

## A TRIBUTE TO LARRY TRIBE

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*You don't need many heroes if you choose carefully.*

—John Hart Ely, 1980<sup>1</sup>

Today I would like to share a few thoughts about the extraordinary career of Larry Tribe. I want to identify four particular elements of that extraordinary career, and on each issue I will make particular reference to his treatise, *American Constitutional Law*.<sup>2</sup> The four things I would like to talk about are Professor Tribe's panoramic range, his lawyerly precision, his dazzling creativity, and his remarkable openness and generosity.

First, consider the panoramic scope of Professor Tribe's project. His treatise is an exceptional event in the history of American law. Let's take a century. It's been about thirty years since the publication of the first edition of *American Constitutional Law* in 1978.<sup>3</sup> Go back another seventy years prior to the publication of that book, and that takes us from 1908 to 2008, effectively the twentieth century.

In the seventy years before the publication of *American Constitutional Law*, it is difficult to think of any other book with the breadth of vision that Tribe's treatise embodies. Long before Tribe, the nineteenth century gave us classic treatises on constitutional law authored by Joseph Story<sup>4</sup> and Thomas Cooley.<sup>5</sup> The decades before 1978 saw important pieces of scholarship as well, some very broad, but none quite in the treatise tradition. I have in mind, for example, the work of Charles Warren<sup>6</sup> in the early twentieth century, and the entire corpus of Professor Corwin.<sup>7</sup> These may have been works of comparable breadth, but there are very, very few things in the twentieth century prior to Tribe's treatise that can compare to its vast range, trying to bring together in one scholarly project all of American constitutional law.

In the thirty years since Tribe's treatise, very few scholars have even attempted

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1. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard U. Press 1980) (quote at dedication).

2. Laurence H. Tribe, *American Constitutional Law* (Foundation Press 1st ed. 1978, 2d ed. 1988, 3d ed. 2000).

3. *Id.*

4. Joseph Story, *Commentaries on the Constitution of the United States* (Brown, Shattuck & Co. 1833).

5. Thomas Cooley, *The General Principles of Constitutional Law in the United States of America* (Little, Brown & Co. 1880); Thomas Cooley, *Constitutional Limitations* (Little, Brown & Co. 1868).

6. See e.g. Charles Warren, *The Making of the Constitution* (Little, Brown & Co. 1928); Charles Warren, *Congress, the Constitution and the Supreme Court* (Little, Brown & Co. 1925); Charles Warren, *The Supreme Court in United States History* (Little, Brown & Co. 1922).

7. See e.g. Edward S. Corwin, *The President: Office and Powers* (N.Y. U. Press 1948); Edward S. Corwin, *The Constitution and What it Means Today* (Princeton U. Press 1924).

anything remotely comparable. Professor Tribe has proved that it is possible, however, and so I think it might be fair to say we have him to thank for Erwin Chemerinsky's very fine efforts to carry on the treatise tradition.<sup>8</sup> Erwin has been part of these proceedings,<sup>9</sup> and of course he can speak for himself, but I think it is very difficult to imagine Chemerinsky being even possible without Tribe.

Outside the treatise tradition, vanishingly few projects in American constitutional law today even try to cover the entirety of the field. I can think of maybe a handful of other scholars in the late twentieth century or early twenty-first who have aspired to do anything quite so broad or so audacious. One thinks of Bruce Ackerman's effort in his unfolding three volume trilogy *We the People*, in which he seeks to encompass the entire constitutional experience, focusing outside of courts as well as on the judiciary.<sup>10</sup> One thinks of the magnificent work of David Currie, who first in his volumes on the Constitution in the Supreme Court<sup>11</sup> and then with his epic on the Constitution in Congress<sup>12</sup> has been part of a similar tradition. One thinks also of my great colleague Jed Rubenfeld, who has tried to offer an account of the entirety of American constitutional doctrine, although with much more economy and without the fine-grained detail of a treatise.<sup>13</sup> My own most recent work has tried to follow in this tradition of offering a broad account of the American constitutional experience. I focus less on the cases and more on the document itself, especially in *America's Constitution: A Biography*<sup>14</sup> and in a companion work-in-progress on the unwritten Constitution.

I am sure there are others out there, but what we should note is how few there are. Most constitutional scholars pick one area of constitutional law to develop in detail—perhaps they do two or three if they are extremely ambitious—but virtually no one tries to bring it all together, or has the audacity to even attempt such a project. Those of us in the last thirty years who have tried to do something broad have been inspired by Larry Tribe because before Tribe, there simply wasn't a modern model.

Take, for example, some of Tribe's predecessors at the Harvard Law School, towering figures like Henry Hart and Paul Freund. They gave us nothing like Tribe's treatise. To be sure, there were extraordinary works by these scholars. One thinks in particular of Hart's great contributions to the casebook tradition with Hart and Wechsler,<sup>15</sup> and with Hart and Sacks, the posthumously published materials on the legal process.<sup>16</sup> What Henry Hart did for the casebook, Larry Tribe has done for a different genre of legal scholarship, the treatise, and for what I have been calling more generally

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8. See e.g. Erwin Chemerinsky, *Federal Jurisdiction* (5th ed., Aspen 2007); Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (3d ed., Aspen 2006).

9. See Erwin Chemerinsky, *In Defense of Roe and Professor Tribe*, 42 *Tulsa L. Rev.* 833 (2007).

10. Bruce Ackerman, *We the People: Transformations* vol. 2 (Harvard U. Press 1998); Bruce Ackerman, *We the People: Foundations* vol. 1 (Harvard U. Press 1991).

11. David Currie, *The Constitution in the Supreme Court* vols. 1–2 (U. Chicago Press 1985, 1990).

12. David Currie, *The Constitution in Congress* vols. 1–5 (U. Chicago Press 1997–2001).

13. Jed Rubenfeld, *Revolution by Judiciary* (Harvard U. Press 2005).

14. Akhil Reed Amar, *America's Constitution: A Biography* (Random H. 2005).

15. Henry M. Hart, Jr. & Herbert Wechsler, *The Federal Courts and The Federal System* (N.Y. Found. Press 1953).

16. Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (tent. ed. 1958).

the “panoramic” book in American constitutional law.

Reviving and reinventing the treatise for modern constitutional law would be an amazing accomplishment in and of itself, but try combining it with remarkable lawyerly precision. Tribe achieves not merely a high level generality or abstraction, but a fine-grained, close, precise, careful, *lawyerly* mapping of the legal materials. Indeed, he combines extraordinary range, both in subject matter and method, with all sorts of very clever, creative mid-level and high-level readings of the legal material, as well as with exquisite attention to the nitty-gritty, the lawyerly detail of the project. One is hard pressed to think of anything that does all of this at the same time. Again, there is the extraordinary career of David Currie, who engaged in a comparable project.<sup>17</sup> But, just for example, take my great friend and teacher, Bruce Ackerman. His project has a comparable panoramic ambition,<sup>18</sup> but thus far hasn’t been nearly so attentive to the precise lawyerly details. Ackerman is not writing in a treatise tradition.

One can see some of this by looking at citation patterns. Tribe’s work has not only been influential for all of us scholars<sup>19</sup>—and I will have more to say about that later—but has also been utterly indispensable for lawyers and judges.<sup>20</sup> Hardly any scholarly projects out there have managed both to captivate and inspire the academy and to prove their worth in the world of practice. Again, one thinks perhaps of David Currie.<sup>21</sup> Not too many other projects have so succeeded in bringing together the three worlds of bench, bar, and academy.

The third thing that I would like to mention about Larry Tribe is his dazzling creativity. His is not merely a treatise that synthesizes and summarizes; it is not just a glorified nutshell; it is an amazing work of creativity, scholarship, imagination, and originality. In Tribe’s treatise there are, in my view, the seed crystals of at least one hundred, maybe five hundred, tenure articles. Just flip through the pages as you are reading it, and you will run across new insight after new insight, many of which actually did become tenure articles by people who picked up on an idea that Tribe had developed first. With all due respect to the many other treatise writers out there, I don’t think that there are very many other treatises—in constitutional law or outside of it—that have that kind of amazing generative force, that originality and creativity.

Let me give you two examples from my own work. At least twice I have borrowed from Tribe, I hope with attribution, and today very much with thanks and gratitude. The first thing I ever did as a law professor, twenty years ago, was a piece called “Of

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17. See Currie, *supra* n. 11; Currie, *supra* n. 12.

18. See Ackerman, *supra* n. 10.

19. A Westlaw search for “(Laurence L.)/2 Tribe” in the text of law reviews and legal journals (database “jlr”) returns 10,000 results, the maximum the system allows for any search.

20. For example, as a rough estimate, Tribe’s work has been cited by courts in a staggering 2,602 cases, including seventy citations by the United States Supreme Court alone. He has appeared in court or on the briefs in another 133 cases, thirty-nine before the United States Supreme Court. Moreover, these numbers surely understate the case, most likely by a substantial amount. Courts routinely cite authors of secondary sources by their last names only, and I have not attempted to separate the relevant set from all possible cases that cite “tribe.” To replicate these results—at least before the numbers grow as more courts turn to his magnificent scholarship—run Westlaw searches in the databases “allcases” and “sct.” For citations: op((Laurence L.) /2 Tribe). A second for citations: op(“Tribe, American”) %(Laurence “L. Tribe”). For court appearances: at((Laurence L.) /2 Tribe).

21. See Currie, *supra* n. 11; Currie, *supra* n. 12.

Sovereignty and Federalism.”<sup>22</sup> I tried to make the case that states can stand as a counterbalance to the federal government by helping individuals when the federal government acts tyrannically. In particular, I highlighted a passage from *The Federalist* No. 28, juxtaposing it with a quote from *The Federalist* No. 51 to flesh out this vision.<sup>23</sup> Since then, many other scholars have picked up on this combination of *The Federalist* Nos. 28 and 51.<sup>24</sup> References to both have even appeared together in several Supreme Court opinions on federalism.<sup>25</sup> But back when I was first thinking about this idea, I couldn’t find any references to *The Federalist* No. 28 in the legal literature. I found a nice discussion in the work of the brilliant political scientist Martin Diamond,<sup>26</sup> but in the legal literature, nothing at all—except for Larry Tribe’s treatise.

I am looking at my copy of the treatise right now. In the very first chapter of the treatise, Tribe maps out his whole project. On page three of the first edition, talking about the original Bill of Rights, Tribe says, “implicit in the refusal to extend the Bill of Rights against the State seems to have been the view that, just as the states were by and large adequately represented in the Congress, so individuals were likely for most purposes to be sufficiently represented in their own states”—and now, here is the key point—“whose obliteration or serious erosion would leave individuals exposed to oppression by private violence and national tyranny alike.”<sup>27</sup> In an accompanying footnote, Tribe quotes from *The Federalist* No. 28, as follows: “The state governments will in all possible contingencies afford complete security against invasions of the public liberty by the national authorities.”<sup>28</sup> Here we have, unique to legal scholarship at the time, the idea that the very existence of States can help protect us against national tyranny. So *en passant* Tribe drops this very interesting idea about a way to think about federalism. When I first read these words, as a junior professor, I wrote in the margin of my copy, “use in Fed article.” Thus, even as I was just beginning to experience Tribe’s treatise—as early as page three—the author was already giving me ideas that, frankly, helped get me tenure!

I could give you anywhere between one hundred and five hundred other examples in this thousand-page treatise of things that Tribe says that really weren’t in the literature clearly before he said them. These nuggets have either subsequently been developed by

22. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425 (1987).

23. See Amar, *supra* n. 22, at 1493–95 (“Hamilton’s point [in *The Federalist* No. 28], like Madison’s in *The Federalist* No. 51, is not simply that a federal system is a good thing because it diffuses power, but the more precise and intriguing claim that federalism will serve to ‘check’ ‘usurpations’ and ‘redress’ invasions of ‘the people’s’ legal ‘rights.’”).

24. A recent computer search revealed roughly two dozen articles that quoted in close proximity the key passages from *The Federalist* Nos. 28 and 51.

25. See e.g. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”) (citing *The Federalist* Nos. 28 and 51); *Printz v. U.S.*, 521 U.S. 898, 921–92 (1997) (similar).

26. See Martin Diamond, *The Federalists’ View of Federalism*, in *Essays in Federalism* 21, 53 (Inst. for Stud. in Federalism, Claremont Men’s College 1961); cf. Martin Diamond, *The Federalist on Federalism: “Neither a National nor a Federal Constitution, but a Composition of Both”*, 86 Yale L.J. 1273 (1977).

27. Tribe, *supra* n. 2, at 3.

28. *Id.* at 3 n. 6.

other scholars into tenure pieces, or they remain to be developed by future scholars when it's their turn to pick up this treatise.

I gave you an example of my own borrowing from Larry Tribe twenty years ago; now let me give you another from ten years ago. I wrote a piece about a case where Larry had been involved in the briefing, *Romer v. Evans*,<sup>29</sup> and I had the germ of a thought that there might be some links between the equal protection idea, as elaborated in that case, and the bill of attainder idea.<sup>30</sup> I first had the thought after I read Justice Kennedy's opinion for the Court,<sup>31</sup> and then I read the brief that Larry Tribe had worked on along with Kathleen Sullivan, John Ely, Gerald Gunther, and others,<sup>32</sup> and this idea became more clear to me. Then I looked at the extraordinary pages in the treatise on the Bill of Attainder Clause.<sup>33</sup> These pages were remarkably generative for me because there were so many original insights linking the attainder idea not just to equal protection, but also to other important constitutional values like due process, separation of powers and the rule of law, and free speech.<sup>34</sup>

Here we have an example of a clause that hasn't gotten very much attention, but what attention it has gotten has been by the best. John Ely wrote his *Yale Law Journal* note on the Attainder Clause,<sup>35</sup> recommending a more originalist approach. He later helped Chief Justice Earl Warren with a case called *Brown v. United States*,<sup>36</sup> which was really at the center of the *Romer* decision in some interesting ways.<sup>37</sup> One can also look at the great work of Zechariah Chafee, writing before Ely and Warren.<sup>38</sup> And then we have Tribe's masterful account of how this clause has lived in the case law—a clause that most of you in the room have never even heard of before, I suspect. You should take a look at the clause, if you want to try to figure out how seven simple words have within them the seeds of an entire constitution, a proto-constitution with many of the values of the rest of the constitution crystallized in a compact little sentence.<sup>39</sup> Separation-of-powers values, rule-of-law values, checks-and-balances values, First Amendment values, Due Process values, equality values—if you want to see how an entire constitutional world view hides within this one little clause, take a look at Larry Tribe's dazzling twenty-five pages on that clause and how it has been elaborated over the centuries by the Supreme Court.<sup>40</sup>

The fourth and final thing that I want to share with you today is Professor Tribe's remarkable openness and generosity. He has not only inspired other scholarly projects

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29. 517 U.S. 620 (1996).

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

31. *Romer*, 517 U.S. at 623–36.

32. Br. of Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip B. Kurland & Kathleen M. Sullivan as Amici Curiae Supporting Respts., *Romer*, 517 U.S. 620.

33. U.S. Const. art. I, § 9, cl. 3.

34. The relevant sections of the treatise are Tribe, *supra* note 2, at § 10-4 to § 10-6 (2d ed. 1988).

35. John Hart Ely, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 Yale L.J. 330 (1962).

36. 381 U.S. 437 (1965).

37. See Amar, *supra* n. 30, at 208–21, 228, 228 n. 106.

38. Zechariah Chafee, Jr., *Three Human Rights in the Constitution of 1787* 109–13 (U. Kansas Press 1956).

39. U.S. Const. art I, § 9, cl. 3 (“No Bill of Attainder . . . shall be passed.”).

40. Tribe, *supra* n. 2, at § 10-4 to § 10-6 (2d ed. 1988).

with his own ideas, but in this treatise, he has also borrowed from, built upon, cited to, and otherwise kindly recognized the work of other scholars. One can see how extraordinarily generous he is by looking at his citation practices, which reflect the way he reads very, very broadly, finds countless interesting ideas, and then brings them to the attention of his audience. He did this not just in the first edition of the treatise but also in subsequent editions, and not just in the treatise, but in everything he has touched. I can't tell you how many younger scholars have come up to me over the years and have told me stories about how after they published their first or second article, they got an unsolicited letter from Larry Tribe, who had read their piece, found it quite interesting, and had this thought or that reaction to it. The job of a scholar is to nurture the next generation, and Larry has done that in so many ways. He has inspired us by planting the seeds of countless tenure pieces that other scholars coming behind him have been able to harvest. He has read the work of younger scholars, encouraging them, writing to them, citing to them, coauthoring with them.

I know from personal experience how generous Larry is: We did an op ed together that was based in part on his favorable reaction to some things I had done on the Second Amendment.<sup>41</sup> He thought they were interesting, got in touch, and so we worked together.<sup>42</sup> I am not the only Yalie; another example is his coauthorship with my dear friend Neal Katyal.<sup>43</sup> More generally, of course, he has mentored or coauthored with countless students at the Harvard Law School, many of whom are now towering scholars in their own right, like Kathleen Sullivan<sup>44</sup> and Mike Dorf,<sup>45</sup> and many others who have gone on to extraordinarily distinguished careers in practice and in politics. There is probably no one in American constitutional law who has produced more protégés.

For a treatise to succeed, it must have a certain kind of openness. A celebrated treatise is something like a great coral reef with many important openings in it, creating an ecosystem where all sorts of other aquatic life can thrive and build on the framework provided. Tribe's has been just that kind of open source project.

Another kind of openness—political openness—has also been an important feature of Professor Tribe's career. He has not been one who restricts himself to consistently push one ideological point of view. For example, in the work Larry and I have done on the Second Amendment, we have been open to the possibility that perhaps the conservatives may have a bit of a point on this one.<sup>46</sup> Tribe, in the passage that I read to you earlier, was open to the idea that federalism need not be understood only as some

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41. See e.g. Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 17–19, 46–59, 147–48, 161, 216–23, 257–66 (Yale U. Press 1998); Akhil Reed Amar, *An(Other) Afterword on The Bill of Rights*, 87 Geo. L.J. 2347, 2360–62 (1999).

42. Laurence H. Tribe & Akhil Reed Amar, *Well-Regulated Militias, and More*, N.Y. Times A31 (Oct. 28, 1999).

43. Neal Kumar Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Constitutionality of the Military Tribunals*, 111 Yale L.J. 101 (2002).

44. Tribe and Sullivan have served as co-counsel for parties before the United States Supreme Court in *White v. Mass. Council of Constr. Workers*, 460 U.S. 204 (1983); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *Okla. Bd. of Educ. v. Natl. Gay Task Force*, 470 U.S. 159 (1985); *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Fisher v. City of Berkeley*, 475 U.S. 260 (1986); *Rust v. Sullivan*, 500 U.S. 173 (1991); and *Bush v. Gore I*, 531 U.S. 70 (2000).

45. Laurence H. Tribe & Michael C. Dorf, *On Reading the Constitution* (Harvard U. Press 1991).

46. See *supra* n. 42.

impermissible conservative or reactionary effort to undo racial progress.<sup>47</sup> The person who is now at the center of the Supreme Court, Justice Anthony Kennedy, has his seat in part because Larry Tribe was very open at an early point to the possibility that then-Judge Kennedy, though a Reagan Republican, would in fact be no Bork, and would make a superb Justice. Tribe was the one who said it first.<sup>48</sup> This willingness to engage people across the political spectrum is, frankly, not equally true of everyone in constitutional law. Some of them are, to my mind, too predictably liberal or too predictably conservative in their scholarship. Tribe's work is particularly interesting to me because every so often he says something that you might not have expected from a liberal, Harvard, Massachusetts Democrat.

So those are my four big themes: the panoramic range, the lawyerly precision, the dazzling creativity, and the remarkable openness and generosity. Now I want to say something on a more personal note. Larry, our mutual friend John Ely famously dedicated a book to Earl Warren and in that dedication said that "You don't need many heroes if you choose carefully."<sup>49</sup> Those are words to live by. For those of you out there who are beginning your careers as students or young academics or lawyers, it's not a bad idea at all to look out there and find a role model, a hero, and to study that person with particular care to try to figure out why that person speaks to you as he or she does. I actually don't have that many role models and heroes. I chose them carefully. Larry, you are one of them, and I am very grateful to you for your leadership, your role as a model for me—and not merely as a superb scholar, a dazzling lawyer, and an amazing mentor, but also as a human being.

Whenever we talk, I enjoy trading stories about how our families are doing, and about the rest of our lives. I think you have achieved a wonderful balance, one I have tried to emulate. Larry, you have already made an impact not merely on me, but on my children, as you know. So I will close by sharing with the rest of you a little story about my son, who is now eight years old. The third edition of Larry Tribe's treatise arrived in the Amar household very soon after another bundle named Vikram Paul Amar—not to be confused with his uncle and my sometime coauthor, Vikram David Amar. I brought Larry Tribe's treatise home with me, and the third edition is quite a weighty tome. My then six-month-old son must have been very curious watching his Dad pore over this book with such care, for as soon as his Dad got up and walked away, that inquisitive little boy, really no bigger than the book, crawled as best he could over to it and started opening it and turning the pages and looking at it. My wife had the presence of mind to snap a picture of the very little boy, absolutely captivated by the very big book. We sent a copy of that photo to Larry with a caption: "Amar (second edition) with Tribe (third edition)."

So Larry, I just want to end by saying that with your treatise, you have not only

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47. See *supra* n. 27.

48. See Linda Greenhouse, *While Examining Kennedy, Senators Look Back at Bork*, N.Y. Times (Dec. 20, 1987) ("The presence of Laurence H. Tribe, the liberal Harvard law professor, underscored the difference [in the confirmation hearings] as perhaps nothing else could have. He was the Judiciary Committee's star academic witness against Judge Bork. He testified in support of Judge Kennedy, calling the nominee capable of 'genuine judicial greatness.'").

49. Ely, *supra* n. 1.

had an amazing effect on me and my generation, but I am quite sure this book will also live on and on for the next century and beyond. You have already had an impact on my children. May you have the same sort of impact on my children's children and their children's children, unto the nth generation.





Amar (second edition) with Tribe (third edition).

