

Michigan Law Review

Volume 87 | Issue 6

1989

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Recommended Citation

Frederick Schauer, *Constitutional Conventions*, 87 MICH. L. REV. 1407 (1989).

Available at: <https://repository.law.umich.edu/mlr/vol87/iss6/19>

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CONSTITUTIONAL CONVENTIONS

*Frederick Schauer**

AMERICAN CONSTITUTIONAL LAW. Second Edition. By *Laurence H. Tribe*. Mineola, New York: The Foundation Press. 1988. Pp. civ, 1778. \$38.95.

I

Under normal circumstances, publication of the second edition of a book about constitutional law, even as important a work as this one, would not merit a review. But Laurence Tribe's *American Constitutional Law*, published in its first edition in 1978, is different. That difference is not so much a function of the way in which this book diverges in quality or even in content from others. Rather, it arises from the very role *American Constitutional Law* plays in the field of constitutional law. When we look at that role, we learn a great deal about the nature of the subject that is constitutional law, and also about the nature of the academic discipline that takes that subject as its focus.

Making sense out of what I have just suggested requires drawing a distinction between works that are part of a subject and works that comment on that subject. At times works that are part of a subject are of such seminal importance that they have in essence created those subjects. Consider in this regard the writings of Marx or Freud, or indeed almost all literature. To think of the writings of Shakespeare, Milton, Zola, Austen, or Dreiser as *about* literature misses the point, for they *are* literature in just the same way that the Grand Canyon *is* geology, pythons *are* herpetology, the acts of George Washington and Queen Victoria *are* history, and the decisions of Margaret Thatcher and Yasir Arafat *are* politics.

Things get tricky, however, for three reasons. First, we often use the same word to describe both the subject and the discipline that studies it. Government is the name both for what George Bush does for a living and for a department at Harvard University. Economics encompasses both the pricing decisions of General Motors and the activities of those in university departments who analyze those decisions. History is both what happens and the discipline of interpreting and analyzing what has happened. Still, this may be little more than lin-

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guistic happenstance. George Bush may be a governor but he is not a political scientist, any more than Dred Scott, a historical figure, was a historian. Is my mental behavior psychology, or is psychology what psychologists study? Here (and perhaps so too with sociology) the linguistic evidence is ambiguous, but my point is only that we ought not to let verbal similarities obscure recognition of a tolerably useful distinction between the process of investigation and the subject of that investigation.

Second, it is sometimes the case that the subject of the discipline takes on the role of investigator or commentator, and frequently uses the discipline itself as the vehicle for that commentary. Here the perspective is one that is often referred to as "modernist," and it involves the way in which the painting of Rene Magritte and the sculpture of George Segal and the architecture of Philip Johnson are simultaneously painting, sculpture, and architecture and *commentary on* painting, sculpture, and architecture. But the role of the participant as commentator is merely a contingent feature of some perspectives on some disciplines. Again the distinctions have fuzzy edges, but art that is self-critical about art is different from art that takes something other than art to be its subject. In some way the frescoes of Diego Rivera and Jose Clemente Orozco are about art, but they are also and more directly about politics and economics. Thus, although sometimes the subject of a discipline takes on the role of self-conscious critic, this need not always be the case.

Finally, and most relevantly, the subject of the discipline may at times be a book. This is most obvious when the subject is literature, but we see the same phenomenon when we consider, now, the role of *The Federalist*, *Mein Kampf*, *Das Kapital*, or *The Wealth of Nations*. Books like these occupy a position in history or political science or economics not dissimilar to that occupied by flounder in ichthyology. That books may be the *object* of investigation rather than merely the *medium* of investigation is most relevant, of course, because words, usually but not always inscribed in books, are the stuff of the law, the discipline which it is the role of the legal scholar to study.

The distinction between words as subject and words as commentary is especially obvious when we consider canonical rules such as those found in statutes, regulations, and written constitutions. The Uniform Commercial Code, while of course saying something *about* law by its very being, is still primarily an item of, rather than regarding, law. Much the same could be said about judicial opinions. Those opinions are most important in their roles as raw material, as the law itself, as partly constitutive of law — just as rocks are partly constitutive of geology.

From this perspective, the legal treatise is an interesting phenomenon. At some level it is about law, but much more significantly it too

is law. The treatise is something that participants in the system, such as lawyers and judges, use; it is something that aims to and frequently does influence the development of the law itself; and it is something that on occasion takes on a status equivalent to or more important than some of the more obvious primary legal items. *Wigmore on Evidence* and *Corbin on Contracts* are far more significant legal items than many cases. Compared to most judicial opinions, they are used more often by participants within the system, they have had a greater influence on the current state of the law, and their citation is likely to be more persuasive in most adjudicative contexts. To understand a particular treatise, therefore, requires that we first understand the role of treatises in general in the legal culture.

II

In constitutional law, a pervasive phenomenon has impeded our ability to see the distinction I am attempting to draw. The phenomenon to which I refer is the overwhelming *normativity* of constitutional scholarship. With monotonous regularity, law review articles attempt to speak to courts deciding today's legal issues, in the hope that some legal actor, such as a lawyer, will refer to the article in a legal argument and persuade some judge (or, more likely, law clerk) to adopt the conclusions and analysis the article advocates. When this happens, and the article is then cited, the article itself becomes part of the primary legal material. It also reinforces a decisionmaking perspective in which that *type* of material continues to be treated as primary source.

I am not troubled by this type of constitutional scholarship, and indeed have done some myself. Legal academics have every right in the world to whisper in courts' ears if they want to, and there is no reason that this variety of scholarship should be denigrated. I am concerned, however, about the virtual exclusivity of this mode. "Mere" description, explanation, interpretation, or analysis, no matter how insightful, rich, imaginative, or informative, is hardly the preferred mode of constitutional scholarship. Rather, the normative mode so pervades that scholarship — whether through doctrine (the Supreme Court should recognize the constitutional rights of *a*'s to *x*) or grand theory (the Supreme Court should base its decisions on original intent/moral values/text/context/human rights/political expediency/precedent/deference to legislative choice/popular will) — that the mode seems essentially to characterize the discipline.

One consequence of this conflation of the scholarly with the normative is that it is far too easy to evaluate what is plainly a primary work by the standards we would use to evaluate work that seeks to explain an enterprise rather than participate in it. When we lose sight of the fact that scholarship need not aspire to make short- or even

intermediate-term changes in the phenomenon it is studying (How often do historians make history?), we tend to evaluate scholarship too much by its actual or potential impact on constitutional actors. But conversely, to lose sight of the distinction would be to expect of a primary item that which we should expect only in a quite different kind of secondary scholarly analysis.

III

As all of the foregoing should make clear, I think it is important to view *American Constitutional Law* as an item of constitutional law rather than as commentary upon that field. In part this is a function of the way in which treatises have always been centrally important items of American law, from Blackstone to Story to Cooley to Corbin to Williston to Pomeroy to Wigmore to Scott to Prosser to Davis to Loss, and so on.¹ Now it may be that constitutional decisionmaking in the Supreme Court is sufficiently political and sufficiently legally indeterminate that the idea of a legal treatise about all or part of that process would be questionable. Just as a legal treatise directed to Congress as it considers which legislation to adopt would seem a bit odd, a legal treatise directed to the Supreme Court as it decides constitutional cases would be open to a powerful (even if not ultimately persuasive) Realist attack.²

But only the most crabbed view of the subject would see constitutional law as solely, or even largely, about how the Supreme Court of the United States decides a mere 155 cases a year. Once we comprehend the tens of thousands (at least) of court cases a year involving constitutional issues, to say nothing of the far larger number of legal events in which the Constitution plays a role, it is plain that constitutional law is every bit as treatise-worthy as trusts, evidence, securities regulation, equity, or agency. Professor Tribe recognizes this phenomenon, and addresses it at the outset of this book. He is properly conscious of the fact that the Constitution speaks not only to, and perhaps not even primarily to, the federal judiciary, but "addresses its commands . . . to all public authorities in the United States" (p. 16). If we expect those authorities to treat both the text of the Constitution and judicial opinions interpreting that text as law, or at least as a set of rules that constrain them, then treatises about the constitutional text as interpreted by the courts would seem to be an indispensable part of the subject. Moreover, since most judicial constitutional decisions are

1. See also??? F. SCHAUER, *THE LAW OF OBSCENITY* (1976).

2. Note that I refer here to the process of Supreme Court decisionmaking and not to the output of that process. To think Realistically about the way the Supreme Court makes decisions, especially in constitutional cases, is hardly to deny the rule-based doctrinal effect of its decisions, any more than to think of Congress as a political body is to deny that the legislation it enacts is, and is treated as, law in a decidedly non-Realist sense.

not made by the Supreme Court, but by courts we commonly expect to treat the output of the Supreme Court as constraining, then once again books about that output that are directed in part to those who are expected to follow it would seem to be an essential part of the institution of constitutional law.

Of course there are treatises and there are treatises. Some are merely descriptive, taking their task to be one of organizing, cataloging, and summarizing the law in order to make it accessible to a wide variety of users.³ Other treatises perform this largely descriptive task but do something more as well, offering interstitial commentary, critique, and normative suggestions about where the law, at the margin, ought to be going. And still others, while providing both description and interstitial prescription, also offer a broad-based critique of and pressure on existing doctrine, seeking not only to organize the field but to make major changes in it. This last-described style is hardly new, and part of the reason that Story, Corbin, Wigmore, and others have achieved their eminence is precisely that they did far more than collect and describe, and were hardly neutral as to important issues, large and small, within the fields in which they wrote.

"*Tribe on Constitutional Law*" falls plainly in this last mold. Although the book is perhaps a bit more disjointed than the first edition (not itself a grounds for criticism, for it is a mistake to try to impose more order on a subject than the nature of the subject permits), it is plainly a book with persuasive but controversial themes. Let me offer a few examples.

Perhaps the most pervasive example is Tribe's explicitly articulated and defended decision *not* to concern himself with issues of judicial legitimacy (pp. 12-17). In part this is a function of his laudable distinction between constitutional law and constitutional decisionmaking by the courts, for once we subtract the latter from the former, questions about judicial legitimacy are largely beside the point.⁴ But his decision to treat questions of legitimacy as essentially settled embodies a quite activist view even about contemporary constitutional decisionmaking. Given that *every* judicial decision is a decision not only of substantive law, but of that decisionmaker's authority to decide cases of that kind,⁵ and given that the courts are incessantly deciding cases

3. The current norms of legal scholarship make it advisable not to cite any examples of this genre.

4. They are not quite as beside the point as Tribe makes them out to be in introducing this theme. Given his concern for constitutional decisionmaking by nonjudicial actors, his discussion of *Cooper v. Aaron*, 358 U.S. 1 (1958), pp. 32-42, takes on a special prominence, as reflected by the recently controversial issue of how nonjudicial actors should look upon judicial opinions interpreting constitutional questions. See generally Meese, Neuborne, Lee, Tushnet, Nagel, Colby, Levinson, Stick & Clark, *Perspectives on the Authoritativeness of Supreme Court Decisions*, 61 TUL. L. REV. 977-1095 (1987).

5. See Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1963).

not identical to ones they have decided before, issues of decisionmaking jurisdiction logically can never be off the agenda. To so regard them is implicitly to assume jurisdiction despite the logical and frequently legal plausibility of deciding against the exercise of that jurisdiction.⁶ Thus, it is not that Tribe does not deal with issues of judicial legitimacy. It is rather that assertion and defense of that legitimacy is a running theme of the book.

The devotion of an entire chapter to "Rights of Privacy and Personhood" (pp. 1302-435) is an equally prominent example of Tribe's willingness to take sides on fundamental and contested questions of constitutional law. Although troubled by the abortion decisions, he ultimately finds their basic aim correct (pp. 1337-62), and endorses strong judicial protection for the rights to realize a chosen vocation (pp. 1373-78), to determine one's appearance (pp. 1384-89), to control information about one's life (pp. 1389-400), and to engage in private sexual associations (pp. 1421-35). By contrast, he is skeptical about constitutionalizing the topic of death and dying (pp. 1362-71), and more skeptical about constitutionalizing risk-taking (pp. 1371-73) than he was in the first edition.⁷ Thus, although Tribe admirably does not sign on reflexively to every claim that has been made for constitutional protection in the name of personhood, it is plain that he finds the foundations for many such arguments to be sound.

In the area of equal protection, Tribe would have the courts, contrary to existing law, examine a wide range of governmental acts that have a discriminatory effect (pp. 1502-14), and have them examine age and disability discrimination much more closely than is now the case (pp. 1588-601). In support of these conclusions, he offers a broad-based theory of subjugation (pp. 1514-21) as a way of distinguishing classifications that are constitutionally troublesome from those that are not.

Although Tribe's views can often be seen as exerting pressure on current constitutional doctrine, at other times he endorses the existing state of the law. For example, he remains unsympathetic to any signif-

6. For example, Tribe endorses rational basis scrutiny for all legislation, pp. 581-86, 1439-51; urges at least some scrutiny of laws having a discriminatory effect but no discriminatory intent, pp. 1502-14; approves of some first amendment scrutiny for restrictions on commercial advertising, pp. 890-904; and is comfortable with a rather particularistic examination of a wide range of state laws that may affect interstate commerce, pp. 408-41. Every one of these conclusions could have been otherwise without jeopardizing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), or *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), and thus every one of these conclusions involves the rejection of the view that it would be unwise in a majoritarian system for the courts to be as intrusive in reviewing legislation as each of these doctrines allows. I have no quarrel with Tribe's rejection, but I do quarrel with the implicit argument that we can easily separate *what* the courts should do with whether they should do *anything*. Thus, my objection is to Tribe's descriptive claim that he does not stress issues of legitimacy in the book. Issues of legitimacy pervade every page, for they are embedded in most constitutional decisions and in Tribe's conclusions about them.

7. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 938-41 (1978).

icant constitutional scrutiny for government speech, finding the existing nonscrutiny preferable to the arguments of those who would have it otherwise (pp. 804-14). Similarly, he comes down tentatively in favor of the unconstitutionality of the Indianapolis anti-pornography ordinance,⁸ resists efforts to expand greatly the existing degree of scrutiny under the Takings Clause (pp. 588-607), and is comfortable with the current expansiveness of congressional power under the Commerce Clause.⁹

Obviously it is not my aim to provide a survey of every position Tribe takes or to analyze the relationship between his positions and existing doctrine. I offer these examples only to show that on virtually every issue Tribe discusses, he has a normative posture. Sometimes that posture is stronger than at others, sometimes it is consistent with existing law and sometimes not, but Tribe is never a passive describer. Tribe the commentator, Tribe the evaluator, and Tribe the advocate are constant presences throughout the book.

IV

Given that Tribe is constantly speaking to and attempting to persuade the reader, it is interesting to examine the voice with which he speaks, and, relatedly, the reader to whom he appears to be speaking. The questions of voice and audience, however, are intimately tied to this book's role as internal to the enterprise of constitutional law. In part the book speaks to those who are somewhat receptive to its arguments, in the hope that they will become more receptive and take the book as authoritative support for views that may have existed, albeit inchoately, prior to hearing what Tribe has to say. The book plainly will not persuade Chief Justice Rehnquist to embrace a wide variety of rights emanating from the concept of personhood. On the other hand, it may partly persuade, and, more significantly, warrant, other Justices to embody some views of constitutional doctrine they may already have. If I am right about this book's authoritative status, then "Private sexual association is protected. L. Tribe, *American Constitutional Law* 1421-35 (1988)" is a better citation than "Private sexual association is protected," and as a result there may be some cases in which Justices inclined to this view will embody it if they can say the former but not if they can say only the latter.

This is of course too crude a causal model. More realistically, sources embark on a journey toward authoritativeness first by being

8. Pp. 921-28. Interestingly, however, he appears, equally tentatively, to be sympathetic to some narrowly drawn damage awards on behalf of those who suffered psychic trauma as a result of events such as the march of the Nazis in Skokie. P. 856.

9. Pp. 305-17. However, Tribe appears to extract more of a requirement of a clear statement on the part of Congress, pp. 316-17, than a few cases in the criminal law area would seem to me to justify.

mentioned in a comparatively superfluous way. But once they are mentioned, even if it is only in passing, they begin to take on an authority that may, over a long enough period, be more meaningfully incorporated into some number of judicial opinions, even determining the result in some.¹⁰ To put it differently, books like Tribe's may make arguments permissible that previously were impermissible.¹¹ For some time those arguments may lose, but as *legitimate* losers they may eventually influence decisionmaking in the long term more than illegitimate arguments that fall outside the playing field of permissible constitutional argumentation.

If we depart from the realm of the Supreme Court, but stay within the realm of the judiciary, we might consider the voice with which this book speaks to lower court judges and to the lawyers who argue before them. Here the nature of the book becomes a bit more puzzling. More specifically, one might expect a treatise to contain a moderately comprehensive description of lower court cases. But although Tribe is somewhat better at recognizing the relevance of lower court cases as part of constitutional law than are most others who write comprehensively about the field,¹² this remains a book that concentrates overwhelmingly on Supreme Court decisions. In this respect it is not only unlike Wigmore and Corbin, but even unlike some number of books dealing with constitutional issues, perhaps most notably the unfortunately obsolete *Emerson, Haber & Dorsen's Political and Civil Rights in the United States*.¹³

This is not to suggest that Supreme Court decisions are unimportant to lower court judges or to lawyers who appear before them. On the contrary, most arguments made by these lawyers are likely to be interpretive judgments about Supreme Court cases, and thus an analysis of those cases will be highly useful. Still, however valuable this book will be from that perspective, it may disappoint those who expect a somewhat more comprehensive treatment of all or even most of the relevant case law.

Conversely, the book is replete with references to the secondary literature, primarily law review articles. Again, however, Tribe's goal here does not appear to be to attain comprehensiveness, and the law-

10. On this process, see N. MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* (1978).

11. This raises a host of interesting complications. If this review had characterized the book as dishonest junk (which is emphatically not what I believe), would I have diminished its authoritative status? What if a review written in the *Harvard Law Review* by Justice Brennan had said the same thing? What about a review written in a local law review by a totally unknown beginning academic? Are book reviews in law reviews themselves internal and not external, primary rather than secondary? If (and a big "if" it is) a strongly negative review by me in this review would have had a negative effect, then have I not done something internal by the very process of not writing such a review?

12. See, e.g. pp. 972 n.9, 1050 n.27, 1184 n.38, 1324-25, 1363-70.

13. N. DORSEN, P. BENDER & B. NEUBORNE, *EMERSON, HABER & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* (4th ed. 1976).

yer or judge seeking all or even most of the relevant literature will have to look elsewhere. But a great deal of the most important literature *is* here, and usually not merely in "see also" form. Tribe actually *uses* the secondary literature, often in the course of those many footnotes that are sufficiently incisive that they could provide the cores for individual articles in their own right.

Yet for all of Tribe's references to Supreme Court cases, lower court cases, and the secondary literature, it is hard to see this book as a place to go to find out about other material. It is primarily a book one would use to find an enormous array of short, prescriptive analyses on discrete constitutional problems. Lawyers and judges will find those analyses useful as introductions to the areas they discuss, as creative perspectives on those areas, and as persuasively presented arguments for what Tribe thinks ought to be done. Most will want to start with Tribe or at least include him in their thinking about these problems. Few, however, will find that this is the only source they wish to consult.

V

All of this, of course, sounds just like how a scholar would use this book — the scholar seeking an introduction to an area she has not previously thought about, or a useful perspective on an area with which she has some familiarity. When Tribe does not persuade, he at least presents a worthwhile view of the problem he addresses. And for those who wish that Tribe had paid more attention to the literature on and debates about constitutional theory, let us not forget that this book *is* a constitutional theory, perhaps at times not presented in the professional language of constitutional theorists, but presented instead in 1778 pages of demonstrating the theory at work.¹⁴

Once we see that this book speaks to the scholar in almost the same voice as it speaks to the lawyer and to the judge, can we still say that it is a part *of* constitutional law rather than a book *about* it? I think we can, precisely because of the way "*Tribe on Constitutional Law*" embodies many of the conventions of constitutional law as *practiced* both by lawyers and by academics.

First, the scope of the book is defined by the topics that are considered part of the subject called "Constitutional Law" in American law

14. The theory that emerges, however, may be insufficiently internally coherent for the practicing constitutional theorist. At times Tribe's positions seem not to fit together, and at times arguments he uses in one area are strangely absent from others. But this may demonstrate that his theory is simultaneously a theory of activism and of comparatively particularized approaches to particular problems. Given the way constitutional decisionmaking operates within a particularized world, given the way the problems of today are not those of yesterday or tomorrow, and given the multiplicity of constitutional decisionmakers, it is apparent that Tribe's diffuse analysis of all constitutional problems is a theory of how constitutional decisionmaking does and should operate in a hardly unitary world.

schools. This subject, however, is but a subset of what might be called "Constitutional Law" in any other context. The book excludes constitutional criminal procedure, constitutional civil procedure, and the constitutional aspects of a wide variety of subjects covered in other law school classes. Moreover, as I have said, the book's treatment of Supreme Court cases and the secondary literature is far heavier than its treatment of lower court cases, and it is addressed far more to the lawyer or the judge than to other governmental decisionmakers. But finally, and most importantly, the book reflects existing constitutional conventions by conflating the very distinction I drew at the outset of this review. It is written by someone who is *simultaneously* a major constitutional scholar at a leading American law school, the preeminent constitutional litigator in the country, and a widely known public commentator on constitutional issues. The book's *description* is glued to its *prescription*, such that almost all of what the book contains is, in one way or another, an *argument* for an approach that American courts, especially the Supreme Court, ought to adopt. Tribe speaks as a participant in the system, and uses, almost exclusively, the methods of the lawyer to comment on the law. And if at times perspectives from other disciplines, whether history or philosophy or economics, creep in, then that too is what we would expect in today's world of constitutional law.

Because it is addressed to the constitutional scholar as much as to the constitutional lawyer or judge, and because its author is both a practitioner of and a commentator on the discipline, this book represents and comments on a domain in which the distinction between the internal and the external, between the participant and the observer, has collapsed. In the final analysis, this book exists *within* constitutional law, not at an angle to it. It is a masterful exercise *in* a tradition, and it embodies in many respects the best of that tradition. Yet the book also ought to be taken as a warning, a warning about what the discipline is becoming. If academic institutions have value, it is in part because they *are* at an angle to society, and at an angle to the phenomenon they wish to explain. Their virtue exists in their ability to say those things that cannot be said by more immediately accountable primary participants. But if the distinction between the participant and the observer collapses, and the observer aspires to have her observations taken into account by today's decisionmakers, there may be no room for those who would stand outside, willing to exchange immediate impact for long-term understanding.

The phenomenon I describe may be lessening. The interdisciplinary nature of much of contemporary legal scholarship, for example, makes it less likely that our words will be directed to or heard by those whose primary expertise is in, and only in, law. Moreover, I can say with some confidence that the Supreme Court in 1991 will be further politically from the constitutional professoriate in 1991 than the

Supreme Court was from the constitutional professoriate in 1968. If the Justices are less inclined to listen, maybe constitutional scholars will be less inclined to talk directly to them.

None of this is to fault Tribe or the spectacular accomplishment his book represents. "*Tribe on Constitutional Law*" represents a world in which, in one form or another, and for better or for worse, the mode of the scholar/participant is overwhelming. That mode has its place, and maybe even the major place. But when it is difficult to separate the discipline from commentary on it, when it is difficult to separate the players from the critics, something is lost. It is not lost to constitutional law now, for the practice of constitutional law has been greatly enriched by academic input. That enrichment, though, may have come at some expense to the ideal of the academy, for without the external perspective the ability to say those things that cannot otherwise be said is lost. This book is a masterwork of a perspective that is largely internal to the practice it seeks to explain and justify. But as such, it is also a warning to a discipline that may not recognize that the internal is not the only perspective there can be.