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Dia-Tribe

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DIA-TRIBE

*Mark V. Tushnet**

AMERICAN CONSTITUTIONAL LAW. By *Laurence H. Tribe*. Mincola, N.Y.: The Foundation Press. 1978. Pp. lxxix, 1204. \$23.50.

It is hard to emerge from Professor Tribe's enterprise without the feeling that Philip Roth's Dr. Spielvogel has offered the last word on the subject: "So . . . Now vee may perhaps to begin. Yes?"¹ The treatise has been criticized from the right² and praised from the center,³ and I suppose my comments will inevitably be taken as the view from the left. I prefer, however, to think of them as coming from, say, the north — from a direction unrelated to the conventional liberal-conservative continuum. I shall examine Professor Tribe's work with the aim of showing that its premises are hopelessly contradictory. The popular allegiance to those premises demonstrates the need for a major reorientation of constitutional theory.⁴

Professor Tribe's treatise is organized around four premises. First, the aim of the Constitution of the United States is to secure justice. Second, the Constitution does in fact — or can fairly be interpreted to — approximate the accomplishment of justice. Third, the Supreme Court should interpret the Constitution so as to promote justice. The first two of these premises are largely uncontroversial. Rawls tells us that justice is the first virtue of institutions.⁵ And, as I will argue by example in the next Section, the flexibility of legal reasoning and the variety of the available precedents certainly provide enough room for the Constitution to be interpreted to promote justice. The third premise is the one around which the standard controversies in constitutional theory rage. I shall not rehearse those controversies here; Professor Tribe comes close to acknowledging that his third premise is independent of the first two, and gives only the weakest of arguments to support it.

Although I shall deal with difficulties in Professor Tribe's inter-

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1. P. ROTH, PORTNOY'S COMPLAINT 274 (1969).

2. See Nagel, Book Review, 127 U. PA. L. REV. 1174 (1979).

3. See Ginsburg, Book Review, 92 HARV. L. REV. 340 (1978).

4. I have suggested elsewhere the direction that such a reorientation might take. See Tushnet, *Truth, Justice, and the American Way: Constitutional Law Scholarship in the Seventies*, 57 TEXAS L. REV. 1307 (1979); Tushnet, *Post-Realist Legal Scholarship*, 15 J. SOC'Y. PUB. TCHRS. LAW 20 (1980).

5. See J. RAWLS, A THEORY OF JUSTICE 3 (1971). See also U.S. CONST. preamble.

pretation of his third premise, the fundamental contradictions within the treatise emanate from the fourth premise: that relatively recent Supreme Court decisions establish doctrines that are reasonable approximations of justice. As we shall see, it matters little whether we take 1968, the end of the Warren era, or 1980 as the date for examining constitutional doctrine; Professor Tribe tends to choose the later date and then to explain why current doctrine is almost as good as Warren Court doctrine. From what we know about the rationality with which the Court decides cases,⁶ the fourth premise is either wildly implausible or rests on an invisible hand mechanism of truly awesome power. Although Professor Tribe's enterprise might be understood as an argument for constructing such a mechanism, he does not do so and indeed talks in terms that are inconsistent with the invisible hand approach.

My argument is designed to show that one cannot treat constitutional law as establishing principles of justice. In Section II, I take the first three premises seriously and explore what might happen if we encouraged the Supreme Court to articulate principles of justice in its constitutional decisions. I argue that it is impossible to join the fourth premise to what that exploration reveals, and that only a different kind of constitutional theory from Professor Tribe's can do the job he thinks should be done.

I. PRINCIPLES OF JUSTICE AND THE CONSTITUTION

Suppose we agreed with Professor Tribe that the Supreme Court should interpret the Constitution so that constitutional doctrine stated principles of justice. In this Section, I shall examine what a political philosopher might say about two substantive areas, equal protection and federalism, and how a political-philosopher-turned-judge might interpret the Constitution in line with Professor Tribe's first three premises. I shall also compare the results with what Professor Tribe himself says. I shall argue that there may be a gross disparity between the two efforts, and that the possibility of disparity can be eliminated only by adopting Professor Tribe's fourth premise. In doing so, however, those who follow Professor Tribe are committed to specific positions on issues that remain controversial among political philosophers. Perhaps the philosophers are wrong; perhaps Edmund Burke was a better philosopher than John Rawls and Robert Nozick. I invoke Burke to suggest a very powerful conservative strain in Professor Tribe's work. Section II examines another aspect of Professor Tribe's conservatism, and my Conclusion suggests its sources.

6. See generally B. WOODWARD & S. ARMSTRONG, *THE BROTHERS* (1979).

A. *The Just Distribution of Wealth: State Action and the Equal Protection Clause*

Someone who learned political philosophy from Professor Tribe, or from reading law reviews, would be surprised to learn that the central issue in political philosophy today, as it has been for at least a century, is not whether or to what extent freedom of expression is required, not whether abortion is morally permissible, not whether remedial action that takes race explicitly into account is justified. In many ways, indeed, those issues are shadows cast by the real one that has animated philosophical discussion: put bluntly, the real issue is which social-economic system, capitalism or socialism, justice demands.⁷ That is what John Rawls and Robert Nozick are concerned with, and what they and their acolytes have to say about other questions is largely derived from premises constructed to give them leverage on that issue.

I take it that I do not have to say much about what capitalism is, but I must say something about socialism. For the purposes of what follows, I take socialism to be a system with two predominate characteristics: substantial though not necessarily complete equality in the distribution of material wealth among all in the society,⁸ and substantial though not necessarily complete control by the society, acting through appropriate forms of collective action, of how people invest their material resources, especially when certain investments threaten to disturb equality in wealth distribution. I want to begin with the hypothesis, which I know is outrageous to American lawyers, that socialism is required by principles of justice; perhaps the outrage can be diminished by emphasizing again that what I treat as

7. Capitalism and socialism can take many forms, of course. Rawls in particular contends that principles of justice can be satisfied in systems of welfare capitalism or modest socialism. See J. RAWLS, *supra* note 5, at 273-74. For my purposes, it is unnecessary to specify more particularly what forms of capitalism or socialism are at stake. According to Rawls, the choice is indeterminate only behind the veil of ignorance, at what he treats as the stage of constitution-making. Given information about the real world, which of course the Supreme Court has, the choice is determined in Rawls's scheme. Thus, Professor Tribe's third premise bars him from saying that the choice between capitalism or socialism should be left to legislatures. In addition, unless the Court can specify the choice, the enterprise of linking the Constitution and distributive justice becomes completely uninteresting. With compensation, the state can expropriate at will, and can then redefine for the future what present holders of wealth can do with it (pp. 463-65). Perhaps it is not as odd as it first seems that Professor Tribe appears to say that the Constitution may limit — for reasons of autonomy and equality, terms that the discussion of the state action doctrine below suggests are surrogates for private property — the legislature's ability to socialize property (p. 465). That reinforces the conclusion drawn above about what the third premise entails. It also, not so incidentally, supports my later arguments about Professor Tribe's conservatism.

8. I should note in passing another anomaly. Most political theories are universalistic, in that they prescribe rules for action in societies of people generally. In this light, a work on American constitutional law that is said to be guided by political philosophy is decidedly odd. If the limitation were taken seriously, it would lead to far more troublesome implications than Professor Tribe realizes. For a fine discussion, see J. DUNN, *WESTERN POLITICAL THEORY IN THE FACE OF THE FUTURE* 55-79 (1979).

a hypothesis has been and remains a conclusion drawn by some respected philosophers.⁹ How then could a socialist judge interpret the Constitution to do justice?

In light of my definition of socialism, she would have to develop two doctrines, one that specified a distribution of wealth and one that allowed collective control of investment. It is not accidental, as a certain element in the socialist camp would say, that she would in fact have those doctrines at hand. Indeed, she could summarize a complex argument by saying, "Socialism follows from *Shelley v. Kraemer* and *Griffin v. Illinois*." Those familiar with the standard efforts in constitutional law courses to confine those cases may need no elaboration, but for those whose memories of the argument have faded, I shall expand it a bit.

*Shelley v. Kraemer*¹⁰ held that the substantive requirements of the fourteenth amendment came into play when a state court sought to enforce a racially restrictive covenant in a deed of land between two private parties. Of course, the case can be read narrowly, as one involving race and a willing seller and buyer whose non-discriminatory decisions were blocked by judicial enforcement of the covenant. But it can also be read broadly, as holding that state action exists, and the substantive requirements of the Constitution are implicated, whenever a court stands ready to enforce rights created by private agreement. Now suppose the socialist judge confronts this case: The People's Power Collective, enraged by the investment and pricing policies of the Detroit Metropolitan Edison Company, invades the Company's power plant and starts producing and distributing electricity according to new criteria.¹¹ The Company seeks an injunction directing the Collective to leave the plant. Obviously, the judge sees, *Shelley v. Kramer* means that the injunction would be state action; whatever she does will affect the distribution of wealth in the society, and she therefore must decide which resulting distribution the equal protection clause requires.

Actually, the judge has a second arrow in her quiver of precedents. *Burton v. Wilmington Parking Authority*¹² held that state action exists where "[t]he State has so far insinuated itself into a position of interdependence" with the nominally private action "that it must be recognized as a joint participant."¹³ *Burton* emphasizes that the question of interdependence depends on the facts, and the

9. See J. RAWLS, *supra* note 5, at 273-74.

10. 335 U.S. 1 (1948).

11. There are precedents, even in the United States. See F. PIVEN & R. CLOWARD, *POOR PEOPLE'S MOVEMENTS* 55 (1979). Of course, the typical response has been coercive repression, but in such instances the lawsuit involving the Collective would simply take another form, seeking damages for false arrest and assault, for example.

12. 365 U.S. 715 (1961).

13. 365 U.S. at 725.

socialist judge realizes that, on standard interpretations of the facts about Metropolitan Edison, there is no interdependence. But facts can be described with varying abstraction, and the judge decides to talk about the interdependence of the state and the business community, of which the relationship between Michigan and Metropolitan Edison is but one instance. She argues that the state depends on business confidence to stabilize its environment so revenue will be generated regularly, and that the business community depends on the state to provide a secure framework for profitable transactions.¹⁴

Is there anything wrong with those arguments? There are obviously some monumental objections of a legal realist sort. Justices Vinson and Clark were no socialists, and they surely did not intend *Shelley* and *Burton* to lay the foundations for socialism. Further, if the socialist judge actually writes the opinion I have sketched, the probability of reversal on appeal is vanishingly close to one. But realist objections will not count against Tribe, as should be clear from his tendentious, or in his own words "unconventional" and "problematic," (p. 313 n.28) account of *National League of Cities v. Usery*,¹⁵ a decision that reeks of the American Enterprise Institute but that Professor Tribe treats as recognizing rights to "basic government services" (p. 313). What matters, then, is what judges write, not what they think, and *Shelley* and *Burton* can fairly be used as the socialist judge wants.

I admit that I have not fully developed the socialist judge's argument. She has at hand, however, some important research aids: commentary on the cases that says, for example, that *Shelley* cannot mean what it said, because if it did we would have socialism, and therefore continues with suggestions for limiting the case.¹⁶ All she has to do is stop after the first part of that commentary. But our judge is not just a socialist; she is a conscientious and honest judge as well and must worry about whether *Shelley* and *Burton* remain good law in all their implications. As to *Shelley*, the answer is clear. Although the Court has never faced up to its implications and has decided cases that would have gone the other way had *Shelley* been at the center of the argument, the implications of the case have never been overtly repudiated, and the case is still cited with approval. The only exception is *Evans v. Abney*,¹⁷ allowing state law to authorize reversion of a bequest to residuary legatees if the discriminatory intent of the testator cannot be fulfilled. *Abney* can be fairly treated

14. See Block, *The Ruling Class Does Not Rule*, 33 SOCIALIST REVOLUTION 7 (1977).

15. 426 U.S. 833 (1976), discussed at pp. 308-18.

16. See Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Lewis, *Burton v. Wilmington Parking Authority — A Case Without Precedent*, 61 COLUM. L. REV. 1458 (1961).

17. 396 U.S. 435 (1970).

as an aberration, or as dealing with the limited sphere of testamentary disposition of property.

The situation as to *Burton* is more complicated. Recent cases seem to have narrowed what will count as interdependence,¹⁸ and *Burton* has tended to merge with a separate line of authority — that state action exists where an ostensibly private actor performs a public function.¹⁹ The current law is that a public function is one over which the state has traditionally exercised a monopoly.²⁰ A conscientious judge can deal with the narrowing of interdependence, as I have suggested, by arguing that it occurred when the Court used a less abstract description of the facts, and that such a description does not foreclose the business-confidence argument she has made. The public function cases are harder for the conscientious socialist judge. One line of defense is to recast the public function, from providing electricity or zoning land to determining legal rights and duties. That function has been, and indeed by definition must be, a state monopoly. In this way, the public function cases become a straightforward deduction from *Shelley*. Here the only obstacle is the outrageous case of *United States v. Kras*,²¹ of which Professor Tribe disapproves precisely on monopoly grounds (p. 1009).²²

Actually, at this stage the judge can rely on Professor Tribe even more directly. His chapter on the state action doctrine treats it as an “anti-doctrine” (p. 1147). I will do no more than point to the rhetorical excesses²³ and the opacity of the formulations in the chapter,²⁴ before noting that, to Professor Tribe, the state action question collapses into the question on the merits: “It is a problem . . . whose solutions must currently be sought in perceptions of what we do not want particular constitutional provisions to control” (p. 1174).²⁵ Thus, the socialist judge can move confidently to the equal protection question, for if Metropolitan Edison’s property rights are important, there is no state action, and if the Collective’s forcible

18. See, e.g., *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

19. See, e.g., *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

20. See, e.g., *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149 (1978).

21. 409 U.S. 434 (1973).

22. See also pp. 1120-22 for a different criticism.

23. I would appreciate hearing from a reader who can explain how “[c]haos . . . may itself be a form of order,” p. 1149, without invoking the second law of thermodynamics.

24. See, e.g., pp. 1159, 1160. On p. 1158: “The state action requirement fixes a frame of reference. The substantive constitutional right at issue initially determines the parameters of this frame. Ultimately, however, it is the frame itself which determines the relevance of the right to the inquiry.” Professor Tribe must have caught more than a glimpse of his back in front of him as he rounded the last bend in that circle.

25. I do not suppose that the word “currently” is intended to suggest that at some future time the problem will receive a different solution. Rather, it suggests that definitions of substantive rights will vary over time, and thus points to the importance, subliminal in this instance, of the fourth premise.

redistribution of property is justified, there is state action. This approach, which Professor Tribe suggests is novel (pp. 1160-61), simply restates the balancing test proposed by Professor Henkin and others.²⁶ Unfortunately, in creating a polar case for that balance, the law professors' parade of horrors — black children trooping across the bigot's lawn on their way to school, invading his living room²⁷ — simultaneously assumes that private property must be taken as a given — the horrors would not be horrible otherwise — and assimilates the bigot's lawn to Metropolitan Edison's power plant, as if a principled socialism could not draw the obvious lines.

On the merits of the case, the leading precedent is *Griffin v. Illinois*,²⁸ in which the Court held that a state must provide a trial transcript to indigents seeking to appeal their convictions where it requires transcripts for such appeals. *Griffin* means that the state may not rely solely on the market criterion, ability to pay, as a basis for allocating at least some goods. *Griffin* opens two questions for discussion: what goods must be allocated by non-market criteria and to what extent must considerations other than ability to pay govern the allocation of goods? Once again, the socialist judge can rely on the commentators who explore, sometimes with excitement²⁹ and sometimes with dread,³⁰ the implications of *Griffin*.

The Supreme Court tried to limit the goods subject to *Griffin* in the school finance case, which said that it applied only to goods (rights) "explicitly or implicitly guaranteed by the Constitution."³¹ As Justice Marshall there points out, however, *Griffin* is unnecessary for such goods; the constitutional right itself, standing alone and unsupported by notions of equality, prohibits allocation according to the market. Thus, *Griffin* must apply to important, or in the terms Professor Michelman draws from Rawls, basic goods, among which are the material necessities of life.

The doctrinal formulation in the school finance case obscures a more important element in the case: the Court's implicit acknowledgement that *Griffin*'s scope was broad indeed. The case repeatedly emphasized that no one contended that the education provided in

26. See Henkin, *supra* note 16.

27. Professor Tribe spots the parade on p. 1170.

28. 351 U.S. 12 (1956).

29. See, e.g., Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

30. See, e.g., Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41.

31. *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973). In light of my comments in note 35 *infra*, I should state that I was one of Justice Marshall's law clerks during the term in which the school finance case was decided. I was only peripherally involved in the work on Justice Marshall's opinion. See B. WOODWARD & S. ARMSTRONG, *supra* note 6, at 258-59.

property-tax-poor districts fell below some minimum level, thus coupling a broad scope for *Griffin* with a limiting answer to the second question. Because we are concerned with Professor Tribe's premises, we can put aside the fruitless controversy over standards of review — strict scrutiny, minimal rationality, and all that. For, by his third premise, the Court must decide whether a distribution of wealth is justified, and cannot, except by arguments I will discuss in the next section, rely on another agency's conclusion that the distribution is justified. The limiting answer to the second question has generally been taken to be Professor Michelman's: a distribution of wealth is justified as long as it meets minimum standards for satisfying just wants for basic goods. Professor Michelman constructed his test by blending Rawlsian moral philosophy with decided Supreme Court cases; that is, he relied on the third and fourth premises. Michelman's minimum protection approach does specify one form of political philosophy, but only the fourth premise justifies that form instead of a more radical equalization approach.

My hypothesis in this Section has been that justice demands radical equality. *Griffin* can be read to support that result, but later cases seem to stand in the way. The socialist judge has several responses to cases like the school finance case. First, they explicitly rely on an improper theory of judicial review; by deferring to the legislature and not assessing the justice of the distribution of wealth, they erroneously rejected the third premise. Second, they were simply wrong; to the extent that they relied on a theory of distributive justice, they relied on one that was not supported by careful moral philosophy. Finally, and I think most interesting, invocation of norms of distributive justice by the courts is, as I argue in Section II, fundamentally a political act: it makes sense only if the political circumstances will allow the decision to be used as part of an extended political process that will ultimately achieve justice. The socialist judge can therefore treat the limiting cases as sensible decisions in light of their political circumstances. But obviously something has changed when a people's collective takes over a power plant, and it may be politically appropriate to invoke the egalitarian standards demanded by principles of justice.

Now we have to see what Professor Tribe says. He begins with a summary whose terms indicate his sympathies. The Warren Court, he says, used "ardent rhetoric of equal justice for the poor, rhetoric which promised more than even the Warren Court had delivered," and its decisions were "informed and perhaps generated" by an "imaginative compassion for the plight of the poor" (pp. 1098-99). He then reviews the decisions that are consistent with broad readings of *Griffin*. When he discusses the later decisions, Professor Tribe criticizes their logic and their premises, suggesting that he would understand the socialist judge's second response to the limiting cases.

But his concluding summary takes back what one might have thought Professor Tribe had given. He first explains the cases as refusing to deprive the rich of what their money can purchase, which is a fair enough account but which, I confess, has no obvious connection to justice absent the fourth premise. Then he concludes:

What emerges from the decisions of the past several years, then, is a wavering commitment to maintain for the poor access to criminal justice and the political process; a possible, but not openly professed or entirely consistent, belief in protection for the poor against the most severe forms of deprivation with respect to education, nutrition, and welfare; and a determined, occasionally even activist, though again not openly proclaimed, commitment to preserve for the non-poor ways of purchasing distance and distinction from the less fortunate — to preserve, in effect, plenty of room at the top, without wholly abandoning protection at the bottom.

The vision animating the mix of aspirations is plainly not an egalitarian one, but it is not without its own elements of decency and concern; whatever the doctrinal stains, the Burger Court will not refuse lifelines to those about to drown, even if it will throw them from a point perched safely above the disquieting signs of distress — a point from which the struggle to survive may not always be visible at all.

Whether the equal protection of the laws can survive this transformation into minimal protection of the laws, with some of us very much more equal than others, remains to be seen. It will depend in part on just *how* minimal the protection provided at the bottom turns out to be. But it may also depend on the viability of a system that separates liberty from equality, and separates both from fraternity. [Pp. 1135-36].

All that is well and good (although one wonders when lifelines will be thrown if the throwers cannot see the struggle). We know from it that Professor Tribe is fair-minded and even-handed, and that his heart is in the right place (that is, on his sleeve). But the tension between the third and fourth premises is evident, unless we agree that distributive justice demands only that lifelines be thrown. There are reasons to think that it demands more.

I have been sketching what might be called a direct argument for socialism, invoking only standards of distributive justice or equality. There is an indirect argument for socialism as well, invoking standards of liberty. That argument, I believe, seriously reduces the degree to which minimum protection or lifeline theories of distributive justice are plausible. Here too a moral philosopher could use Supreme Court cases to illustrate the argument, though not to support it. The argument assumes that basic liberties — to speak, vote, and so on — ought to be preserved, and then claims, on the basis of substantial empirical evidence, that significant inequalities in the distribution of material wealth make it impossible to preserve those lib-

erties.³² An incidental example can be found in the absence of freedom of speech in the workplace, so that whistleblowers may be fired at their employers' will, a result that I suspect would be hard to support under any plausible moral theory. But the examples from contemporary constitutional law are themselves important. In *Buckley v. Valeo*³³ the Court held unconstitutional limits on individual expenditures on behalf of candidates for political office, and in *First National Bank v. Bellotti*³⁴ it struck down expenditure limitations on corporate promotion of political views. Although Professor Tribe argues that the decisions can be limited (1979 Supp., p. 59 n.14), their message for those who find the indirect argument for socialism persuasive is that the fourth premise must be rejected, for the Court has, as Professor Tribe acknowledges, embedded in constitutional law a prohibition on legislative efforts to reduce the power that wealth brings to its owners (p. 1135).

The Court in *Bellotti* was seriously divided, and one can conclude from that fact alone that the first three premises are, at this point, unimpaired: the materials available for constitutional decision would allow us to interpret the Constitution so that it embodied principles of justice.³⁵ But those three premises yield indeterminate results. It is only the fourth premise that allows Professor Tribe to get anywhere at all in his work. Yet it should be clear by now how ideological that premise is. The commentary attempting to limit *Shelley* and *Burton*, and the recent monopolization cases, are explicitly animated by concern that prior state action doctrine might be used to socialize private property. The lesson of *Bellotti* is equally clear. In the absence of the fourth premise, a normative theorist might simply reject those concerns as wrong. Given the fourth premise, though, we must conclude that only capitalism is justified by political philosophy.

Perhaps, however, I should not take the fourth premise as seriously as I do. What I call a premise, after all, may simply be an artifact of Professor Tribe's enterprise: if one wants to write a treatise

32. The argument is most forcefully made in C. LINDBLOM, *POLITICS AND MARKETS* (1977), cited, with the author's name misspelled, in 1979 Supp., p. 77 n.12.

33. 424 U.S. 1 (1976).

34. 435 U.S. 765 (1978).

35. A footnote on the ethics of treatise-writing is warranted. After *Bellotti*, the City of Boston argued that it, a municipal corporation, had to be allowed to spend money in a political campaign; Justice Brennan, who dissented in *Bellotti*, turned the screws on the majority in issuing a stay so that the city could do so. *City of Boston v. Anderson*, 439 U.S. 1389 (1978). The Supreme Court denied plenary review after the election had ended. 439 U.S. 1060 (1979). In the 1979 Supplement, which notes *Anderson* at 57 n.4, Professor Tribe argues that several cases "may . . . represent . . . a deeper and wider trend in our constitutional law: municipal corporations are increasingly being differentiated from mere arms of the state itself." (1979 Supp., p. 31). Readers could better assess that suggestion if they were told that Professor Tribe represented Boston in *Anderson* and other cases. See 47 U.S.L.W. 3353 (Nov. 21, 1978).

tise on American constitutional law, instead of a work that is labelled moral philosophy, one is obliged to tell one's audience what current law is. I admit that there are elements in the treatise that do seem to be artifacts. The most notable is Professor Tribe's central organizing scheme. He presents "seven models of constitutional law" on the first page as both heuristic and historical. It is hard to avoid the feeling that Professor Tribe uses those models in a rather forced way. The chapter on the state action doctrine, for example, is tacked on at the end; Model III (takings and the contract clause) occupies 17 pages; and Model VII (structural justice) occupies only 10. Model III seems to be simply a way to combine in one chapter the discussion of two clauses that other text writers discuss in two. Model-building may thus be as much an attempt to differentiate Professor Tribe's product from others as it is an intellectual enterprise.

But the fourth premise is not the same kind of artifact; it is essential to Professor Tribe's work. My extended hypothetical case is designed to show that the first three premises yield only indeterminate results without some external source of normative judgments. The third premise confines results *if* we have a theory of justice. But the currently fashionable way of developing such a theory is through systematic moral philosophy, not through examining what the Supreme Court has said. Professor Tribe in effect proposes an alternative: capitalism is required not because it satisfies standards of justice developed in systematic moral theory but because the Supreme Court has over time defended it. The fourth premise is the motor of this alternative, and is therefore a true premise. Indeed, it is an essential premise to any effort that uses decided cases as the framework for developing a law that is consistent with justice. Diverse and sometimes conflicting lines of precedent pervade every area of law, and the standard tools of legal reasoning allow us to use those lines to any end we choose. But then decided cases cannot guide us to justice: we must find it for the future either by moral philosophy alone or by agreeing that the law — as it is occasionally stated by judges who are not primarily moral philosophers — embodies justice.

The fourth premise might be defended as an essential element in a Dworkinian best theory of constitutional law, "morally the strongest" theory among those that provide a reasonably "good fit" with the decided cases, "particularly recent decisions."³⁶ There are, however, two difficulties, each fatal to Professor Tribe's enterprise. First, the strongest available moral theory may still be extremely flaccid, and Professor Tribe's second and third premises demand something more than a flaccid moral theory. Second, the *Shelley-Griffin* argument demonstrates that theories which, to the legal profession at

36. Dworkin, *Seven Critics*, 11 GA. L. REV. 1201, 1252 (1977).

least, are wildly eccentric, fit the cases well enough to be among those from which the best theory must be selected, especially if, as Dworkin permits, we may reject some decisions as mistakes. Then, however, we need arguments for the moral theory chosen as best that are independent of the decided cases, and it is precisely such arguments that Professor Tribe's fourth premise precludes.

The Burkean theme is, I think, the only way to make sense of Professor Tribe's work. I have argued elsewhere that Burkean constitutional theory is impossible;³⁷ it is enough here to allude to Professor Bickel's hints at such a theory as a way of suggesting the difficulty of the endeavor.³⁸ One thing should be noted, though: if Professor Tribe's fourth premise commits him to a Burkean theory, I find it hard to understand his basis for criticizing any line of cases even as moderately as he does. That is, the Burkeanism of the fourth premise contradicts the rationalism with which Professor Tribe infuses the third premise.

B. *Coordination and Institutionalism: Federalism*

The next step in my argument questions Professor Tribe's interpretation of the third premise, but it is best made indirectly. The argument from liberty to socialism suggests that liberty can be preserved only if relatively small permanent combinations of wealth and therefore of political power are allowed. But that raises questions about the ability of socialist society to produce levels of material well-being that require large-scale activity. A socialist must therefore give some account of how small units can coordinate their activities.

In constitutional law, that account is provided by the law of federalism, whose concern is precisely how we can assure sufficient power in the national government to guarantee adequate coordination without at the same time concentrating power so much that liberty is threatened. Political philosophers have suggested two methods to reach that end; American constitutional law is interesting here because the Framers attempted to devise a third method, whose failure is instructive. The philosophers say that coordination can be accomplished either by a rule requiring unanimous agreement before action can be taken or by a rule of majority agreement.³⁹ In the American setting, those rules are mirrored in the choice between a confederation of states and a federal nation.

37. See Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1039-42 (1980).

38. A. BICKEL, *THE MORALITY OF CONSENT* (1975).

39. Nozick argues for the unanimity rule and Rawls for majority rule at the legislative stage, though he requires unanimity at the constitutional stage.

The Framers, of course, rejected the unanimity rule,⁴⁰ and contemporary constitutional law therefore provides little insight into the philosophers' problems. But it might be possible to use the institution of judicial review as a mechanism for determining the subjects as to which unanimity was required in a mixed system. Had it been used that way, we could look at the cases for guidance on the philosophical issue. However, the Court has, with brief exception, consistently followed the majority rule approach in its federalism decisions, treating congressional power as plenary in cases involving national power and assuming that congressional decisions can override local decisions in cases involving state power. The exception is the period from 1896 to 1936, when the Court imposed federalism constraints on the exercise of national power. No coherent doctrine emerged during that period, nor has one come since.⁴¹

Two conclusions may follow from the constitutional law of federalism. The territorial units that underlie federalism in the United States may still be too large to guarantee both liberty and coordination; certainly the mental pictures one draws of Robert Nozick's utopia and Roberto Unger's organic groups are those of units rather smaller than California. Then too, there may be a more general point. Professor Tribe's treatment of federalism obscures this point completely, even though it seems to be the only question about federalism that a moral philosopher would find interesting. Professor Tribe provides chapters on federalism whose primary analytic point is the inability of the Supreme Court to develop federalism restraints on national power even though federalism is designed to protect liberty (in his Model I, of "Separated and Divided Powers") (pp. 1-4). Given the fourth premise, the emphasis on decided cases is unsurprising, but it comes close to abandoning the third premise. What would be of interest is something to which Professor Tribe alludes only in passing: the Court has its chance to talk about federalism and national power only when Congress has acted, and yet the constitutional division of subjects between state and nation may be better revealed if we look at what Congress does not do, that is, at subjects as to which, at least provisionally, coordination can be reached only by unanimous agreement (p. 224). The Court's failure to define when unanimity is required may mean that there is no necessary connection between institutional arrangements such as judicial review and the substantive requirements of justice. The next Section explores that general point drawn from Professor Tribe's treatment of federalism and the tensions between the third and fourth premises that his treatment reveals.

40. Aficionados will note U.S. CONST. art. V, proviso 2.

41. See *National League of Cities v. Uery*, 426 U.S. 833 (1976).

II. JUSTICE AND INSTITUTIONAL ARRANGEMENTS

In this section I develop two challenges to the third premise. First, the Burkean theme makes it difficult to defend the interpretation of that premise which Professor Tribe follows; there are theories of justice that would not allow Professor Tribe to move from substantive principles of justice to the assertion that the Court should follow those principles. Second, and for me more interesting, even if one accepts Professor Tribe's notion of what justice requires, or indeed any theory of justice that specifies outcomes, one probably should not accept his assertion about what the Court should do; there are reasons to think that the outcomes will sometimes not be reached by that route.

The first challenge is, in one of its forms, the general institutional challenge to judicial review. Assuming that the Constitution is designed to secure justice, the challenge goes, what reason is there to think that the Supreme Court will better serve justice than legislatures? Professor Tribe in essence ignores the challenge, and when it is stated in the ordinary way, I think he does so correctly. The ordinary form leads to a morass from which no one has emerged more enlightened, or enlightening, than before. For Professor Tribe, therefore, institutional concerns have only a limited relevance to substantive ones (p. 14).

But he should not be let off so easily just because the ordinary form of the institutional challenge is unhelpful. There are indeed interpretations of justice to which institutional concerns have almost no relevance. These interpretations evaluate the outcomes of social activities according to some substantive criteria. Nozick calls them "patterned" theories of justice,⁴² and it is of course true that if one holds a patterned theory, in which only outcomes matter, one can move rather directly from theory to doctrine, subject to qualifications discussed below. But patterned theories are not the only ones available in political philosophy. For example, there are also what might be called process theories, in which outcomes are evaluated according to criteria that speak only to the manner in which the outcomes were reached. Obviously, Professor Tribe's approach is acceptable only if some patterned theory, instead of some process theory, satisfies the requirements of justice. In a way, this difficulty recapitulates the underlying problem discussed in Section I. There we saw the odd consequences of assuming that the Supreme Court has resolved controversies that continue to excite political philosophers; here we see Professor Tribe assuming that he has done the same, aided by "historical givens" about the Supreme Court (p. 12). I suspect that a serious Burkean could explain the connection be-

42. R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 156 (1974).

tween judicial and academic behavior in an interesting way, but I know that, once again, Professor Tribe has not followed lines that would open if he attempted to defend his premises.

Even as reformulated, the institutionalist challenge is rather uninteresting, because there appear to be no contemporary political philosophies that are purely process theories.⁴³ For questions on which the majority (or the process specified by the theory) should not rule, then, one who accepts the first two premises will have to accept the third as well. Let us assume, therefore, that constitutional theory allows the Supreme Court to say that at least some legislative decisions are inconsistent with principles of justice. At this point the second challenge arises, for it does not follow that the Court should impose what justice requires. The challenge here is different from the institutionalist one, because we have assumed that it is permissible to override majoritarian or process decisions. Rather, the challenge is political.

I think it helpful to invoke Rawls and the economic theory of second best here. Rawls, to whom Professor Tribe is obviously, and with good reason, attracted, develops a theory of justice that assumes a society in which the conditions of justice are almost secure.⁴⁴ In such a society, it might make sense for a court to rectify the occasional deviations from justice by directly imposing what justice requires. But where the deviations from justice are substantial in degree and widespread in scope, as they are in the contemporary United States under the theories of both Rawls and Nozick, such actions may not be sensible. The economic theory of second best holds that, where there are numerous deviations from the conditions that guarantee Pareto optimality, there is no reason, in general, to think that alleviating one deviation will yield outcomes that are more efficient than existed before; changes can be justified only by a detailed examination of the precise setting in which the occasion for decision arises.

I do not know whether the analogy to political action has been rigorously developed, but it certainly has strong intuitive force. Acts that alleviate the immediate problem may, by reducing political pressure, delay the rectification of other, perhaps greater injustices. Examples of recent constitutional law from the campaign against segregation and from the welfare rights movement reveal the necessity of careful political analysis: constitutional decisions like *Brown v. Board of Education*⁴⁵ amplified the political forces seeking equal-

43. Burkean theory is completely undeveloped, probably because it is ultimately incoherent too. My colleague Warren Lehman is currently attempting to resurrect what I call Burkean theory.

44. See J. RAWLS, *supra* note 5, at 245-49.

45. 347 U.S. 483 (1954).

ity, while decisions like *Goldberg v. Kelly*⁴⁶ at least arguably diminished those forces, first by deflecting them into a fruitless struggle against a bureaucracy that readily swallowed the Court-prescribed dose of due process without any change in symptoms, and second by bolstering the idea that fairness was not far away in the American welfare state.

The socialist judge of Section I might, after political reflection, conclude that the circumstances did not favor a socialist revolution when the collective acted, and might therefore interpret the state action doctrine or the equal protection clause to require that the requested injunction be issued. That course is not an easy one to follow. The judge must consciously decide to perpetuate an existing injustice that hurts real people present before her, so that an indefinite but, it is hoped, larger number of people will be hurt less in the more or less distant future. The problem is not unfamiliar to political philosophers, who have discussed it under the heading of "dirty hands."⁴⁷ Professor Tribe treats it as a nonproblem, and perhaps the philosophers will someday prove him right. But the satisfaction with contemporary American society that is evident in the fourth premise, rather than serious philosophical reflection, animates the way Professor Tribe interprets the third premise.

As these comments suggest, the third and fourth premises are linked, not by some rigorous logic, but by a more general way of thinking, which I like to think of as the Burkean conservative side of contemporary liberalism. Though liberals think differently, politics ain't beanbag, as has been said before. The politics of liberalism, as exemplified by Professor Tribe's work, are inherently conservative. They assume that contemporary American society approximates a just society; thus, both the fourth premise, which is explicit on the point, and the third premise, interpreted in the Rawlsian way discussed above, make sense. They also, and concomitantly, deny the need for massive and therefore probably violent changes in the structure of the society. In this respect, Professor Tribe is the quintessential liberal, a term that, it should be clear, is not one I regard as one of honor. Constitutional theory poses problems in political philosophy; liberals take pains to construct their premises, which in the nature of things receive almost no examination, so that those problems are obscured.

III. CONCLUSION

Tribe-trashing is something of a thing to do these days,⁴⁸ and I

46. 397 U.S. 254 (1970).

47. Walzer, *Political Action — The Problem of Dirty Hands*, 2 PHILOSOPHY & PUB. AFF. 160 (1973).

48. See, e.g., Bodine, *Harvard's Hustler*, Natl. L.J., Oct. 8, 1979, at 1, col. 2.

therefore want to emphasize that my final comments are directed at the present state of constitutional scholarship, of which Professor Tribe's treatise is, for these purposes, only an example. I hope that what has gone before raises a serious puzzle: how could so morally obtuse a work be taken so seriously? The answer can be found in Professor Tribe's ambition, which, like that of constitutional scholars generally, lies outside the world of scholarship and in the world of contemporary public affairs. Not that there is anything intrinsically wrong with ambition. Its rewards, enumerated by Ward Just as honor, power, riches, fame, and the love of women,⁴⁹ are, with one obvious modification, nothing to be sneered at. Most of us have imagined ourselves as Justices of the Supreme Court, and Professor Tribe, whose chances are better than those of the rest of us,⁵⁰ would surely be a better Justice than many.

The question, though, is to what activities the rewards of ambition accrue. In the world of public affairs, they accrue not necessarily to intellectual substance. One who addresses the real questions of justice is by that fact alone disqualified from serious consideration for public position and influence, because raising those questions raises in turn questions about the worth of the positions that now exist, to be occupied or influenced. Under the circumstances, I take some pleasure, not however unmixed with regret, in noting that the Framers would have understood the phenomenon that Professor Tribe's work represents: they called it corruption.⁵¹

49. W. JUST, HONOR, POWER, RICHES, FAME, AND THE LOVE OF WOMEN (1978).

50. I do offer Professor Tribe two bits of gratuitous advice. The track record of appointments of academics to the Supreme Court is weak indeed, as some of Professor Tribe's own colleagues could tell him. And I pass on an observation by Judge Henry Friendly, who ought to know about this question: "Don't take one job expecting that it will lead to another."

51. See B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1968).