BOOK REVIEW

REACHING THE LIMITS OF TRADITIONAL
CONSTITUTIONAL SCHOLARSHIP

A REVIEW OF

H. Jefferson Powell**

Laurence H. Tribe is a unique feature in our constitutional landscape. In recent years, Professor Tribe has argued many controversial cases before the United States Supreme Court1 while his treatise, American Constitutional Law,2 published in 1978, already has achieved the status of a classic. Never before in American history has an individual simultaneously achieved Tribe's preeminence both as a practitioner and as a scholar of constitutional law. Daniel Webster and John W. Davis, in their day, cut gigantic figures at the bar of the high Court, but neither was a scholar. Felix Frankfurter's academic stature in the twenties and thirties was similar to Tribe's today, but Frankfurter's extrascholarly role in shaping constitutional law was more limited before his appointment to

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the Court. Any work by Tribe on the Constitution, therefore, rightfully commands the attention of judges, advocates, and academics.

Professor Tribe's latest book on constitutional doctrine, Constitutional Choices, is a collection of essays addressing a variety of topics, including the appropriate subjects for constitutional theory, ambitious syntheses of deeper themes underlying the Court's decisions, traditional doctrinal issues, and specific case studies. He explains in his preface that Constitutional Choices is neither a unified theory nor a global synthesis. Instead, the work represents a series of rough-edged forays into the actuality of "doing constitutional law: . . . constructing constitutional arguments and counterarguments [and] exploring the premises and prospects of alternative constitutional approaches in concrete settings."

Tribe notes that his experience in constitutional litigation, and his consequent concern for the practical questions of argumentative strategy, have shaped both the style and the subjects of the essays. Constitutional Choices does more than collect a group of discrete and disparate studies, however. Professor Tribe's broader objective is to enrich our general understanding "of what the Constitution is and what it might be," and in the process to demonstrate to his academic colleagues the superiority of his concern with "constitutional problem solving" over the alternatives of narrow doctrinalism and metaconstitutional theorizing that characterize much of the recent scholarship. I will return in the second part of this Review to the question of Tribe's success in achieving these ends. My immediate task is to examine the overarching theme that unites the book

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3 In addition to the work under review here, Tribe recently has published God Save This Honorable Court (1985), which addresses the Senate's role in confirming judicial nominees and is less technical in tone and analysis.


5 Chapters 2, 3, 4, 5, 6, and 14 previously appeared in part or in somewhat different forms in various legal periodicals.

6 See L. Tribe, supra note 4, chs. 1-3.

7 For example, Tribe discusses the role in judicial decisionmaking of legislative or constitutional silence (ch. 4), the antiredistribution "tilt" in just compensation and contracts clause cases (ch. 12), and the unarticulated assumptions about what is "natural" that undergird the Court's approach to issues of sexual equality (ch. 15).

8 For example, Tribe addresses congressional control over federal court jurisdiction (ch. 5), standing (ch. 8), free speech (ch. 13), the legitimacy of affirmative action (ch. 14), and the proper approach to state action problems (ch. 16).


10 L. Tribe, supra note 4, at x.

11 Id. at ix-x.

12 Id. at viii.

13 "Much of what constitutional scholars write these days either focuses so closely on constitutional doctrine, or looks to matters so distant from doctrine, as to bear no real resemblance to doing constitutional law. . . ." Id. at x (emphasis in original). Tribe asserts that "constitutional problem solving . . . is in less academic vogue nowadays . . . ." Id.
as well as gives it its title: The necessity of choice in constitutional law.14

I. THE NECESSITY OF CHOICE

Professor Tribe’s first five words in the preface state the primary motif of his book: “Constitutional choices must be made . . . .”15 Constitutional law is not, has not been, and could never be the passionless application of neutral principles by judicial automatons. Constitutional decisionmaking inevitably involves “an unending series of choices” about the nature of the constitutional enterprise and the values that constitutional decisionmakers choose to advance.16 In the post-Realist era, one might think that such an observation amounts to a truism, but Constitutional Choices presents a sustained and powerful argument that the central characteristic of recent constitutional discourse among both Justices and scholars has been the search for an escape from choice. “The pretense that such choices may be avoided by some interpretive or analytic magic . . . is pervasive,” Tribe writes, “but it is in fact a dangerous illusion [since] . . . [t]o abandon that pretense is a beginning of wisdom . . . .”17

The flight from choice takes many different avenues. Tribe repeatedly demonstrates that the decisions of the Burger Court often were presented with a textual or doctrinal formalism that obscured, perhaps even to the Justices themselves, the extent to which the Court’s actions reflect unarticulated decisions promoting certain values and discounting others.18 Tribe is equally merciless in his attack on the recent spate of theories of judicial review and constitutional interpretation. These theories—textualism, intentionalism, representation-reinforcement, and im-

14 Here is as good a place as any for registering this reader's strong protest against the publisher's decision to place en masse at the back of the book. Separated from the parent text, the notes constitute a virtually impenetrable wilderness, over 150 pages long. Even if the motive was the laudable one of keeping down the volume's price, the decision has the highly unfortunate effect of significantly reducing the volume's usability. If we are to have footnotes, let them be accessible. But see Mikva, Goodbye to Footnotes, 56 U. COLO. L. REV. 647 (1985) (repudiating footnotes).
15 L. TRIBE, supra note 4, at VII.
16 Id. at 267.
17 Id.
18 See, e.g., id. at 85 (Chadha and Marathon Pipe Line were triumphs of "formalism"); id. at 96 (discussing United States v. Raddatz, 447 U.S. 667 (1980), as based on a "dangerously formal" test); id. at 118-19 (discussing City of Los Angeles v. Lyons, 461 U.S. 95 (1983), as a "decision of substantive law" concealed under a "formal reliance on the doctrines of standing"); id. at 136 & n.131 (stating that the Court's opinions in Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982), and Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982), demonstrate that the majority has lost sight of substantive values "among the dense thickets of doctrinal rubrics," while noting that Justice Brennan's obvious hostility to National League of Cities indicates a conscious intent to eviscerate that decision without openly repudiating it); id. at 179 (just compensation decisions concealed Court's value choices); id. at 239-42, 245 (both the majority and the dissenters in Michael M. v. Superior Court, 450 U.S. 464 (1981), were captives of the assumption that "the natural" must inevitably be incorporated into "the legal").
plementation of American ideals— all share a common structure in that they identify "normative criteria for how the [constitutional] enterprise may legitimately be conducted," on the basis of which some exercises of constitutional decisionmaking can be rendered nonproblematic and others ruled out of court. Tribe points out, however, that there is no "Archimedean point outside ourselves" upon which the constitutional theorist can stand and legitimate or reject certain decisions without the intrusion of personal values or the exercise of choice. The selection of a starting point involves a choice that is no more value-free or "objective" than the choices implicit in particular decisions.

On the other side of the spectrum from the Court and the theorists are the "nihilists," who believe that "the categories of constitutional discourse . . . are inherently empty, infinitely malleable, and ultimately corrupt." Although this nihilism usually leads to the conclusion that we are free "to choose however we might wish to choose," this too for Tribe is finally an escape from the hard necessity of wrestling with choice within the limits of "a specific, necessarily imperfect Constitution." The nihilist, like the formalist Justice and the normative theorist, seeks to avoid the responsibility and the vulnerability of deciding between values personally while remaining within a community of discourse. The nihilist does so, however, not by invoking the pretense of "objective" criteria, but by reducing choice to idiosyncratic preference. If de gustibus non est disputandum is the ruling principle of constitutional law, then constitutional scholarship can be nothing more than a study of the interaction among the political whims of the Justices, or of the defensive propaganda promulgated by society's ruling elite. Constitutional Choices makes plain Professor Tribe's repudiation of both the rejection and the reduction of choice. Instead, he calls for a frank acknowledgement of the "different hopes and concerns" that we bring to constitutional law, along with a commitment that we reason and argue within the historical "community of shared [constitutional] understandings."

Among his academic targets, Tribe saves his most stringent criticisms for the process theorists. With John Hart Ely's Democracy and Distrust clearly in mind, Tribe attacks the attempt to ground judicial

19 See id. at 5.
20 Id. at 4.
21 Id. at 5.
22 "Because the answers to metaconstitutional questions cannot come entirely from 'the Constitution,' there can be no entirely 'neutral' or 'objective' reading of the Constitution: its readers must take a stand at the outset." Id. at 287 n.37 (emphasis in original). See also id. at 25-26.
23 Id. at 4.
24 Id. at 268.
25 "There is no point in arguing over matters of taste."
26 L. Tribe, supra note 4, at 187.
27 Id. at 44.
review in the protection of the political process as unworkable, inconsis-
tent, and ultimately incoherent.29 The power of such “substance-denying
theories”30 of constitutional law rests in part upon their compatibility
with the generally process-oriented text of the Constitution, and in part
upon the modern equation of the Constitution with representative de-
mocracy. Tribe challenges these presuppositions, correctly insisting that
the text’s concern with political structure is predicated upon substantive
political and moral beliefs.31 Still more fundamentally, Tribe argues that
a concern with fair and representative procedure is itself a choice of sub-
stantive values. In the very act of “neutrally” safeguarding the political
process, the process theorist is deciding for certain values, such as the
principle of majority rule, and against others, such as an individual’s
right to determine for herself whether to become a parent.32

Professor Tribe’s critique of process-based constitutional theories is
only the most detailed example of a broader and more thorough assault
upon the role of constitutional law theories generally. Theories purport-
ing to explain which exercises of judicial review are legitimate and which
are not, Tribe argues, inevitably are based upon the theorists’ choices of
fundamental principles. “[T]here may be premises,” Tribe states, “that
others do not share and that no one can claim to have ‘discovered’ in a
privileged place external to the disputants and insulated from who they
are and what groups they belong to.”33 As a consequence, such theories
invariably are unconvincing, except to the already converted. Tribe,
however, goes beyond his successful demonstration that no theory can be
based upon “neutral” premises to stake out a more radical position that
theories purporting to provide canons of legitimacy for constitutional
decisionmaking intrinsically threaten the very heart of the constitutional
enterprise, which is the quest for ways and means of constraining and
channeling power.34 The problem with all such theories, Tribe argues, is
that they falsely imply that at some point, at least on some issues, constitu-
tional debate can end because a particular position will be clearly right

29 Chapter 2 is a slightly different version of Tribe’s well-known article, The Puzzling Persistence
of Process-Based Constitutional Theories, 80 YALE L.J. 1063 (1980). See L. TRIBE, supra note 4, at
30 L. TRIBE, supra note 4, at 19.
31 Id. at 276 n.11.
32 See, e.g., id. at 14 (issue of who may participate in electoral process involves substantive deci-
sions about the limits of the political community as well as about the permissible forms of hierarchy
within the community); id. at 226 (fair process has “substantive constitutional significance even
when the end results are indistinguishable” from those obtained by other, imperfect procedures).
33 Id. at 5.
34 Id. at 6. Professor Tribe writes,
[I]t is largely because I believe that all exercises of power by some over others—even with what
passes for the latter’s consent—are and must remain deeply problematic that I find all legitimat-
ing theories not simply amusing in their pretensions but, in the end, as dangerous as they are
unconvincing.
Id. (emphasis in original).
or clearly wrong under the criteria applied. Proponents of "strict construction" of the Constitution's text and of allegiance to its framers' intent, process-perfecters, and human-rights defenders share the idea that the answers to constitutional problems can be easy, obvious, and unproblematic, although of course these theorists need not be committed to the proposition that their particular theory renders all issues readily solvable. For Tribe, they disregard our primeval constitutional duty to suspect power rather than naively to endorse its exercise. Constitutional Choices is firmly rooted in the ancient American tradition that "in matters of power, the end of doubt and distrust is the beginning of tyranny." The deepest obligation of anyone who deals with or thinks about the Constitution, according to Professor Tribe, is to question the coercive and dominating effects of power, even when that power is directed toward ends one endorses or in accordance with criteria one accepts. This call to recognize "the need for continuing self-doubt in the exercise of . . . power" is not addressed solely to judges and other governmental officials; Tribe eloquently acknowledges his own need—and that of all scholars—for intellectual and moral humility in dealing with our society's fundamental law.

The 1985 publication of Professor Tribe's defense of personal choice is timely to a degree that the author himself, perhaps, did not foresee. Constitutional Choices convincingly demonstrates that the vision of constitutional law publicly espoused by the Attorney General of the United States, by the Chief Justice of the Supreme Court, and by the individual many regard as heir-apparent to the Court, is an illusion and a trap. In a widely reported speech delivered to the American Bar Association in July 1985, the Attorney General criticized recent Supreme Court decisions as flawed not only in their result but in their fundamental approach. He said,

"[I]t seems fair to conclude that far too many of the Court's opinions were, on the whole, more policy choices than articulations of constitutional principle. The voting blocs, the arguments, all reveal a greater allegiance to what the Court thinks constitutes sound public policy than a deference to what the Constitution—its texts and intention—may demand."

According to Mr. Meese, the exercise of choice is the ultimate judicial

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35 Id. at 7 (emphasis in original). Cf. T. Jefferson, Draft of Kentucky Resolutions of 1798, reprinted in The Political Writings of Thomas Jefferson 156, 161 (E. Dumbauld ed. 1955) ("In questions of power, then, let no more be heard of confidence in man but bind him down from mischief by the chains of the Constitution.").

36 L. Tribe, supra note 4, at 7-8, 21. See also id. at 267-68.


40 Meese, supra note 37, at 14-15.
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sin, a sin of which the current Court is guilty far too often. Being sin rather than fate, however, constitutional choice can be avoided by adherence to the proper “jurisprudential stance.”41 The Attorney General’s solution to the problem he perceives is simple, even beguiling. By “seriously” aiming at the historical reconstruction of the Constitution’s original intention, lawyers and judges can avoid tainting their constitutional decisions with their “ideological predilection[s].”42 A Court that followed his prescription, the Attorney General assured his listeners, could not be characterized or criticized as “too conservative or too liberal.”43

The only problem with the Attorney General’s desire to rescue constitutional judgment from the mire of choice and to place it on the high ground of history is that the endeavor is quite impossible. As Professor Tribe has pointed out, the decision to view “the Constitution” as the embodiment of the visions and commitments of figures in our historical past is itself a choice fraught with substantive values and necessitated by neither text nor history.44 Take, for example, the argument, based on original intention, against a woman’s constitutional right to choose an abortion. The intentionalist must rest his position upon an inference from silence, since none of the framers and adopters of the 1787 text, the Bill of Rights, or the fourteenth amendment discussed the question at all. The intentionalist also must ignore the view, widely held in the era of the Constitution’s creation, that later interpreters necessarily would find meanings in the Constitution unintended and unforeseen by the founders.45 Perhaps most remarkably of all, the intentionalist has to discount the explicit denial in the Constitution’s text that the rights the Constitution enumerates comprise the whole of those “retained by the people.”46

41 Id. at 15, 17.
42 Id. at 17.
43 Id.
44 See, e.g., L. TRIBE, supra note 4, at 267.
45 See Powell, The Original Understanding of Original Intent, 98 HARV. L. REV. 885 (1985). Professor Tribe occasionally writes as if he too were an intentionalist. For example, Tribe states that the state action doctrine, to the extent it suggests that states do not owe positive duties to their citizens, is “a subterfuge for substantive choices the framers did not necessarily make one way or the other.” L. TRIBE, supra note 4, at 247. Given the historical difficulties with intentionalism suggested in the above article and Tribe’s own obvious disinterest in the founders’ views generally, such references may be sheerly rhetorical; they certainly seem to rest uneasily within the book’s primary lines of argument. A revealing indicator of Tribe’s attitude toward historical evidence from the founding era is the index to Constitutional Choices, which lists one reference each for Hamilton and Madison, and none whatsoever for any other member of the Philadelphia or state conventions. The index, to be sure, is not complete, see, e.g., L. TRIBE, supra note 4, at 43 (reference to Hamilton, Madison, “and others”); id. at 165 (reference to Justice Samuel Chase, a member of the Maryland ratifying convention), but no reader of Constitutional Choices will suspect its author of being overconcerned with “original intention,” whatever that expression may refer to.
46 U.S. CONST. amend. ix; see also id. at 17 (equal protection decisions “entail a theory of unenumerated substantive rights, rights at best suggested by constitutional text and history”) (emphasis in original); cf. L. TRIBE, supra note 4, at 43-44 (ninth amendment should not be treated as “evidence of unenacted ideas or desires” of its framers or ratifiers) (emphasis deleted).
Whatever the reasons for and against the asserted right to an abortion, any intellectually honest conversation on the subject must acknowledge the inescapable importance of the personal predilections and subjective value preferences of the disputants. It is the lasting achievement of *Constitutional Choices* that it demonstrates this truth as fully and forcefully as is possible in the inherently controversial sphere of constitutional discourse. When, and only when, those who share the Attorney General’s asserted preference for “controversy-denying strategies” of constitutional argument accept the necessity of choice, and acknowledge the role of their own personal values in their public viewpoints, can meaningful constitutional debate take place.

II. THE NECESSITY OF THEORY

Professor Tribe delivers the central message of his book, the necessity of choice in constitutional law, with great power and persuasiveness. Yet, despite Tribe’s success in developing this theme, a close reading of *Constitutional Choices* left this reader with a curious sense of disappointment. For all the book’s frequent insistence that constitutional discourse must proceed on the basis of extratextual theories about political morality and human rights, Tribe’s work is remarkably free of sustained focus on the “commitments and visions” that he believes are “the stuff of genuine constitutionalism.”

Tribe certainly is candid about his own moral and political predilections: he approves of an active judicial role in safeguarding human rights, an expansive definition of free speech, affirmative action, equality for women, and protections for the poor against economic destitution and the inability to secure effective legal rights that follows. Tribe’s personal choices are plain and, to me, admirable. But Tribe gives the reader no basis on which to understand why, apart from taste, he holds these values or thinks them proper to incorporate into constitutional law. Only on very rare occasions, and then with extreme brevity, does Tribe step back from the advocate’s close scrutiny of the case law and his study of how far that case law can be manipulated toward specific ends to ask what goals we ought to pursue, and how we should choose them. *Constitutional Choices* simply does not address these broader questions, even though its author insists that the questions and their answers lie at the core of the constitutional enterprise.

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47 L. TRIBE, *supra* note 4, at viii.
48 See, e.g., *id.* at 165 (in two paragraphs, contrasting two different visions of “property” and “contract”); *id.* at 242 (discussing, in one paragraph, Michael Walzer’s explanation of why economic inequality ought to be regarded as offending “the principle of equality under the law”).
49 The absence of any discussion of questions of social morality in *Constitutional Choices* is signalled by the paucity of references to philosophical and political theorists. My own, quite possibly incomplete, accounting shows references to Cavell (one, at 294 n.55), Dworkin (two, at 287 n.37 and 288 n.42), Fried (one, at 299 n.105), Hofstadter (two, at 299 n.106 and 313 n.57), Locke (one, at 394 n.44), Montesquieu (one, derived from a quotation in THE FEDERALIST NO. 78 (A. Hamilton), Nozick (one, at 274 n.15), Rawls (four, at 287 n.29, 394 n.44, 395 n.59, and 405 n.177), Walzer

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Professor Tribe probably would respond to the criticism implicit in this observation by referring the reader to his preface, which explains that *Constitutional Choices* is not an exercise in abstract political theorizing, but an attempt actually to do “real” constitutional law. The essays collected in *Constitutional Choices* are explorations of the types of arguments possible within the particular, limited form of political discourse engaged in by Supreme Court Justices and the lawyers who argue before them.50 A few pages later, Tribe indicates that his approach to constitutional law is based in part on simple personal choice: “[I]t’s what I think I can do best.”51 Tribe certainly has few equals in practicing his type of constitutional thinking. Moreover, no one, not even a scholar of Tribe’s extraordinary gifts, has a moral obligation to do everything, to undertake substantive political theory as well as normative constitutional scholarship and advocacy. But Tribe’s own argument for assessing constitutional choices as reasoned and “fundamental choices of principle”52 renders his procedure in this book, and for that matter in his earlier treatise, deeply problematic. For the reader who accepts Tribe’s understanding of the role of choice, the specific discussions in *Constitutional Choices* seem to float in mid-air, with no foundation more substantial than the moral intuitions of the author. To someone who substantially disagrees with those intuitions, I suspect reading much of the book is rather like overhearing a discussion among a group of lawyers with a common cause on the best tactics for presenting their cause to a hostile or at least indifferent court.

The most unfortunate consequence of Professor Tribe’s self-chosen restriction has to do not with his readers but with the quality of his own discussion. From confining his attention to Supreme Court decisions, law review articles, and occasional actions by the other branches of the federal government, Tribe drifts unawares into a surprisingly radical sort of “Court-positivism,” in which he treats the Court’s decisions as a given, to be explained, manipulated, and systematized, but criticized only within narrow limits. The universe of *Constitutional Choices* is that of *Cooper v. Aaron*,53 where the Constitution is what the Justices say it is. In such a universe, the actions of a majority of the Court may be regret-

50 L. Tribe, *supra* note 4, at viii-x.
51 *Id.* at 5.
52 *Id.* at viii. Such choices or principles, according to Tribe, necessarily depend on metaconstitutional commitments to moral visions and values. See, e.g., *id.* at 287 n.37.
table, and they may require considerable, and ingenious, interpretation to fit within the observer’s own values, but the decisions cannot easily be dismissed as wrong.

Court-positivism is rampant in Constitutional Choices. Again and again, Professor Tribe discusses a decision or series of decisions with which he clearly is not in political sympathy, but concludes with an optimistic description of what is valuable about the Court’s behavior. The Court’s recent first amendment cases, for instance, reveal an enhanced solicitude for the speech rights of the wealthy, even as the Court curtails the rights of labor and of middle- and low-income citizens. Nevertheless, “it is important to see these developments not as deviations from timeless principles but as part of the normal functioning of constitutional adjudication.” Similarly, Tribe claims that the resurrection of the right/privilege distinction in analyzing the speech rights of government employees is “a dangerous trend,” but one that “should not be exaggerated. The Court has stopped far short of a general revival.” So too, despite the battery of problems Tribe sees in the Court’s handling of the issue of affirmative action in Regents of the University of California v. Bakke, he suggests that “the surest path to equal justice in this troubled area [may be] the twisted path the Court marked out,” and he asserts that the case’s attention to process and structure as substantive values “ought to be universally welcomed.” The Court’s recent decisions under the just compensation and contracts clauses reveal “a strong tilt” in favor of those with economic power and against those who lack it. Even so, Tribe asserts that amelioration of this tilt need not involve an actual reduction of the Court’s protection for entrenched wealth. Although the type of state action analysis employed in Burton v. Wilmington Parking Authority, a case Tribe clearly finds attractive, has been “almost constantly at ebb,” Tribe flatly rejects the criticisms of the Court as incoherent and inconsistent on the issue. The Court’s doctrine, he assures us, is “considerably more consistent and less muddled than many have long supposed,” and indeed displays “a surprisingly coherent pattern once one gets past [the Justices’] often neuralgic prose.”

In this book Professor Tribe far too often appears as the Court’s apologist rather than as its critic. The Court-positivism of Constitutional Choices runs so deep that one fears a major change of doctrinal direction by the Justices might lead to a similar, if at times more muted, change by

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54 See L. Tribe, supra note 4, at 188-220.
55 Id. at 192.
56 Id. at 209.
58 L. Tribe, supra note 4, at 222 & 232.
59 Id. at 186-87.
61 L. Tribe, supra note 4, at 250-53.
62 Id. at 248.
this volume's author.63

What's gone wrong here? Why has a scholar as intelligent as Professor Tribe denied himself participation in what he himself regards as the soul of his profession, the reasoned elaboration and discussion of the fundamental commitments we all bring to the Constitution? Why has a public person as deeply concerned with social justice as Professor Tribe denied himself the right to repudiate the Court's actions when it goes ethically astray? The answers, I think, have less to do with Tribe's biography than with our shared intellectual history. Because of his prominence and ability, Tribe simply exemplifies a problem endemic to American constitutional discourse: The illusion that fundamental political debate over the structuring and limits of power in society can be adequately conducted within the narrow limits of a positivist legal tradition. We have confined that debate within those limits for so long that it now seems natural to do so. It is, however, far from inevitable. Indeed, the attempt to decide fundamental political questions, by carefully parsing the opinions of nine lawyers in black robes, might well seem ludicrous if it were not so familiar.

Although this tradition of legalizing political discourse goes far back in time, our constitutional discussions have not always taken this form. The earliest constitutional arguments in Congress and the Supreme Court, as well as the writings of early constitutional scholars such as James Wilson and William Rawle, show a common understanding of American constitutional discourse as a subset of western civilization's ongoing dialogue over the requirements of justice and the appropriate structure of government.64 The constitutional text and its ongoing elaboration in practice and precedent shaped and constrained the discussion, but did not affect the essential continuity with the work of Harrington, Locke, Hutcheson, Montesquieu, Rousseau, and Bentham. John Mar-

63 Indeed, this may have happened already. In Constitutional Choices, as in his treatise, L. Tribe, supra note 2, at 208-18, and in his well-known, albeit controversial, article, Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services, 90 Harv. L. Rev. 1065 (1977), Professor Tribe attempted to explain and justify the Court's decision in National League of Cities v. Usery, 426 U.S. 833 (1976). Despite his clear lack of sympathy with the obvious purpose of the Usery opinion to revive "states' rights" as a limit on federal power, Tribe chastised the subsequent decisions limiting Usery for losing their way "among the dense thickets of doctrinal rubrics" and in the process slighting Usery's solicitude for state autonomy. L. Tribe, supra note 4, at 125-37. Since Constitutional Choices was published, however, the Court has overruled Usery, in Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528 (1985), and Tribe apparently has receded from his concern that we "avoid insulting the states by ordering them about like so many federal bureaucratic lackeys . . . ." L. Tribe, supra note 4, at 131. See 54 U.S.L.W. 2205 (Oct. 15, 1985) (reporting address in which Tribe commented favorably on Garcia).

shall’s insistence on painting with a broad brush when constructing his opinions, sometimes criticized as unlawyerly by later Americans, simply reflected a general recognition that fundamental political issues could not and should not be excluded from constitutional discussion. Although Marshall’s foes, discomfited by the power of his writing, sometimes grumbled at the scope of his decisions, their affirmative response was to offer similarly broad discussions of their own views.65

The transmogrification of high political debate into dispute over the meaning of Supreme Court precedent has its roots in the third and fourth decades of the nineteenth century. During that period of our history, a variety of forces converged to drive American constitutional discourse into the narrow legal corner in which it has remained. Perhaps the most important factor was the collapse of the consensus on basic political issues that emerged after the electoral triumph of the Jeffersonian Republicans in 1800. Sectional divisions resulting from arguments over slavery and federal legislative activity, as well as the broad social changes we conventionally label “Jacksonian democracy,” rendered the old orthodoxy incompetent to resolve new constitutional disputes.66 On the stage of legal activity, the efforts of leading members of the bench and bar to upgrade and professionalize the practice of law led to a heightened respect for technical mastery of doctrine and precedent, and a corresponding devaluation of the overtly political style of lawyering practiced by the founding generation.67 The earliest and most important constitutional products of this shift within the legal world were the constitutional treatises of James Kent68 and Joseph Story.69 Both men eschewed general discussions of political and ethical issues, substituting for them detailed treatments of Supreme Court decisions. Story, in particular, elevated his rejection of a role for political theory in constitutional discourse to the level of principle.70 Although the earlier, more philosophical type of constitutional scholarship occasionally appeared after 1830,71 from the

65 See, e.g., the opinions of the Virginia judges, unanimously refusing to obey the Supreme Court’s mandate in Fairfax’s Devisee v. Hunter’s Lessee, 11 U.S. (7 Cranch) 603 (1813), on remand, 15 Va. (4 Munf.) 1 (1815), rev’d sub nom. Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304 (1816); and John Taylor’s various works on constitutional law, especially J. Taylor, New Views of the Constitution of the United States (Washington 1823).


67 This process can be traced in the documents collected in The Legal Mind in America from Independence to the Civil War (P. Miller ed. 1962).

68 1 J. Kent, Commentaries on American Law (New York 1826).

69 J. Story, Commentaries on the Constitution of the United States (Boston 1833).


middle of the nineteenth century to the present, the most striking formal characteristic of American constitutional discourse has been its narrow legal complexion.\textsuperscript{72}

It is Professor Tribe's very success in carrying on this longstanding tradition of equating constitutionalism with constitutional law that, I suggest, leads to the pervasive Court-positivism of \textit{Constitutional Choices} and to that positivism's unfortunate effects on the power and persuasiveness of the work. Moreover, the positivist character of \textit{Constitutional Choices} is unsurprising when we treat fundamental political issues as matters for lawyers, and train the lawyers to approach those issues as questions about the meaning and malleability of Supreme Court opinions. \textit{Constitutional Choices} fails to provide the reader with the kind of political and ethical depth our constitutional discourse so desperately needs. It is a mark of Professor Tribe's stature that he nevertheless has pointed out with clarity the inescapability of choice, and of theoretical reflection on our choices.

\textsuperscript{72} \textit{See} Powell, \textit{supra} note 70, at 1314.
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1904-1986