THE BLACK HOLES OF AMERICAN CONSTITUTIONAL LAW

AMERICAN CONSTITUTIONAL LAW, THIRD EDITION, VOLUME I. By Laurence H. Tribe.[1] The Foundation Press, Inc. 1999. Pp. 1381. $47.50.

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It has been a little more than ten years since Professor Laurence Tribe published the Second Edition of *American Constitutional Law,* and now he has returned with the Third Edition (Volume 1). The prior versions of the treatise have already been reviewed by some of this country's most respected constitutional law thinkers.[3] This extensive scholarship raises the question whether there is anything left to say about Professor Tribe's project that would be helpful and important. For the following reasons, I believe *American Constitutional Law* is worthy of further evaluation.

First, the Supreme Court has decided a number of important cases over the last ten years, especially in the federalism and separation of powers arenas. This review will critique parts of Professor Tribe's treatise that could not have been included in previous editions.[4]

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3. See generally Ruth Bader Ginsburg, *Book Review*, 92 Harv. L. Rev. 340 (1978); Robert F. Nagel, *Book Review*, 127 U. Pa. L. Rev. 1174 (1979); Mark V. Tushnet, *Dia-Tribe*, 78 Mich. L. Rev. 694 (1980); Telford Taylor, *Book Review*, 79 Colum. L. Rev. 1209 (1979); Patrick E. Higginbotham, *Tribe's Agenda*, ABA J. 151 (May 1, 1988); Ira C. Lupu, *Risky Business*, 101 Harv. L. Rev. 1303 (1988); Frederick Schauer, *Constitutional Conventions*, 87 Mich. L. Rev. 1407 (1989).

4. Volume I deals mostly with federalism, separation of powers, and justiciability issues. There are also sections on *Lochner*, the Privileges and Immunities Clause of the Fourteenth Amendment, and constitutional interpretation. Volume II will be concerned with equal protection, due process, and various other individual rights. Normally, I would never review a work until it is complete. However, since Professor Tribe felt free

Second, the third edition includes one hundred new pages on the legitimacy of judicial review. In this part of the book, Professor Tribe raises fundamental questions about the various modes of constitutional interpretation. Unfortunately, this new section is disappointing because it is limited to generalizations about traditional legal doctrine that have little application to how the Supreme Court actually decides constitutional cases. This review will argue that Professor Tribe overstates significantly the role that text, tradition, history, and precedent play in constitutional interpretation.

Third, I am going to take a different approach to Professor Tribe's discussion of case law than most of my predecessors. The reviewers of the first two editions generally summarized and critiqued two or three sections of the book while explaining why his or her solution to a specific constitutional problem was better than Professor Tribe's. I doubt many people care what I think about discreet constitutional law issues, and most of the readers of this review already know how Professor Tribe would resolve most constitutional questions. Therefore, instead of summarizing and critiquing his substantive views, I will identify a serious problem with his *mode* of analysis that renders much of the normative argument in the treatise unsatisfactory for precisely the same reason so many of the Supreme Court's cases consistently disappoint constitutional law scholars. I will label this difficulty the "black hole" problem.

The dictionary definition of a black hole is "a hypothetical invisible region in space with a small diameter and intense gravitational field that is held to be caused by the collapse of a massive star."[5] I will use the phrase "black hole" metaphorically to refer to a difficult problem raised by a constitutional controversy that the Court ignores or fails to recognize but when exposed by a critic renders the Court's analysis unpersuasive. In light of the open texture of the traditional sources of constitutional doctrine, the "gravitational" pull of these black holes inevitably swallows the asserted justifications for many of the Court's decisions.

Professor Tribe's treatise is also replete with black holes, both when he proposes solutions to specific constitutional prob-

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to publish the first half separately from the second, and because we are talking about 1381 pages, my normal reservations about reviewing half a book have been significantly dissipated.

5. *Webster's Ninth New Collegiate Dictionary* 156 (Merriam-Webster, 9th ed. 1991).

lems and when he discusses the legitimacy of judicial review. In this regard, the book is a perfect reflection of how the Supreme Court decides constitutional cases, and yet another reminder of how those who write about constitutional law have failed to develop a coherent response to the problem of legal indeterminacy.[6]

I. CONSTITUTIONAL INTERPRETATION

The Third Edition of *American Constitutional Law* contains a lengthy new section discussing the "competing and complementary approaches to constitutional interpretation . . . [and] explores the relationship of those approaches to one another and to alternative theories of what the Constitution is for and of what, if anything, makes it (and the judiciary's power to enforce it) 'legitimate.'" (p. v) Despite this characterization of this new section, Professor Tribe also states that "political and moral philosophy" are "deliberately relegate[d] to the periphery" of his book. (p. 1 n.1) Furthermore, he concedes that the treatise does not focus on the problem that "constitutional adjudication is especially problematic—is not judging in the ordinary sense—and therefore that constitutional law is always open to the worry that Supreme Court justices routinely exceed their office." (p. 3) By page three of the book, therefore, the reader is told that *American Constitutional Law* contains a new section on constitutional interpretation and "what (if anything) . . . make[s] [it] legitimate," (p. 1) but the book is going to largely ignore issues of moral and political philosophy and not directly address whether Supreme Court Justices "exceed their office" because "constitutional adjudication is especially problematic." When I read this section, I wondered how Professor Tribe could discuss constitutional interpretation and the legitimacy of judicial review without discussing political philosophy or whether constitutional adjudication is especially problematic.

To accomplish his goals, Professor Tribe provides separate discussions of text, structure, original intent, normative and pragmatic argument, and precedent. Each section follows a consistent pattern. Professor Tribe raises difficult questions about

6. I read *American Constitutional Law* from beginning to end. It is possible, however, that Professor Tribe did not intend his treatise to be read continuously but rather assumed his readers would use the book as a resource on discrete legal issues. Therefore, it may not be fair to judge the book in the context of reading it cover to cover. I have tried to keep this in mind in framing my comments.

the relationship between each mode of interpretation and constitutional analysis, and then purports to say some rather definitive things about how those who interpret the Constitution should use each mode. The problem is that every chapter contains statements about the modes of interpretation that are inconsistent with each other, with specific constitutional outcomes he defends, or both. The result is that Professor Tribe evades most of the truly difficult issues raised by the Supreme Court's exercise of judicial review.

Professor Tribe begins with the text of the Constitution and argues that "[i]n all of what follows, the constitutional text is taken as *authoritative* in the sense that anything flatly contrary to it cannot stand, even if not as invariably *exhaustive* of the universe of constitutional meaning." (p. 38) Professor Tribe rejects the "realist" claim that the text of the document "may be discarded by desuetude and in any event represents supreme law only when actual practices conform to it." (p. 35)

This is a nice description of textualism most judges would happily embrace. Unfortunately, when applied to actual cases and controversies, it does little work and is not entirely accurate. For example, in his chapter on textual analysis, Professor Tribe argues that the current Supreme Court's reading of the Eleventh Amendment (that it prohibits federal question suits against the states unless Congress acts pursuant to Section 5 of the Fourteenth Amendment, even suits brought by in-state citizens) is inconsistent with the Amendment's clear text, which provides the following: "The Judicial power of the United States shall not be construed to extend to *any* suit in law or equity, commenced or prosecuted against one of the United States by Citizens of *another* State, or by Citizens or Subjects of any Foreign State."[7] Professor Tribe's proposed interpretation of the Eleventh Amendment, however, that would allow Congress to authorize *all* federal question suits against the states, (pp. 547-55) is equally inconsistent with the text of the Eleventh Amendment, which unambiguously prohibits all lawsuits against a state by an out-of-state citizen, with no exception for federal question suits. A person who would allow such suits in clear contradiction to the text cannot also endorse the idea that "the constitutional text is taken as authoritative in the sense that anything flatly contrary to it cannot stand." Yet, Professor Tribe takes both positions

7. U.S. Const., Amend. XI (emphasis added).

and makes little effort to reconcile them. A true analysis of the relationship between the role of clear text in constitutional interpretation and real life controversies falls into a black hole.

Similarly, Professor Tribe purports to adopt a rigid textualist-formalist approach to most separation of powers cases.[8] He cites with approval the language from *INS v. Chadha*,[9] that Article I contains a "single, finely wrought and exhaustively considered procedure" for national lawmaking. (p. 749) And, in his rejection of Bruce Ackerman's theory that the New Deal amounted to an informal constitutional amendment, he argues the following:

> The form of reasoning employed to discover constitutionally . . . acceptable modes of Constitution-changing could certainly be used at least as easily to conclude . . . that laws might be passed for the entire country by bodies other than Congress . . . [because] [o]nce one endorses a mode of interpreting structural provisions like Article V that is as loose and unconstrained as is the mode these arguments entail, we're off to the races and it's anybody's guess where we might end up. This is one reason that "the most plausible way of reading the Constitution as a legal text . . . *[is] to read as exclusive those provisions that specify how elements of the supreme law of the land are to be adopted.*" (p. 107) (emphasis added)

This reliance on textual analysis when interpreting the Constitution's structural provisions rings hollow, however, inasmuch as there is no serious discussion in the book of the inconsistency between the current Administrative state and Article I's command that "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."[10] The Executive Branch exercises "legislative powers" through regulatory activities pursuant to extremely broad delegated powers and has done so for a long time. A "realist" might even suggest that Article I's unambiguous directive has in fact been "discarded by desuetude" and no longer reflects "supreme law" because "actual practices [no longer] conform to it." (p. 35) Any discussion of the relationship between textual analysis and actual constitutional practice should try to make sense of this problem, especially one that suggests unambiguous text is supreme. *American Constitutional Law*, however, contains no such attempt.

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8. See notes 21-31 and accompanying text.
9. 462 U.S. 919 (1983).
10. U.S. Const., Art. I, § 1.

Professor Tribe's discussion of originalism takes a similar path. He poses the question as follows: "[W]hat weight should we give to what we know of 'original' understandings of constitutional language?" (p. 48) He begins to answer this question by agreeing with Ronald Dworkin that the relevant original meaning is not what specific results the framers expected but rather what broad principles they were setting forth. (p. 54) He recognizes that with vague phrases such as due process, equal protection, and freedom of speech, this mode of analysis will render original meaning largely irrelevant to constitutional interpretation. For example, the fact that the ratifiers of the Fourteenth Amendment "*expected* racial segregation by law in public schools and other public facilities to withstand attack under the Equal Protection Clause does not negate the proposition that such legally mandated segregation of the races is incompatible with the meaning of the Equal Protection Clause." (pp. 54-55) Similarly, the fact that the framers did not believe capital punishment was invariably cruel and unusual punishment (as evidenced by the unambiguous text of the Fifth Amendment), does not mean the death penalty can never be inherently cruel and unusual because what is important is the principle they were setting forth not the results they thought would occur. (pp. 55-56) This use of original meaning demonstrates Professor Tribe doesn't feel it is a particularly important mode of interpretation.

The problem, however, is that in this same chapter Professor Tribe states the following: "How defensible would it be to *ignore* evidence of why a provision was enacted, and what people generally assumed it would mean, in the process of interpreting and applying it? The answer surely is: Not very." (p. 58) Professor Tribe just got through telling the reader that the fact that those who wrote the Fourteenth Amendment believed it did not prohibit racial segregation was largely irrelevant to the analysis of that question. But then he argues that we should not "*ignore* evidence of why a provision was enacted and what people generally assumed it would mean, in the process of interpreting and applying it[.]" It is difficult to reconcile these two statements and he presents no argument to that effect.

Later in the book, Professor Tribe again states that "[T]he probable assumptions of many at the time of the Fourteenth Amendment's adoption that the forced separation of the races would not be deemed a denial of equal protection are . . . entitled to no privileged status." (p. 81) Assuming that's a correct proposition, shouldn't Professor Tribe concede that original

meaning, even when clear and unambiguous, counts for very little in hard cases and leave it at that? Similarly, Professor Tribe (like the Court) will ignore even unambiguous constitutional text if the stakes are important enough as his discussion of the Eleventh Amendment, and his failure to discuss the constitutionality of the administrative state, amply demonstrate. For the purposes of this review, I have no quarrel with a non-textual, non-historical method of constitutional interpretation, but Professor Tribe shouldn't overstate the role text and history play in constitutional doctrine.

Professor Tribe's discussion of *stare decisis* begins with the descriptively accurate observation that the Supreme Court's constitutional law decisions are "notable, in many famous instances, for their changes of course." (p. 78) He lists the usual suspects (*Brown*, *West Coast Hotel*, and *Garcia* among others) to support this proposition and then spends several pages justifying the Court's willingness to depart from prior cases. These "corrections" don't "revise the underlying constitutional provision or structure itself. They aim, instead, to preserve the basic meaning of the Constitution by improving one's reading of its terms." (p. 79) The reworking and overruling of prior cases is defensible because the "'course of human events'—in any of its political, economic, or social dimensions—is capable of teaching lessons that seem to compel one to read the same text in a new way." (p. 79)

After he concludes his defense of the Court's propensity to depart from prior cases, Professor Tribe sets forth the justification for having a system of *stare decisis* in the first place. This explanation is quite eloquent. Professor Tribe cites John Marshall for the proposition, fundamental to the entire enterprise of judicial review, that the Constitution is "LAW" and therefore "its interpretation must be constrained by the values of the rule of law, which means that courts must construe it through a process of reasoning that is replicable, that remains fairly stable, and that is consistently applied." (p. 82) (citation omitted) Professor Tribe suggests that our system could not work unless judges sometimes reach results based on *stare decisis* they would not reach if they were deciding the case for the first time, and cites *Casey* as proof that this happens in the real world. Finally, he notes that *stare decisis* legitimates the "constitutional order" and contributes to the "reality and the appearance of the law as impersonal if not altogether objective." (p. 82)

Looking at just the universe of constitutional law cases decided by the Supreme Court, it is hard to take seriously the idea that *stare decisis* plays an important role in the Court's decisions. The Court often overrules itself not because new facts come to light or new evidence is discovered, but because the personnel on the Court changes and new majorities are formed. In recent years, the Court has changed its mind on such important issues as whether there is a principle of state sovereignty that trumps Congress' commerce clause power;[11] on whether Congress has the power under the commerce clause to abrogate a state's sovereign immunity;[12] on whether public school teachers may provide secular remedial education to children in private religious schools;[13] and on whether the Eighth Amendment bars a capital sentencing jury from considering victim impact evidence.[14] In the federalism area, Justices on both the left and the right candidly admit that *stare decisis* plays little or no role in the Court's decisions.[15]

In light of the Court's habit of overruling previous cases (a practice Professor Tribe concedes exists), an important question concerning *stare decisis* is whether precedent plays a significant enough role in constitutional cases to act as a serious constraint on the Justices. There is no discussion of this question, nor is there even a reference to the fact that sometimes decisions change solely because the people on the Court change, in *American Constitutional Law.* Professor Tribe's failure to wrestle with this question is especially unsatisfying in light of his concession that the "legally unfettered freedom to choose a 'meaning' that one is free to abandon and replace with another for avowedly political reasons is the very essence of making, as opposed to genuinely interpreting or discerning [the] law." (pp. 998-99 n.74) (emphasis removed) As was the case with text and originalism, Professor Tribe ducks many of the truly interesting

11. *Printz v. United States*, 521 U.S. 898 (1997).
12. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).
13. *Agostini v. Felton*, 521 U.S. 203 (1997).
14. *Payne v. Tennessee*, 501 U.S. 808 (1991).
15. See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting) ("[T]he judgment in these cases should be affirmed, and I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court."); *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 653-654 (2000) (Stevens, J., dissenting) ("The kind of judicial activism manifested in cases like *Seminole Tribe* . . . represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises.").

questions surrounding the relationship between precedent and constitutional interpretation.[16]

Professor Tribe correctly recognizes that one of the great questions of constitutional law is what judges should do when the various modes of interpretation lead to different results in the same case. Therefore, I was most interested to read how Professor Tribe was going to answer the following question: "[H]aving set forth the several modes or facets of constitutional interpretation—text, structure, history, ethos, and doctrine—we consider how to proceed if and when those modes of approach point in divergent directions." (p. 85)

Professor Tribe begins to discuss this question by providing an example of an indeterminate constitutional question involving the dormant commerce clause. He persuasively demonstrates that the various interpretive modes would lead to different results. Then he argues there is no way to privilege one particular mode of interpretation over another or to create a new "metamode" by reference to the Constitution. (p. 88) From there he argues against any quest for "a grand unified theory" and says "only a 'candid avowal of the limits of originalism,' of every other interpretive technique, and of every effort to blend the techniques into an integrated, determinate whole, 'can open the process of constitutional interpretation to the full public debate without which it partakes only of miracle, mystery, and unquestioned authority.'" (pp. 88-89) Then, the chapter ends.

Professor Tribe did not present a meaningful analysis of the important question of what to do when the various modes of constitutional interpretation lead to different results. He has avoided this question before, and in a footnote he summarized how both Justice Scalia and Ronald Dworkin previously reacted

16. Professor Tribe also includes a section on normative and pragmatic argument. (pp. 70-78) He concedes in this chapter that judges inevitably will and should appeal to normative arguments when engaging in judicial review. (p. 72) The values chosen by judges, however, should be rooted in our nation's histories and traditions as well as the constitutional text. He argues that "constitutional argument cannot pass muster if it cannot draw convincingly upon constitutional language, structure, or history." (p. 78) By linking normative argument with the traditional sources of constitutional interpretation, Professor Tribe tries to avoid the indeterminacy problem. The difficulty, of course, is that the traditional sources of constitutional interpretation are hopelessly indeterminate in the context of actual constitutional cases that make their way to the Supreme Court. This is not to suggest that there are no easy cases, just that the discussion of easy cases is irrelevant to how the Supreme Court should resolve the constitutional cases it decides to hear.

to his evasion of this fundamental question. Justice Scalia "responded to this critique of unwarranted certitude by saying that he would not 'disparage candor and humility' but finds those 'qualiti[es] of character [to be] of little use to the judge who must determine' how to construe the Constitution." (p. 88 n.14) (citation omitted) Ronald Dworkin thought Tribe's analysis was "innocuous" because "no one but a fool would think his own constitutional judgments beyond challenge . . ." and because everyone knows "'we cannot appeal to shared principles of either political morality or constitutional method to demonstrate that we are right.'" (id.) (citation omitted)

Professor Tribe refers to these criticisms but does not respond to them. The point Scalia was obviously making, however, and the question that has loomed large in constitutional law beginning with the realists and continuing with the critical legal scholars, is that the indeterminacy of constitutional interpretation at the Supreme Court level of decision making may suggest a reduced role for the Supreme Court in our political system. If reasonable people can differ over what the Constitution means in any given case, then perhaps the final decision about what the Constitution means in that case ought to be made by the legislature, the executive, or in the case of popular initiatives, the people. Commentators on both the left and the right, such as Mark Tushnet and Robert Bork, have started to question the wisdom of any system of judicial review for similar reasons.[17]

The legitimacy of judicial review in a post-realist world is a fundamental question of American constitutional law. In 1381 pages, however, the best Professor Tribe can offer is the following:

> One virtue of the thought experiment undertaken in the preceding paragraphs is that it brings out in bold relief the necessarily indeterminate character of constitutional interpretation conducted through attention to text, structure, history, ethos, and doctrine. Whether or not one believes that, in principle, there exist identifiable 'right answers' to all questions of constitutional law, the institutional environment within which constitutional interpretation and adjudication take place is such that, by the very nature of the beast, there will be a spec-

17. See generally Robert H. Bork, *Slouching Towards Gomorrah: Modern Liberalism and American Decline* (Harper Collins, 1996); Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton U. Press, 1999).

> trum or range of at least *arguably* right answers to such questions. The nihilists who reach the facile conclusion that, therefore, everything is permitted and that there are *no* constraints are surely wrong. For there are plenty of *wrong* answers, answers that are wrong beyond any real debate, and their very existence testifies to the falsity of the boast that anything goes. (pp. 93-94)

This response to the realist critique attacks a strawman. No one argues there are no wrong answers to constitutional questions, but many believe that the relative indeterminacy of constitutional law (which Professor Tribe concedes exists) raises difficult questions about the wisdom of a political system where strong judicial review by an unelected judiciary plays a significant role. The evasion of this question has always been a problem in *American Constitutional Law,* but in the Third Edition Professor Tribe promises for the first time a discussion of the "competing and complementary approaches to constitutional interpretation . . . [and] the relationship of those approaches to one another and to alternative theories of what the Constitution is for and of what, if anything, makes it (and the judiciary's power to enforce it) 'legitimate.'" (p. v) This task was not even remotely accomplished by Professor Tribe's new section on constitutional interpretation and the legitimacy of judicial review.

II. CASE LAW

Professor Tribe's methodology for discussing constitutional issues is consistent throughout the book. He begins with text, history, and relevant case law. These descriptive accounts are comprehensive, accurate and exceedingly informative. *American Constitutional Law* provides a voluminous amount of helpful information for those interested in specific constitutional law questions.

Following his descriptive accounts, Professor Tribe usually provides an opinion as to the correctness of the doctrine or case he is describing. How he performs this task is vital to the success of the treatise because such judgments take up much of the book, and because *American Constitutional Law* is remarkably influential. As Professor Schauer observed ten years ago, *American Constitutional Law* is more a part of constitutional law than a book about constitutional law,[18] and a citation to the trea-

18. See Schauer, 87 Mich. L. Rev. at 1410 (cited in note 3).

tise appears to be roughly equivalent to a citation to non-binding judicial authority.[19]

It would certainly be possible to write an informative treatise on constitutional law and avoid taking positions on how cases should be resolved. Professor Chemerinsky has written such a book.[20] Professor Tribe's agenda, however, seems quite different. The doctrine he describes seems to be a place setting for the articulation of the results he prefers. The remainder of this review is primarily concerned, therefore, not with how well Professor Tribe describes constitutional doctrine, but with his method of justifying proposed solutions to difficult constitutional questions.

A. THE COMMERCE CLAUSE

In the previous edition of his book, Professor Tribe seemed to support the line of cases in which the Court abandoned the enforcement of internal limits on Congress' commerce clause power. He stated the following:

> [T]he interests that would be served by a judicial doctrine limiting the commerce power are also interests likely to be represented in ordinary congressional processes of decision.... If there is a role for the judiciary here, it ought to be defined primarily as one of encouraging the legislative processes autonomously to set the limits of congressional power. And it is largely this role that the Supreme Court has assumed.[21]

In the third edition, however, Professor Tribe has apparently changed his mind. He argues that the Court correctly decided in *United States v. Lopez*,[22] that the Gun-Free School Zones Act of 1990, which criminalized the possession of guns near schools, exceeded Congress' powers. *Lopez* is a difficult case, and I am not concerned with Professor Tribe's agreement with the result but rather how he explains why he thinks the decision was correct. Like Justice Rehnquist's opinion for the

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19. A Westlaw search turned up a staggering 2843 citations to the Second Edition of the Treatise in law review articles and, much more importantly, 147 citations in the federal court system.

20. See Erwin Chemerinsky, *Constitutional Law Principles and Policies* (Aspen Law & Business, 1997).

21. Laurence H. Tribe, *American Constitutional Law* 314 n.2 (Foundation Press, Inc., 2d ed. 1988).

22. 514 U.S. 549 (1995).

Court, Professor Tribe failed to engage in a discussion of the real issue in the case.

Here is Professor Tribe's descriptive account of the *Lopez* holding:

> *Lopez's* discussion of the 'substantial effects' test reveals that, rather than focusing on the quantity of the regulated activity's effects, the Court was attempting to reconfigure its precedents to focus more attention on the *nature of the underlying activity*—paying particular attention to whether or not that activity could itself be described as part of an economic enterprise. In *Lopez* the Court reaffirmed its decisions upholding federal laws regulating such intrastate activities as coal mining, loan sharking, running a restaurant, running a hotel, and producing wheat for home consumption.... The key move in *Lopez* was the Court's characterization of these prior cases as involving 'intrastate *economic* activity.' This post-hoc reconfiguration of the cases may suggest that, absent a jurisdictional tie to interstate commerce or regulation of the channels or instrumentalities of such commerce, the focus of the Court's attention—as long as *Lopez* survives—will not be simply on whether the cumulative or aggregated *effects* on interstate commerce of an intrastate activity can be called substantial, but rather on whether there is a *colorable claim* [emphasis added] that the intrastate activity itself is 'commercial' or 'economic.' (p. 819) (emphasis added)[23] ????

In footnotes scattered throughout the section on *Lopez*, Professor Tribe expresses satisfaction with the commercial/noncommercial distinction; supports the Court's efforts to try and articulate some limit on Congress' commerce clause power; and suggests that the statute in *Lopez* should have been struck down by the Court because a "conclusion that the Gun-Free School Zones Act came within Congress' commerce power... would seem to leave *everything* within Congress' power, down to the last nail." (p. 818 n.45) Professor Tribe supports these conclusions by noting, as did the Court, that neither the government at oral argument nor the dissenting Justices provided examples of activity that would be beyond Congress' commerce clause powers nor tried to explain why the "demand for such an example was somehow illegitimate." (p. 818 nn.45-46)

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23. The Supreme Court recently validated Professor Tribe's interpretation of *Lopez* in *United States v. Morrison*, 120 S. Ct. 1740 (2000) (invalidating civil remedy provisions of the Violence Against Women Act).

This defense of the result in *Lopez* should have required Professor Tribe to address the arguments made by the government and dissenting Justices, and here is the black hole. Justice Breyer's dissent included an appendix of 167 reports concerning the relationship between guns, education, and the economy. Nowhere in the treatise, and for that matter nowhere in the Court's decision, is there a discussion of why significant threats to the educational process do not involve commercial or economic activity (or at least a "colorable claim" to that effect). Professor Tribe's discussion of this point is found in two footnotes. In note 45 on page 818, he summarily states the following:

> Mere possession of a handgun has no obvious connection to interstate commerce; there were no findings or legislative history alleging any effect of handgun possession as such on commerce; and the statute lacked a jurisdictional requirement that would have limited its scope to firearms that *did* have some connection to or [have an] effect on interstate commerce .... The United States attempted to argue that guns were special because of their pervasive and at times shattering effects on society, but any product can obviously have significant effects—depending on how it is used.

This argument is not persuasive. The Gun-Free School Zones Act did not prohibit mere gun possession, but specifically the possession of guns near schools. There is no debate that guns and schools do not mix well (to say the least) and that the deterioration of our schools affects (and is therefore related to and part of) both local economies and our nation's economic situation as a whole. These arguments are supported by the voluminous materials contained in the appendix to Justice Breyer's dissent, but ignored in the treatise. Moreover, Justice Breyer countered the Court's fear that upholding the law would mean that Congress could regulate all aspects of the educational process by pointing out that guns present a "particularly acute" threat to that process.[24] This qualifier is not mentioned in Professor Tribe's discussion of the case.

Having ignored Justice Breyer's factual arguments, here is Professor Tribe's response to the dissent's contention that Congress could have rationally found that violent crime in school zones substantially affects commerce because of its threat to education:

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24. *Lopez*, 514 U.S. at 624 (Breyer, J., dissenting).

> The problem with this test is exposed by the fact that one could freely substitute just about any problem for 'violent crime in school zones.': Why not 'rampant divorce' or 'the wearing of tight shorts'? For that matter, one could substitute nearly anything for 'education,' as well. A resourceful legislator (or legislative assistant) could likely compile an impressive array of materials connecting just about any activity to the national economy. (p. 818 n.47)

Even under the Court's and Professor Tribe's test, however, we have to wrestle with the following problem: Is gun possession around schools an economic or commercial activity? This is a hard question that cannot be persuasively answered by reference to legal doctrine (text, precedent and history). Gun possession in close proximity to banks is certainly an economic activity, gun possession around zoos probably not, and gun possession around schools, maybe. Justice Breyer believed acute threats to the educational process fell on the economic side of the equation and attached numerous studies to his appendix to support that conclusion. Professor Tribe did not attempt to rebut that judgment or define in any meaningful way what he meant by commercial activity, other than to make clear that wheat grown for home consumption is such activity, but possessing a gun around a school is not. In his failure to truly engage the only question that the legal doctrine he embraced made relevant, his analysis fell into the black hole.

B. THE LEGISLATIVE VETO

Professor Tribe spends a considerable amount of time defending the result in *INS v. Chadha*,[25] though he concedes Justice Burger's majority opinion "begs the question . . . whether members of Congress are *constitutionally acceptable delegatees* of powers that Congress could constitutionally delegate to the Executive or to an independent agency." (pp. 145-46) This is the important issue in the case because both the government and Justice White argued that executive branch personnel constitutionally make law without going through bicameralism and presentment, and therefore the Court shouldn't treat the legislative veto any differently. Professor Tribe correctly points out that Justice Burger's response to this argument amounted to the *ipse dixit* that when the executive makes decisions that affect legal

25. 462 U.S. 919 (1983) (invalidating the legislative veto).

rights the action is executive, but when Congress does so the action is legislative. (id.) Incredibly, after he points out the Court's deficiency, Professor Tribe falls into the very same black hole. Virtually all of the analysis of this question is contained in the following paragraph on page 146:

> It might seem arbitrary to require, as the *Chadha* majority implicitly did, that members of Congress must act according to the rules applicable to their lawmaking capacity even when discharging duties delegated to them by statute, while not insisting that members of the executive or judicial branches be deemed to act purely in their executive or judicial capacities when they exercise delegated power. Yet even if the Court failed to explain fully its return to a form of constitutional exegesis that appears to deal in 'legislative' and 'executive' essences, the decision in *Chadha* is not without solid structural grounding in the Constitution's design. The Framers regarded the legislature as the most dangerous branch, and even two centuries later it remains a plausible proposition to many that there is more to fear when Congress—which is the source of all statutorily delegated authority—delegates not to the other branches, but to itself.

Although it is true the framers feared Congress more than the President, in twenty-first century America it is difficult to support the proposition that Congress poses a greater risk of tyranny than the Executive Branch. Certainly, the argument needs to be made, not assumed. Moreover, our current administrative state would shock the framers just as much as the legislative veto inasmuch as the executive branch routinely promulgates regulations with the force of law and holds judicial-type hearings. Thus, even though *Chadha* cannot be persuasively defended or rejected on purely historical or textual grounds, Professor Tribe supports the result without engaging in a full-blown discussion of the institutional arguments on both sides of the question, and therein lies the black hole. Finally, he gives the game away when he notes that "it remains a plausible proposition to many that there is more to fear when Congress" delegates to itself than to the President. I would have hoped Professor Tribe would not advocate the invalidation of an act of a coordinate branch of government on the basis of a "plausible proposition," as opposed to clear constitutional text or unambiguous historical authority.

C. THE LINE ITEM VETO

Professor Tribe takes a similarly formalistic approach to *Clinton v. City of New York*.[26] The issue in *Clinton* was the constitutionality of the Line Item Veto Act which gave the President the authority to "cancel" certain types of spending and taxing provisions of duly enacted laws. The President was required to give Congress notice of such a cancellation within five days after a law's enactment. The Congress could then reject a cancellation with two thirds majorities in both houses, subject to Presidential veto, and then congressional override. (pp. 744-45)

The Supreme Court held that the Line Item Veto Act violated the Presentment Clause of Article I, Section 7.[27] According to the Court, that clause requires a President to veto an entire bill, not part of one, and he must do so before, not after, it becomes a law.[28] Additionally, the Court decided that the absence of any constitutional support for a partial cancellation authority amounted to "an express prohibition" of any such authority.[29] Professor Tribe agreed substantially with this analysis. (pp. 740-53)

The most difficult issue raised by *Clinton* is easy to identify. In dissent, Justice Scalia argued that the cancellation authority given the President in the Line Item Veto Act was not materially different from the authority Presidents have often exercised to decline to spend appropriated funds.[30] Professor Tribe cites the following as the relevant portion of Scalia's argument:

> 'Insofar as the degree of political, 'lawmaking' power conferred upon the Executive is concerned, there is not a dime's worth of difference between Congress' authorizing the President to *cancel* a spending item, and Congress' authorizing money to be spent on a particular item at the President's discretion' which 'ha[d] been done since the Founding of the Nation.' (p. 747) (citation omitted)

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26. 524 U.S. 417 (1998).

27. Article I, Section 7 provides the following in pertinent part: "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to the House in which it shall have originated...."

28. See *Clinton*, 524 U.S. at 439.

29. Id.

30. See id. at 466-68 (Scalia, J., dissenting).

Scalia cited numerous examples to support this argument including a 1934 law which appropriated almost a billion dollars "for such projects and/or purposes and under such rules and regulations as the President in his discretion may prescribe."[31] The dissent did not believe there was a constitutional distinction between the exercise of this authority and the power given the President in the Line Item Veto Act. In both circumstances, the President was given discretion to decline to spend appropriated funds pursuant to laws enacted in conformity with Article I, Section 7.

The majority opinion ducked this argument by arguing that the Line Item Veto Act allowed the President to alter the *text* of a law whereas the discretionary appropriation bills relied upon by Scalia did not involve the actual physical changing of the *text*.[32] Obviously, no reasonable person would equate that utterly formalistic response with a full blown argument. Professor Tribe adopts a slightly different approach, although not one that keeps him from being pulled into the black hole.

Professor Tribe suggests that when the President is given the discretion not to spend money based on changed facts he is implementing a policy choice made by Congress, but when he has the authority to cancel an item of direct spending he has the "unilateral power simply to *repeal* part of a law that he thinks is not in the national interest and thus essentially *to promulgate an amended law never enacted by Congress*." (p. 748) The laws cited by Justice Scalia, however, contained extremely vague substantive terms such that the President's discretion was not effectively cabined, and in effect he retained a continuing power to veto (or cancel) what Congress had decided without clear congressional guidance.[33] Moreover, the Line Item Veto Act went through bicameralism and presentment, and therefore in implementing that law the President was also implementing a policy choice made by Congress through constitutionally acceptable means. Of course, if Congress disagreed with the President's cancellation, it could have passed a new law just like if Congress disagreed with a Presidential decision to not spend allocated funds it could enact new legislation requiring the funds be spent.

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31. Id. at 467.

32. See id. at 446-47.

33. See *Field v. Clark*, 143 U.S. 649, 693 (1892) (holding that Congress had the power to delegate to the President the ability to indefinitely suspend free importation laws against countries which he "deem[ed]" to be unfairly and unequally dealing with the United States).

Professor Tribe also argued that the "Line Item Veto Act allows the President, having signed a statute into law, immediately to reject part of that law and thereby to reject the specific policy choice just made by Congress. This is functionally far different from what occurs under a law in which Congress expresses a policy that certain of the measures it is provisionally putting into place should be rendered ineffectual based on future contingencies." (pp. 748-49) This argument, however, is a *non sequitur*. The laws cited by Justice Scalia did not specify "future contingencies," but gave the President broad discretion to decide for himself whether large sums of money should be spent and for what items.[34] Even the majority opinion in *Clinton* recognized that under the laws cited by the dissenting opinions and the government, the President was often "given wide discretion with respect to both the amounts to be spent and how the money would be allocated among different functions."[35] The truly difficult question raised by *Clinton,* therefore, was whether the Line Item Veto Act could be distinguished from these laws. A thorough discussion of this issue, both in the case and in *American Constitutional Law*, fell into the black hole.

Perhaps because Professor Tribe couldn't meet the dissenting arguments head on, he also argues generally for a textualist-formalist approach to separation of powers cases. He spends several pages arguing about the dangers of Presidential lawmaking and how if "Congress may give the President power to strike provisions of appropriations statutes after they are enacted and signed into law, then there is no reason why the President could not likewise be given power to 'cancel' all or part of any duly enacted civil rights laws . . . or to 'rescind' pollution laws that he deems a burden to the economy, or to 'prevent from having legal force' any other previously enacted measure signed by the President into law that he would rather do without." (pp. 749-50) This Presidential veto power is inconsistent with Article I's "single, finely wrought and exhaustively considered procedure" for national lawmaking. (p. 749, citing *Chadha*)

The problem with this analysis is that Professor Tribe does not explain why the Line Item Veto Act provides the President too much authority, but all of the other executive lawmaking conducted by the Executive Branch (such as rule making pursuant to hopelessly vague delegations) passes constitutional mus-

34. See *Clinton*, 524 U.S. at 466-67 (Scalia, J., dissenting).
35. Id. at 446.

ter. Much of the work of the Executive Branch is just as inconsistent with Article I's "finely wrought and exhaustively considered procedure" as the Line Item Veto Act's cancellation authority. Thus, another difficult question raised by *Clinton* is why the President is prohibited from canceling laws pursuant to congressional authority but not prohibited from actually enacting laws pursuant to that authority? The attempt to answer this question by a reference to the quotation from *Chadha* that Article I contains a "finely wrought and exhaustively considered procedure," is unpersuasive.

I feel compelled to make one more point about Professor Tribe's textualist-formalist approach to separation of powers cases. Although he uses that approach to justify the outcomes in *Chadha* and *Clinton*, when it comes to the problem of non-Article III courts exercising federal judicial power, Professor Tribe sounds like a Justice White type functionalist. He criticizes Justice Brennan's formalist reasoning in *Northern Pipeline*,[36] and seems to support the results in *Thomas*,[37] *and Schor*,[38] as well as the case-by-case balancing test articulated in those two decisions. (pp. 293-97) He never explains, however, why he prefers a functionalist approach to these separation of powers cases but a formalist approach to *Chadha* and *Clinton*. This inconsistency jeopardizes Professor Tribe's attempt to provide a "unified analysis of constitutional law," (p. xv) inasmuch as he fails to provide such an account of just separation of powers cases.

In *Lopez*, *Chadha*, and *Clinton*, text, history, and doctrine run out before the hard work can be done. Yet, in all three cases, the Court and Professor Tribe's treatise proceed as if their reliance on traditional legal materials can persuasively support the judgments. Although there is nothing particularly new in this critique, it is disappointing that Professor Tribe's mode of analysis has not changed since the first edition was published twenty-two years ago. Professor Tribe could have provided a great service if, instead of employing the same tired manipula-

36. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (invalidating on separation of powers grounds the Bankruptcy Act of 1978, which allowed non-Article III judges to decide state law claims related to bankruptcy proceedings).

37. *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985) (upholding mandatory arbitration by non-Article III judges in certain pesticide registration disputes).

38. *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986) (upholding jurisdiction of federal agency to hear state law counterclaims).

tions of standard legal doctrine, he actually came out and made transparent the reasons he fears Congress more than the President; or explained why serious threats to our schools do not present the kind of economic risks Congress can regulate under the commerce clause; or why the veto of legislation by the President pursuant to congressional authorization threatens the separation of powers more than the passing of legislation by the Executive Branch pursuant to congressional authorization. Although it is unlikely any one scholar, even Professor Tribe, could undertake such an analysis with regard to the universe of constitutional law issues, that inevitability argues in favor of a treatise with much less normative argument, like Professor Chemerinsky's, or a less comprehensive project. It does not excuse the pretense that judges and scholars can resolve hard constitutional questions on the basis of indeterminate doctrine.

III. CONCLUSION

Professor Tribe's treatise is a perfect reflection of how constitutional law is practiced by the United States Supreme Court. The Court's constitutional decisions play lip service to legal doctrine, while the Court's results appear to be based on political value judgments. The same can be said of much of *American Constitutional Law*. His project is "characterized as much by unresolved conflict as by unity. In this respect, the work accurately reflects the field it attempts to capture."[39] Like the Supreme Court, Professor Tribe consistently understates the doctrinal incoherence present in the cases and issues he purports to resolve.

Professor Tribe is no doubt the preeminent constitutional litigator of this generation. Moreover, his opinion on how constitutional questions should be resolved no doubt makes a significant difference to judges and scholars. Measured by the standard of influence, *American Constitutional Law* is a remarkable success. Professor Tribe could do the academy a greater service, however, if he used his formidable abilities to try and improve how constitutional law is practiced instead of just engaging in the standard manipulations of text, history, precedent and policy. That's been done many times before.

39. Lupu, 101 Harv. L. Rev. at 1321 (cited in note 3).