in the home should be decriminalized.”⁸⁴ The Court had previously held that states could not criminalize the status of being a drug addict or arrest alcoholics for drinking at home; the same principles, Powell explained, prevented states from criminalizing homosexuals. His reasoning was no model of clarity, but

⁷⁶ *Id.* at 294.

⁷⁷ *Id.*

⁷⁸ See MURDOCH & PRICE, *supra* note 55, at 23, 272–75; ESKRIDGE, *supra* note 58, at 237, 244.

⁷⁹ MURDOCH & PRICE, *supra* note 55, at 274.

⁸⁰ *Id.* at 295.

⁸¹ JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 515 (1994).

⁸² MURDOCH & PRICE, *supra* note 55, at 295.

⁸³ See ESKRIDGE, *supra* note 58, at 244. In addition, this discussion draws on my own conversations with Stuntz, for whom I served as a research assistant in the year preceding his untimely passing.

⁸⁴ ESKRIDGE, *supra* note 58, at 245.

the gist was that homosexuals were powerless to change their sexual orientation, were therefore (in a sense) addicted to sodomy, and should be left to act on that impulse alone in their homes.⁸⁵ As Justice Powell spoke, Justice Blackmun wrote in the margins of his conference notes, “Clerks! Can this position hold[?]”⁸⁶

No, it couldn’t. Under pressure from Chief Justice Burger, Justice Powell switched his vote less than week later. He wrote to his colleagues: “I did not agree that there is a substantive due process right to engage in conduct that for centuries has been recognized as deviant, and not in the best interest of preserving humanity.”⁸⁷ On this basis, he flipped the majority.

In the end, Justice White wrote a cruel, dismissive opinion that haunted the cause of LGBT equality in America for decades.⁸⁸ The Chief Justice penned a spiteful anti-gay concurrence;⁸⁹ Justice Powell added a toothless concurrence mentioning but not pursuing his Eighth Amendment angle;⁹⁰ and Justices Blackmun and Stevens each produced devastating dissents.⁹¹ Their dissents followed Tribe in highlighting that Hardwick’s claim did not depend upon his sexual orientation—but both went further and expressly rejected Georgia’s offensive, anti-gay justifications for the law.⁹² These dissents echoed through time and were cited by the Supreme Court in *Lawrence* and *Obergefell*.⁹³ Too late, they also came to persuade Justice Powell, who told a reporter after retiring: “When I had the opportunity to reread the opinions a few months later, I thought the [Justice Blackmun] dissent had the better of the arguments.”⁹⁴ He added in October 1990, “I think I probably made a mistake in that one.”⁹⁵ But even with the benefit of hindsight, Justice Powell remained blind to the magnitude of

⁸⁵ See MURDOCH & PRICE, *supra* note 55, at 305; ESKRIDGE, *supra* note 68, at 244.

⁸⁶ GREENHOUSE, *supra* note 74, at 150.

⁸⁷ MURDOCH & PRICE, *supra* note 55, at 314.

⁸⁸ See *Bowers*, 478 U.S. at 187–96.

⁸⁹ See *id.* at 196–97 (Burger, C.J., concurring).

⁹⁰ See *id.* at 197–98 (Powell, J., concurring).

⁹¹ See *id.* at 199–214 (Blackmun, J., dissenting); *id.* at 214–20 (Stevens, J., dissenting).

⁹² See *id.* at 199–200 (Blackmun, J., dissenting); *id.* at 216 (Stevens, J., dissenting).

⁹³ See *Lawrence*, 539 U.S. at 566 (first citing *Bowers*, 478 U.S. at 199–200 (Blackmun, J., dissenting); and then citing *id.* at 216 (Stevens, J., dissenting)); *Obergefell*, 576 U.S. at 678 (first citing *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting); and then citing *id.* at 214 (Stevens, J., dissenting)).

⁹⁴ ESKRIDGE, *supra* note 58, at 263.

⁹⁵ Ruth Marcus, *Powell Regrets Backing Sodomy Law*, WASH. POST (Oct. 26, 1990), <https://perma.cc/J8H9-HX4E>.

his error, describing *Bowers* as “not a major case.”⁹⁶ Later, in a letter to Tribe, Justice Powell wrote, “I did think the case was frivolous as the Georgia statute had not been enforced since 1935. The court should not have granted *certiorari*.”⁹⁷

Although Tribe knew that it would be difficult to persuade the Court, he was gutted by the result in *Bowers*. Hardwick remembers calling Tribe and finding him “more devastated than I was.”⁹⁸ Sullivan said the experience “burned a hole in Larry.”⁹⁹ In our own conversations, Tribe’s heartbreak shone through. By 1986, he had many more LGBTQ friends—and so the damage felt more real, more personal. *Bowers* was the stuff of totalitarian diktat; it was also a devastating and shockingly personal attack by our nation’s highest court on LGBTQ people. To this day, Tribe is taken aback by the Court’s stark failure to grasp the brutality and inhumanity of its decision in Michael Hardwick’s case.¹⁰⁰

Still, Tribe doubts that any other strategy could have succeeded—and it’s hard to disagree with that assessment. Nobody could have predicted Justice Powell’s improbable Eighth Amendment theory (which hadn’t been alleged in the complaint). Given what we now know, it seems clear that an equal protection argument urging heightened scrutiny would have been a nonstarter and would have focused the Court on aspects of the case that it was unwilling or unable to comprehend. And a strategy centered directly on the LGBTQ experience—or the personal significance of same-sex intimacy (adhering to Tribe’s work in *ACL*)—would have further alienated Justice Powell (who nearly voted the right way). Following *Bowers*, Tribe grew more convinced that only a sea change in American culture would bring the Court around. Until then, lawyers working in *Bowers*’s shadow would have to redouble their efforts to articulate universal principles in seeking to protect LGBTQ people from discrimination.

⁹⁶ MURDOCH & PRICE, *supra* note 55, at 339.

⁹⁷ *Id.* at 340.

⁹⁸ *Id.* at 331. Hardwick himself recalls, “I was totally stunned. I just cried . . . because to me it was frightening to think that in the year 1986 our Supreme Court, next to God, could make a decision that was more suitable to the mentality of the Spanish Inquisition.” *Id.* at 330–31.

⁹⁹ *Id.* at 331.

¹⁰⁰ Telephone Interview with Laurence H. Tribe, *supra* note 10.

C. *Romer*: A “Per Se” Violation of the Equal Protection Clause

One year after *Bowers* came down, Justice Powell announced his retirement and President Ronald Reagan nominated D.C. Circuit Judge Robert Bork to replace him. Appalled by the nominee’s interpretive methods and legal positions, Tribe did everything in his power to halt Judge Bork’s elevation.¹⁰¹ In the end, he and other opponents of the Bork nomination succeeded.¹⁰² Although Tribe did not spotlight LGBTQ-rights issues in his congressional testimony, he has emphasized to me that he had *Bowers* (and its hoped-for reversal) very much in mind.¹⁰³ When Reagan later nominated Ninth Circuit Judge Anthony M. Kennedy, Tribe supported Justice Kennedy’s elevation in no small part because he seemed open to protecting unenumerated rights and overturning *Bowers*. Tribe drew this lesson from then-Judge Kennedy’s opinion in *Beller v. Middendorf*,¹⁰⁴ which held that the constitutional right to privacy did not protect naval personnel from discharge for homosexual conduct.¹⁰⁵ Tribe saw the outcome in *Beller* as required by existing precedent but was comforted by then-Judge Kennedy’s reasoning and rhetoric, which repeatedly cited Tribe’s own analysis in *ACL* and suggested a more humane, open-minded jurisprudence than Bork’s haughty originalism.¹⁰⁶ In a confirmation fight that defined the future of civil rights at the Supreme Court, Tribe’s opposition to Judge Bork and support for Justice Kennedy helped forge the path to overturning his loss in *Bowers*.

¹⁰¹ Interview by Michael Kirk with Laurence Tribe, Professor, Harvard L. Sch. (January 29, 2019), <https://perma.cc/7YNM-AM2Q>.

¹⁰² *Id.*

¹⁰³ Judge Bork had made his hostility to LGBTQ rights, and his outlook on the issues later posed in *Bowers*, perfectly clear in *Dronenburg v. Zech*, 741 F.2d 1388, 1391 (D.C. Cir. 1984).

¹⁰⁴ 632 F.2d 788 (9th Cir. 1980).

¹⁰⁵ *See id.* at 807–12.

¹⁰⁶ *See id.* at 809 (citing TRIBE, *supra* note 5, § 15-13):

We recognize . . . that there is substantial academic comment which argues that the choice to engage in homosexual action is a personal decision entitled, at least in some instances, to recognition as a fundamental right and to full protection as an aspect of the individual’s right of privacy.

As Tribe later noted:

Kennedy’s approach to the Navy’s treatment of same-sex intimacy revealed an appreciation—even in a military setting where judicial deference is at its peak—for the complex and relational structure of the rights and liberties implicated by any government decision to disadvantage such behavior or to penalize the sexual proclivities it might be thought to indicate.

Tribe, *supra* note 60, at 1955 (emphasis omitted).

The Court took its first step down that path in *Romer*. Through a statewide referendum, Colorado had adopted Amendment 2 into its state constitution.¹⁰⁷ This amendment “prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect . . . homosexual persons or gays and lesbians.”¹⁰⁸ The Colorado Supreme Court blocked Amendment 2 because it violated the fundamental rights of gays and lesbians to participate in the political process.¹⁰⁹ When the U.S. Supreme Court granted review, the plaintiffs adhered to that process-based objection, arguing that “Amendment 2 deprives [gays and lesbians] of a right to participate equally in the political process and, therefore, must be subjected to strict scrutiny.”¹¹⁰

Tribe saw a different flaw in Amendment 2. The problem was not simply that it rendered gays and lesbians worse off in the state's political process without an adequate justification. Instead, the defect ran much deeper: Amendment 2 constituted a “*per se* violation of the Equal Protection Clause” because it absolutely “preclude[d], for a selected set of persons, even the possibility of protection under any state or local law from a whole category of harmful conduct, including some that is undeniably wrongful.”¹¹¹ This conclusion, Tribe emphasized, required “no benign or even neutral view” of “homosexual . . . orientation, conduct, practices or relationships.”¹¹² Indeed, the principle at stake had little to do with which particular class of persons was subjected to outlawry. In Tribe's telling, Amendment 2 “explicitly create[d], for selected persons, a unique hole in the state's fabric of existing and potential legal protections against [discrimination].”¹¹³ It therefore “provide[d] 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.’”¹¹⁴

¹⁰⁷ *Romer*, 517 U.S. at 623.

¹⁰⁸ *Id.* at 624.

¹⁰⁹ *Evans v. Romer*, 882 P.2d 1335, 1341–49 (Colo. 1994).

¹¹⁰ Brief for Respondents, *Romer*, 517 U.S. 620 (No. 94-1039), 1995 WL 17008447, at *13.

¹¹¹ Brief of Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip B. Kurland, & Kathleen M. Sullivan, as Amici Curiae in Support of Respondents at 2, *Romer*, 517 U.S. 620 (No. 94-1039).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

Thus, Tribe argued, the Court could resolve *Romer* simply by holding that a state violates the Equal Protection Clause

when it decrees that homosexuality, or indeed *any* identifying characteristic the state uses to select a person or class of persons from the population at large, may never be invoked as the basis of any claim of discrimination by such persons under any present or future law or regulation enacted by the state, its agencies, or its localities.¹¹⁵

As Professor Kenji Yoshino notes, Tribe stated his principle in universal terms—as “a liberty right held by us all, not an equality right asserted by a group.”¹¹⁶ Tribe savvily offered the Justices a theory that doomed Amendment 2 without asking them to consider their own feelings about LGBTQ people. He showed them a route to the right outcome that avoided potentially difficult, controversial questions about the constitutional status of LGBTQ rights claims in the aftermath of *Bowers*. In Yoshino’s framing, Tribe asked the Court to hold only that “[a]ll individuals have the right not to be made outlaws.”¹¹⁷ Even a judge unsympathetic to LGBTQ people could endorse that proposition.

Dean Heather Gerken was a law clerk when *Romer* was decided. She writes:

I remember [Tribe’s] 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 read it, as did just about every intellectually engaged law clerk in the building.¹¹⁸

The law clerks weren’t the only ones to read Tribe’s filing. At argument, Justice Kennedy led a devastating assault on Amendment 2, at times “sounding almost as if he were quoting Tribe’s brief.”¹¹⁹ And when Justice Kennedy issued the Court’s opinion seven months later, Tribe’s influence was undeniable:

It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our

¹¹⁵ *Id.* at 3 (emphasis in original).

¹¹⁶ Kenji Yoshino, *Tribe*, 42 TULSA L. REV. 961, 966 (2007).

¹¹⁷ *Id.*

¹¹⁸ Gerken, *supra* note 4, at 844 (emphasis omitted).

¹¹⁹ MURDOCH & PRICE, *supra* note 55, at 466.

own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities. Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.¹²⁰

But Justice Kennedy also took a decisive, significant step past Tribe's approach. Whereas Tribe had worked hard to frame a universal principle—adhering to his strategy from *NGTF* and *Bowers*—Justice Kennedy didn't stop there. Contemplating what Tribe had called Colorado's "per se" violation of the Equal Protection Clause, Justice Kennedy wrote that it "raise[d] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."¹²¹ Emphasizing that a bare desire to "harm a politically unpopular group cannot constitute a legitimate governmental interest," Kennedy recognized that Amendment 2 "inflicts on [gays and lesbians] . . . immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it."¹²² This part of *Romer* forcefully rejected an implicit, despicable premise of *Bowers*—that a mere desire to injure and subordinate gays and lesbians was a sufficient basis for official action.

This was a watershed moment in Supreme Court history. And it followed an equally extraordinary oral argument where Justices—for the first time ever—"talked publicly about gay people as ordinary folks who check out library books, eat in restaurants, hold jobs and might need police protection or kidney dialysis."¹²³ The sea change that Tribe hoped for had finally begun. A majority of the Court was prepared (or at least preparing) to recognize the humanity of the LGBTQ community. By invalidating Amendment 2 for treating them as outlaws, *Romer* itself invited LGBTQ people into our legal order, promising a measure

¹²⁰ *Romer*, 517 U.S. at 633–34 (quotation marks and citations omitted).

¹²¹ *Id.* at 634.

¹²² *Id.* at 634–35 (emphasis omitted) (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

¹²³ MURDOCH & PRICE, *supra* note 55, at 471.

of protection and offering a gesture of inclusion that marked *Bowers* for the dust bin. No longer would Tribe (and many other lawyers) feel forced to speak solely in a universal register. The Court had opened the door to a very different model of advocacy—one that centered aspects of LGBTQ experience, that proposed a vocabulary and conceptual framework for situating those experiences in our constitutional traditions, and that merged more universal legal principles with a recognition of the personal and particular.¹²⁴

III. LAWRENCE AND BEYOND

In June 2003, the Supreme Court announced its decision in *Lawrence v. Texas*. Writing for the Court, Justice Kennedy found that *Bowers* had severely misapprehended the liberty claim at issue, the history relevant to that claim, and the state of the law at home and abroad.¹²⁵ Given those and other errors, Justice Kennedy declared: “*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”¹²⁶ Tribe was in the audience as Justice Kennedy spoke those words, sitting with gay and lesbian friends, crying tears of joy.

Tribe did not represent the petitioner in *Lawrence*. As Dean Gerken suggests, however, “in some ways, Larry is *Lawrence’s* ghost writer.”¹²⁷ In a similar vein, Professor Yoshino writes that “the animating genius of the liberty-based dignitary argument was his. One can trace the genealogy of that argument from his initial argument in *Bowers*, to his brief in *Romer*, to his participation in the litigation effort in *Lawrence* itself.”¹²⁸

Lawrence had many parents—but Tribe is surely one of them. If anything, the story of Tribe’s contribution to *Lawrence* dates

¹²⁴ Obviously, I do not mean to suggest that these projects or these forms of advocacy were first initiated after *Romer*. Lawyers, activists, scholars, and many others—from within the LGBTQ community and among its allies and interlocutors—had spent decades developing a rich and diverse body of thought on these very questions (among many others). In some cases, those efforts were distilled into briefs and filed with courts long before *Romer*, especially in lower state and federal courts more open to LGBTQ-rights claims. What changed around *Romer*, in my estimation, is the Supreme Court’s openness to hearing a different form of advocacy—which, in turn, prompted further thought and reflection on how to speak to the Court.

¹²⁵ See *Lawrence*, 539 U.S. at 564–78.

¹²⁶ *Id.* at 578.

¹²⁷ Gerken, *supra* note 4, at 846.

¹²⁸ Yoshino, *supra* note 116, at 967–68.

back even earlier, to his *ACL* treatise from 1978. It's impossible to read *ACL* without feeling premonitions of *Lawrence*. Decades ahead of its time, it anticipates the level of generality maneuvers, the rejection of past practice as a warrant for continued discrimination, the framing of privacy and substantive due process principles, and (most strikingly) the recognition that same-sex intimacy and association are central to personal identity and autonomy in ways that evoke constitutional protection. And all this flows from a straightforward acknowledgement that "homosexuals" are people, that they deserve respect, and that they should be free to fulfill and honor their innermost selves.

As we've seen, however, Tribe largely submerged this empathic core of his *ACL* analysis when acting as an advocate. For decades, in his effort to persuade the Court to protect LGBTQ people, he pressed broad, universal claims—sounding mainly in liberty—about the rights of *all* Americans. That led him to see the general in the particular and to articulate inspired understandings of speech, privacy, and equality. Tribe was uniquely well suited to that task, given his encyclopedic knowledge of the law, the mathematical precision of his intellect, and the creative spark with which he illuminates hidden meaning. The result was a wondrously generative project of constitutional analysis that gave form and structure to principles at the heart of *Lawrence* and the civil rights movement that led there.

But it wasn't until *Lawrence* itself that Tribe (liberated by *Romer* and the cultural evolution surrounding it) married the empathy of his early work with richer understandings of LGBTQ experience and the formal brilliance of his legal analysis. Representing the ACLU, which wisely allowed him broad authorial prerogatives, Tribe filed an amicus brief that reads very differently than his prior filings.¹²⁹ To be sure, aspects of this brief were resonant of his *Bowers* brief—including its focus on privacy rights and the home, its substantive due process analysis, and its exposition of associational intimacy.¹³⁰ Now, though, these arguments rested on more than first principles. They were bolstered by a confident, particularized engagement with LGBTQ experiences. In discussing intimate association, Tribe wrote: "Lesbians and gay men, no less than other individuals, center their lives around close-knit emotional bonds. As adults, they form intimate

¹²⁹ See generally Brief Amici Curiae of the American Civil Liberties Union and the ACLU in Texas in Support of Petitioner, *Lawrence*, 539 U.S. 558. (No. 02-102).

¹³⁰ See *id.* at 4–11.

relationships with one another, often have or adopt children, and interact with groups of relatives that make up their extended families.”¹³¹ Turning to history, Tribe reminded the Court:

[P]eople who love members of the same sex have hardly been invisible, in either 19th century, 20th century, or contemporary America. The very fact that people do not report the sexual activities of their neighbors and acquaintances and have not done so for a very long time underscores the degree to which our national culture has broadly embraced the belief that private consensual acts are ordinarily none of the government’s business.¹³²

Whereas Tribe’s *Bowers* brief elided the scourge of selective enforcement, here he blasted states for using sodomy laws “collaterally as justification for taking various discriminatory actions against gay people, from disrupting or destroying relationships between gay people and their children, to denying gay people employment, to discrediting them in public discourse.”¹³³

In this filing, we see a new stage of Tribe’s advocacy—one that centers the social meaning and lived experience of same-sex intimacy, that situates those understandings in historical perspective, and that proudly displays the humane commitments that long ago set him down this path. Freed by a cultural and judicial evolution that he had spent decades hastening, Tribe no longer had to fight with one hand tied behind his back. He could invoke liberty, and equality too. He could bring to bear all his analytical brilliance, all his powerful empathy, and all his commitment to ensuring that gays, lesbians, and so many others were free to discover and realize their authentic selves through intimate association. The result was a masterful amicus brief—and a striking premonition of Justice Kennedy’s ruling.

Just a few months after *Lawrence* was decided, Tribe penned an influential essay unpacking its analysis. In his telling, *Lawrence* framed “a narrative in which due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix.”¹³⁴ The Court’s substantive due process precedents, Tribe added, were never about a “set of specific acts,” but rather concerned “the

¹³¹ *Id.* at 8.

¹³² *Id.* at 20–21.

¹³³ *Id.* at 24.

¹³⁴ Tribe, *supra* note 60, at 1897–98.

relationships and self-governing commitments out of which those acts arise—the network of human connection over time that makes genuine freedom possible.”¹³⁵ Building from this foundation, Tribe saw that *Lawrence* aimed unerringly at same-sex marriage rights: “[I]t is only a question of time.”¹³⁶ Tribe therefore bent his efforts to developing the “double helix” model of liberty and equality, which he ultimately came to picture as interdependent and mutually reinforcing values in a project meant to advance human dignity.¹³⁷ Tribe’s vision of how these constitutional principles may interact served as a vital corrective to accounts that rigidly separated liberty- and equality-based arguments. It also helped to motivate a more sophisticated view of marriage equality and substantive due process—presaging in notable respects the Court’s approach in *Windsor* and *Obergefell*.¹³⁸

CONCLUSION

Following his decision to include “homosexual rights” in the first edition of *ACL*, Tribe has played an extraordinary role in the struggle for LGBTQ equality for nearly fifty years. He served as lead counsel in *NGTF* and *Bowers*. He filed a historic amicus brief in *Romer*. He helped mark the path to *Lawrence*. He articulated an account of liberty, equality, and dignity that shines powerful light on the marriage cases. And his engagement with LGBTQ rights persists to this very day. In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,¹³⁹ I represented him (along with other leading church-state scholars) as an amicus to address free exercise issues.¹⁴⁰ In *Bostock v. Clayton County*,¹⁴¹ he and I filed

¹³⁵ *Id.* at 1955 (emphasis omitted).

¹³⁶ *Id.* at 1945.

¹³⁷ See generally, e.g., LAURENCE H. TRIBE & JOSHUA MATZ, *UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION* (2014); Laurence H. Tribe & Joshua Matz, *An Ephemeral Moment: Minimalism, Equality, and Federalism in the Struggle for Same-Sex Marriage Rights*, 37 N.Y.U. REV. L. & SOC. CHANGE 199 (2013); Laurence H. Tribe & Joshua Matz, *The Constitutional Inevitability of Same-Sex Marriage*, 71 MD. L. REV. 471 (2012).

¹³⁸ See generally, e.g., Brief of Amici Curiae Professors Laurence H. Tribe & Michael C. Dorf in Support of Petitioners, *Obergefell*, 576 U.S. 644 (U.S. Nos. 14-566, 14-562, 14-571, 14-574). See also Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 22–23 (2015).

¹³⁹ 138 S. Ct. 1719 (2018).

¹⁴⁰ See generally Brief of Church-State Scholars as Amici Curiae in Support of Respondents, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (U.S. No. 16-111).

¹⁴¹ 140 S. Ct. 1731 (2020).

an amicus brief advancing textualist arguments on behalf of former government lawyers.¹⁴² As a scholar and an advocate—and as a friend and mentor to so many LGBTQ lawyers (including me)—Tribe remains actively committed to the continuing struggle for our constitutional rights.¹⁴³

If this were all that Tribe had accomplished in his career, *dayenu!*¹⁴⁴ But it's only the tip of the iceberg. Tribe authored the most compelling and creative doctrinal exegesis of U.S. constitutional law ever produced. He helped write the constitutions of South Africa, the Czech Republic, and the Marshall Islands. He has (thus far) argued before the U.S. Supreme Court thirty-six times. He has mentored students including future President Barack Obama, future Justice Elena Kagan, future representative Jamie Raskin, and future representative Adam Schiff. And he has devoted much of his career to making our society a more decent place. That's true across many fronts—women's rights, racial equality, veteran homelessness, the rights of criminal defendants and undocumented migrants, the treatment of exploited farmworkers, and animal rights, just to name a few. In addition, Tribe has repeatedly, heroically defended our promise of ordered liberty against arbitrary action and abuse of power. Faced with the sometimes-Kafkaesque tribulations of our legal system, he has championed fairness and justice. Tribe's legacy thus extends far beyond particular cases and causes. He has made invaluable contributions to the rule of law itself. He has improved life for many people in many ways. And he still has much more to teach us as we navigate these fraught times for U.S. constitutionalism.

¹⁴² See generally Brief of Walter Dellinger, Karen Dunn, Neal Katyal, Theodore B. Olson, & Seth Waxman as Amici Curiae in Support of the Employees, *Bostock*, 140 S. Ct. 1731 (U.S. Nos. 17-1618, 17-1623, 18-107).

¹⁴³ It has been a distinct honor and pleasure for me to collaborate in recent years with Tribe and my partner Robbie Kaplan, a heroine of the LGBTQ-rights movement and the lawyer who boldly brought the Defense of Marriage Act toppling down in *United States v. Windsor*. See generally ROBERTA A. KAPLAN, THEN COMES MARRIAGE: HOW TWO WOMEN FOUGHT FOR AND WON EQUAL DIGNITY FOR ALL (2015).

¹⁴⁴ *Dayenu* is a Hebrew phrase that roughly translates as "it would be enough."