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Less than the Sum of its Parts


Reviewed by Charles F. Abernathy*

In *Return of the Secaucus Seven* and *The Big Chill*, film makers in early middle age examined college society of the late 1960s and early 1970s, wistfully approving its values and aspirations even as they demonstrated that those values could not survive intact in the 1980s. These movies about values erroneously lost and erroneously retained, about the choices made by a generation, are the best of contemporary nostalgic films.

Contemporary professors of constitutional law have been busy at a similar task. In the last five years, our best professors have produced a crop of books that reexamine the legitimacy of judicial review and constitutional lawmaking by courts. These books are also, in a sense, nostalgic works, treatises alluding to the Warren Court's values and the aspirations it engendered, values and aspirations that were undercut as the Burger Court refused to extend Warren-era precedent or, worse yet, retained precedent that seemed to cause new problems rather than alleviate old ones. These books relate distantly to *Marbury v. Madison* the way modern torts books relate to *Anonymous*. Though their topic is the ever-present one of judicial legitimacy, they have been shaped by the heat of only the last twenty-five years.

Laurence Tribe's *American Constitutional Law* offered the only substantial alternative, a brilliant one, to such nostalgic books. Because the others were so clearly shaped by current events, one suspected that even process-oriented authors had manipulated concerns about process in order to promote their own current social policies. Tribe, on the other hand, gave us a truly long-term view of constitutional law that saw the field not as a set of rules, but as a collection of modes of thought, some successful, some less so, but each with a discernible set of problems and attempted solutions that was influenced by the mode of thought itself. Tribe gave constitutional law what it had lacked since Cooley—structure. More precisely, he did not give constitutional law a structure so much as he disclosed its own inherent structure, thereby transcending all prior arguments about legitimacy, neutral principles, and nostalgia-laden social values.

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2. 5 U.S. (1 Cranch) 137 (1803).
3. Y.B. 6 Edw. 4, f. 7, pl. 18 (1466).
6. Tribe has retained this transcendent perspective in the first chapter of *Constitutional Choices*, declar-
Constitutional Choices, therefore, comes to an audience with high expectations. And that is, perhaps, why it is ultimately unsatisfying. From the author who has shown us the structure of constitutional law, a book urging us to believe that there are constitutional choices to be made is small potatoes. Of course there are constitutional choices to be made. What we need to know is how better to make these choices, but Tribe only offers examples of the choices he has made. If his secondary goal is to continue to persuade us that the legitimacy problem can still be transcended, he has not succeeded. The reader is likely to be more skeptical after reading Constitutional Choices than before.

I. A COLLECTION OF ESSAYS

Constitutional Choices is not a newly created treatise but a collection of essays on a diverse range of topics. Most were printed previously in serial publications, and the others, one suspects, arose from projects undertaken independently of one another over the last few years. Such reprintings may strike some as a waste of paper and purchasers' money, but, as The New Yorker Album of Drawings amply proves, additional insight is often gained from seeing parts brought together as a whole. But that is not the case here, for the whole of Tribe's new book is less than the sum of its parts.

Much of the failure of Tribe's book lies in the quality of the parts taken individually. The essays are not poor; they are simply like everyone else's essays. The introductory set starts off strongly enough. It repeats the powerful arguments that there are many more substantive norms in the Constitution than process-guaranteeing authors care to admit, and that even process-oriented solutions often only mask substantive decisions. When John Ely talks about "we" (whites/men) and "they" (blacks/women) and suspects that the democratic process has been corrupted when "we" put "them" at a disadvantage, he has made a disguised substantive decision about what groups are cognizable as "we" and "they"—or even, indeed, about what is the membership of the "we" and "they" groups.

Yet the first group of essays is convincing only in showing that the "Constitution tells us something." The remaining essays must carry the weight of defining or exemplifying what that something is, or else there is no vision to the book. But the author's two groups of essays, one on separation of powers, the other on individual rights, are unsatisfyingly ordinary and often only reportorial.

A. ESSAYS ON SEPARATION OF POWERS

With so many essays to describe, it is difficult for the reviewer to establish that his subject has not performed outstandingly. I could note that Tribe's essay on
"court-stripping" legislation, originally offered as congressional testimony in opposition to a flurry of bills limiting federal court jurisdiction, adds nothing to expositions already put forward in excellent law review articles which the author does not acknowledge. Similarly, the essay on standing, which reaches the wholly unremarkable conclusion that the Court has probably manipulated standing rules to achieve desired substantive results, is demonstrably secondary in its observations and much less interesting than the Brilmayer-Tushnet debate of a few years ago.

Two essays in particular show why this book fails to meet the reader's expectations. The essay on National League of Cities v. Usery, which discusses the principal case and its offspring, makes some interesting, though not earth-shaking, observations and, therefore, develops for us a fuller understanding of what the Court has been doing. Professor Tribe cannot be faulted for failing to foresee the likelihood that the Court would overrule such a recent decision. What bothers me is the unsophisticated reason that he gives for having thought National League of Cities would endure: "increasing conservatism and widespread concern for states' rights—and...the prospect of more [conservative] appointments to the Supreme Court." This is analysis that a first-year law student could make and ranks up there with such cartoon comments as "the Supreme Court always reads the election returns."

"Guam's Vanishing Bonds" is the one complete disappointment in this group.


11. See L. Tribe, supra note 6, at 113-14, 347 n.170.

12. See Warth v. Seldin, 422 U.S. 490, 520 (1975) (Brennan, J., dissenting) (majority's standing decision "can be explained only by an indefensible hostility to the claim on the merits"). In his discussion of City of Los Angeles v. Lyons, 461 U.S. 95 (1983), Tribe curiously labels the Court's alternative holding—denial of equitable relief because of an adequate remedy at law—as dictum. L. Tribe, supra note 6, at 102, 331 n.38. It is at least plausible that the standing rationale was the real dictum. See Curtis v. Loether, 415 U.S. 189, 192 n.6 (1974) (when both constitutional and nonconstitutional issues arise, constitutional issue preferred ground for decision only when "clearly settled"). Moreover, Tribe fails to discuss the most far-reaching aspects of the Court's decision to ground its judgment in constitutional law. First, it deferred the exercise of congressional power to change the result. See Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 64 (1976) (Brennan, J., dissenting on standing issue) (basing standing decision on constitutional grounds prevents Congress from rectifying situation). Second, it effectively extended the equity rule. Equity could often provide a remedy when damages were simply unavailable or inadequate at law, but by grounding its judgment in constitutional standing rules, the Court forecloses injunctive relief even when there is no damage remedy at law. Cf. Imbler v. Pachtman, 424 U.S. 409 (1976) (official immunity may prevent recovery of damages in § 1983 actions).


15. Tribe notes, for example, that a congressional requirement that state agencies merely consider a federal agenda of energy-related issues may intrude on state sovereignty much more than the Court conceded. Such a law not only allocates hearing resources but also may usurp governmental power at the very basic agenda level where it is decided what topics even merit governmental consideration. L. Tribe, supra note 6, at 125-31.


17. L. Tribe, supra note 6, at 137.
of essays, because it violates Tribe's own rule that the constitutionalist should be most skeptical when the result seems most obvious.\textsuperscript{18} In this essay, Tribe discusses the constitutionality of the Treasury's announcement that it would seek retroactive repeal of the tax-favored status of proposed bonds. Tribe considers the case an easy one, because the Executive clearly usurped congressional power by killing an otherwise lawful bond deal. After discussing the \textit{Steel Seizure Case},\textsuperscript{19} Tribe hastily concludes that the "power to execute laws does not include the power to make them."\textsuperscript{20} Yet since the President not only executes Congress' laws, but also has some independent constitutional authority of his own,\textsuperscript{21} including the Article II power to "recommend to [Congress] such Measures as he shall judge necessary and expedient,"\textsuperscript{22} I would have thought that something more than the quoted talismanic phrase should have been discussed. Are executive veto threats unconstitutional when they successfully scare Congress into inaction? Is a presidential threat to seek new legislation against abortion-clinic bombers unconstitutional if it successfully induces such persons to refrain from acts not currently punishable by federal law?

\textbf{B. ESSAYS ON INDIVIDUAL RIGHTS}

Tribe's second group of essays, covering topics related to individual rights, suffers the same shortcomings as his essays on separation of powers. The most consistent theme here is that supposedly neutral rules in fact have different impacts on various economic classes because of the groups' varying economic resources. Thus, Tribe notes that the Court's sometimes-articulated speech-conduct distinction necessarily inhibits those who can only afford to speak by acting, while it protects those who can afford to pay for a pure-speech printing press.\textsuperscript{23} The same can be said of other decisions in the area of individual rights.\textsuperscript{24} And that is the problem: this can not only be said, it has been said. It was a problem fifteen years ago when I was a law student, and my students study it today.\textsuperscript{25}

The economic theme is sounded again in Tribe's essays on property and affirmative action, and he goes on to develop a corollary notion. This notion is that the courts' decisions not only discriminate against poor people but also perpetuate and serve the economic status quo.\textsuperscript{26} I believe, because I have heard this

\begin{itemize}
\item \textsuperscript{18} See \textit{id.} at 7.
\item \textsuperscript{19} Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
\item \textsuperscript{20} L. Tribe, \textit{supra} note 6, at 161 (emphasis in original).
\item \textsuperscript{21} \textit{Youngstown}, 343 U.S. at 635-37 (Jackson, J., concurring).
\item \textsuperscript{22} U.S. Const. art. II, § 3.
\item \textsuperscript{23} L. Tribe, \textit{supra} note 6, at 198-200.
\item \textsuperscript{24} See \textit{id.} at 192, 203 (remnants of right-privilege distinction inhibit presumably low-income public workers from speaking out), 205 (campaign-spending limits stricken while free access to mailboxes denied), 236-37 (discussing discriminatory impact of neutral rules on minorities with fewer economic resources than majorities).
\item \textsuperscript{26} See L. Tribe, \textit{supra} note 6, at 186, 236-37 (groups with greater economic resources receive greater
Indeed, this bias in favor of the status quo seems so fundamental that it may be one reason for law as we know it. These essays are at best only ordinary incremental scholarship, the extension and popularization of thoughts originally developed by others.

II. THE WHOLE IS LESS THAN THE SUM OF ITS PARTS

American Constitutional Law proved to be important, in part, because it satisfied a widely felt need to turn away from the fetish so many modern constitutionalists have made of the legitimacy issue. Tribe admits in a candid introduction that Constitutional Choices is not as global as his initial effort, but he holds out hope that these essays, with “rough edges only partly trimmed and links only tentatively forged,” will provide us with some clearer “horizons” for constitutional law. In essence, he expects that we may detect some looming truth in these essays so that the “whole will . . . add up to more than the sum of its several parts.” Perhaps some people will see what Tribe thinks is there—Big Bird can see Snufalofagus and Jimmy Stewart could see Harvey the Rabbit—but for me no reliable values underlie Professor Tribe’s constitutional choices. “There is,” as Gertude Stein once said of Los Angeles, “no there, there.”

Occasionally, the essays show no values or are so contradictory that one can infer no underlying values. The reportorial essay on National League of Cities, for example, makes it seem that Tribe thinks there is a kernel of truth and desirability in the Court’s decision, but he frustratingly takes no position. The legislative-veto and Guam-bond essays seem at least initially irreconcilable. Tribe sees the legislative veto as a useful and creative device that responds to the exigencies of modern life and that the Court has arbitrarily stricken in the name of separation of powers. But he sees Treasury’s creative announcement of proposed legislation, designed to deter bond sales and thus reduce the perennially deficit-ridden budget, as a usurpation of power. Perhaps there are unarticulated values that help Tribe distinguish these situations. Legislative sovereignty is a lesser threat to liberty than is executive sovereignty? Positive usurping action (the Treasury announcement) is a greater threat to liberty than is negative usurping action (the legislative veto)?

My greater disappointment, however, arises from the essays that do suggest values. These essays reveal no underlying ethical system or method for deriving such values. Instead, the impact of the whole work is simply that Tribe has

29. L. TRIBE, supra note 6, at x.
30. Id. at ix.
31. See id. at 136-37.
32. See id. at 67-76 (Court failed to justify rejection of legislative veto, which was useful means of delegating power to Executive while retaining popular control).
33. See id. at 154-61 (Treasury’s calculated announcement had legislative effect of making bonds unmarketable, and power to execute law does not include power to make law).
34. In fact, though he thinks that readers may detect some unifying themes and values in these essays, Tribe disclaims any interest in normative criteria. L. TRIBE, supra note 6, at 4.
values and that they are as idiosyncratic and as biased as any other human being’s set of values. Courts, not just legislatures, he says, should help poor people through favorable interpretation of the Constitution; the same help should be given to unions, public employees, women, and blacks. The values are based on sometimes eccentric, or at least one-sided, views of history: in Tribe’s eyes, the decline of the entire labor movement is directly traceable to the Supreme Court’s refusal to give unions and corporations equal speech rights. And sometimes the motivations for his decisions are as petty as yours and mine. His veiled criticism of the Skokie decision—since the courts seldom have enforced free speech rights evenhandedly, there is no reason to start with the Nazis—is as atrocious as my bad parenting—“that A in history, son, proves that you could have made better than a B in English.”

One can hardly blame Tribe for being human, except that American Constitutional Law held out hope for so much more. That work gave order to the chaos of constitutional law and held out the vision that this order might itself give us hints of enduring, or at least workable, values. Constitutional Choices obliterates that vision. And worse, in the process of showing us that Tribe’s values are not more exalted than anyone else’s, this book raises again the issue that Tribe had hoped to transcend—the legitimacy issue.

The publication of Constitutional Choices should lead us not only to a reevaluation of Professor Tribe’s contribution to constitutional law but also to a reappraisal of much of current constitutional scholarship and constitutional law itself. Tribe’s genius now appears more clearly than ever to be in his mastery of macrolaw, the history of legal ideas and how they relate to one another. The best parts of his current book continue that effort. But Constitutional Choices mainly focuses on the ordinary. These essays on such narrow issues show that Professor Tribe is a skilled and insightful observer of relevant considerations, but

35. Id. at 187.
36. See id. at 202-03.
37. See id. at 203-04, 209.
38. See id. at 241.
39. See id. at 233-34, 236-37.
40. Tribe writes:

Indeed, the proof of this imbalance of power [regarding the right to speak] can be seen in the results: ‘the failure of labor to pass any [significant legislation] since 1935’, and the decline in the rate of union representation of American workers from 35 percent in the 1940’s to barely 20 percent in 1980. Id. at 202. This is a preposterous statement on several grounds, not the least of which is that employers’ commercial-speech rights were wholly excluded from constitutional protection during most of this period, as Tribe himself recognizes. See id. at 210-11 (Court did not grant protection to commercial speech until 1976). Although the lack of controls would make an impartial study impossible, I would be extremely surprised if the decline of the labor movement could be attributed more to indirect judicial rules than to powerful social and economic forces. Finally, Tribe’s statement sounds disturbingly similar to many given by persons who would override all public and private choices: “the people would have chosen differently had they known all the facts I was not allowed to show them.”
42. See L. Tribe, supra note 6, at 219-20 (“In the face of such inconsistent application of the First Amendment’s guarantees, making a virtue of consistently applying an assertedly neutral principle in Skokie . . . may be cause for little assurance or self-congratulation.”).
43. The essay on property rights and the contract clause shows flashes of the brilliance of American Constitutional Law. See L. Tribe, supra note 6, at 165-66, 179-87.
on this microlaw level he has little more to offer than do many other current scholars.

What remains for Tribe and others is to resupply the missing or transcendent element between the doing of constitutional law and the legitimacy of constitutional law. Tribe seems sure that the old verities are unworkable, but his insistence that it is worth continuing to do constitutional law because we are doing it now sounds like a familiar law of physics, not social intercourse. I share with Professor Tribe a reluctance to submit to the notion that constitutional law is ordinary politics or that "power comes out of the barrel of a gun" held by a federal judge. But these are powerful contending views of law, and it will take more than Constitutional Choices to deflect them.

44. Some of my colleagues have turned their attention to this topic. See generally L.M. Seidman, G. Stone, C. Sunstein & M. Tushnet, Constitutional Law (1985) (manuscript in preparation for publication); Spann, Simple Justice, 73 GEO. L.J. 1041 (1985); Tushnet, Anti-Formalism in Recent Constitutional Theory, 83 MICH. L. Rev. 1502 (1985) (forthcoming).

45. See L. Tribe, supra note 6, at 4 (author concerned with illuminating choices involved in doing constitutional law, not making constitutional law seem worth doing).

46. "We must make choices but we must renounce the equally illusory freedom to choose however we might wish to choose." Id. at 268.

47. II SELECTED WORKS OF MAO TSE-TUNG 224 (1978).