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The Constitution as Mirror: Tribe's Constitutional Choices

Richard A. Posner
U.S. Court of Appeals for the Seventh Circuit

THE CONSTITUTION AS MIRROR: TRIBE'S CONSTITUTIONAL CHOICES

*Richard A. Posner**

CONSTITUTIONAL CHOICES. By *Laurence H. Tribe.* Cambridge, Mass.: Harvard University Press. 1985. Pp. xiv, 458. $29.95.

This book of essays (some previously published) by a leading professor and practitioner of constitutional law argues, in effect and often in words close to these, that the Constitution is what we want it to be (hence "choices") and that what we should want it to be is the charter of a radically egalitarian society. Professor Tribe acknowledges the conventional constraints on judges' molding the Constitution to their personal preferences, but none of those constraints (text, structure, history, tradition, precedent) hampers him much. He makes the Constitution the mirror of his political preferences and criticizes the current Supreme Court for having sought to conceal its own political preferences behind a facade of formalistic reasoning and thus for being hypocritical and uncandid. I shall consider the method by which Tribe attempts to establish his criticism and his own effort to fill the chasm that appears if the criticism is accepted and constitutional decisions are judged purely on political grounds.

I

The book has three parts. The first, "The Nature of the Enterprise," explains the author's method, which turns out to be the conscious rejection of method. The brief first chapter sets the tone by renouncing the quest for postulates or principles of constitutional "interpretation." Text, history, structure, philosophy, and political theory (as distinct from raw political preferences) are all rejected because "contingency pervades all" (p. 8). Although Tribe says that "constitutional interpretation is a practice alive with choice but laden with content" (p. 4), and that the Constitution is not "infinitely malleable" (*id.*), in his hands it is almost that; he recognizes few limits on "interpretation."

Chapter Two continues the theme of the first chapter with an attack on John Hart Ely's view that virtually all we need bother about in

* Judge, U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. — Ed.

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reading the Constitution is what Ely regards as its latent goal of making the popular branches of government, the legislative and executive branches, more representative of the full range of outlooks and interests in society.[1] Although Tribe attacks Ely for neglecting the substantive policies in the Constitution, the force of the attack is blunted by Tribe's implicit belief that those policies do not really originate in the Constitution but are put there by the observer, the "chooser."

Chapter Three of Tribe's book takes up the matter of amending the Constitution. This may seem unrelated to interpreting the existing Constitution, but amending and construing are much the same thing to Tribe. Both are arenas of "constitutional choice," and, for him, choices of the same character. Thus he advances the startling proposition, one consistent with his view of the Constitution's plasticity but without basis in the language or history of the Constitution, that an amendment might be unconstitutional merely because of a lack of "fit" with the existing Constitution. "An amendment prohibiting atheists from holding federal office, for example, would clash with the current Constitution's paramount concern for freedom of conscience *no less* than a statute to the same effect would run counter to the current Establishment Clause."[2] Tribe rightly adds, however, that the courts should not pass on the constitutionality of amendments, as that "would unequivocally subordinate the amendment process to the legal system it is intended to override and would thus gravely threaten the integrity of the entire structure" (p. 27).

This part of the book ends with a chapter on how courts should treat omissions in constitutional and statutory enactments. The chapter contains an interesting discussion of the steel seizure case[3] and little with which to disagree. A competent discussion of some technical problems of interpreting enactments, it shows that Professor Tribe has

1. *See* J. HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

2. P. 25 (emphasis added, and — a qualification I shall not repeat — end notes omitted). Although there are no footnotes, the 159 pages of end notes take up more than a third of the entire book. Many notes take up more than a half page of fine print; some as much as a page and a half. There are 1829 notes in all, which means that to read the notes together with the pertinent text the reader must flip to the back of the book an average of seven times for every page of text read. What a chore it was!

Publishers prefer end notes to footnotes because they are cheaper and enable the book to be produced faster. But having published two books in recent years with the publisher of *Constitutional Choices* (Harvard University Press), both with footnotes rather than end notes, I can testify that this publisher's policy on the matter is not inflexible; and Tribe would have been well advised to insist on footnotes. Yet if his notes had been printed as footnotes, each page of the book would be (on average) less than two-thirds text and more than one-third footnotes, and the reader would be spending too much time interrupting his reading of the text to read footnotes — often long and dense textual footnotes. (There would be less interruption than if the reader had to flip to the back of the book every time he hit a note, but there would still be too much.) There is something more deeply wrong with Tribe's notes than their location. I shall have more to say about the style of the book in Part III of this review.

3. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

lawyerly skills, as his other writings, and his success as a practitioner of constitutional law, also show. The issue, we shall see, is whether such skills are alone enough to fashion a constitutional philosophy. But I find much to agree with in Part I. The problem is that one comes out of Part I and plunges into the consideration of specific doctrines without knowing what Tribe's own approach is to be. The approach of not taking an approach is not illuminating.

Part II addresses various topics in the allocation of powers within the federal government and between that government and state government. Chapter Five (the first chapter in this part) argues the unconstitutionality of legislative proposals to withdraw the Supreme Court's appellate jurisdiction over types of cases offensive to the proponents — such as abortion and school prayer cases. Tribe argues that the proposals he discusses (some of which may have been intended more as attention-getting gestures than as practical proposals) would circumvent the procedure for amendment set forth in the Constitution and violate the provision in article III ordaining a supreme court. Here, as in Tribe's discussion of the justiciability of constitutional amendments, the reader might think himself in the presence of a conventional constitutional analyst who derives modest conclusions from the text and structure of the Constitution. Not so; read on.

Chapters Six and Seven attack two recent decisions of the Supreme Court — the *Marathon*[4] and *Chadha*[5] decisions, the first holding that bankruptcy judges had been given certain powers in violation of article III, the second that the legislative veto violated articles I and II. Tribe makes several good lawyerly points about these decisions, but the points show only that better opinions could have been written in defense of the Court's results; they do not show why Tribe disagrees with the results. But he does, and the reason seems to be that the cases invalidate "political and institutional innovation[s] of the sort that may well be essential to the functioning of an ambitious government" (p. 85). The separation of powers in the Constitution was designed for a much smaller government, not for the welfare state; therefore the Constitution must be read flexibly if it is not to limit the growth of the federal government. Tribe does not pause to consider, however, whether we are better off or worse off with a big federal government — not merely a bigger government than we had in 1787, which is inevitable, but the giant government we have today — though he plainly thinks we are on the whole better off. Nor does he ask whether, if we are better off with a giant government, this might nevertheless be the type of good thing that requires a constitutional amendment to obtain. Tribe appears to believe that every good thing already is in the Consti-

4. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

5. Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983).

tution,[6] which means, can be put there by judges "interpreting" its provisions. But this is assumed rather than argued.

And here we come close to the essential weakness of Tribe's method. He is good at demonstrating logical flaws in judicial opinions, but all that such a demonstration accomplishes is to knock out the opinion; it does not show that the result is wrong. Tribe writes as if showing that a particular decision is badly reasoned establishes that the opposite decision would have been correct.

This is further illustrated in the next chapter (Chapter Eight), where Tribe discusses standing to sue. He casts his discussion in the form of a diatribe against the *Lyons*[7] decision, where the Supreme Court held that the victim of a policeman's "choke hold" lacked standing to seek an injunction against the practice. Tribe contrasts *Lyons* with *Duke Power,*[8] where (he argues) the Supreme Court brushed aside a more serious problem of standing to sue in order to reach the merits and affirm the constitutionality of the limitations in the Price-Anderson Act on tort damages for nuclear reactor accidents.[9] The contrast between these decisions typifies for Tribe the dishonesty and class bias of today's Supreme Court, which Tribe thinks uses the doctrine of standing opportunistically, on the one hand to deny a legal remedy to a poor black man brutalized by the police and on the other hand to uphold a subsidy for big business. The contrast is overdrawn. Lyons had a remedy: damages. So would any other chokehold victim. The question was whether Lyons could also get an injunction, though it would be of very little benefit to him as he was unlikely to be subjected to a chokehold again. The denial of an injunction could have been upheld on the basis of standard principles of equitable relief, without reference to the constitutional doctrine of standing.

In any event, the cases that Tribe has chosen to discuss are not representative of the Supreme Court's recent decisions on standing.[10]

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6. Henry P. Monaghan effectively criticizes this position in *Our Perfect Constitution,* 56 N.Y.U. L. REV. 353 (1981), as conflating politics and constitutional law.

7. City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

8. Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978).

9. Tribe is not alone in the view that *Duke Power* presented a serious problem of standing. *See* G. ROBINSON, E. GELLHORN & H. BRUFF, THE ADMINISTRATIVE PROCESS 229 (2d ed. 1980), which contrasts the upholding of standing in that case with the denial of standing in two cases where low income persons or their representatives were the plaintiffs: Warth v. Seldin, 422 U.S. 490 (1975), and Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976).

10. To correct the balance, see Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 954-59 (1984); Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Commn., 461 U.S. 190, 199-203 (1983); Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982); Hodel v. Virginia Surface Mining & Reclamation Assn., 452 U.S. 264, 297 (1981); Zablocki v. Redhail, 434 U.S. 374, 380 n.6 (1978); Nyquist v. Mauclet, 432 U.S. 1, 6 n.7 (1977); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 260-64 (1977). *Havens,* involving the standing of black "testers" to complain about racial discrimination even though they weren't in the market for housing, and *Village of Arlington Heights,* involving a challenge to a

And while making clear that he thinks the requirement of standing should be relaxed, Tribe does not explain why it should be relaxed, whether this can properly be done without amending article III, how far he would go in relaxing the requirement, or what the impact on the workload of the federal courts would be of a minimal standing doctrine, consistently applied. So again he scores lawyer's points but does not lay a foundation for his own position.

As a critic, Tribe is open to several criticisms besides bias in the selection of cases to discuss. He criticizes only decisions he deems conservative. For example, a decision cutting back slightly on the minimalist doctrine of standing is criticized, but the decisions that created that doctrine in the first place are not. It seems that if a decision is politically "correct," Tribe will forgive its technical shortcomings.

Furthermore, the majority opinions of the Supreme Court are such large targets for technical criticisms that the sense of decency that restrains a sportsman from shooting fish in a barrel should restrain the critic from attacking the Court as fiercely as Tribe does. To secure a majority, a Justice must persuade four other Justices to join his opinion. To do that he may have to make compromises that reduce the opinion's intellectual integrity. The alternative is to condemn the bar and the lower courts to the frustrating labor of trying to extract a majority position from the intersection of a plurality opinion with a concurring opinion(s). The Justice who opts for compromise and consensus should ordinarily be forgiven the unavoidable intellectual untidiness of the opinion. A more important point — for my impression is that relatively few majority opinions in the Supreme Court are in fact the product of hard-fought compromise, that the spirit of compromise is not strong in the modern Court — the Court has so vast a jurisdiction that no Justice can hope to have the same knowledge of particular fields of law as a professor specializing in one or two fields has. A judicial opinion should not read like, and should not be read like, a law review article.

The next chapter of Tribe's book, Chapter Nine, deals with federalism, but turns out to be narrowly focused on a few decisions, mainly *National League of Cities v. Usery*[11] (which held that the federal minimum wage law could not constitutionally be applied to state government employees), and the cases following it. On the purposes and proper dimensions of federalism Tribe has little to say, but given his enthusiasm for centralized government I was surprised to find even qualified approval of the doctrine of *National League of Cities,* whose

zoning ordinance as being racially exclusionary, are particularly good counterexamples to Tribe's picture of a Supreme Court determined to manipulate the doctrine of standing to produce politically conservative outcomes.

11. 426 U.S. 833 (1976).

overruling[12] coincided with the publication of the book. The form of the doctrine that he approves (or should I say, approved) is, however, extremely narrow:

> It may be virtually impossible to halt the erosion of state sovereignty caused by preemptive federal legislation, because the Supremacy Clause is essential to our federal system of government; national cohesion and national policy coherence demand it. But we surely can avoid insulting the states by ordering them about like so many federal bureaucratic lackeys when the federal constitutional rights of individuals are not at stake. [p. 131]

So it comes down to avoiding "condescension" (*id.*), which isn't much; and given Tribe's broad conception of "the federal constitutional rights of individuals" (of which more shortly), the qualification in the subordinate clause ("when the constitutional rights of individuals are not at stake") overwhelms the assertion in the main clause.

This chapter also criticizes — and cogently, too — the Supreme Court's decisions applying the Sherman Act to local but not state government. Tribe argues that the internal allocation of state powers is no business of the federal government "when the federal constitutional rights of individuals are not at stake" — a vital qualification, as we shall see. In this area, too, the rapid evolution of legal doctrine is overtaking Tribe's discussion.[13]

The last two chapters in Part II deal with highly specialized problems, growing out of Tribe's extensive consulting practice, in the application of constitutional doctrine to regional banking pacts and the issuance of bonds by American overseas possessions, respectively. Limitations of space move me to skip them[14] and come directly to Part III, "The Structure of Substantive Rights." Here Tribe puts forth a very expansive conception of civil rights and civil liberties.[15] He thinks that as interpreted by the Supreme Court the Constitution is too protective of the status quo. He regrets for example that the Court has interpreted the just compensation clause of the fifth amendment to protect only conventional property interests and not the "new property" — such things as jobs and welfare benefits — that are so important to ordinary people and the poor. In Chapter Thirteen, Tribe points out that while freedom of speech has been interpreted to protect the interests of people who have the money to buy advertising — and

12. *See* Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985).

13. *See* Town of Hallie v. City of Eau Claire, 105 S. Ct. 1713 (1985).

14. Except to note that again events have overtaken Tribe's discussion: Northeast Bancorp, Inc. v. Board of Governors of Fed. Reserve Sys., 105 S. Ct. 2545 (1985), though not inconsistent with Tribe's analysis of regional banking pacts (he argued and won the case), makes the analysis somewhat academic. Tribe's book is perhaps too topical; it is obsolescing rapidly.

15. A surprising omission from Tribe's discussion of civil liberties, however, is criminal procedure, a matter on which Tribe feels strongly but which he does not discuss except for passing references in his discussion of the *Lyons* decision, and a long and rather angry end note to the preface. *See* p. 271 n.1.

thus limits on campaign spending by individuals on their own behalf have been struck down — it has not been interpreted to protect the interests of those who cannot afford to put postage stamps on their campaign literature yet have been denied the right to deposit that literature (unstamped) in home letter boxes. Others who substitute personal time for money in the communication of ideas — labor picketers carrying placards — receive less protection than large corporations, which can take out full page ads to propagate their views. As with the just compensation clause, Tribe's answer to the law's tilt toward the status quo is not to curtail the rights of the wealthy and the established but to enlarge the rights of the poor and the marginal. That there might be a collision, since one person's right is another's duty, is not mentioned.

One form of the status quo that particularly distresses Professor Tribe is that caused by the physical differences between men and women. The fact that women get pregnant and men don't, a fact that underlies a variety of traditional laws and practices, is not for Tribe a legitimate basis for treating men and women differently. Tribe believes that the Constitution should be interpreted to offset such burdens as nature has imposed on women but not on men, even though in another sense, not considered by Tribe, this would mean treating men and women differently. If women are biologically vulnerable to particular workplace hazards, this would not for Tribe justify a law forbidding them to be employed where they are exposed to the hazard; rather, it would mean that they are constitutionally entitled to more protection than men. The excessively brief chapter in which this position is argued, Chapter Fifteen, is revealingly entitled, "Reorienting the Mirror of Justice: Gender, Economics, and the Illusion of the 'Natural.' "

The implicit theme of Part III is that the Constitution has (more precisely, can be given), as a principal goal, compensating for inequalities in wealth and power, however caused. Thus does Tribe, although opposed to overarching themes of constitutional interpretation, back into such a theme. As a redistributivist Tribe is led to endorse the constitutionality of affirmative action (reverse discrimination). But he does so with a caveat: he admires Justice Powell's opinion in the *Bakke* case,[16] rejecting rigid quotas, which in Tribe's view are impolitic and also insufficiently sensitive to people as individuals rather than as members of racial and other minority groups. Here and in Tribe's convoluted discussion of the freedom of speech of Nazis (pp. 219-20) one senses a slight unease with certain aspects of modern liberal thought. This chapter also endorses the suggestion that the propriety of affirmative action should depend, in part anyway, on the level of government that decrees it; the lower, the more suspect. So much for

16. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289 (1978).

the principle that the internal allocation of functions in state government is not of federal constitutional concern.

The last chapter of Part III challenges the fundamental distinction in constitutional law between the public and private spheres. In general the Constitution is a charter of negative liberties. It requires government to leave people alone in certain respects but does not tell it to provide services, correct private wrongs, or bring about a more just distribution of the world's goods. The due process and equal protection clauses of the fourteenth amendment, for example, limit only "state action," not private action. Tribe will not abide the distinction; it seems to him to ignore "the state's complicity in" "the patterns of social and economic domination that permeate and in part define our society" (p. 265). This is strong language. Consider its application to the *Irvis* case,[17] where the Supreme Court held that the equal protection clause did not forbid a private club to discriminate against black people, merely because the state had given the club a license to sell liquor. Tribe thinks that the plaintiff should have sued the liquor control board rather than the club, so that "he could have directly charged the board members with suborning racism and aggravating its impact by handing out the privilege of a scarce liquor license without regard to the licensee's racist practices" (p. 255). If licensing the sale of liquor, as distinct from allowing liquor to be sold without a license, increased the likelihood of racial discrimination by private clubs, Tribe would have a point. Maybe some types of regulation do increase the likelihood of discrimination, and maybe the idea of state action could be enlarged to embrace discrimination by firms so regulated.[18] But Tribe makes no argument along these lines.[19] His position seems to be that state agencies that have the power to combat racial discrimination by private persons should not be allowed to take a neutral stance. They must use their power to forbid those persons to discriminate; the Constitution imposes an overriding duty on all public officials with an axe to wield it in such a way as will advance egalitarian ideals. The *reductio ad absurdum* of this view is that a minister or rabbi unwilling to perform mixed marriages should not be licensed to perform any marriages.

If one combines Tribe's view that the Constitution requires government to eliminate natural inequalities with his assault on the "public-private" distinction, one has a recipe for rampant judicial activism. Yet how far he would actually push the logic of his position is unclear. The chapter on state action is the least coherent in the book. To the

17. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

18. *See* R. POSNER, THE ECONOMICS OF JUSTICE 355-58 (1981).

19. In his treatise on constitutional law he suggests that Irvis might have found it easier to obtain liquor in nondiscriminatory surroundings if liquor were unlicensed. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1173 (1978). No basis for this suggestion is offered.

radical notion that private prejudice is typically a product of state action ("complicity") — that there is little or no bigotry in the state of nature — Tribe juxtaposes an imaginatively limited reading of *Shelley v. Kraemer,*[20] where the Supreme Court held that a state's judicial enforcement of racially restrictive covenants violated the equal protection clause. Tribe says that the state refused to enforce most restrictive covenants, deeming them impermissible restraints on alienation; the decision to enforce racial covenants was thus a decision to use state power to promote racial segregation. Since the state was Missouri and the time the 1940s, this is a realistic analysis. But in the name of "complicity," Tribe apparently is willing to find unconstitutional state involvement in private discrimination where (as in *Irvis*) others would find a policy neutral in purpose and effect: a policy not adopted in order to promote discrimination and unlikely to make it greater than it otherwise would be.

II

In developing a rationale for *Shelley v. Kraemer,* and in his criticisms of specific cases, not all of which I have mentioned,[21] Tribe's book makes a worthwhile contribution to the literature of constitutional law. But the book aspires to be more than a series of individual case readings. The fulsome senatorial encomia that decorate the dust jacket are not likely to have been bestowed as compliments for Professor Tribe's legal analytic powers or individual case readings, but are more likely to reflect his political slant. In his view (one widely shared by constitutional scholars at all points of the political compass) every good thing can be found somewhere in the Constitution; and most of the good things happen also to be advocated by politicians supported by Tribe. As Tribe conceives constitutional "interpretation," the Constitution is flexible enough to embrace — to command — a partisan political position. The most important question about his book is whether this view is tenable.

I think not; and in fact the view is barely defended, in the book or anywhere else, which is a clue to its indefensibility. The book is overwhelmingly negative. It attacks; it does not defend. We learn what are not legitimate sources of constitutional meaning. Text is not. *Constitutional Choices* contains few quotations from the Constitution, an omission that obscures the distance between the actual words of the document and the meaning Tribe would impress on it. History,

20. 334 U.S. 1 (1948). This reading is foreshadowed in Tribe's treatise. *See* L. TRIBE, *supra* note 19, at 1023. This is true of some other discussions in *Constitutional Choices* — compare for example the discussion of the steel seizure case in *American Constitutional Law* at 181-82 with the discussion of the same case in *Constitutional Choices* at 32-33. For the most part, however, *Constitutional Choices* is not a rehash of the earlier book.

21. There is a particularly good discussion of FERC v. Mississippi, 456 U.S. 742 (1982). *See* pp. 125-32.

whether in the broad or the narrow ("legislative history") sense, is not a proper source of constitutional meaning either, for Tribe. He has virtually nothing to say about history; history might have begun in the year of Earl Warren's appointment as Chief Justice (the implicit view of many law students). Therefore the values and intentions of the framers of the Constitution and its amendments are not significant sources of constitutional meaning for Tribe. Precedents mean little to him, too, unless they come from or anticipate the era of expansive constitutional interpretations that crested between the replacement of Felix Frankfurter by Arthur Goldberg on the Supreme Court in 1962 and the appointment of Warren Burger in 1969. Any deviation from the "line" laid down in this era, the heyday of the "Warren Court," Tribe deprecates; the line itself he swallows along with hook and sinker.

Tribe is also against "formalism," the idea that legal outcomes can be derived by logical deduction from premises external to the judge's own values and experience. He considers it a technique for concealing the true grounds of decision in difficult cases. He is also, as we have seen, against all overarching schemes of constitutional interpretation. And he is against "technocratic" reasoning,[22] typified by the cost-benefit approach of the economic analysts of law but apparently encompassing all instrumental reasoning. Thus he disagrees that the goal of legal procedure should be to minimize the sum of the error costs and avoidance-of-error costs of applying legal sanctions, or even that accuracy should be the overriding goal. He writes, "procedural *fairness* reflects the intrinsic value of assuring *fair* treatment as an individual and not simply the instrumental value of assuring correct outcomes" (p. 227; emphasis added). In other words, fairness means being fair. This is not quite so empty a view as it sounds; if it were, we would approve of lynching, provided it was clear that the victim of the lynching would have been convicted and executed if spared for trial, and we don't approve of it. But whether there is as much to the view as Tribe thinks may be doubted; I shall come back to this point.

There are things that are appealing in Tribe's litany of negations. Distinguished Supreme Court Justices as otherwise different as John Marshall and Oliver Wendell Holmes have also believed that the Constitution should, in many of its provisions anyway, be interpreted flexibly, as a document — with the amendments, really a series of documents — intended to be adaptable to an unforeseeable future. This view limits (but does not eliminate) the role of text, history, and

22. But not consistently against it. *See* p. 147 ("Only when the costs may be externalized, and the benefits internalized, does the Commerce Clause clearly disapprove of self-interested moves on the part of a state.") Incidentally, the dust jacket and preface describe the book as an attack on cost-benefit thinking, *see* p. viii, but in fact this theme rarely appears. *But see* p. 271 n.1.

precedent, and makes formalism an unworkable judicial philosophy.[23] I even agree with Professor Tribe that the Constitution is not a general mandate for economic efficiency, though many of its provisions can be illuminated by economic analysis — among them the commerce clause, where, it seems to me, Tribe gets into trouble by refusing to think economically. I shall give just one example. The judge-made "market participant" doctrine allows a state engaged in market activities, such as selling cement from a state-owned cement plant, to impose restrictions on itself that would violate the commerce clause if imposed on private sellers. Tribe defends this result by reference to the distinction between "*creating* commerce that would otherwise not exist" and "merely *intruding* into a previously existing private market" (p. 146; emphasis in original — as a matter of fact twenty-four words on this page are italicized for emphasis). But before the state had a cement plant, there was a market for cement; otherwise the state would not have built or acquired the plant. By owning such a plant, the state reduces the private supply of cement; it substitutes a public for a private market participant. The restrictions it imposes on itself (e.g., refusing to buy inputs from out of state) are therefore equivalent to restrictions imposed on the same amount of private supply by a state that does not participate in the market.

Having stripped away the usual aids to constitutional interpretation, and lacking a taste for political philosophy, Tribe is left with a set of unexamined political premises to guide the formation of constitutional doctrine. They are not only unexamined; despite Tribe's contempt for judges who (he believes) conceal their class bias and conservative politics behind a formalist facade, the political character of his own premises is not acknowledged. He deflects the reader's attention from this omission by making the Supreme Court's decisions of the 1960s the baseline for normative judgments (without explaining why) and then criticizing later decisions as reactionary deviations.[24] He criticizes them as illogical and not just politically repulsive deviations, but that angle of attack, as I have suggested, is superficial; to show that a decision is poorly reasoned does not establish that the opposite decision would be correct. Many of the decisions he admires

23. Unless (perhaps) a majority of Supreme Court Justices happen to come from identical backgrounds, both personal and professional. If so, their shared values might provide an adequate set of common premises from which to deduce the outcomes in otherwise indeterminate cases, and the reign of logic would be preserved. Simpson, *The Common Law and Legal Theory*, in OXFORD ESSAYS IN JURISPRUDENCE 77, 95 (2d ser. A.W.B. Simpson ed. 1973), makes a similar argument in discussing the cohesiveness of the English common law. But like other American judges, Supreme Court Justices come from diverse personal and professional backgrounds.

24. A good example is his use, in Chapter Eight, of Flast v. Cohen, 392 U.S. 83 (1968), as the baseline for attacking recent decisions on standing to sue. Had Tribe used as his baseline Frothingham v. Mellon, 262 U.S. 447 (1923), which announced the approach to standing that was repudiated in *Flast* over a forceful dissent by Justice Harlan, many of those recent decisions — though, admittedly, not *Duke Power* — would not seem deviant. *See* notes 9-10 *supra*.

were poorly reasoned too. At bottom Tribe is expressing disagreement with the politics of the current Supreme Court — and distorting those politics. If Tribe had taken as his baseline the Supreme Court of the 1940s or 1950s — both periods in which the Court's average quality was as high as at any time since — he would have to regard both the Earl Warren and the Warren Burger eras as "liberal" deviations. To think the contemporary Supreme Court a "reactionary" court is to betray a lack of perspective, as well as to ignore much scholarship to the contrary.[25]

Tribe might answer that the difference between the Warren and Burger eras that he perceives is not a difference in political orientation in a narrow partisan sense but a difference in fundamental values. The Warren Court (Tribe might say) wanted to create a freer, more equal society; the Burger Court wants to preserve social arrangements that are unjust, unfree, and unequal. If this were the choice, it would be an easy one to make. But in adumbrating his "vision of what this country is about" (p. 357 n.246), Tribe forgets that he is taking sides on burning issues, rather than uttering truisms. Diametrically opposed to the "liberal" ideology espoused by Tribe is an equally articulate "conservative" ideology with as good a philosophical pedigree as the "liberal"[26] and a better historical one from a constitutional standpoint because it is more in keeping with the values of 1787, 1789, and 1868. The adherents to this ideology would (improperly in my view) reorient constitutional law to make it a mandate for economic liberty and a nemesis of the welfare state.[27] Preoccupied with the modest retrenchments of the Burger Court — ignoring its bold initiatives in abortion, free speech, and other areas — Tribe overlooks the greater potential menace to all he holds dear in constitutional analysis that comes from a point of the political compass far to the right of the current Supreme Court, and that derives legitimacy from a position, such as Tribe's, which empties the Constitution of meaning.

Tribe's neglect of all but a narrow segment of political and social thinking on the issues that he discusses undermines his book at many points. For example, his position that due process (in the sense of notice and an opportunity for a hearing) is an unqualified good to be pursued without regard to costs is made unpersuasive by his refusal to consider the extensive literature, most of it neither economic nor con-

25. *See, e.g.*, THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Blasi ed. 1983); Gunther, *Reflections on the Burger Court*, STAN. LAW., Spring 1985, at 5.

26. *See, e.g.*, R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

27. *See, e.g.*, R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980); Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments:* Slaughter-House Cases *Re-Examined*, 31 EMORY L.J. 785 (1982); Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703 (1984); *Economic Liberties and the Judiciary*, 4 CATO J., 661 (1985). There are as well a variety of other conservative positions, none of which Tribe discusses. I mention only the most dramatic contrast to his position.

servative, that emphasizes the adverse impact on the very people intended to be benefited by the procedural safeguards that Tribe would see extended — juveniles, the disabled, people on welfare.[28] He also does not consider whether the poor would actually gain from an interpretation of the just compensation clause that made welfare a form of property, given that such an interpretation would make government reluctant to raise welfare levels, since once raised they could not be lowered. And he seems unacquainted with the literature on the actual consequences — many of them perverse — of welfare rights which he would constitutionalize.[29] His discussion of policy is, in a word, superficial — a serious weakness in a book that equates constitutional law with sound social policy.

Tribe's treatment of labor picketing, in the chapter on freedom of speech (pp. 198-203), provides a further illustration of this point. He considers the application to picketing of the principle that the first amendment permits the regulation of "speech brigaded with action" an example of the Supreme Court's class-conscious hostility to inexpensive modes of communicating ideas, for he can find no distinction between picketing and advertising except that the latter costs more. He ignores the fact that unions are allowed to and do make substantial political contributions,[30] and the fact that picketing is potentially coercive in ways that advertising is not. Even those most friendly to the union movement, and most hostile to the judicial position on picketing, recognize that picketers are sometimes violent (which means, often potentially violent) and that picketing enables the identification of replacement workers and other strikebreakers for future retaliation.[31] These are not properties of advertising. It is true that some people regard advertising as "coercive" in subtler ways, but the same people are likely to complain — with justification, too — about the loose use of the word "coercion" in discussions of purely peaceful, nonretaliatory picketing.[32] It is also true that labor picketing is a lot more peaceful than it once was; but it could become less peaceful again

28. *See, e.g.*, 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE 495-99 (2d ed. 1979); W. GELLHORN, C. BYSE & P. STRAUSS, ADMINISTRATIVE LAW: CASES AND COMMENT 445-51 (7th ed. 1979); J. MASHAW & R. MERRILL, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM: CASES AND COMMENTS 192-94 (2d ed. 1985); Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1275-77, 1289-91, 1303-04, 1316-17 (1975); Fuerst & Petty, *Due Process — How Much is Enough?*, 79 PUB. INTEREST 96 (1985); Mashaw, *The Management Side of Due Process*, 59 CORNELL L. REV. 772 (1974).

29. *See, e.g.*, M. ANDERSON, WELFARE: THE POLITICAL ECONOMY OF WELFARE REFORM IN THE UNITED STATES 43-58 (1978); B. PAGE, WHO GETS WHAT FROM GOVERNMENT 60-100 (1983) — the former written from a conservative, the latter from a liberal, standpoint.

30. *See* Pipefitters Local Union No. 562 v. United States, 407 U.S. 385 (1972).

31. *See, e.g.*, Note, *Peaceful Labor Picketing and the First Amendment*, 82 COLUM. L. REV. 1469, 1491 (1982).

32. *See, e.g.*, Jones, *Picketing and Coercion: A Jurisprudence of Epithets*, 39 VA. L. REV. 1023 (1953).

if it were wholly free from regulation, as Professor Tribe thinks the first amendment requires that it be.

There is a more fundamental point. The purpose of labor picketing generally is to increase wages, or economic equivalents such as fringe benefits. Picketing thus resembles concerted activity by companies to raise prices (or depress wages).[33] Yet even in an era when commercial speech is constitutionally protected, no one thinks the government cannot forbid cartels just because their members communicate information and opinions on prices and other matters of mutual concern, either with each other or (to make the analogy to picketing closer) with consumers, suppliers, and competitors. It is not obvious that wage-fixing should have a different status under the first amendment from price-fixing. This is another issue that Professor Tribe ignores.

His suggestions that the recent decline in the percentage of American workers belonging to unions is due to corporations' spending more than unions on propaganda (p. 202), and that American unions' traditional lack of interest in ideology "has been shaped in large degree by the Supreme Court itself" (pp. 202-03), are unsupported and implausible. And his failure to mention the severe restrictions that the National Labor Relations Board has imposed, and the Supreme Court has upheld, on employers' freedom of speech[34] leaves the reader in the dark about Tribe's view of what the first amendment should mean in the labor field. It also illustrates Tribe's selective use of legal doctrine to support his thesis about the political character of the current Supreme Court. By avoiding mention of the Supreme Court's refusal, in the teeth of the statute,[35] to give employers the same rights of free speech that the Court has given the Communist Party, Tribe avoids having to confront a conspicuous contradiction of his thesis that the Court is a right-wing institution.

III

Tribe's policy choices seem based on will and emotion rather than evidence and logic. Maybe this is true for everyone, but not everyone is so eager to impose his choices on the community. Further evidence of the emotional and egoistic character of Tribe's constitutionalism is the book's overripe, immodest, and opaque style. Here is one example: "If I succeed in evaporating a cloud here or a mist there and, thus, in displaying more lucidly a broader span of the constitutional horizon

33. *See* Posner, *Some Economics of Labor Law,* 51 U. CHI. L. REV. 988 (1984).

34. *See* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), and for criticism Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression,* 43 MD. L. REV. 4 (1984).

35. *See* section 8(c) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(c); NLRB v. Golub Corp., 388 F.2d 921, 926-28 (2d Cir. 1967) (Friendly, J.).

and its curvature, this volume will have achieved most of what I hoped to accomplish by writing it" (p. x). Here is another:

> Publishing these essays in the meantime [pending revision of his 1978 treatise on constitutional law, which he describes as "a more global effort: it was an attempt to roll the constitutional universe into a ball and show it as a unified whole"], rather than reducing and polishing them into pieces of that more comprehensive later work, has been a liberation for me. I would not wish to squirrel the essays away until they can be folded into a larger study, one in which they fit elegantly but no longer reflect my freshest thoughts on the issues they seek to treat. I would rather publish them now — rough edges only partly trimmed and links only tentatively forged — in the season of their completion. [p. x].

This is awfully plummy prose ("season of completion," etc.), written by someone who takes himself awfully seriously; and it does not make much sense, either. Since many of the essays published in this book had been published previously in law reviews or elsewhere, the choice was not between collecting them in a book and "squirrel[ing] them away." And why should a reader want Professor Tribe's "freshest" thoughts, unmatured by reflection? Do they stale so quickly?

Several other characteristics of Tribe's style also deserve attention for the light they cast on his method of constitutional argument:

1. Excessive use of italics is one. I mentioned a page on which twenty-four words are italicized for emphasis;[36] on another page I counted twenty-five (p. 43). Here is one sentence from a different page:

> In short, remembering that it is an *amendment* to the Constitution we are considering may be almost as important as remembering that it is a *Constitution* we are, in the end, amending and construing — and remembering that, because *neither* process may be emptied of substance or subjectivity, *both* must engage the judiciary in a more candid and collaborative way than the pretense of proceduralism permits. [p. 28]

Notice, besides the italics, the excessive alliteration ("substance or subjectivity," "candid and collaborative," "pretense of proceduralism permits"), the filler words ("almost," "in the end"), the apparent lack of a verb to go with the third "remembering that," which makes the sentence collapse — and the incongruous "In short" which introduces the sentence.

2. Professor Tribe's writing is plethoric. In the following sentence I have bracketed the words that could be eliminated without loss of meaning:

> At stake in [any] such response — particularly if it becomes a [more or less] common reaction to constitutional rulings that [seriously] displease a [popular] majority that finds itself not quite able to overturn them by amendment — is [nothing less than] the survival of a distinctly Ameri-

36. *See* text following note 23 *supra.*

> can institution, that of review of legislative and executive action by an independent judiciary [entrusted to enforce the Constitution]. [p. 48]

Take away the superfluous words and you will realize how little is being said. Notice also the use of "distinctly" where Tribe means "distinctively."[37]

3. Tribe is too fond of metaphor, as in "disarmed, disembodied oracle" (p. 53), "increasingly slender reed" (p. 358 n.250), and the "mythical" [was there, as Herodotus thought, a real?] "Sword of Damocles" that, all on one page (p. 49), hangs, is tested, then falls — then, in most un-Damoclean fashion, is fallen on — and the author wonders whether the Supreme Court would "take the blow lying down." He makes metaphor a substitute for analysis, as when he says of the anti-abortionists that they would "conscript women . . . as involuntary incubators" (p. 243), "foster involuntary servitude" (p. 244), and make women "donate their bodies to their unborn children" (*id.*). These are arresting (if derivative[38]) ways of characterizing the anti-abortionists' position, but they create a rhetoric of emotion rather than of meaning. Does Tribe really take these metaphors seriously? Consider the "incubator" metaphor. An incubator does not contribute anything to the genetic makeup of the baby. It is thus an impoverished metaphor for a mother. Tribe gives no evidence of being willing actually to think about the abortion controversy.

4. Legal and academic jargon, "with-it" cliches, and dense nominalizations give the book an air that Tribe might if more self-aware have called "technocratic," as in "delineate the perimeter which circumscribes" (p. 123 — meaning, "describe"), "manipulable born-again Contract Clause analysis" (p. 182), "mechanical gender-based classifications" (p. 224),[39] "suitably sequenced combination of two different lenses" (p. 248), "Close-Focus Lense: Looking for a Nexus" (p. 249). The last phrase is a subtitle. The titles and subtitles are awful.

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37. Other, less serious because more common, solecisms are the "hoi polloi," p. 186, and "schizophrenic," p. 195. "Hoi" is the Greek masculine plural nominative article, "the"; "the hoi polloi," the form used by Tribe, means "the the many." "Schizophrenia" is psychosis; it is not the condition in which one has trouble making up one's mind or acts inconsistently — the latter being Tribe's meaning. Of course this is a very common mistake; I'm sure I have made it. But he underscores it by saying, "The response of the Court may be described, without exaggeration, as schizophrenic." "[W]ithout exaggeration" is, to anyone who knows what "schizophrenia" really means, a comical exaggeration.

38. *See, e.g.*, Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).

39. The use of "gender" for "sex," and the addition of a superfluous "-based" to words like "gender" and (in first amendment law) "content," are among the uglier bits of contemporary legal jargon. One might expect academics, at least, to eschew them. One might also expect academics to avoid false antitheses ("For a doctrine in its infancy, commercial speech has demonstrated remarkable vigor," p. 211 — as if infants typically lacked vigor), as well as such gobbledygook as: "In short, the Court indulged in a shell game, first throwing out a circular definition of the limited public forum, then trying to break the circle by noting the acceptability of subject-matter restrictions, and, finally, proceeding to apply minimal scrutiny to alleged viewpoint discrimination," p. 207.

These faults of style may be accidents of haste or carelessness,[40] but they are not unrelated to the book's substance. They pad and bedazzle, and if one stripped them away one would lay bare a slim and unimpressive substance, the literary counterpart to a shaven Persian cat. Also, a writer's style indicates, if not always the quality of his (or her) thought, always the character of his culture. Despite Tribe's antagonism to "technocracy," he himself is not, on the evidence of this book anyway, a person steeped in the humanities. This would not be important if he did not present himself to the reader as a defender of traditional culture against economists and other "technocrats," or if he did not claim to be expounding a new constitutional philosophy. It is his ambition to shape and direct constitutional thinking along new paths that draws the reader's attention to the poverty of his style and to the fact that those 1829 end notes contain few references to the world of thought that exists outside of recent Supreme Court opinions (many drafted by twenty-five-year-old law clerks fresh out of law school) and the professional commentary on them.

So, to complete the list of the things that this book is not, it is not a book by someone who brings to the study of law a perspective beyond that of the intelligent legal practitioner equipped only with the lawyer's technical skills. I do not mean to denigrate those skills, which are essential to constitutional reasoning and enable Tribe to offer some shrewd analyses of individual cases. Only they do not, standing all by themselves, enable him, or anyone, to construct a system of constitutional law. A person who knows only what is in cases is not equipped to make fundamental social choices for us. If Tribe knew more, he would be less confident that he could make such choices correctly. Activism begins in ignorance.

And yet Professor Tribe is, if perhaps not as the dust jacket says the nation's leading scholar and practitioner of constitutional law, certainly a prominent one. The failure of the book is a failure not of a person but of a method; and the method is to use the skills of a lawyer to make political choices for society in the name of a fictive constitution, as if the Supreme Court really were a superlegislature and government by lawyers had, at last, arrived.[41] The failure is a particularly striking one because Tribe disparages the tradition of legal analysis at the same time that he wields its tools. He faults the Supreme Court for illogic and uncandor, often effectively, yet at the same time sug-

40. Tribe's constitutional law treatise, *supra* note 19, is much better written than *Constitutional Choices.* On the relationship of bad writing to bad thinking see, *e.g.,* George Orwell's classic essay *Politics and the English Language* (widely reprinted); S. CHASE, THE TYRANNY OF WORDS (1938); G. KRESS & R. HODGE, LANGUAGE AS IDEOLOGY (1979).

41. *See* Professor (now Judge) Easterbrook's recent reply to an article by Tribe: Easterbrook, *Method, Result, and Authority: A Reply,* 98 HARV. L. REV. 622, 627-29 (1985), criticizing Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?,* 98 HARV. L. REV. 592 (1985).

gests that the test of constitutional doctrine is not its craftsmanship but its political soundness — that the question is not how good a court the Supreme Court is but how good a legislature.

He does not defend this view, so I shall not bother to attack it beyond remarking that although it is inevitable that judges will have political views, it is not inevitable that judges will use them to thwart the political decisions of the elected branches of government. Judging and legislating were not meant to be identical. The failure to appreciate this rather elementary point is the fatal, though not the only, flaw of this book.

The Supreme Court is a committee of lawyers, appointed for life, who are on average no wiser or humbler than Professor Tribe, except insofar as age and institutional responsibility create wisdom and humility in some. For the sake of social peace and stability, let us hope that the Court, whatever the politics of its members, will always hesitate more than the author of *Constitutional Choices* hesitates to translate personal political preferences into constitutional imperatives.