

## TRIBUTE TO LAURENCE H. TRIBE

I have known Larry Tribe for almost 30 years—we met in Berkeley while I was on sabbatical there in the mid-70s and he was either delivering a paper at a workshop or just hanging out on Telegraph Avenue. But I cannot claim to be the sort of close friend of his that some other speakers are. Yet in one sense it is very easy for me to fashion a tribute to his remarkable career.

The late Erwin Griswold, former dean of Harvard Law School and former Solicitor General of the United States, said, “Professor Tribe has had a greater impact on constitutional law than anyone in the country’s history who has not been a member of the U.S. Supreme Court.” He might have added that Larry’s impact has been greater than many members of the Court. How did he do this? It wasn’t the old fashioned way of doing one or two things very well. No. It has been a full court press that could not have been conceived of a half century ago. Scholarship, teaching, participation in current public debates, appellate litigation in the Supreme Court and elsewhere, and continuing advice, to public interest organizations and commercial firms alike, on breaking questions of constitutional law, all are part of Larry’s armory and all have been executed with virtuoso skill. In short, my tribute to Professor Tribe could be rendered simply by footnoting Dean Griswold’s all-encompassing comment. But that would not do justice to the occasion because listeners and readers of what we say here expect to see beyond even the most awesome C.V. to glimpse the honoree as personally experienced by the speakers.

If this is so, I must start with the first edition of Larry’s monumental treatise on constitutional law.<sup>1</sup> I can still remember how depressed I was when I first read it. I had been teaching constitutional law for more than 20 years and had litigated dozens of constitutional cases. Yet it was obvious to me, in what used to be called a *scintilla juris*, that this book, in section after section, had gone far beyond my penetration of the subject. More than that, the chapters hung together in a remarkably integrated way. It was stunning. I don’t remember now whether I thought immediately of two books I have long admired that also brought together new ideas and synthesized them in a novel and creative fashion. One is Jacob Burckhardt’s *The Civilization of the Renaissance in Italy*,<sup>2</sup> and the other is

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1. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1st ed. 1978).

2. JACOB BURCKHARDT, *THE CIVILIZATION OF THE RENAISSANCE IN ITALY* (1937).

Thomas Kuhn's *The Structure of Scientific Revolutions*.<sup>3</sup> I admit that I didn't altogether understand those books; but I enjoyed them and, after all, they were not in my field. But Tribe was in my field, in its dead center, and I was pretty sure that at points I didn't really understand him either. Whatever painful conclusion one may draw from this fact, it was obvious to me then and is today that Tribe's treatise is a masterpiece that reordered complex materials just as Burkhardt and Kuhn did before him.

As the years passed, Larry and I intersected fairly often, most commonly when my duties at the American Civil Liberties Union led me to call on him for assistance or when I found it necessary to complain when he didn't follow the ACLU line. These relatively rare lapses on his part were not mortal sins, although in the closely knit civil liberties world there always has been more anger directed at an errant ally than a sworn enemy (we knew that our enemies were out there, but how could our friends desert us when we needed them?).

Larry Tribe marched to no other drum but his own. Independence could be his middle name. I remember the time I wrote him after he supported the position, most notably advanced by Professor Catherine McKinnon, that in some circumstances pornography could be censored because it had a causal relationship to violence against women, a position contrary to the ACLU's strong First Amendment policy on free expression. I berated him for his apostasy. Instead of telling me to get lost, he took the trouble to write at length and to observe that he considered himself open to new ideas, including the ideas of "radical feminism." Of course, Larry was politely suggesting that the ACLU should also be open to new ideas of civil liberty.

On two other notable occasions we were allies. The first, in 1987, was the nomination of Robert Bork to the Supreme Court. Larry provided some of the most impressive, indeed devastating, testimony against Bork, shredding his pretension to be viewed as a conservative along the lines of the admired Justice John Marshall Harlan. You might think that this was fun for Larry, a little bit like shooting fish (or rather *a* fish, though a large one) in a barrel. It may indeed have been fun, but Larry must have known that he was enraging the conservative wing of the Republican Party (that is, almost all of it) and that his just claim to a scholar's seat on the Su-

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3. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

preme Court thereafter would be much harder to assert. His testimony took rare courage as well as rare talent.

Another time we worked to the same end was the struggle in 1989 to defeat a constitutional amendment that would have authorized criminal prosecution of people who “desecrated” the American flag. The amendment was promoted nationwide by those who deplored the Supreme Court’s decision in *Texas v. Johnson*,<sup>4</sup> which had recently declared that the Texas flag desecration statute abridged free speech. This is a long story. But, in sum, Larry wrote and testified in favor of the constitutionality of a federal *statute* permitting such prosecutions that was introduced in Congress in order to ward off the proposed constitutional amendment. True believers, including the ACLU, were distressed by Larry’s position because a statute criminalizing flag desecration would have the same practical effect as a constitutional amendment. But the statute passed. Larry then studied the matter more carefully and concluded that, after all, the statute was unconstitutional, a position that the Supreme Court adopted the following year, aided I might add by a brilliant brief co-authored by Kathleen Sullivan on behalf of the ACLU. Larry’s more mature view of the federal statute again did not endear him to certain members of Congress, who had relied on his words in promoting it. Although the ACLU opposed the statute from the start on constitutional grounds, and although we were eventually proved correct under the First Amendment, Larry’s support of the statute helped get it passed and enabled public passions for a constitutional amendment to cool while the challenge to the statute was being litigated.

There are many other highlights in Larry’s extraordinary career, but I will mention only one. In 1981, when John Sexton was still a law clerk at the U.S. Supreme Court, I interviewed him for a position on the NYU Law School faculty. John impressed me favorably, but I still wanted some verification. Larry Tribe was listed as a reference on John’s resume, so I called him. Larry was enormously positive based on their work together on the constitutional law treatise. Then he said, almost as an afterthought, “moreover, someday John might make a good dean.” I don’t think Larry added “and also a good university president.” One sound prediction is enough for any conversation.

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4. 491 U.S. 397 (1989).

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It is a great privilege to join in these tributes to a titan of constitutional law, Laurence Tribe.

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