Northwestern University Law Review Colloquy
Vol. 103

LOST IN SPACE: LAURENCE TRIBE'S INVISIBLE CONSTITUTION

Eric J. Segall[*]

For over two hundred years, scholars, judges, and constitutional theorists have debated whether the American people possess fundamental rights and liberties beyond those derived from the explicit text of the United States Constitution. As early as 1798, Justices Chase and Iredell differed over whether Supreme Court Justices should employ natural law principles to decide the cases before them.[1] Almost one hundred years later, James Bradley Thayer argued for greater judicial deference to political institutions by suggesting that judges should invalidate decisions by the elected branches only when those decisions were clearly inconsistent with unambiguous constitutional text.[2] In the 1960's, Alexander Bickel wrote of the "counter-majoritarian difficulty,"[3] spawning hundreds of law review articles written by the legal academy's most esteemed scholars trying to justify decisions such as *Brown v. Board of Education*, *Baker v. Carr*, and *Roe v. Wade*[4] against the charge that the rights protected in those cases could not be gleaned through constitutional text and history.[5] And in 1975, Thomas Grey wrote his seminal article *Do We Have an Unwritten Constitution?*,[6] which helped spark a volume of responses on this question from eminent

---

[*] Professor, Georgia State College of Law. I would like to thank Michael Dorf, William Edmundson, Stephen Griffin, Lynn Hogue, and Steve Kaminshine for helpful comments on earlier drafts.

[1] Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.); *id.* at 399 (opinion of Iredell, J.) (link).

[2] *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

[3] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–22 (1962).

[4] Brown v. Bd. of Educ., 347 U.S. 483 (1954) (link); Baker v. Carr, 369 U.S. 186 (1962) (link); Roe v. Wade, 410 U.S. 113 (1973) (link).

[5] *See* Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1208–09 (1984) ("The controversy has been characterized as a debate between the 'interpretivists,' who believe that the Court must confine itself to norms clearly stated or implied in the language of the Constitution, and the 'noninterpretivists,' who believe that the Court may protect norms not mentioned in the Constitution's text or in its preratification history.").

[6] Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

scholars on both the left and the right.[7] Now, one of the most prominent constitutional lawyers of our generation and our chief legal doctrinalist, Laurence Tribe, has tried to contribute to this discourse with his book *The Invisible Constitution*.[8] Given my inclination to agree with Professor Tribe's politics, and in light of his substantial reputation as a teacher, scholar, and constitutional litigator, it would be wonderful to report that his new book adds to the considerable literature on this subject. Unfortunately, *The Invisible Constitution* fails to advance the debate.

Where his writing is transparent, Professor Tribe's descriptive account of constitutional law, doctrine, and history fails to break new ground. Where he fashions new ideas to support his descriptive account, Tribe's reasoning is often obscure. Although he presents normative justifications for numerous liberal results, his reasoning is not persuasive. And to the extent that Professor Tribe is articulating new methods of constitutional interpretation to clarify some of our most difficult controversies—for example, the privileged status of privacy over economic freedom—his book employs tools that could lead to conclusions opposite from the ones he advocates. Professor Tribe is obviously struggling (like the rest of us) with the current incoherence of constitutional doctrine and the subjectivity of Supreme Court decision making, but there is little in *The Invisible Constitution* to help the reader come to terms with those problems.

This review explains why Professor Tribe's descriptive account is at times unoriginal and at other times obscure. It also suggests that the normative sections of Tribe's book do raise important but often-asked questions about nontextual constitutional interpretation, which he then fails to illuminate. Finally, I explain my belief that Professor Tribe is struggling with the current state of constitutional law, and then discuss why Tribe's difficulties represent an important moment in our constitutional history.

I. A DESCRIPTIVE ACCOUNT OF THE INVISIBLE CONSTITUTION

A. The Transparent Ideas

The first three quarters of *The Invisible Constitution* are devoted in large part to demonstrating why the Constitution of the United States cannot be understood by simply reading its text. Although this conclusion is accepted by virtually everyone who reads and studies constitutional law (as a descriptive, not normative, account), apparently Tribe believes that by call-

---

[7] *See, e.g.*, Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1127 (1987) ("[T]he founding generation did not intend their new Constitution to be the sole source of paramount or higher law, but instead envisioned multiple sources of fundamental law. The Framers thus intended courts to look outside the Constitution in determining the validity of certain governmental actions, specifically those affecting the fundamental rights of individuals."); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 209–10 (1990).

[8] LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION (2008).

ing the Constitution "invisible," he is saying something different than if he said there is an "unwritten" Constitution. Yet, if the word "invisible" were replaced by the word "unwritten" every time it appears in his book, the meaning would not change, although some of Tribe's arguments would make more sense, and he wouldn't have to overstate his case. For example, he begins his argument that we have an "invisible" Constitution by suggesting that there are many essential constitutional postulates that cannot be gleaned from its text or derived by standard legal argument. These unstated principles include the following:

- "Ours is a 'government of laws, not men.'"
- "We are committed to the 'rule of law.'"
- "In each person's intimate private life, there are limits to what government may control."
- "Congress may not commandeer states as though they were agencies or departments of the federal government."
- "No state may secede from the Union."[9]

According to Professor Tribe, the "apparent detachment and distance from the Constitution's text does not prevent any of these propositions from being identified by nearly everyone as binding elements of our nation's supreme law."[10] Of course, the first two propositions are so vague as to be difficult to apply to any concrete constitutional problem, and the fourth is contestable enough that at least four Supreme Court Justices would argue that it is simply not true that the federal government is constitutionally prohibited from commandeering the states.[11]

In any event, it is the last of Tribe's "constitutional postulates" that is the most revealing about his "invisible," or in common parlance, "unwritten" Constitution. Apparently, Tribe believes that the Constitution prohibits states from seceding from the Union—though that proposition "is written not in ink but in blood."[12] Whether there really is a *constitutional* prescription that states cannot secede is certainly an interesting question.[13] Such a rule cannot be found in the document's text, which is of course Professor Tribe's point. But what exactly does it mean to say that there is a constitutional ban on secession? Tribe never answers that question, and it is a diffi-

---

[9] *Id.* at 28.

[10] *Id.* at 29.

[11] *See* Printz v. United States, 521 U.S. 898, 939 (1997) (Stevens, J., dissenting) (arguing that the federal government is not constitutionally prohibited from commandeering state officials to enforce federally mandated gun control laws) (link). Justices Souter, Ginsburg, and Breyer joined Justice Stevens's dissent. *Id.*

[12] TRIBE, *supra* note 8, at 29.

[13] The Supreme Court thought there was such a rule. *See* Texas v. White, 74 U.S. (7 Wall.) 700 (1869) (link).

cult one. Any state planning to secede would probably not consider the Constitution binding, and certainly no Court decision would deter such a state. So does our Constitution prohibit governmental decisions most of us would find unimaginable, even without any possible link to text and even though such a prohibition probably could not be enforced under the rule of law? And how do we find such "invisible" propositions? Admittedly, Tribe is more interested in making the point that nontextual constitutional rules exist than in defining their substance and enforcement mechanisms, but exploring these questions would have been useful to the reader.

The inclusion of an "anti-secession" principle in Tribe's Invisible Constitution poses another difficulty with his thesis. Tribe states early on that his book is not about what role the Supreme Court or other governmental actors should play in interpreting the Constitution.[14] Instead, his "main focus" is on the "invisible, nontextual foundations and facets of that Constitution."[15] Implicit in many of Tribe's arguments is the idea that everything that is unthinkable (a state seceding) is unconstitutional. The problem is that there may be many governmental acts, such as intrusions on sexual privacy or torture of alleged terrorists, that many people consider morally wrong but not necessarily unconstitutional. Tribe does not even hint at this possibility, but it becomes a major stumbling block later in the book when he tries to explain how he would discover what is and what is not unconstitutional. Since Tribe suggests that the answer is not derived from text, history, structure, or precedent, how do we as a society try to draw the line between the unthinkable and the unconstitutional? A fair reading of the book is that there is simply no difference. If that is true, however, Tribe should have said so explicitly, and he should have discussed the implications of such a novel view for those governmental actors who are called upon to discover the Invisible Constitution. Unfortunately, this discussion is nowhere in the book.

Throughout his descriptive account, Tribe repeats again and again that what the Constitution means cannot be gleaned from its text but instead "*resides only in much that one cannot perceive from reading it*."[16] But questions such as who in the government has legal authority to see this Invisible Constitution and how Justices "ready to kill one another over the visible text will ever reach agreement about an unseen one"[17] are left unanswered. What the reader is left with are Tribe's descriptive statements that doctrines such as substantive due process (which he says is antitextual) and judicial interpretations of the First Amendment that go well beyond its text are part of the "invisible," or as others would say, "unwritten" Consti-

---

[14] *See* TRIBE, *supra* note 8, at 10.

[15] *See id.* at 11.

[16] *Id.* at 21 (emphasis in original).

[17] Dahlia Lithwick, *The Dark Matter of Our Cherished Document*, SLATE, Nov. 17, 2008, http://www.slate.com/id/2204377/ (link).

tution. This reader's response to Tribe's lengthy attempt to establish that proposition was a big "So what?" As mentioned earlier, this point has been made persuasively before.[18]

B. The Opaque Ideas

As over the top as this criticism sounds, there is so much in *The Invisible Constitution* that can't be taken seriously as an explication of constitutional law that the only fair approach is to allow Professor Tribe to speak for himself. The context of the quotations below is Tribe's belief that the true Constitution of the United States cannot be found by reading its text or the Supreme Court's constitutional decisions but instead must be found by looking, in Tribe's own words, at its "dark matter."[19] Although Professor Tribe implies in the beginning of the book that he is writing for everyone, not just lawyers and constitutional law scholars,[20] much of his prose is difficult to understand. As a reviewer for the *New York Times* observed, "Tribe's opaque sentences make 'the invisible' even harder to see."[21] Here are a few representative samples of this difficult-to-understand prose:

> So the visible Constitution necessarily floats in a vast and deep—and, crucially, invisible—ocean of ideas, propositions, recovered memories, and imagined experiences that the Constitution as a whole puts us in a position to glimpse.[22]
>
> * * *
>
> How the Constitution's "invisible" rules and rights are to be elaborated is a question amenable in the first instance less to theory than to observation. I would identify six distinct but overlapping modes of construction in forming the invisible Constitution: *geometric*, *geodesic*, *global*, *geological*, *gravitational*, and *gyroscopic*. . . . [T]he fact that my list of methods has ended up being organized around the letter "g" will doubtless alert the reader at the very start that my aesthetic sense at times leads me to succumb to the allure of alliteration even at some loss in transparency of meaning.[23]

---

[18] *See, e.g.*, Grey, *supra* note 6; Sherry, *supra* note 7.

[19] *See* TRIBE, *supra* note 8, at 171.

[20] *See id.* at xxi.

[21] Tara McKelvey, *The Invisible Constitution*, N.Y. TIMES, Sept. 28, 2008, at BR 22 (book review) (link).

[22] *See* TRIBE, *supra* note 8, at 9.

[23] *Id.* at 155–56.

* * *

> The need to answer [constitutional] questions like these, combined with the silence of the text, again demonstrates the unavoidable existence of a large body of "dark matter" that constitutes the Constitution's all-important set of "invisible" structures and principles. And the geometric mode of construction represents not some magic key with which to unlock the secret of that dark matter but merely the *simplest* way to organize its points, lines, and planes into culturally meaningful forms—forms akin to the constellations the ancients superimposed on the starry sky.[24]

Tribe ends the book with this quotation a friend of his read in a fortune cookie: "'Everything that we see is a shadow cast by that which we do not see.'"[25]

These excerpts typify much of Tribe's discussion about constitutional interpretation. His space references do not add clarity, and this reader at least tired of them rather quickly. In addition, even when Professor Tribe is not employing metaphors to make his points, his discussion can be confusing. He says that his "interest is less in what's invisible 'around' the Constitution than in what is invisible *within* it,"[26] and that his "hope is to nudge the nation's constitutional conversation away from debates over what the Constitution *says* . . . and toward debates over what the Constitution *does*."[27] These distinctions are never adequately fleshed out by Tribe, and the difference between what is "around" the Constitution and what is "within" it is difficult to grasp, and how a Constitution can "do" anything eluded this reader completely. Moreover, I found myself asking silly little questions like "Can an 'invisible' Constitution have anything 'within' it?" and "Wouldn't it be easier to find an 'anti-cloaking' device than to try to understand Tribe's effort to illuminate the 'invisible?'"[28]

In any event, the reader eventually nears the last quarter of the book and encounters Tribe's six g's of Constitutional interpretation (the geometric, geodesic, global, geological, gravitational, and gyroscopic) and six colorful and abstract (at best) pictures of each "g."[29] Without reproducing the pictures, there is no way to explain how utterly unhelpful they are in trying

---

[24] *Id.* at 170–71 (emphasis added).

[25] *Id.* at 211.

[26] *Id.* at 10 (emphasis in original).

[27] *Id.* at 22 (emphasis in original).

[28] In various episodes of *Star Trek*, the Enterprise had to fight an invisible Romulan ship and needed an "anti-cloaking" device to see its enemy. I would like to thank my wife for this insight, which occurred to her immediately after seeing the title of Tribe's book.

[29] *See* TRIBE, *supra* note 8, at 156.

to decipher each method of constitutional interpretation.[30] As one reviewer has already pointed out, the "craggy rocks and shady cliffs evoke 'The Lord of the Rings' more than legal principles."[31] To this reader, the pictures looked more like outer space and the pyramids, but of course art is subjective. The point is that the pictures fail to make transparent the six g's. In Tribe's defense, it may be that he intended these pictures to be more artistic than explanatory, as he admits that they are "presented as [he] created them rather than in a professional rendition, in the belief that any resulting reduction in clarity will be more than offset by the gains in vibrancy and immediacy."[32] Where all of this properly falls in a book about nontextual consticonstitutional interpretation is a bit mystifying.

So the reader moves forward and learns that the first "g," "geometric construction," means "'connecting the dots' and 'extending the lines,'"[33] and that the last "g," "gyroscopic construction," is the idea that:

> [J]ust as a spinning gyroscope . . . is governed by vectors of force that give it stability and enable it to resist gravitational pulls that would otherwise knock it off its axis of spin, so the Constitution embodies vector forces both centripetal (pulling toward the center) and centrifugal (pulling outward) that ensure a measure of stability.[34]

In between is more of the same, combined with normative justifications for various legal results Tribe advocates, and the reader feels that he has been knocked of his "axis of spin" himself, and could desperately use some traditional constitutional tools like precedent or history to restore his "stability." And this reaction comes from a reviewer who is a devout legal realist and skeptic, and who believes that the results of constitutional interpretation at the Supreme Court level of decision making is nothing more and nothing less than the aggregate subjective value preferences of each Justice.[35]

In sum, Tribe's descriptive account of constitutional law, where transparent, persuasively but unoriginally demonstrates that we have a robust unwritten Constitution. Where his descriptive account is original, it is largely unhelpful and often indecipherable. The next Part of this Review

---

[30] To view two of Tribe's illustrations, visit THE INVISIBLE CONSTITUTION's profile on Amazon.com:
http://www.amazon.com/gp/product/images/019530425X/ref+dp_otheriews_1?ie=UTF8&s=books&img= (link).

[31] *See* McKelvey, *supra* note 21.

[32] *See* TRIBE, *supra* note 8, at 156.

[33] *Id.* at 157.

[34] *Id.* at 207.

[35] *See* Eric J. Segall, *The Black Holes of American Constitutional Law*, 17 CONST. COMMENT. 425, 444–45 (2000) (reviewing LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW (3d ed. 1999)).

examines Tribe's normative justifications for the "invisible" constitutional propositions he supports.

II. THE NORMATIVE (OR MAKING THE INVISIBLE VISIBLE)

Although most of Tribe's book is devoted to demonstrating that we have an Invisible Constitution, he also spends considerable effort trying to justify both the Court's substantive due process privacy decisions and its abandonment of *Lochner* and its progeny.[36] It is somewhat unclear whether he embarks on this journey to illustrate how the six g's might apply to particular cases or whether he has an interest in privileging particular constitutional results. Either way, Tribe fails to persuasively argue that his six g's are an improvement over the traditional methods of constitutional interpretation.

Tribe begins this section by referring to the actual text of the Constitution (that which we can see). He relies on the Ninth Amendment to support the notion that "[w]hatever else" the Amendment might mean, it "cautions against any reading of the rights 'enumerated' in the Bill of Rights that would treat those rights as a comprehensive and exhaustive list."[37] He then argues that because the First Amendment protects freedom of speech and the right to peacefully assemble, and because the Fourth Amendment protects the right of the people to be secure in their persons and homes from unreasonable searches and seizures, that:

> [T]here is a strong case for treating as presumptively protected from government the choices adult individuals make about the identity of those with whom they share their homes and lives, and the details (anatomical and otherwise) of the ways they choose to interact expressively in their homes with other consenting adults.[38]

All of this is in the service of justifying *Griswold v. Connecticut*,[39] *Lawrence v. Texas*,[40] and other decisions invalidating governmental efforts to interfere with private sexual decisions between consenting adults.

There are several problems with Tribe's efforts to justify the Court's privacy and substantive due process decisions. First, Tribe offers no response to Justice Scalia's dissenting opinion in *Lawrence*. Scalia argues that *Lawrence's* rationale, if taken seriously, would invalidate state laws

---

[36] Lochner v. New York, 198 U.S. 45 (1905) (overturning state law regulating hours of bakery employees on substantive due process grounds).

[37] *See* TRIBE, *supra* note 8, at 161.

[38] *Id.* at 162.

[39] 381 U.S. 479 (1965).

[40] 539 U.S. 558 (2003).

prohibiting consensual adult incest, bigamy, prostitution, and most other morals-based legislation.[41] Perhaps Tribe believes such laws would violate some combination of the First, Fourth, Ninth, and Fourteenth Amendments, but he doesn't say and the reader is left wondering. Scalia's objections merit some kind of response if *Lawrence* is going to be defended as an example of proper constitutional interpretation.

Tribe's failure to address Scalia's objections to *Lawrence* is especially problematic because, unlike several eminent scholars, Tribe specifically disavows any general libertarian presumption against governmental action. This disavowal, however, is directed at a straw man (or perhaps, in keeping with the spirit of the book, a ghost). After defending a robust right to privacy, Tribe argues that some scholars (specifically referring in the endnotes to Randy Barnett and Richard Epstein)[42] have tried to use the Ninth Amendment and other constitutional text to adopt "a broadly libertarian premise that no branch or level of government may restrict any aspect of anyone's freedom of action without a demonstrably 'good' reason rooted in the safety or welfare of others and, even then, going no further than good reason demands."[43] Tribe's response to this position is that it could mean either that the government would be restricted "far more than anyone appears to have envisioned when voting to ratify the relevant constitutional provisions," or it might "restrict government hardly at all, which is an outcome we should expect if courts and others chose to give government an enormously wide berth in identifying impacts on the welfare of others . . . ."[44] Both outcomes, Tribe argues, would result in a Constitution that cannot meaningfully distinguish between:

> [T]rivial and fundamental encroachments on the shape of people's lives. Requiring people to drive on the right side of the road . . . would become essentially indistinguishable from demanding that they worship only as the majority of their fellow citizens worship . . . or that they bear exactly the number of children the majority deems optimal.[45]

Tribe's suggestion that the immense body of work authored by Epstein and Barnett on the Constitution's libertarian presumption would equate traffic rules with restrictions on religious worship is unpersuasive and perhaps even a bit demeaning to those two scholars. Moreover, Tribe's example of religious worship is especially unpersuasive, as the clear text of the First

---

[41] *Id.* at 599 (Scalia, J., dissenting). The majority had found that mere disapproval of a particular practice on moral grounds cannot be a rational basis for criminalizing that practice. *See id.* at 577–78 (majority opinion).

[42] *See* TRIBE, *supra* note 8, at 228.

[43] *Id.* at 166.

[44] *Id.* at 166–67.

[45] *Id.* at 167.

Amendment would prohibit such governmental action.[46] The fact is that Tribe's own analysis, fairly read, could support a strong libertarian presumption contained within, or around, or radiating above, our Invisible Constitution. His three-paragraph refutation of that possibility is unconvincing.

After ducking the logical implications of his justification for a strong, unenumerated right to privacy, Tribe tries to explain why privacy is privileged by the Invisible Constitution while freedom of contract is not. He concedes that one could certainly take Article I, Section 10's prohibition on laws impairing the obligations of contracts,[47] the Fifth Amendment's ban on taking private property without just compensation,[48] and the Fourteenth Amendment's prohibition on taking property without due process of law,[49] and construct a scheme of constitutional rights similar to the ones protected by *Lochner* and its progeny.[50] He then suggests, however, that the problem with "Lochnerizing," and what "ultimately distinguishes *Lochner* from the contemporary line of privacy decisions," is that the *Lochner* rationale was "insufficiently attentive to the dynamics of power that rendered ostensibly self-governing relationships of employer to employee or of producer to consumer hollow forms that concealed what were, at bottom, unilateral impositions of power."[51] He concludes this line of reasoning by arguing that:

> To employ "liberty of contract" rhetoric to prevent regulation of wages and working conditions in settings where lawmakers have plausibly found that severe inequalities of bargaining power exist would be akin to employing "sexual intimacy" rhetoric and the trope of "privacy" to prevent regulations of sex harassment of employees in the workplace or rape of wives by their husbands in abusive marital relationships.[52]

Tribe's response to the argument that governmental regulation of private economic relationships should be presumptively unconstitutional demonstrates the inevitably subjective nature of his reasoning. First, regardless of what was true at the time of *Lochner*, to suggest that the gov-

---

[46] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

[47] U.S. CONST. art. 1, § 10 ("No state shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . .").

[48] U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

[49] U.S. CONST. amend. XIV, § 1 ("No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

[50] *See* TRIBE, *supra* note 8, at 168–69.

[51] *Id.* at 169.

[52] *Id.* at 169–70.

ernment today regulates economic relationships only when it has "plausibly" found that there are "severe inequalities" of bargaining power between employer and employee or producer and consumer is to blind oneself to the realities of current economic legislation, and to the Court's almost complete deference to the government's power to dictate the terms of private contracts and other economic arrangements. Second, even where there are gross inequalities of bargaining power, there are both textual and nontextual foundations for a right to contract despite such inequalities. No such analogy can possibly be made to support the rights of sexual harassers, much less the rights of men who rape their wives. To offer such analogies is to abdicate all hope of reasoned argument.

Even under Tribe's own reasoning, the privacy and economic rights cases are much more difficult to distinguish than Tribe would have the reader believe. When justifying the privacy cases under his "gravitational" mode of constitutional interpretation, Tribe uses an "anti-slippery-slope" argument.[53] In keeping with the overall tone of his book, however, Tribe moves from the slope to the sky to ask the following question: "Formulating legal principles with a view to the black holes into which they might threaten to plunge all who come too close . . . is a method that insists on taking proposed rules and principles to their logical conclusions—on asking where following them would risk leading the surrounding society."[54] Therefore, according to Tribe, if the government were allowed to "dictate which forms of sexual gratification are lawful between consenting adults in the privacy of their homes . . . a gravitational analysis would necessarily ask: Would there remain *any limits at all* on how closely government could regiment every last detail of personal life?"[55] If the government could regulate consenting oral sex among homosexuals, Tribe asks, why not "deep kissing or mutual masturbation or even tender consolation in identical circumstances?"[56] An answer, for those who think *Lawrence* was wrongly decided, might be that there is no tradition in this country of banning kissing or tender consolation, whereas there is a long (and unfortunate) history of criminalizing consensual sodomy. But leaving that critique aside, Tribe's gravitational analysis could be applied with similar effect to private consensual economic arrangements. If the government can tell a small business what minimum wage it must pay its employees, or dictate the terms of overtime arrangements to any firm operating in interstate commerce, what is to stop the government from dictating all aspects of the employer-employee relationship, such as the precise salaries to be paid all employees, mandatory overtime requirements, or the maximum number of people to be hired for different tasks? Such governmental overreaching is arguably at odds with

---

[53] *See id.* at 198.

[54] *Id.* at 202.

[55] *Id.* at 204 (emphasis in original).

[56] *Id.*

numerous constitutional provisions as well as much of our tradition and history. Apparently, Professor Tribe is concerned about the black holes of personal privacy but not the black holes of economic freedom. Fine, but he should not pretend that the Invisible Constitution privileges one form of privacy but not the other (at least not for the "gravitational" reasons he provides).

The remainder of *The Invisible Constitution* is devoted to justifying a number of liberal doctrines and a few conservative ones. For example, under his "global" mode of analysis, Professor Tribe approves of Justice Kennedy's and the Court's uses of international norms in cases like *Lawrence v. Texas* and *Roper v. Simmons*.[57] At least in this chapter the connection between his "g" and the results he favors is rather obvious—global means global.[58] He also thinks that *Reynolds v. Sims*'*s* "one person one vote" rule[59] is a good idea,[60] as is the public figure rule for defamation of *New York Times v. Sullivan*.[61] Approving some results on the right, Professor Tribe justifies the Court's decision in *United States v. Lopez*,[62] which invalidated the prohibition of guns around schools, under the "gravitational" mode.[63] He fails to discuss, however, the later decided *Raich* case,[64] which to many seems to undo much of what *Lopez* stands for.[65] In any event, these discussions have little to do with the Invisible Constitution, and simply reflect Professor Tribe's personal value judgments about what the Constitution should and should not mean (or do). By the time the reader finishes reading these normative justifications, she might have the sense that they belonged more in a new version of his treatise advocating his vision of the Constitution[66] than in a book about the "geological" and "gravitational" modes of constitutional interpretation.

III. CONSTITUTIONAL CONFUSION

Nine years ago, I reviewed the Third Edition of Volume I of Professor Tribe's famous treatise on constitutional law. [67] I argued that Tribe's work reflected much of what is wrong with constitutional doctrine because Tribe's treatise seemed to assume that judges and scholars could use text,

---

[57] Lawrence v. Texas, 539 U.S. 558, 572–73 (2003); Roper v. Simmons, 543 U.S. 551, 575–78 (2005). *See* TRIBE, *supra* note 8, at 183–88.

[58] *See* TRIBE, *supra* note 8, at 181.

[59] Reynolds v. Sims, 377 U.S. 533 (1964).

[60] *See* TRIBE, *supra* note 8, at 121.

[61] N.Y. Times v. Sullivan, 376 U.S. 254 (1964). *See* TRIBE, *supra* note 8, at 192.

[62] United States v. Lopez, 514 U.S. 549 (1995).

[63] TRIBE, *supra* note 8, at 203–04.

[64] Gonzales v. Raich, 545 U.S. 1 (2005).

[65] *See id.* at 43 (O'Connor, J., dissenting).

[66] *See infra* Part III.

[67] *See* Segall, *supra* note 35.

history, structure, and precedent to decide and/or solve hard constitutional law cases.[68] I also suggested that Tribe should stop trying to make doctrinal sense of constitutional law and should instead focus more on identifying those forces that actually generate results in difficult Supreme Court cases.[69] A few years later (though I am not suggesting any causal relation) Tribe dramatically announced to the world in a public letter to Justice Breyer, and in a rather long letter to the *Green Bag*, that he would not publish the second volume of his treatise (or do any work supplementing the treatise), at least partly because "the reality is that I do not have, nor do I believe I have seen, a vision capacious and convincing enough to propound as an organizing principle for the next phase in the law of our Constitution."[70] A fair reading of his thirteen-page letter to the *Green Bag* suggests a person sincerely grappling with the current state of constitutional doctrine and scholarship.

In his letter, Professor Tribe also said that no treatise true to that form could answer the following critical question: "[I]f not dictated by the text, where does one's set of criteria for better or worse readings, or ways of reading, constitutional text come from? And who ratified the meta-constitution that such external criteria would comprise?"[71] Apparently, *The Invisible Constitution* is Tribe's most recent attempt to deal with that difficult question. Unfortunately, as I hope this Review has suggested, helpful answers to the many problems with what I will call constitutional confusion do not lie in outer space and/or geodesic methods of constitutional interpretation. I believe Professor Tribe is running away from the following inevitable starting place for any helpful analysis of our unwritten Constitution and from its implications for a strong system of judicial review by unelected judges: constitutional law in the most important and controversial cases is mostly about the give and take of the subjective value judgments of the Justices. It is not always about politics—Republicans versus Democrats or liberals versus conservatives—but it is always about values. *The Invisible Constitution*'s inability to persuasively argue otherwise is further evidence of that inescapable fact.

In our post-realist world, some academics (and judges with an academic bent, such as Judge Posner) are trying to reconcile the large role subjectivity plays in Supreme Court decisions with the rule of law, but few (Posner is an exception) teach, write, or judge with that question in mind. When considering the numerous questions related to Supreme Court interpretation of vague phrases, such as due process and equal protection, where precedent hardly matters and there is no legislative override, the place to start is with the relationship between values and law. The differences be-

---

[68] *See id.* at 426–27, 445.

[69] *See id.* at 444–45.

[70] Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2D 291, 295 (2005).

[71] *Id.* at 305.

tween the results in *Bowers* and *Lawrence*, *Usery* and *Garcia*, *Garcia* and *Printz*, and *Roe*, *Casey*, *Stenberg*, and *Gonzales v. Carhart*,[72] have little to do with text, history, structure, or precedent and everything to do with Justice Blackmun changing his mind in *Garcia*, Justice Kennedy's personal agenda to overturn *Bowers*, and the substitution on the Court of Justice Alito for Justice O'Connor.

I don't yet have good answers to Professor Tribe's important question about nontextual constitutional interpretation, but I do know they don't reside in black holes or craggy cliffs. When a constitutional lawyer as important and talented as Professor Tribe cannot meaningfully advance the debate over proper constitutional analysis, something must be dreadfully wrong with the state of constitutional law and constitutional scholarship. It is only when scholars and judges truly recognize the reality of value choice and the role of preferences by individual Justices that we can get back on the right track (or planet). Maybe, just maybe, Professor Tribe had to leave us far behind to show us where we need to go. That may well be the inevitable lesson of *The Invisible Constitution*.

[72] Bowers v. Hardwick, 478 U.S. 186 (1986) (link); Lawrence v. Texas, 539 U.S. 558 (2003); Nat'l League of Cities v. Usery, 426 U.S. 833 (1976) (link); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (link); Printz v. United States, 521 U.S. 898 (1997); Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (link); Stenberg v. Carhart, 530 U.S. 914 (2000) (link); Gonzales v. Carhart, 127 S. Ct. 1610 (2007) (link).