CONSTITUTIONAL CHOICES. By Laurence H. Tribe.[1] Cambridge, Mass.: Harvard University Press. 1985. Pp. xiv, 458. $29.95.

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In the preface to his new book, Laurence Tribe complains that too much current constitutional scholarship "either focuses so closely on constitutional doctrine, or looks to matters so distant from doctrine, as to bear no real resemblance to *doing* constitutional law . . . ."[3] This book is certainly not like that. It is clearly a product of "doing constitutional law."

The opening chapter on "The Futile Search for Legitimacy" expresses exasperation with all theoretical efforts to delimit the legitimate bounds, sources, or aims of judicial review. Rather, Tribe urges, we ought to remember that "*no* exercise of power, in any society the planet has ever seen, is genuinely unproblematic"[4] and then get on with the vital task of debating the substantive merits of particular efforts at "constitutional problem-solving." He continually insists on the need to remain sensitive to different viewpoints,[5] to keep "replacing arrogant certitudes . . . with a more open search for a shared future."[6] Tribe's desire for an "open" Constitution makes him as impatient with historical inquiries into the original intent of the framers as with abstract theories about the proper role of courts in a democracy. Like a good contemporary practitioner, he wastes almost no space on Locke or Blackstone or *The Federalist* and instead bases almost all his arguments on Supreme Court decisions of the last two decades. Being an unusually skillful and imaginative practitioner, however—and drawing on an unusually confused period of constitutional history—Tribe is able to tease quite diverse and often quite radical implications from this material.

He is entitled to consider himself one of the charmed circle of those who "do" constitutional law for the rest of us. A distinguished professor at the Harvard Law School, author of a widely

1. Ralph S. Tyler, Jr., Professor of Constitutional Law, Harvard Law School.
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3. L. TRIBE, CONSTITUTIONAL CHOICES at x (1985) (emphasis in original).
4. *Id.* at 7 (emphasis in original).
5. *Id.* at 8.
6. *Id.* at 267.

cited, encyclopedic treatise on constitutional law, Tribe also maintains an active private practice and has himself argued a number of major cases before the Supreme Court over the past decade. Many of the legal arguments in this book were originally developed in briefs for clients and, though his arguments have not always prevailed with the Burger Court (as we learn in the endnotes to this volume), Tribe has clearly established himself as one of the most resourceful advocates in contemporary constitutional practice.

Constitutional Choices is of most interest, in fact, as a reflection of the broad range of causes and issues that one may encounter in "doing constitutional law" these days. The book is actually a collection of essays on a grab-bag of assorted topics, mirroring the remarkable diversity of Tribe's pursuits. Many of the essays derive from purely academic lectures or papers and all have been refined or restitched to make for a highly readable and quite topical collection. But the range of topics is a continual reminder of the extraordinary scope afforded by "doing constitutional law." And the collection as a whole illustrates the remarkable maneuvering room for imaginative advocates that is made available by an "open" approach to the Constitution.

Tribe juggles his diverse clients and commitments with aplomb. One essay growing out of his private practice, for example, criticizes the Reagan administration for foiling an attempted bond issue (by the government of Guam) by unilaterally announcing its intention to make the bonds taxable. Tribe offers a clever argument on behalf of the due process claims of the bondholders in this instance—without any apology for (or even acknowledgement of) his suggestion in a different essay that the country needs a massive redistribution of capital.

Similarly, he argues at length in another essay that the courts should not attempt to rule on ambiguous procedural questions concerning the adoption of constitutional amendments, but instead should let Congress decide, for example, whether states may rescind previous votes to ratify. Otherwise, "the Supreme Court would frequently be asked to pass on the legitimacy of actions taken to correct perceived flaws in its own jurisprudence—a task with uncomfortable implications for the integrity of the judicial enterprise."[7] These arguments, we learn from an endnote, were inspired by his work on behalf of the National Organization of Women. NOW secured Professor Tribe's services to help overturn the ruling of an Idaho district judge, who found that Congress had violated constitutional norms by extending the ratification period for the

7. *Id.* at 27.

Equal Rights Amendment. Only two essays later in this volume, Tribe argues with seemingly equal conviction that federal courts would be obliged to overrule (as constitutionally invalid) any selective limitations on their jurisdiction imposed by Congress. This argument was inspired by Tribe's congressional testimony against efforts to strip the federal courts of jurisdiction over abortion, compulsory school busing for integration, and other causes he favors. He does not find it necessary to explain why judicial disregard of such limitations would not equally involve judgments "on the legitimacy of actions taken to correct perceived flaws" in the Supreme Court's "own jurisprudence"—or why the "implications" of this for "the integrity of the judicial enterprise" should leave the judges any less "uncomfortable."

Other examples of apparent inconsistency are easy to find in this volume but it is doubtless naive to make too much of them. Professional advocates must be expected to shade their arguments to fit the circumstances of particular clients or causes. What distinguishes Professor Tribe's brand of "doing constitutional law" is his detachment from the ongoing interests of actual clients. As a part-time practitioner, he can be selective in the cases he takes up and clearly does not depend on property claims for his bread and butter. Perhaps partly in consequence, he does not have that instinctive concern for order that animated most lawyers before the 1960's and still animates most business lawyers today. This is not a matter of intellectual consistency but of attitudes toward power—and most especially toward the ultimate coercive power wielded by government. Where lawyers traditionally viewed the Constitution as a shield for the autonomy of private interests—on which their clients depended—Tribe sees the Constitution as a vehicle for social justice, a "lead into a better world."[8] This "better world" will be created by the state. He is accordingly quite prepared to see the courts attempt to manage ongoing social revolutions in the name of constitutional "law."

This disdain for traditional ordering principles is most evident in his essay on "Compensation, Contract and Capital." There he complains that the Supreme Court's traditional approach to the fifth amendment ban on taking private property without compensation is "calculated to protect . . . from majoritarian rearrangement extant distributions of wealth and economic power, almost as though such patterns and distributions of capital reflected something decreed and indeed sanctified by nature rather than something

8. *Id.* at 268.

chosen by the polity."[9] Of course, the original purpose of the "taking" clause in the fifth amendment (as of article I's ban on state laws "impairing the obligation of contracts") was precisely to prevent politicans from regarding "distributions" of wealth as "something chosen by the polity." The Founders plainly wanted private property to be private. Tribe does not try to dispute this original purpose of the framers but reminds us that, "Like all parts of the Constitution, Compensation Clause and Contract Clause doctrine are human creations, constantly in the process of being recreated."[10]

While "excessively" protecting existing wealth, Tribe complains, the Court "ignores the need for economic and emotional security among the vast majority of Americans . . . in a marketplace increasingly dominated by large corporations and unions and various appendages of the government."[11] The Constitution, he insists, already "offers ample material out of which doctrines could be fashioned to protect those interests."[12] He offers only one example in this chapter of how this might be done, but it is instructive. He attacks the Court's decision in *Railroad Retirement Board v. Fritz*[13] for allowing Congress to rescind certain previously scheduled federal pension benefits for railroad workers. Tribe protests that the workers' expectations of federal benefits received no protection, while federal bondholders would have received full protection if the government had sought to welsh on earlier promises to them. That the workers sought public benefits—ultimately derived from taxes on other people—while the bondholders would be reclaiming their own property does not appear as a relevant distinction for Tribe. He seems to view nearly all distinctions between public and private property as "constitutional choices" which "we" could make otherwise.

Thus he argues at length in an essay on "state action" doctrine that all economic transactions, including all private transactions, are potentially subject to constitutional challenge as denials of "equal protection" since they all depend on an enabling framework of state law. He suggests that the Supreme Court is constitutionally authorized to consider whether "our" evolving ideals of "equal protection" can tolerate state laws allowing landlords to evict poor tenants for nonpayment of rent, allowing stores to repossess goods purchased on credit when impoverished buyers have defaulted on

9. *Id.* at 165.
10. *Id.* at 187.
11. *Id.*
12. *Id.*
13. 449 U.S. 166 (1980).

the payments, and so on. Tribe argues in a different essay that the Court must take into account the differential effects of seemingly neutral regulations of speech on speakers or messages with differing financial resources behind them. At least, he suggests, this consideration should lead the court to be more accepting of spending restrictions designed to equalize access to the channels of communication. Similarly, he argues in yet another essay that the Court should go further in recognizing that identical treatment of blacks and whites or men and women may leave established "hierarchies" in place and therefore deny "equal protection of the laws." Affirmative action, he suggests—and public benefits, like the financing of abortions—may be constitutionally *required.*

Constitutional Choices does not, in fact, offer a twelve point socialist program for the achievement of adequate "equality." It does not even attempt to sketch a doctrinal framework indicating when the courts should insist on new redistributive ventures and when they should leave well enough alone. In his earlier, 1200-page treatise, Tribe was equally free with suggestions about government's "affirmative" constitutional obligations to equalize conditions and provide special benefits for the disadvantaged—and equally unwilling to develop these suggestions at all systematically or at all in detail.[14] His reticence, then, seems not to reflect inner doubts so much as a continuing concern as a practicing advocate not to get too far ahead of the Supreme Court with utopian demands or alarming programs.

Far from betraying any doubts or misgivings about grandscale social engineering by the judiciary, Tribe boasts of his indifference to the practical consequences of such ventures. In his preface, he tells us that he writes "out of a conviction that constitutional choices, whatever else their character, must be made and assessed as fundamental choices of principle, not as instrumental calculations of utility or as pseudo-scientific calibrations of social cost against social benefits."[15] He seems to believe that if employment quotas or compulsory school busing—causes that he favors[16]—are correct in "principle," then judges must forge ahead with them, whether they turn out to be helpful to minorities or (as many critics have warned) a net drag on their integration and advancement. He seems to believe that if it is wrong in "principle" to hold poor people to their contracts or leave rich people their wealth, judges must get on with their constitutional duty to redistribute financial obligations and as-

14. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 11-4, § 16-47 (1978).
15. L. TRIBE, *supra* note 3, at viii.
16. *See id.* at 236, 262.

sets—whether the ultimate consequences prove helpful to lower income people or (by drying up credit and growth) harmful to the poor as a whole.

Perhaps this overstates Professor Tribe's understanding of the distinction between "principle" and "utility." Despite a few references to Dworkin, he does not commit himself to a rigorously nonconsequentialist conception of "rights" or "principles." In truth, he is no more inclined to engage in extended theorizing on this subject than on any other. It may be that his dismissal of "instrumental calculations" and "pseudo-scientific calibrations" is simply meant to suggest that courts should pay less heed to the analysis of technical experts, like economists or administrators, and give closer attention to the constitutional "choices" presented by edifying legal advocates, like—well, like Professor Tribe.

Tribe is not, in fact, doctrinaire about his "principles." When other champions of higher causes change their views, he is prepared to keep pace. In his 1978 treatise, for example, he ridiculed efforts to suppress hardcore pornography, attributing them to the class prejudice of those who prefer D.H. Lawrence novels to *Hustler* magazine.[17] In *Constitutional Choices* of 1985, however, there are respectful references to Andrea Dworkin and Catherine MacKinnon (the feminist promoters of antipornography ordinances) and the suggestion that "[i]t may simply be naive to chalk up . . . [the defense of pornography which degrades and objectifies women] . . . as the price we pay for the privilege of expressing ourselves on topics that concern us."[18]

Still, there are definite limits to Professor Tribe's openness to new twists of "principle." After more than a decade of impassioned right-to-life protest against *Roe v. Wade, Constitutional Choices* argues that *Roe* was too conservative; Tribe propounds a new defense of abortion on demand through the entire duration of pregnancy. Is there really such a clear moral distinction between the killing of a healthy but somewhat premature newborn baby and the abortion of an unborn baby after eight or nine months in the womb? Tribe does not even bother to acknowledge the moral anguish of abortion, because he is so intent on developing his thesis that "a right to end pregnancy might be seen . . . as a matter of resisting sexual and economic domination . . . ."[19] From this perspective, he goes on to argue for government's obligation to finance all abortions. For all his cautions elsewhere about "arrogant certitudes," Professor Tribe

17. L. TRIBE, *supra* note 14, at 668-69.
18. L. TRIBE, *supra* note 3, at 220.
19. *Id.* at 243.

does not offer even a passing verbal concession here to the tens of millions of citizens who believe that abortion is murder and feel that government financing of abortion would force them, as taxpayers, to contribute to the crime.

But in fairness to Tribe, it should be said that the candor with which he expresses his extreme views on abortion rights is not characteristic of his style. It may be that he was encouraged to develop his "principles" more fully in this area by the knowledge that these particular principles are only one or two votes ahead of the left wing of the Supreme Court[20] and only a few steps behind "the most interesting work in the newly emerging feminist jurisprudence."[21] In other fields, Professor Tribe is typically more vague about the full implications of his interpretive suggestions. Perhaps that is because he has learned through "doing constitutional law" that courts can only manage dramatic redistributions of wealth and power a case at a time. Or perhaps his more typical indefiniteness simply reflects his commitment to "openness."

Professor Tribe is indeed quite impatient with those who would seek to pin down the precise meaning of constitutional provisions. He expresses great exasperation, for example, with the "withering . . . one-sided anticipatory dissection to which the [proposed Equal Rights Amendment] has been exposed for over a decade . . . ."[22] This sort of "anticipatory" analysis seems to irk Tribe because it is so alien to the spirit of "doing constitutional law."

The way Professor Tribe does constitutional law makes it seem altogether the most enviable calling in public life. One can float from issue to issue as new "principles" suggest and go back on recent "principles" when still newer ones beckon. No need to worry about consequences. No need to worry about contrary public opinion. No need to worry about opposing moral traditions. Best of all, no need to worry much about all those pedantic theories of legitimacy. Who wouldn't rather do constitutional choices than submit to the hassle of political compromise and practical constraint?

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20. *See* Colautti v. Franklin, 439 U.S. 379 (1979), and Maher v. Roe, 432 U.S. 464 (1977).

21. L. TRIBE, *supra* note 3, at 421 n.36.

22. *Id.* at 288 n.42.