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# Book Review: American Constitutional Law. (2d Ed.). by Laurence M. Tribe.

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pages! Berger is, himself, the most frequently cited author in his bibliography, even without counting the citations to five reviewers of his books.

## AMERICAN CONSTITUTIONAL LAW (2d ed.). By Laurence M. Tribe.[1] Mineola, New York: Foundation Press. 1988. P.p. 1778. $38.95.

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In their response to the Supreme Court nomination of Robert Bork, the leading lights of the legal academy gave proof, if such were needed, that constitutional jurisprudence in America has been transformed. Of all the so called "extremist" positions for which Bork was pilloried before the Senate Judiciary Committee, not one lacked support from a liberal giant of yesterday, such as Herbert Wechsler, Hugo Black, or Bork's own mentor, Alexander Bickel. Yet at Bork's nomination hearings last fall, the legal academy passionately and overwhelmingly opposed him. Leading the charge was Laurence Tribe, Tyler Professor of Constitutional Law at Harvard Law School.

Contemplating Professor Tribe's career, former Harvard Dean Erwin Griswold doubted if any legal scholar off the Court "has ever had a greater influence on the development of American constitutional law." Perhaps an overstatement, but at forty-seven years of age, Tribe has compiled an impressive record. He has written or edited a dozen books and scores of influential articles; a leading casebook in constitutional law cites his commentaries nearly fifty times (more than twice the number for Bickel).[3] He has won nine of the twelve cases he has argued before the Supreme Court. He has smooth relations with the media, and is their most frequently quoted source on constitutional questions. And he has close ties to liberal politicians, including some presidential aspirants.

With his scholarly credentials, press relations, and political connections, Tribe weighed in heavily against the Bork nomination. He devised legal arguments for Democrats on the Judiciary Committee, rehearsed them in marathon sessions with Chairman Joseph

1. Tyler Professor of Constitutional Law, Harvard University.

2. Associate Professor of Political Science, Colgate University. This review is adapted from "Rewriting the Constitution," originally published in *Commentary* magazine, Dec. 1988, p. 36.

3. G. STONE, L. SEIDMAN, C. SUNSTEIN, and M. TUSHNET, CONSTITUTIONAL LAW (1986).

Biden, and as lead witness for the Democrats testified against Bork for three hours on national television. Central to his attack was the charge that Bork stood outside the "mainstream" of American constitutional jurisprudence. If the way the subject is taught in law school today is the "mainstream," Bork may indeed be standing in the dried river bed of yesterday. But if so, we might well ask where the academy's fresh currents would take us. With the publication of the second edition of his magnum opus, Tribe provides a river cruise.

## I

Ten years ago when *American Constitutional Law* first appeared, Tribe might have seemed an unlikely defender of the constitutional mainstream. In the preface to that edition, he voiced disdain for "conventional scholarship" then still partly in the shadow of Alexander Bickel and other advocates of judicial restraint. He urged courts to take a more "candidly creative" role in achieving justice and denounced the Burger Court ("unduly beholden to the status quo") for its "distressing retreat" from this role.

The notion of writing a "treatise" on constitutional law was itself both bold and ambitious, especially for a professor in his early thirties. Just three treatises of note had been published on constitutional law, and of these, only the *Commentaries* of Joseph Story, published in 1833, made a serious effort to articulate the philosophy behind the Constitution.

The philosophic dimension of Story's commentary was rich, profound, and elegant, but in one sense it was also comparatively straightforward. For him constitutional meaning was largely fixed. Its meaning was that envisioned by the framers, which was by and large as the Marshall Court—of which Story was a key member—also understood it. In the late 1970s, however, Tribe saw it differently. For him, the Constitution evolves in a course that is ever more revelatory of an immanent meaning, a meaning unfathomed by the framers, unbound by the text, and only dimly perceived by the Supreme Court, which had been, nonetheless, haltingly pulled towards it. A mere casebook could no longer adequately portray the Constitution. Only a treatise, less bound to cases, more sensitive to social theory, pointing the direction towards which doctrine is evolving, could provide the foundation for this "openly avowed effort to construct a more just constitutional order." In this new order there will be, he tells us, misappropriating a phrase from the

Constitution's Preamble, "a more perfect Union" between constitutional rights and what is truly right.

In the preface to his second edition, Tribe expresses embarrassment at the "grand tone" of this first preface, positions himself above the controversies of left and right, and allows that the experience of the last ten years has given him a "deeper appreciation of the very great difference between *reading* the Constitution we have and *writing* the Constitution some of us might wish to have." The words conjure up an image of the elder statesman mildly amused by the impetuous energy of his youth; the reality is more nearly that of the revolutionary consolidating his hold on power. Backed by a legion of law professors come of age in the 1960s, Tribe now "reads" the Constitution that he "wrote" in the first edition.[4] The course of constitutional meaning that he set in the first edition has become the mainstream he charts in the second.

Because a relatively brief essay cannot trace the many and finely nuanced arguments of this 1,778-page treatise, I wish to focus on its unifying structure and its underlying vision. In its outward organization, it does not differ from a casebook. The doctrines of separation of powers and federalism are followed by property rights, then personal rights of liberty and equality. What is distinctive is the evolutionary significance Tribe gives to this organization. We might liken the growth of Tribe's constitution to that of a chambered nautilus. The early doctrines, or what he calls "models," like the inner chambers, once contained the vital parts; they are still part of the organism and perform useful functions—they keep us afloat—but their basic shapes were determined at moments in the organism's history and the vital meaning, the inner essence, has passed to newer regions.

The continuing theme is freedom. Model I, "Of Separated and Divided Powers," is premised on the idea that freedom is best served by "deliberately fragmented centers of countervailing power."[5] Dominating constitutional debate from the founding to the Civil War, Model I suggested a high degree of trust in the integrity and representational character of the new institutions; states were well represented in the federal government and individuals were well represented in the states. Thus the Court upheld claims of the federal government over those of the states and the claims of the states over those of the individual. That the Court of this era

4. The move closely parallels that of Michael Perry, who in his second book, MORALITY, POLITICS, AND LAW, "interprets" the Constitution to mean precisely what he had "noninterpreted" it to mean in THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS.

5. TRIBE, at 2.

regularly sustained claims of state authority over individual rights does not damage the premise of a fundamental concern with freedom so much as delineate its character and underscore the belief that the interests of the individual were well represented in the state and a strong state government was necessary for protection against private violence and the threat of tyranny by the central government. The persistence of slavery and the civil war demonstrated the inadequacy of Model I's reliance on state authority as a guarantor of rights.

Chartered for a more direct protection of individual rights by the three Civil War amendments, but restrained by an abiding concern with the danger of national tyranny, the Court eventually gained, by the end of the nineteenth century, a new understanding of freedom that allowed it to check state authority without raising the specter of an overpowerful central government. This is Model II, "Of Contractual Liberty." No longer content to trust the institutions to represent the appropriate sphere of interest, this model required the Court to define the appropriate spheres of federal, state, and private power—all this in the name of a laissez-faire theory of property rights supposedly derived from nature itself and largely revealed in common law principles. By the 1930s, however, this model was enfeebled by growing doubt that it represented any true *nature* of things rather than a governmental *choice* of whom to protect through legal rules and whom "to abandon to the strength of others;"[6] it soon collapsed beneath the weight of the Great Depression.

Models III "Of Settled Expectations" and IV "Of Governmental Regularity," mostly concern property rights, like Model II, but outlive it as a model of constitutional decisionmaking. Their greater longevity is due in part to their more specific textual focus—such as the just compensation and contract clauses—but more to their appearance of greater neutrality and objectivity than the "natural law"-inspired Model II. That appearance, warns Tribe, is an illusion, for these models are empty or circular unless they are filled out with substantive values, the origin of which lies external to them.[7]

Because Model I implied a view of human rights that it protected only by indirection, Model II embraced an untenable and erroneous view of such rights, and Models III and IV have force only by reference to other more fundamental values, it is only with Models V "Of Preferred Rights: Liberty Beyond Contract" and VI

6. *Id.* at 7.
7. *Id.* at 7, 8, 608, 699.

"Of Equal Protection" that we come to the real substance of constitutional law. Only with the advent of the Warren Court and the rise of contemporary constitutional commentators have we entered the higher stage of constitutional adjudication. Though the project has been stymied occasionally by benighted conservative appointees, the Justices (and more profoundly, the commentators) have begun to set forth the deep meaning of equality and freedom (or "autonomy," to use Tribe's preferred term for the latter).

In these ideals of equality and autonomy, the Constitution is said to reveal its vision of human personality. Here, Tribe tells us, we are to find the "elements of being human," the "aspects of self which must be preserved and allowed to flourish."[8] "The judiciary has thus reached into the Constitution's spirit and structure, and has elaborated from the spare text an idea of the 'human' and a conception of 'being' not merely contemplated but required."[9] On this notion of human personality, the entire constitutional scheme must ultimately rest.[10]

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8. *Id.* at 778 and 1308.

9. *Id.* at 1308. Tribe also sketches a Model VII, "Of Structural Justice," in which he links the concern with individual rights with the structures of decisionmaking, giving primary attention to the concept of state action. For the most part, this model simply indicates some structural implications of the view of human personality developed earlier. *Id.* at 8. While the model is suggestive of the affirmative responsibilities Tribe envisions for the future development of constitutional law, I shall not discuss it because it adds little to the notion of personality that informs Tribe's project.

10. The overview sketched here closely follows that stated by Tribe, *id.* at 2-9, and as indicated in the above notes and the text that follows, the structure and argument it indicates are reinforced throughout the text. The tone of this overview also follows naturally Tribe's first preface where he announced in the first sentence that he was venturing "a unified analysis of constitutional law;" this analysis would provide a "systematic treatment, rooted in but not confined to the cases" and "a coherent foundation for an active, continuing, and openly avowed effort to construct a more just constitutional order," an effort in which the Court would be urged to play a more "candidly creative role." *Id.* at vii-viii.

Maintaining the tone of his second preface (and his deepening appreciation of the "very great difference between *reading* the Constitution we have and *writing* the Constitution some of us might wish to have"), Tribe in this edition displays a few phrases of doubt about efforts to find deep coherence in the Constitution. Drawing from his recent four -page essay criticizing Richard Epstein's effort, among others, to explicate the Constitution in terms of natural rights of property (37 J. OF LEG. ED. 170 [1987]), Tribe writes: "It may be that all efforts at such reduction or simplification, however suggestive, are ultimately more misleading than informative. For the Constitution is an historically discontinuous composition; it mirrors no single vision or philosophy but reflects instead a set of sometimes reinforcing and sometimes conflicting ideals and notions." *Id.* at 1; *see also* 10 n.2 and 102 n.42. Had Tribe in any significant way changed the overarching argument of the first edition, or in fact become a follower of original intent, I would take more seriously this expressed concern for fidelity to constitutional origins. But Tribe continues to emphasize that fundamental constitutional concepts cannot be bound by text or intention. Consider, e.g., his statement that "principles of equal protection have emerged in ways fairly independent of particular constitutional phrases. What must be explicated here is thus truly a model—a way of looking at constitutional issues generally—and not simply a section of the document." *Id.* at 1437. If anything, especially with his new "antisubjugation principle," *infra*, at notes 30-47 and 67-79, Tribe

Though Tribe's development of this idea is distinctly contemporary, the notion that our constitutional order rests on a vision of what it means to be human is not novel; such notions are often submerged but never absent from serious reflections on government. To gain a clearer sense of what is at stake in Tribe's formulation, and thus the new "mainstream" of academic constitutional law, we should contrast his idea of human personality with that implied in earlier constitutional jurisprudence, what we might call, without exaggerating the consensus behind it, the traditional understanding.

## II

Human personality in the traditional understanding of liberty under the Constitution builds from two currents of thought, the liberal and the republican. With boldness and lucidity, our Declaration of Independence proclaims the liberal component in holding it self-evident that man is endowed with unalienable rights. Yet as the Declaration itself makes clear, these rights could be secured by many forms of government, including monarchy; for it was not monarchy that the document set itself against, but a particular monarch who had become a tyrant by his denial of rights.

This is where republicanism came in. "No other form," Madison wrote in the *Federalist Papers*, "would be reconcilable with the genius of the people of America; with the fundamental principles of the revolution; or with that honorable determination which animates every votary of freedom to rest all our political experiments on the capacity of mankind for self-government." To the framers, the claim that Americans were capable and worthy of governing themselves, was less a fully matured claim of the individual than a standard of public aspiration, less a claim of the subject than of the citizen, less a matter of inherent rights than of honorable determination. "There is no inherent right to self-government," Irving Kristol once wrote of this traditional understanding, "if it means that such a government is vicious, mean, squalid, and debased."[11] In a new context and with a distinctive vision, the republican ideal thus echoed the ancient idea of a human good.[12]

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attempts in this second edition to state more profoundly than ever the underlying unitary justification of the Constitution.

11. I. KRISTOL, ON THE DEMOCRATIC IDEA IN AMERICA 42 (1972).

12. I should point out that my use of the term "republican" differs somewhat from that developed in the "republican revival" that swept American historians in the late sixties and seventies, *see, e.g.*, B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967), 1776-1787, and G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1972), and is now influencing legal thinking, *see, e.g.*, Michelman, *Traces of Self-Government*, 100 HARV. L. REV. 4 (1986) and Sherry, *The Intellectual Origins of the Constitution: A Lawyer's Guide to Contemporary Historical Scholarship*, 5 CONST. COMM. 323

The confluence of the "republican" ideal of good character and "liberal" doubts about the competence of government itself to shape that character yielded the once fundamental distinction between liberty and license. The "blessings of liberty," which the Constitution sought to secure, could never be compelled, but the abuse of liberty, or license, could be checked. Not surprisingly the line between liberty and license in constitutional thought has never been clear or constant, and the idea of proper human character upon which it rests is to some extent always a matter of controversy. But the proposition that a sound constitution of government presupposes a sound constitution of man has, until recently, never raised a serious doubt. And while contemporary intellectual currents have eroded the confidence in such notions of human character and thus the distinction between liberty and license, they have not erased them from constitutional thought.

Even in the early years of the Warren Court, when it considered whether obscenity was constitutionally protected speech, the conceptual residue was sufficient to imply in its very definition of obscenity a hierarchy in the elements of human personality. Obscenity, the Court held, appealed to a "prurient interest," defining the latter as a "shameful or morbid interest in sex, nudity, or excretion," and was "patently offensive"—offensive, that is, to sensibilities that are properly cultivated by government and that are coarsened by the proliferation of obscenity. Obscenity, in short, offends what is high and appeals to what is base in human character; lacking "a redeeming social value," it stands outside of constitutional protection.

If the general course of constitutional thought in recent years has been to wear away this distinction between high and low, it is Tribe's goal to wipe it out entirely. Of no small significance is the change in vocabulary he affects, for while liberty was traditionally understood in opposition to license, Tribe's preferred term, "autonomy," implies no such limit.

An illuminating point of departure in considering Tribe's vision of autonomous personality is his attack on the "continuing suppression of obscenity." During its later years, the Warren Court had significantly qualified its earlier definition of legal obscenity by emphasizing that the material in question, in addition to being patently offensive and appealing to a prurient interest, had to be "*ut-*

(1988). This tradition seeks to find in the American past a prebourgeois communalism, to revive and revise it, and apply it to the present. Without denying the presence of communalism, I wish to emphasize that in the American republican tradition community itself was derived from notions of what constituted good character.

*terly*" (the Court italicized for emphasis) "without redeeming social value."[13] But the Burger Court, in another of what Tribe would number among its "distressing retreats," changed this latter criterion to "lacks serious literary, artistic, political, or scientific value."[14] To the usual complaint that there is no "scientific" proof that pornography has adverse effects, the Court, implicitly invoking the older understanding of human personality, pointed to the "wellnigh universal belief that good books, plays and art lift the spirit, improve the mind, enrich the human personality and develop character," and asked rhetorically if we cannot logically infer the corollary that obscenity corrupts and debases character.[15]

Tribe responded that the "parallel seems fatally flawed, for the state does not and could not compel its adult citizens, on pain of imprisonment, to read Dante, watch Shakespeare, or listen to Brahms."[16] A nice debater's point, perhaps, but no more. For the major thrust of the distinction between liberty and license is precisely that it is possible and desirable to forbid the abuse of liberty even though its better uses cannot and should not be compelled. That Congress may forbid its adult citizens to conspire and incite riots does not imply that it may compel them to compose and recite essays on civic virtue.

In fact, Tribe is less intent on insisting that since the state cannot compel the high it cannot forbid the low than he is on denying, as far as the Constitution is concerned, that there is any such thing as high and low, noble and base. Speech is speech, and obscenity, according to Tribe, generously defining his terms, is speech.[17] We need not quarrel with Tribe's observation that obscenity employs the same media as speech—it takes the form of words or pictures—but neither do we need to overlook the obviously distinct functions of speech and obscenity. Hardcore pornography is a mode of stimulating the genitals, not the mind.[18] Such distinctions, however, become irrelevant, or rather inexplicable, from the perspective of Tribe's ideal of human personality, which can know neither nobility nor depravity. What inspires *Lear* is equal to what solicits leers. *Hustler*, like *Hamlet*, places an image before the mind, and in that sense makes one aware. To close out such awareness, writes Tribe, is "ultimately incompatible with the First Amendment's premise that awareness can never be deemed harmful in itself. For in the

13. Memoirs v. Massachusetts, 383 U.S. 413, 419 (1966).
14. Miller v. California, 413 U.S. 15, 26 (1973).
15. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1972).
16. L. TRIBE, at 917.
17. *Id.* at 909.
18. F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 181-84 (1982).

last analysis, suppression of the obscene persists because it tells us something about ourselves that some of us, at least, would prefer not to know."[19]

In other words, pornography laws are nothing more than a remnant of Victorian "hang-ups" about sex. As Tribe has to admit, the Court has distinguished proscribable pornography from erotic art, yet for him this distinction seems to render its rulings only the more disturbing, since a "selective tolerance for the tastefully salacious, coupled with contempt for the coarsely vulgar" is utterly at odds with his view of autonomous personality according to which everything is a matter of taste.[20]

If all expressions of the self are intrinsically equal because there

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19. L. TRIBE, at 919.

20. Even the exception that the Court has made to the unprotected status of pornography, Stanley v. Georgia's holding that one has a constitutional right to possess pornography in the privacy of one's home, looks suspiciously elitist to Tribe, for it "tends to coincide with a distinction between polite society and hoi polloi; for protecting the living-room gathering around the privately owned film projector, but not the adult theatre crowd, smacks of economic and cultural discrimination." L. TRIBE, at 919 n.96. It may seem odd that Tribe should follow this trashing of "prudish," *id.* at 928, approaches to obscenity with a section manifesting deep sympathy with the feminist attack on pornography (concluding, however, that many feminist inspired ordinances, such as that of Indianapolis, were "constitutionally overambitious," *id.* at 928). Nonetheless, there is an underlying consistency. For while the basic neo-Kantian project, which Tribe follows, seeks to maximize each person's "autonomy" in a manner compatible with a similar autonomy for others, the project does not prevent limiting autonomy when it is likely to cause harm to others. What it does prevent is one person's "subjugating" another according to his notion of the good life. Thus, under Tribe's model, religious beliefs, political ideas, obscenity, and drug induced states of mind—all what we might call "brain events"—must all be protected equally. This too is the position taken by radical feminists in their attack upon pornography: the traditional definition of obscenity, with its notion of prurient interests and a hierarchy of values, reflects and perpetuates patriarchy. *See* Bryden, *Between Two Constitutions: Feminism and Pornography*, 2 CONST. COMM. 147 (1985). Tribe can sympathize with these feminists, insofar as they profess to be concerned about the concrete harm the expression allegedly causes to women.

No doubt pornography does cause harm. But if harm or violence is the measure, it would be easy to demonstrate that equal violence may ensue from speeches we think at the core of the first amendment; consider, for example, the speeches of abolitionists, civil rights activists, and anti-war critics. Thus we see the problematic nature of the neo-Kantian attempt to erase all distinctions between liberty and license: the first amendment must either carry as its burden all the harm that may ensue from pornography and drugs or surrender all expression (equally) to state control once the expression reaches a certain level of probable harm. (R. Dworkin's free speech argument runs into similar difficulty. *See* R. DWORKIN, MATTER OF PRINCIPLE 335-72 [1985] and Brubaker, *Taking Dworkin Seriously*, 47 REV. OF POL. 45-67 [1985]).

It is more faithful to the intention of the framers, the presuppositions of republican government, and common sense to adhere, as the Court has done, to the traditional line: obscenity appeals to a prurient interest—a morbid interest in sex. Typically, it creates, not an idea, but a mere physical sensation. The constitutional protection accorded it should be the same as for other sex stimulants and drugs; the state must merely demonstrate a rational basis for the legislation. Such "expression" ranks considerably below the realm of religious beliefs and political ideas. These should be protected against all but the most grave and immediate of harms.

is no external standard by which to assess them, then it follows that human consciousness itself has no natural perfection, no models of excellence towards which youth should be educated and none from which they should be steered. Thus with perfect though foolish consistency, Professor Tribe tells us that government may not inhibit an individual from altering his state of consciousness with marijuana and other more potent psychoactive substances. The ideal of autonomous personality would mean little, it seems, if the individual could not choose to alter "the ways in which the mind processes the sensory data it receives from the world" and thus to alter by chemical reaction his perceptions of what is good and bad, virtuous and vicious, beautiful and ugly, and how he feels towards these things. Choices such as these "constitute an individual's psyche."[21] Thus for government to suppress the consumption of such drugs and so to limit an individual's control over the processes of his mind is "perhaps the starkest form of governmental invasion of personality."[22] If one wants to express himself with words, he still may, of course—"just say no." But if one wants to find himself with drugs, the Constitution, according to Tribe, must say yes.[23]

If the Constitution must be indifferent to modes of consciousness, at least where there is no provable harm to others, then it must also be indifferent to modes of intimate association, at least among consenting adults. Though he includes phrases seemingly designed to give him "plausible deniability," Tribe attributes to the Constitution a strong presumption in favor of all consensual sexual associations[24] which includes (in addition to homosexual sodomy), rights to homosexual marriage and polygamy.[25] Even incestuous relations are "not necessarily" foreclosed from constitutional protection. A state "could perhaps" make a "plausible argument" for banning prostitution and "at least a colorable argument" against sadomasochism and bondage because both might involve an excessive risk of coercion, but he judiciously withholds judgment on these questions. He does express doubt that there is a constitutional right to bestial-

21. L. TRIBE, at 1324 and 1326.

22. *Id.* at 1312.

23. Tribe is not explicit about which substances would be protected. Marijuana is to be protected, but not, it seems, heroin. As for the rest, the standard seems that of equal protection: the government cannot prohibit any psychoactive substance of equal or lesser potency than the most potent substance it permits. Today alcohol would seem to set the pace. He lays the path for the protection of peyote and its derivative, mescalin, by noting its importance for the religious autonomy of certain Native Americans, *id.* at 1247-49, and by urging the assessment of claims for religious autonomy, not from any "objective" perspective, but in terms of "the role a belief plays in the individual's or group's life," *id.* at 1182, an assessment which seems tantamount to equating religious autonomy with plain autonomy.

24. *Id.* at 1432.

25. *Id.* at 1434, 1271 and 1434 n.89.

ity,[26] but leaves the reader wondering why a constitution, broadly indifferent to the sexual conduct of humans, should manifest such solicitude for the sexual propriety of animals.

The pivotal case for Tribe's program of autonomy is *Roe v. Wade*, for if the claim of autonomy can be made forceful enough to defeat the state's interest in preserving the life of a fetus, surely it will defeat the apparently less compelling, or at least more abstract interest of the state in preserving the moral tone of the community. Yet the Court's reasoning in *Roe* was notoriously weak; its basic point—that the Constitution's protection of liberty "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy"—was simply an ipse dixit.

Recognizing this weakness, Tribe has abundantly invested his creative talents in the task of defending *Roe*, devising four distinct justifications since 1973. Initially he claimed that laws prohibiting abortions represented an "establishment" of religion in violation of the first amendment.[27] A couple of years later, he withdrew from that position, acknowledging that it unduly restrained the political liberty of religious groups and underestimated the moral arguments against abortion that did not derive from specifically religious foundations. Instead, he claimed that when opinion on moral questions is in a state of flux, but the political process is deadlocked from change by groups committed to the old moral consensus, the judiciary can intervene to allow the evolution of a new moral consensus.[28]

That argument was patently disingenuous, for Tribe's "liberation" of the polity allows it to develop a "new consensus" only behind the Court's opinion; the people cannot choose to restore the old moral order unless they manage to amend the Constitution or the Court reverses itself. Perhaps recognizing its flaw, Tribe barely alluded to this argument in his first edition of *American Constitutional Law*.[29] Instead, he argued (in his third stab at the issue) that the exceptions in the typical abortion law—such as for rape, incest, or the life of the mother—indicated a less than "coherent commitment" to fetal life to be weighed against the woman's claim of autonomy, and thus abortion laws "in the historical circumstances of the 1970's can be perceived as unwarranted deprivations of liberty."[30] In the second edition, this vacant argument too is quietly

26. *Id.* at 1432 n.77.

27. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 11, 15, 22 (1973).

28. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L.L. REV. 269-321, esp. 317-18 (1975).

29. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 929 (1st ed. 1978).

30. *Id.* at 932.

interred. In its place, Tribe offers what is probably his most revealing statement yet on human personality.

This is the antisubjugation principle.[31] Although the Court, and Tribe himself until recently, missed it entirely, it turns out that the essential fault with laws forbidding abortions (and with laws failing to fund them) lies in "the subordination of women to men through the exploitation of pregnancy."[32] Through abortion laws, it seems, and in violation of the thirteenth as well as the fourteenth amendment, "male dominated society" "sentences" women into "involuntary servitude," or forced labor.[33] Tribe does not mention that women are as likely as men to oppose abortion; these women apparently suffer false consciousness and hence desire their own subordination. Nor does he mention that men generally are unaware of their having such a malign purpose; like the capitalists described by Marx, men do not intend to exploit, but do so as a result of the "system."

Here the system is biology. After a woman engages in sexual intercourse and conceives a child, she can avoid the personal sacrifice of childbearing only with the help of an abortionist. She is unlike a man who simply by his own refusal could avoid, for example, the sacrifice of one of his kidneys to save his child's life.[34] Given the burdens of pregnancy and childrearing, unless women can terminate pregnancy, they cannot be the equal of men in society. "Even a woman who is not pregnant is inevitably affected by her knowledge of the power relationships thereby created."[35] So when a state bans abortions, refuses to fund them, or assists childbirth but not abortion, it "exploits this special vulnerability of women in a way that reinforces their subordination to men, and thus their lack of fully autonomous and equal roles in social, economic, and political life."[36] By contrast, Tribe muses, "the law nowhere forces *men* to devote their bodies and restructure their lives in those tragic situations (such as organ transplants) where nothing less will permit their children to survive."[37]

That such organ transplant laws do not now exist is due more to lack of need than to principled opposition. In any event, we do ask men to bear significant hardships for the sake of others, as when we draft them (but not women) for military service and combat

31. Tribe uses subjugation and subordination interchangeably.
32. L. TRIBE, at 1353.
33. *Id.* at 1354.
34. *Id.* at 1355.
35. *Id.* at 1354.
36. *Id.* at 1355.
37. *Id.* at 1354.

duty. Yet Tribe's notion of individual autonomy would function as if there *were* principled and constitutionally based opposition to such organ transplant laws and to military service (which, by the logic he develops in the abortion controversy, would also raise a thirteenth amendment claim of involuntary servitude).

By such reasoning do we proceed from the idea that everything is a matter of taste to radical doubts about the morality of the draft. Nor is the chain of logic altogether surprising, for as Solzhenitsyn has observed, where liberty degenerates into simple "unlimited freedom in the choice of pleasures," it becomes impossible to answer "why and for the sake of what should one risk one's precious life in defense of the common good?"[38]

## III

If Tribe's notion of "autonomy" provides the most striking displays of his view of human personality, his conception of equality holds more pervasive and more radical implications for the American political system. Here again, we can best understand Tribe's view by contrasting it with the traditional understanding, focusing on the issue of racial equality.

According to that traditional view, the basic moral fault of legally imposed discrimination lies in prejudice, that is, in bringing race to bear on judgments of merit or fitness. There is a moral fault in the process, when government attributes to race itself a worth it lacks, and there is moral fault in the outcome—material harm and the resulting stigma, the marking of the racial group as lacking in estimable qualities of human character. Thus, even where the legally imposed disadvantages are materially small—sitting in the back of the bus, swimming in a different pool, and attending a different school, where objective features may even be identical—still, these laws make judgments about worth and character, and so they inflict bitter wounds. Further, exactly because these are judgments about estimable human qualities—intelligence, industry, truthworthiness, hygiene—qualities that are widely relevant to social and economic positions, the material harms are not small or discrete, but cumulative and large. The traditional understanding holds that such judgments can only be made of an individual, not of the racial group to which he or she belongs.

Adherents to this tradition are unabashed in honoring merit, for it is primarily by such standards, before which we are judged impersonally and equally and given what we deserve, that consider-

38. A. SOLZHENITSYN, A WORLD SPLIT APART 15 (1978).

ations of race become irrelevant and invidious. The prize goes to the swiftest, the position of trust to the most trustworthy, the job to the applicant best fit to perform it. To bring forth the best in us, the traditional approach welcomes both extra effort in training the disadvantaged and wider nets for recruitment. But it views "preferential treatment"—giving race a worth in the actual award of jobs, prizes, or positions, in the name of racial fairness—as a threat to standards, merit, and thus to genuine equality. As Solicitor General Charles Fried recently stated the case before the Supreme Court, "Henry Aaron would not be regarded as the all-time home-run king, and he would not be a model for youth, if the fences had been moved in whenever he came to the plate."[39]

Rules that discriminate on their face, such as a rule denying blacks admission to a state university, are virtually per se unconstitutional under the traditional approach. The more difficult problem is with rules or policies that are neutral on their face, but affect the races differently, such as zoning rules affecting low-income housing. The traditional approach is to declare such laws unconstitutional if their purpose is to discriminate. But where there is no discriminatory purpose, there is no morally objectionable process, no resulting stigma, and no constitutional fault. There may remain a resulting hardship, but it is not different from what each citizen suffers as the occasional loser in legislative contests. Thus, when a municipality sells a public swimming pool to a private club, the material effects may be the same, but it makes a world of moral and constitutional difference whether the motives were to preserve scarce public funds or to prevent blacks from mingling with whites.

The distinction is crucial, for given the different demographic characteristics of racial and ethnic groups—average age, education, family size, wealth, income—legislation often harms one group more or benefits it less than others. Sales taxes, professional license requirements, minimum wage legislation, welfare support levels, and countless other laws and policies all have disparate impacts among racial groups. These laws may be bad, and if so they should be modified or repealed, but they are not unconstitutional.

To be sure, figuring out why a legislature enacted a policy is not always easy. Often a lawmaker is trying to accomplish several things for many reasons: pursue sound public policy in a high-minded public spirit, gain re-election, reward friends, weaken opponents, etc. The traditional approach is to ask whether the legislature had sufficient legitimate reasons to support the law; or alternatively stated, would the law have passed "but for" racial

39. *Quoted in* 43 CONGRESSIONAL QUARTERLY 2104 (Oct. 1985).

prejudice?[40] If it seems likely that the law would not have been enacted without such racial prejudice, it is declared unconstitutional. In most cases the matter is clear; in marginal cases it is less so. But in all cases the inquiry is necessary, for the alternative, to focus exclusively on material effects and require that all laws affect each racial or ethnic group identically, would result in mandatory color coding of virtually all governmental policies, the abandonment of standards, or blatant color consciousness in the design of tests or standards to ensure that the results come out with the proper racially proportionate mix.[41]

With his newly discovered "antisubjugation principle," Tribe would chart just such an alternate course. The "purpose" test, he claims, is "utterly alien to the basic concept of equal justice under law." After all, he asserts, "[t]he burden on those who are subjugated is none the lighter because it is imposed inadvertently."[42] Given the need to color code all social and economic legislation if one focuses exclusively on the material effects of the law, plus the difficulty of defining a hardship as a denial of racial equality in the absence of a discriminatory purpose, it is hard to believe that Tribe, despite his rhetorical flourishes, is entirely serious. And as it turns out, he is not—at least not *entirely*. For as he moves closer to practical applications, he does end up defining the relevant "effects" of the law in terms of the lawmaker's state of mind. His innovation here is not exactly, as he initially claims, to turn from purpose to effect, but to move from conscious to subconscious states of mind. For contemporary racism, he maintains, consists less of conscious hostility than it does of subconscious patterns of thought that render the majority race more concerned for its own well being than for that of minorities. In deciding the constitutionality of a law under his antisubjugation principle, Tribe would have courts ask roughly the following question: Taking into account their subconscious motives, would the lawmakers have enacted this law if its disadvantages were to fall on *them* and "their kind"?

A Golden Rule for the subliminal, the approach is not without moral charm. Yet it has problems. If a lawmaking body is told that it subconsciously subjugated a people, how is it to respond? If conscious purpose is at stake, the words of the lawmakers may be suspect, but if it is their subconscious state of mind that is in question, not only their words, but their very thoughts are suspect. Like the

40. *See, e.g.*, Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977).

41. For a heroic defense of the contrary position, see Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 25 U. PA. L. REV. 540 (1977).

42. L. TRIBE, at 1519.

psychoanalyst who stands above the subterranean forces that drive the rest of us, the courts—in Tribe's view—occupy a privileged position above the racism buried in the minds of others and thus have special competence to pronounce whether the law and its effects imply a properly pure subconscious. In practice, of course, the answer will depend on whether the results come out "right."

That this makes his concession to state of mind analysis nugatory, however, is perhaps the least of the problems with Tribe's anti-subjugation principle. Far more troubling is its abandonment of the traditional emphasis on standards of merit, and the consequent transformation of the understanding of human personality that underlies the Constitution. The traditional approach takes its moral bearings from a vision of human personality with estimable character, talents, and traits; the wrong of racial discrimination is the judgment that a people, because of its race, is lacking in these and is therefore unfit for a position, prize, association, or benefit. Its typical claim is one of justifiable outrage: "Because of my race, you denied me what I deserve." For Tribe, the question is not one of fitness, or merit, or desert, but of distributive fairness. Its claim is thinned to a whine, "You gave them more than me." As we saw in his discussion of autonomy, Tribe's aim is to level the vision of constitutional personality, so it is not altogether surprising that he should seek to define equality without reference to anything that makes mankind admirable; such judgments inevitably subjugate one person to another's notion of what is good in and for men and women. What is remarkable is the loss of moral authority that Tribe's principle brings. Subtract from racial discrimination the idea of prejudice, the judgment that an individual, because of his race, lacks desirable human qualities and talents, and in what sense does the remaining discrimination present a significant moral or constitutional wrong? At some time or other, each of us is disfavored by legislative policy: the tariff that favors manufacturers over farmers, the labor law that favors workers over managers, the airline deregulation that diminishes service to small towns. If we simply ask Tribe's question—would the lawmakers have enacted that policy if they came from the same group as the disadvantaged—then the laws disadvantaging farmers, managers, and small towns become indistinguishable from those harming racial groups.

As Tribe thus drains the moral force from equal protection, he at the same time vastly extends its reach and the scope of "remedies" for its violation. Because the traditional view respects the standards of fitness set by society and state, it regards our possessions, opportunities, and honors as properly ours, unless their distri-

bution was infected with identifiable racial prejudice. Because Tribe's antisubjugation principle employs an abstract standard of fair distribution, it regards all that we have as potentially subject to redistribution to make it conform to what would have emerged from a hypothetically pure state of mind. Thus Tribe would not hesitate to extend legal remedies to what might be thought the consequences of acts that occurred decades or centuries earlier. Indeed, it seems the chief problem with our present racist subconscious is its blind indifference to the way seemingly neutral policies, rules, and tests perpetuate the "virulent vestige of centuries of official subjugation."[43] Thus where the traditional approach finds occasional and discrete acts of racial prejudice by today's lawmakers, Tribe's antisubjugation principle sees institutional racism pervading contemporary America.[44]

To "dismantle this house that racism built,"[45] according to Tribe, we must create the situation, often by the direct redistribution of opportunities, that would have occurred if racial animus did not lurk beneath our present consciousness and if more manifest discrimination did not stain our past. Tribe's own design, while not lacking in curb appeal, is morally dubious both in structure and substance. It is jerrybuilt from a twofold hypothetical—*if* we had not discriminated in the past and *if* we did not remain at least subconsciously racist—and an unlikely claim that courts know the motives of lawmakers far better than they do. He would license a free ranging judicial imagination to write the story of what would have been and then to orchestrate its enactment.[46] As thus extended, his

43. *Id.* at 1521.

44. *Id.* at 1518.

45. L. TRIBE, CONSTITUTIONAL CHOICES 221 (1985).

46. Courts, in Tribe's scheme, clearly must take the lead in defining constitutional rights and indicating what is necessary for their vindication. On the extent to which they should be involved in the actual design and implementation of *remedies* he is decidedly ambiguous. Discussing school desegregation, the field where courts have been involved most extensively in broad systemic remedies, he initially expresses determination that courts should do whatever is necessary—separation of powers concerns be hanged: "If all vestiges of racial isolation in the public schools are to be 'eliminated root and branch,' the federal courts will require discretion to formulate remedies as complex, continuing, and wide-ranging as the problem they confront," TRIBE, at 1500.

Elsewhere he is more equivocal. He ventures the theory, for example, that the Court has failed to embrace his anti-subjugation principle, not because it sees something wrong with his theory, but because the Court is concerned about the extensive remedies such a theory would entail. Rather than "masquerading" its decisions in the language of rights the Court's "proper course," he tells us, "would have been to confront the remedial challenge head on: either grit the teeth and get to work fixing the inequality, no matter what it takes, *or* swallow hard and acknowledge that the constitutional wrong cannot be judicially put right," *id.* 1512 (my emphasis).

In the context of other affirmative rights, he does state more forthrightly that there are limits to the capacity of courts to provide remedies for the rights it announces (without ever

goal of fairness stands at odds with the idea of merit. Instead of asking who is most qualified for a position, Tribe would have us ask who would have been most qualified if our past had been what it should have been. Maybe the sixteen less qualified minorities who displaced Allan Bakke from admission to the Davis medical school would have had higher qualifications than he if the past had been otherwise. Maybe Brian Weber would not have had that apprenticeship. Maybe Michael Tyson would not have been heavyweight champion. Maybe the Nobel Prize for physics would have gone to a currently unknown minority. Maybe . . . .

Undaunted by the task of identifying what this doubly hypothetical situation would have been, untroubled by the expansion of judicial and governmental authority required to achieve it, Tribe is most decidedly unimpressed by the cost to individual desert and merit necessary to obtain this idea of a fair distribution among racial groups. While the traditional approach gains its moral force from the belief that people should get what they deserve, the antisubjugation principle gains its force from the doubt that people deserve what they have. The traditional approach seeks to ensure that desert is cleansed of racial discrimination; the antisubjugation principle seeks to redistribute goods according to a hypothetical criterion of racial fairness. The traditional approach appeals to the honor of mankind, the antisubjugation principle appeals to guilt and doubt.[47] Where Alexander Bickel held it a moral underpinning of the Constitution that we should honor the expectation of men and women of all races "to succeed by hard work and to better themselves by making themselves better,"[48] Tribe tells us that the expectations of whites in the context of contemporary racist America "are likely to be inflated, if not wholly unfounded."[49]

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specifying what those limits might be). But this very question of judicial competence to provide remedies arises almost entirely from his extraordinarily expansive ideas of what those rights are. (Working from cases such as Rochin v. California, 342 U.S. 165 [1952], he charts, for instance, the evolution of a right to "bodily integrity," and hopefully sketches the development from a presumptive right to be free from governmental invasion of the body to a right to governmental care of the body. For "governmental omission can be as deadly as the most pointed of governmental acts," *id.* at 1336.) And the definition of those rights, he leaves no doubt, is the job of the courts. That he might then enlist the powers of the sword and the purse to implement his ideas of rights (or to suffer the ignominy of violating the Constitution) should bring small comfort to anyone concerned about the expansive role the judiciary plays in our democratic system of government.

47. In one of his more remarkable displays of chutzpah, Tribe also appeals to a theory of "original intent," claiming, "the antisubjugation principle is faithful to the historical origins of the Civil War amendments," *id.* at 1516, and denouncing what I have called the traditional approach as "creative constitutionalism," an "activist" reading that "revises the fourteenth amendment at its most basic level." *Id.* at 1516.

48. A. BICKEL, THE MORALITY OF CONSENT 133 (1975).

49. L. TRIBE, at 1537. It is in light of comments such as these that we should under-

The difference between the traditional approach and Tribe's antisubjugation principle is nicely illustrated by the case of *Washington v. Davis*. At issue was "Test 21," used by the District of Columbia police department to evaluate language skills in the selection of recruits. Developed by the Civil Service Commission, the test was widely used by the federal civil service, proven to be a reliable measure of success in the police training program, and though it had not been tested in relation to job performance, the job of a policeman does require, as the majority opinion pointed out, "special ability to communicate orally and in writing."[50] There was no evidence of any purpose to discriminate either in the adoption or in the administration of this test. Following the traditional approach, the Court held that the relevant constitutional question was one of purpose (assuming consciousness of purpose), not mere effects, and the mere fact that blacks failed the test at a higher rate than whites did not render it unconstitutional.

Not a single Justice in *Washington v. Davis* dissented from this statement of constitutional principle.[51] Yet it is here that Tribe denounces the obligation to show purpose as "utterly alien to the basic concept of equal justice under law."[52] Where the Court looked for prejudice and found none in this modest endeavor to upgrade the language skills of a police force, Tribe looked for "legally created or legally reenforced systems of subordination that treat some people as second class citizens,"[53] and for conditions, which "in their social and historic context, are manifestations of official oppression"[54] and found them in Test 21.

"Oppression," "systems of subordination," and "second class citizenship" might seem extravagant ways to describe the use of a carefully designed language skills test by a police department, more than forty percent of whose members were black (a figure equivalent to the racial mix in the metropolitan area), whose recruits were more than fifty percent black,[55] and that had, as the majority opinion pointed out, "systematically and affirmatively

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stand Tribe's suggestion that "property rights" in the Constitution must be understood as mere reflections of the more fundamental values of equality and autonomy, and thus qualified appropriately. *Id.* at 7, 8, 608, and 699. Thus, it would be a rare white in contemporary America, who could claim that his property interests were "taken" by an affirmative action plan.

50. Washington v. Davis, 426 U.S. 229, 246 (1976).

51. Justice Brennan, joined by Justice Marshall, would have decided the case for Davis, but on a statutory ground.

52. L. TRIBE, at 1519.

53. *Id.* at 1515.

54. *Id.* at 1516.

55. Davis v. Washington, 348 F. Supp. 15, 16 (D.D.C. 1972); Davis v. Washington, 512 F.2d 956, 961 n.32 (D.C. Cir. 1973).

sought to enroll black officers."[56] Tribe, however, finds sufficient manifestation of official oppression in the link between the higher failure rate of blacks and the District's history of segregated schools, a link he calls "obvious." Since the segregation had ended twenty years earlier and since the evidence is at best ambiguous that the quality of education and test performance has improved during those years, this link would appear problematic to most. But with a zeal and singularity of vision more commonly found in ideological tracts than legal treatises, Tribe assesses disparate impacts, such as that resulting from Test 21, as if they were known to be results of a "system of subjugation."

Because we must deal, according to Tribe, with "systems" of subjugation rather than mere "acts" of discrimination, massive legal intervention, or "systemic remedies" will be frequently needed. Accordingly, to root out all traces of "subjugation" in the public schools, Tribe advocates eliminating the well established distinction between *de jure* and *de facto* segregation, a distinction that has been unanimously accepted by the Justices.[57] That is, regardless of whether the state or the local school board had committed any sort of discriminatory act (de jure segregation), public schools would be vulnerable to court integration orders until their populations show the "proper" racial mix, that is, the sort of mix that he presumes would have occurred if our past had been what it should have been and if our present subconscious racism did not perpetuate the past. Until then, Tribe maintains, the Constitution must allow federal courts the discretion to formulate system-wide remedies, "remedies as complex, continuing, and wide-ranging as the problem they confront."[58] Racial quotas, busing, redrawing of district lines without regard to neighborhoods or municipal boundary lines, and redrawing the lines again if the population movements upset the court established quotas—one searches *American Constitutional Law* in vain for a desegregation remedy that Tribe thinks goes too far.

Like school districts, governments themselves will have to be reformed if they fail to produce the proper racial mix of representa-

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56. Washington v. Davis, 426 U.S. 229, 235-36 (1976). In fact, it seems plausible that the higher failure rates among black applicants was due in part to that same affirmative effort, for in its aggressive recruitment efforts for blacks—whites were essentially self-selected—the police department cast a wide net likely to provide a lower yield; though blacks in the metropolitan area constituted only forty-four percent of the population, the recruitment effort brought an applicant pool that was seventy-two percent black. (Lerner, *Employment Discrimination*, 1979 SUP. CT. REV. 17, 25 n.23 and 27 n.26). Tribe's antisubjugation principle would go a long way to ensure that good deeds not go unpunished.

57. Powell once toyed with but then dropped the idea of eliminating this distinction. Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189 (1973).

58. L. TRIBE, at 1500.

tives. Consider how Tribe would have handled *Mobile v. Bolden*. In this case, a complaint was brought against the commission form of government adopted by the city of Mobile, with its system of at-large election for the three commissioners. The allegation was that this system of election and government, which is used by thousands of municipalities across the country, had the effect of "diluting" the black vote.

The District Court found no purpose to discriminate in the adoption of the city's commission form of government and electoral system, the drawing of its municipal boundary lines, or in access to the ballot, and no deviation from the principle of one person, one vote. The judge decided nonetheless to transform the government to a mayor/council system with single member districts—this in order to enhance the chances of electing more black representatives. As Justice Stewart pointed out in his plurality opinion for the Supreme Court reversing this decision, one could speak of vote "dilution" under the circumstances of this case only on the absurd assumption that every minority group "has a federal constitutional right to elect candidates in proportion to its numbers."[59]

Tribe, however, praises the lower court's remedy and attacks the Supreme Court's reversal of it; he embraces precisely the notion of "vote dilution" the Court rejected.[60] And from the perspective of his antisubjugation principle, he does so logically, for when just procedures—procedures free from discriminatory purpose—are displaced from the center of equal protection analysis, there is little to which one can point as a standard of evaluation except a fair distribution among racial groups, meaning here a proportional representation according to race.

Tribe, it seems clear, would find equal protection violations where the Court has never discovered them before and extend race conscious "remedies" far beyond anything the Court has ever sanctioned. Yet the permissiveness of the antisubjugation principle towards racial criteria does not stop with mere remedies of even distant wrongs. Even when there is no evidence of past discrimination, as long as the aim is to bring about Tribe's new order where all positions of advantage and disadvantage show the proper racial mix, legislators and private actors are encouraged to employ the criteria of race. In fact, if the Civil Rights Act of 1964, that moral monument of the twentieth century, were understood according to its original intent—as a prohibition of discrimination "against any individual because of his race, color, religion, sex, or national ori-

59. Mobile v. Bolden, 446 U.S. 55, 75 (1980).
60. L. TRIBE, at 1506-07.

gin"—it would have to be declared unconstitutional, according to Tribe, for it would then block this "forward looking" affirmative action.[61]

Beyond issues of race, Tribe's antisubjugation principle would extend its standard of mental purity to issues of sex, sexual orientation, and more. Women's colleges would have to go, unless they could prove that they functioned as a "remedial haven for women from the hierarchy of domination in the 'man's world' of higher education;"[62] men's colleges do not have a prayer. Women equally with men must be eligible for the draft and combat duty.[63] Laws with disparate impacts on homosexuals would also fall under this principle,[64] including, one presumes, laws that favor heterosexual over homosexual couples in the adoption of children. Despite the plain words of the Constitution to the contrary,[65] Tribe maintains that felons equally with the rest of us must have the right to vote; a footnote questions whether it is constitutional even to imprison felons unless society and the criminal can be shown "conclusively"—that is, to the Court's satisfaction—to benefit from such unequal restrictions on liberty.[66]

The list goes on, but it is time to consider two fundamental questions about Tribe's work. First, what is the proper role of the courts for Tribe under the Constitution? Second, what is the substance of the philosophy that for him undergirds the Constitution?

## IV

Tribe's willingness to subordinate the text of the Constitution to an evolving spirit behind it, his identification of that spirit with his own vision of what is truly right, and his eagerness to use judicial authority to implement this vision, combine to leave little in American political life that would not be subject to judicial oversight, or that the people, acting through their elected representatives, would be free to decide. If "the highest mission of the Supreme Court" is, as he states in his first preface, "to form a more perfect Union" between rights under the Constitution and what is truly right, then there is no question of moral significance for which the Court does not hold the final say. His approach to the abortion question is exemplary. Even while wandering through four differ-

61. *Id.* at 1532.
62. *Id.* at 1570.
63. *Id.* at 1574.
64. *Id.* at 1616.
65. U.S. CONST. amend. XIV, § 2.
66. L. TRIBE, at 1094 and n.6.

ent justifications for *Roe* over the last fifteen years, Tribe was steadfast in his conviction that abortion is a matter that only the judiciary can decide. Abortion raises questions of moral rights, both of the unborn and of the pregnant woman, and though there is really nothing in the text supporting either claim, since questions of morality are involved, the Supreme Court must decide them. The idea that abortion is a matter for the political branches of government to resolve, as it was prior to *Roe*, is "fatally flawed," for it "presumes that fundamental rights can be reduced to political interests." That the Constitution could be silent on a question of moral significance, that the political branches can render sound judgment on a question of moral significance, that some such questions can best be handled by the political branches—all of this seems to escape him. It would be intolerable to allow state legislatures to handle a question of such importance, he tells us, with some favoring the rights of the fetus and others the rights of the pregnant woman. Then with a good ear for cadence but a bad eye for historical parallel, he blithely intones "Lincoln's warning, voiced on a previous occasion when the nation was deeply divided over a different issue of fundamental liberty, that the Union could not long endure 'half free and half slave.' "[67] Tribe does not inconvenience his point by mentioning the Court's "solution" to that issue of liberty, the *Dred Scott* decision.

Tribe can make appealing a world where courts rule on the really big questions, and he can, as he did so successfully at the Bork hearings, make fearful the prospect of government without such judicial oversight. After all, who wants to live under a government that is free to do wrong? But the claim on which he bases judicial authority, that it might bring about his "more perfect Union" between what is truly right and what is right under the Constitution, is a claim that is destructive of constitutional democracy. The political branches, under Tribe's approach, forfeit authority to the judiciary because they know less of what is right than does the Court. But if he is serious about this claim to rule on the basis of knowledge, the Court must forfeit authority to the perfect philosopher, the one who truly knows what is right. Only if we abandon all formal authority to this philosopher and make him absolute king, as Plato taught in the *Republic*, will there be that perfect union of legal rights and what is truly right. Michael Walzer, whose moral philosophy is not far from Tribe's, but who is much more astute on the nature of authority, made the point forcefully. The claim of the people to rule "is most persuasively put . . . not in

67. *Id.* at 1351.

terms of what the people know, but in terms of who they are. They are the subjects of the law, and if the law is to bind them as free men and women, they must also be its makers. . . . They may not know the right thing to do, but they claim a right to do what they think is right."[68]

Tribe's logic on judicial authority, however, is one of convenience and not of consistency, for he is unwilling to see authority drift out of the Court's hands and into those of a perfect philosopher, or of anyone else. Even when the Court does not know the right thing to do, Tribe would have the people recognize its claim to do what it thinks is right. What he finds intolerable is a similar claim to authority by the people themselves, or their elected representatives.

Tribe's view of judicial authority, in short, leaves no place for constitutional government and precious little for democracy. But perhaps even more grievous than this substitution of rule by judges for the rule of the Constitution, is the substitution of his new vision of human personality for the traditional one underlying the Constitution. As we have seen, according to Tribe's philosophic history of the Constitution, it is only in the last two or three decades, with the doctrines of autonomy and equality, that the Court and commentators have begun to develop the idea of human personality that would, in his view, justify the entire enterprise of constitutional government.

By his criticism of the doctrines of earlier eras, Tribe would lead us to expect an emphasis upon substance. Certainly that is the promise of his rhetoric. He tells us, for instance, that equality "makes non-circular commands and imposes non-empty constraints only to the degree that we are willing to posit substantive ideals."[69] On this point, Tribe is correct,[70] for without this substance, claims of equality wrap us in the following sort of loop: Jack and Jill are equal so they should be treated equally. In what respect are they equal? Equal moral worth. What is the content of this moral worth? That they should be treated equally. And in what respect are they equal? It should be noted that the founders did not make this mistake, for the Declaration of Independence is quite explicit about the substantive respect in which we are equal. They held this equality to consist not in some circular reference to equal moral worth, but in each of us having unalienable rights.

The idea of natural rights, as one would expect, is a mere his-

68. *Philosophy and Democracy*, 9 POL. THEORY 379, 383 (1981).
69. L. TRIBE, at 1436. *See also* 1514.
70. *See* Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

torical curiosity for Tribe and currently a barrier to real justice.[71] For him the real substance of constitutional equality lies in the "antisubjugation principle." Yet as Tribe develops this principle, we observe it looping back to the starting point of equality. "The core value of this principle" he proclaims, as if he were supplying content, "is that all people have equal worth."[72] Equal worth in what respect? That "no citizen is 'more equal' than any other," he replies. Where's the beef? Perhaps we would do better to look for substance in Tribe's idea of autonomy. After all, it is here that he insists most emphatically that we are given "an idea of the 'human' and a conception of 'being' not merely contemplated but required."[73] But where the claims of autonomous personality must be stated with greatest force, on the abortion question, Tribe simply points back to equality's antisubjugation principle.

If Tribe's conceptions of equality and autonomy are circular and empty, how is it that they can have such apparent force? For with these conceptions Tribe would batter down so called "legal hierarchies" and void laws "subjugating" one person's lifestyle according to the public's idea of good character. And behind these conceptions lies the mainstream of today's academic jurisprudence. Ronald Dworkin,[74] Bruce Ackerman,[75] and John Rawls[76]—the neo-Kantian school as a whole—give virtually the identical meanings as Tribe to the rights of liberty and equality. Despite the breadth of their support in contemporary academe, the force of these rights is illusory. The moral confidence of these "mainstream" advocates hinges on their dogmatic doubt that we can ever know what is good for man and woman or that there even is such a thing as the human good; the apparent force of their principles derives from the impotence of their idea of reason.[77] Regarding liberty they ask, if we can know nothing about the good, or the good does not exist, what reason do you have to impose your judgments of "good character" on me? Regarding equality, they ask if all distributions based on character, talent, and merit are groundless, why should you have more than I? Because we cannot give a reason for constraints, we are free; because we cannot give a reason for hierarchy or inequality, we are equal.

71. *See, e.g.*, TRIBE, *supra* note 45 at 238-45.
72. L. TRIBE, at 1515.
73. *Id.* at 1308.
74. TAKING RIGHTS SERIOUSLY 272-73 (1978).
75. SOCIAL JUSTICE AND THE LIBERAL STATE 11 (1980).
76. A THEORY OF JUSTICE 61 and 83 (1971).
77. One of the balder statements comes from Ackerman: "But can we know anything about the good? The hard truth is this: There is no meaning in the bowels of the universe." Ackerman, *supra* note 75, at 368.

These claims display what we might call the friendly face of nihilism. For it is from such claims of the moral arbitrariness of all judgments about the human good that Rawls gives us "the original position,"[78] Ackerman the "neutral dialogue,"[79] and Dworkin his "serious rights,"[80] and from such claims they promise equal liberty and fair distribution. Yet the promise is illusory. For if there is no human good or knowledge of it, one might with equal logic conclude there is no reason for me *not* to impose my will on yours. And the only meaning of equality is that we are equally worthless.[81]

For the past three centuries, liberalism gained its moral authority not just by its rejection of arbitrary restrictions and false claims of hierarchy, but by its *release* thereby of a human character worthy of admiration and respect. Recognizing that the human good is vast and diverse, that reason cannot discern and express all elements of this good with clarity and confidence, that for the most part, and certainly at its higher reaches, the good can only be an object of choice, not of coercion, American liberalism pointed the way up mostly by indirection, by checking the path down, that is, by prohibiting license. But occasionally we find the beauty of exemplary character so moving that we erect monuments in its praise, as we did with the Lincoln Memorial. It was before this monument and to this still living tradition of American liberalism that Martin Luther King appealed when he spoke of his dream of an America where each will be judged not by the color of his skin, but by the content of his character. The derailment of American liberalism and the destitution its moral authority has suffered in the last two decades are exhaustively displayed in this work by Laurence Tribe. For he would have us judged by the color of our skin and decisively not by the content of our character.

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78. J. RAWLS, *supra* note 75, esp. at 11-22.

79. B. ACKERMAN, *supra* note 74, esp. at 8-12.

80. R. DWORKIN, *supra* note 73, and *supra* note 19.

81. I develop these propositions more systematically in *Can Liberals Punish?*, 82 AM. POL. SCI. REV. 822 (1988).