



The Treatise Power

Laurence H. Tribe

In 2000, Professor Tribe completed the first volume of what was going to be a two-volume third edition of his constitutional law treatise, but he has decided to stop at volume one, at least for now. The following letters explain that decision in short form (a two-page letter to Justice Stephen Breyer) and long form (a thirteen-page open letter to readers). We would like to hear what you think of his decision and his reasons.

– The Editors

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April 29, 2005

The Honorable Stephen G. Breyer
Associate Justice
Supreme Court of the United States
U.S. Supreme Court Building
One First Street, NE
Washington, DC 20543

Dear Steve:

I appreciate your asking about the projected second volume of the third edition of *American Constitutional Law*. After considerable thought, I recently concluded (and informed my book's publisher, The Foundation Press) that I should suspend work on the balance of that volume and indeed on any new edition of my treatise—not because my views about constitutional issues have fundamentally changed (they haven't), or because today's constitutional controversies lack enduring interest (they don't), or because I'm out of sympathy with some of where the Supreme Court appears to be headed (that's been true ever since I first began this project in the mid-1970s).

Rather, I've suspended work on a revision because, in area after area, we find ourselves at a fork in the road—a point at which it's fair to say things could go in any of several directions—and because conflict over basic constitutional premises is today at a fever pitch. Ascertaining the text's meaning; the proper role and likely impact of treaty, international and foreign law; the relationships among constitutional law, constitutional culture, and constitutional politics; what to make of things about which the Constitution is silent—all these, and more, are passionately contested, with little common ground from which to build agreement.

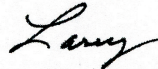
Treatises that don't try to do much beyond describing the relevant judicial decisions can cope with times like these. And treatises that are actually appellate briefs in disguise, pushing the author's preferred answers to constitutional questions, are as appropriate when so much is up in the air as at any other time. But if one is aiming at a work that organizes the corpus of decisional law—that identifies, and reflects critically on, the major themes and directions of movement—then this isn't the moment.

Happily, many of the same factors that make ours a peculiarly *bad* time to be going out on a limb to propound a Grand Unified Theory—or anything close—contribute to a ferment and excitement that make this a particularly *good* time, challenging and even thrilling, to be writing about, teaching, briefing and arguing constitutional law—all of which I remain enthusiastic about doing.

So the work of generating a new edition might more properly fall to my granddaughter than to me. Her taste at the moment runs more to music and dance than to law, however—she’s just a year old—so, unless she picks up the legal cudgels fairly soon, she just might find her grandfather re-entering the fray to produce a new edition.

If and when that happens, you’ll be among the first to know. In the meantime, thanks again for asking. I’ve set out in greater detail the thinking behind my answer in an “open letter” that the publisher of *Green Bag* has expressed an interest in including in that journal’s Spring 2005 issue.

Sincerely,

A handwritten signature in cursive script, appearing to read "Larry", written in dark ink.

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April 29, 2005

An Open Letter to Interested Readers of *American Constitutional Law*:

After considerable thought, I have concluded that I should not publish, and therefore will not complete, the projected second volume of the third edition of my treatise, *American Constitutional Law*, which was to contain the bulk of my analysis of individual rights and liberties (along with much of chapters 7 and 8 of the first volume, published in 2000). There are several reasons for my decision—some fairly pragmatic, others going to the very idea of the enterprise. I sketched these reasons in a letter to Justice Breyer recently, and I would like to use this as an apt occasion for setting out those reasons in greater detail in order to explain my (perhaps surprising) decision to the many kind and generous people who have eagerly inquired about the volume in recent years (including representatives of courts of quite a few countries, who are increasingly interested in our Constitution and in our Supreme Court's construction of it).

Let me first put to the side some factors that were not relevant to my decision. It's not my health, which is fine. And it's not that I've finally discovered the secret of how to stop being a workaholic or that I've lost interest in the questions the unpublished chapters would have discussed or the drive to pursue them doggedly. To the contrary—as I will explain, those questions continue to engage and challenge me as much as ever. Nor is it that the basic structure of the treatise has been rendered obsolete: Indeed, if putting volume 2 in the bookstores were simply a matter of publishing the basic text of the second edition, redlined with deletions and insertions keyed to changes in the Court's decisional law in the “individual rights” chapters (9 through 18) that comprise that volume, I would have published it several times over quite some time ago, using drafts I've prepared on an ongoing basis in connection with my teaching at the law school and my other lectures and writings. Actually, very little of what is probably the most useful (and, I hope, the most lasting) material in the treatise—the connective tissue linking disparate points and topics and the exoskeleton on which the whole is draped—needs much updating: If it's wrong or beside the point now, it was most likely wrong or beside the point in 1978, and in 1988, too.

It is instead that I have come to the sobering realization that no treatise, in my sense of that term, can be true to this moment in our constitutional history—to its conflicts, innovations, and complexities. There is a time to write a constitutional law treatise (or, in my case, to complete a treatise many of whose chapters I have begun many times over and some of whose chapters I have “completed” more than once)—but this is

not such a time. The reason is that we find ourselves at a juncture where profound fault lines have become evident at the very foundations of the enterprise, going to issues as fundamental as whose truths are to count and, sadly, whose truths must be denied. And 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.

This is not to say, of course, that constitutional analysis in general, or the tracing of constitutional doctrine through decisional law in particular, has been rendered futile. Far from it. Even today, those interested in how and where the picture may have changed since 1988 on any given topic in constitutional law can consult a multitude of sources, including some available online and updated in real time, while those interested in the kinds of foundational and theoretical analyses that I included in a much-expanded chapter 1 of the third edition of *American Constitutional Law* are most likely to look in any of the many interesting new articles and books that come out annually touching these matters before thinking of consulting a treatise. And some entirely serviceable hornbook-like treatments of the corpus of constitutional law, ranging in length from compact single-volume versions to more elaborate multi-volume series complete with pocket parts, now exist—unlike the situation in 1978, when there was a surprising paucity of serious writing about constitutional doctrine. But such a compendium of usable information was never my idea of what I wanted to create, or of what I thought was most needed even when there was less such writing by far than there is these days. The situation may well be different for antitrust or corporate law or any other field less tightly linked with the rapidly changing political universe, but for constitutional law the treatise form—at least if one means by that the sort of book I published in 1978 and in a couple of succeeding versions—fits some eras better than others.

Such a treatise—however much it might attempt to innovate or to incorporate some particular conception of right and wrong results—proceeds by bringing together a large body of judicial work and by calling attention to the organizing themes that thereby become apparent. There may not be just one or two themes—there may be “seven models,” for example. But it is the attempt at a synthesis of some enduring value that is the point. And I have come to have profound doubts whether any new synthesis having such enduring value is possible at present.

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My decision is not based on any eternal verity about the treatise form as applied to constitutional law. The point is a contextual one, a function of the time and the problems posed for resolution—and of the particular goal that I set for myself in the writing of such a treatise. Obviously, I did not have such doubts in years past. I have no regrets about the treatise I originally published, or about the second edition, or even about the first volume of the third. A treatise may be helpful—worth the effort—in periods during which a considerable body of judicial work has accumulated that needs to be pictured as a whole in order to be properly appreciated, extended, or reconsidered. The mid-1970s, when I started the research and writing for the first edition of *American Constitutional Law*, seemed to me such a period. The Warren Court had done so much

constitutional work, sometimes breaking away from its predecessors and sometimes dramatically extending earlier ideas. And the work of that Court had, to the surprise of many, been carried forward without significant discontinuities in—and, in some important areas such as sex discrimination and reproductive freedom, with important extensions by—the work of the Burger Court, in no small part, I'm sure, because of the unifying vision of the magnetic Justice Brennan. If that corpus of decisional law and doctrine were to be meaningfully carried forward—or coherently contained or cut back—it needed to be seen entire, and seen set within the larger body of cases and their thinking accumulating in the efforts of the Supreme Court across its considerable history.

Of course, the principal approaches of the Warren and Burger eras had their detractors, particularly as that Court reached the most controversial result of the past half-century, *Roe v. Wade*. But responding to those critics was part of what a treatise for that time needed to attempt. And, significantly, even the critics were in an important sense reading from the same page as the majority—although from the present vantage point, that may be hard to remember clearly. I wrote the bulk of my first edition in the several years immediately following the decision in *Roe v. Wade*, before its galvanizing effect on the religious right had been felt in national politics, and before the depth of disagreement over its premises had been plumbed. John Hart Ely had famously charged as early as 1973 that the Court's abortion ruling wasn't "constitutional law and made no effort to be," or words more or less to that effect, but that brush-off seemed to me at the time (and seems to me still) to read too narrowly the word "liberty" and to read out of our tradition the substantive inflection that comes from italicizing the word "law" in the phrase "due process of *law*," as well as to ignore the equality and bodily-integrity dimensions of the *Roe* decision (dimensions that did not come to the fore until considerably later). Indeed, although Justice Rehnquist had differed with the majority over the circumstances in which the Constitution prevented government from compelling a woman to remain pregnant (only in cases where her life was in danger from continued pregnancy, he suggested), he did not disagree with the seven-Justice majority that the Constitution imposes *some* substantive constraints on government in such matters. Thus the deeper fissures that decisions like *Roe* would later open had not yet become so prominent as to demand central treatment—or, more to the point, so prominent as to preclude unified treatment.

When such fissures loom large enough, what once looked like a synthesis becomes at best a new thesis. Imagine, for instance, endeavoring to write a treatise on constitutional law during the period immediately following Franklin D. Roosevelt's election to the presidency in 1932, right at the cusp of what seemed quite certain to be momentous change. At such potential turning points, and until more is known about the antithesis and about the dynamics of the battle ahead, attempting to proclaim a new synthesis would bespeak utter hubris were it not so manifestly quixotic.

* * * *

This is not to suggest that the changes ahead will be as momentous as those of 1937. I trust that the current President will not have the opportunity to make more than at most a handful of appointments to the Court. I trust as well that, whatever the fate of

those appointments in the Senate, nothing nearly so dramatic waits in the wings as the change that the composition of the Court underwent in the half-dozen years following FDR's first election to the presidency. Yet, just as in 1932, we find ourselves now at an especially complicated juncture in our constitutional story.

The imminent prospect of major changes in the Court's membership following the current record-long period without departures from the group of nine is only one of the factors making this a problematic time for another edition of my treatise. Indeed, other things being equal, the anticipated infusion of fresh minds might be thought to present an ideal opportunity for an overarching restatement of doctrine. But other things are not equal. For the limits of the treatise form have become apparent in the distinctive features of the Supreme Court's work over the past decade or so.

A period of reassessment in several doctrinal contexts, it appears, is largely over—but plainly we see no new constitutional law emergent and ready for synthesis. There is talk of the return of a “constitution in exile,” but no real reason to imagine that it could plausibly be adopted either whole or piecemeal in any coherent way. To be sure, there is a lot of new thinking apparent in the individual rights work of the Supreme Court—and not only there: questions of state prerogatives and immunities and the prerequisites for congressional action have triggered much new matter as well. But in all of this the Justices write as though self-consciously in the midst of unresolved, ongoing struggle, sometimes choosing to present their views in exaggerated, polemical forms, and sometimes too conspicuously trying to restrict the reach of their ideas as though in this way to give them space to survive. It is not a criticism of Chief Justice Rehnquist (who has worked so hard to recreate the administrative golden age of Chief Justice Hughes) to note the similarities linking the Supreme Court now with the Court headed by Chief Justices Stone and Vinson. There were genuinely great Justices sitting in that era, we all know—Black, Frankfurter, Jackson, Murphy, Stone himself. Many of the ideas that the Warren Court put to work originated in the great debates of the Stone period. But no one, I think, would have concluded in (say) 1946 or 1948 or 1950 that the time was ripe for anything like a treatise, an attempt at overall synthesis. Any such comprehensive effort written then would likely have obscured the fundamental fact that conflict and irresolution organized the elaboration of constitutional law.

Nor is it only a question of still-live conflict within the Court. The new century, it increasingly seems, marks what look like the beginnings of a period of profound transformation. There is an emerging realization that the very working materials of American constitutional law may be in the process of changing.

There is, for example, a sharp continuing debate addressing how the work of Congress fits within the corpus of constitutional law. Can congressional efforts within some range add to or otherwise revise conceptions of constitutional protections of individual rights? This is a hard problem at many levels (one that has, of course, been present in some form since the enactment of the great promises of the enforcement provisions of the Thirteenth, Fourteenth and Fifteenth Amendments). The pertinent point is that, if congressional constitutional thought deserves to be taken more seriously, then it may be necessary that statutes, like judicial opinions, be collected and subjected to

scrutiny from the critical perspectives of the constitutional ideas they embody. But of course, statutes are not as easy to synthesize as Supreme Court opinions; moreover, one would have to contend with and depict serious methodological issues—real conflicts—raised in working with statutes—something made especially clear in the contrasting thinking articulated by Justices Breyer and Scalia.

Also of great significance is the way in which constitutional protections of individual human rights are acquiring an international or transnational dimension. As a result, we are beginning to find ourselves in another sharp methodological debate—not only about the acknowledged influence of foreign law on the Court's own understanding of our Constitution (the strong and widespread first reactions to the Court's ruling about the execution of juveniles this Term being a case in point), but also about whether and when treaties and other forms of international law can themselves impose quasi-constitutional norms and limitations on government actors here in the United States (questions that have for the most part lain dormant since *Missouri v. Holland* but that are now beginning to take center stage again in fascinating cases such as *Sosa* and *Medellin*).

Justice Breyer's recent Tanner Lectures at Harvard, evoking Benjamin Constant's "ancient liberty" not as a matter of intellectual history but as an element of current working thought, illustrate one new movement—the increasing recognition that American constitutional law draws invigoration from (much as it also reinvigorates) currents in thinking not only in nineteenth century Europe, but in Renaissance and Reformation Europe, in the seventeenth and eighteenth century transformations of political theory, and even in the constitutional innovations of Rome and Athens. Nor is it only Europe, we know: contemporary developments in Islamic constitutional thought, the windows already opening or soon to be opened to us by the work of the supreme courts of Israel, India and South Africa, and our imminent appreciation of Chinese counterparts—all of this may well work a great change in the starting points and sensitivities of American constitutional scholars.

Even if the work of international or transnational entities, or indeed the work of the national courts of other countries, becomes part of American constitutional law only as material with which judges and academics are familiar (and not material to which they regularly refer in constitutional argument narrowly defined), one must still address the criteria for deciding what work elsewhere in the world should be considered at all and for what purposes. It is too early to say whether, a decade or so from now, this will seem so well settled as to be old hat or whether what I might regard as modest attempts to learn how others do things and how they manage to avoid certain pitfalls in pursuing goals akin to ours will long since have generated a backlash so large as to set back the effort for a generation.

The recent interest in comparative law is but one spark in an ongoing explosion of inter-disciplinary scholarly effort. Consider, for example, our increasing recognition of the lessons to be learned from behavioral economics (Cass Sunstein, in particular, has taught us much about this) and the sometimes startling results of computer modeling in game theory, the ideas of "small worlds" and informal networks, the new sociology that Judge Posner would have us read, cognitive theory (as in Jerry Kang's startling recent

essay), political philosophy post-Rawls (Martha Nussbaum's newer works provide rich examples)—all of this, along with now well-established perspectives and techniques (critical theories of both the right and left, perhaps especially those emphasizing the sociology and semiotics of race, gender, and sexual orientation, in the important work of such scholars as Catharine MacKinnon, Janet Halley, Kenji Yoshino, and Reva Siegel and some versions of law and economics), promises to enrich both the form and the substance of academic writing about constitutional law.

Finally, and perhaps most importantly, the state of our own “constitutional culture” calls for systematic attention. I refer here not only to the ever-accumulating, rich corpus of academic commentary, with distinguished participants too numerous to name. I refer as well to popular conceptions of constitutional law, conceptions that drive everyday politics in many ways—within the arguments of families in crisis, within the mundane world of bureaucratic disputes, in the lives of communities, as swords and shields within the recurrent politics of outrage and protest. Popular conceptions of constitutional law therefore shape government—even if the careful work of courts (for example) does so as well. (Robert Post's studies of constitutional domains and the facets of constitutional culture, and Fred Schauer's work on constitutional salience, seem to me especially likely to generate important new insights on the subject.)

Consider, for example, the obvious clashes of world view in the tragic Schiavo case that has recently dominated our headlines and broadcasts: We've seen an extraordinary politics of feeling, of sympathy and hope and faith and frustration and anger—expressed not only in the declarations and demonstrations of Terri Schiavo's parents and their many supporters, but also through remarkable congressional theater: the dramatic rush to legislation, the all-night session, the President's sudden return to the White House to sign the bill just passed, and once again the encompassing rhetoric of searing emotion, at times nearly overwhelming both the practical and tactical language of legislative deliberation and the deeply settled rule-of-law, separation-of-powers, and federalism principles that had to be pushed aside in order to set the stage for what, had the federal courts accepted the invitation, would have been viewed by some (including me) as a tragic (and unconstitutional) show trial, but by others (including some prominent liberal Democrats) as a last chance to have escaped the tragic outcome that was decreed by doing business as usual.

No doubt some of those behind the legislative maneuver that sought to federalize the case for “any parent of Theresa Marie Schiavo,” as I believe the statute put it, were engaged in shamelessly opportunistic appeasement of their “base.” It's easy enough—and in many respects entirely appropriate—to chide the supporters of states' rights for how prepared they were so casually to undo the results of years of state court adjudication when the result felt to them so wrong; easy enough—and in many respects entirely proper—to scold the apostles of judicial restraint for their eagerness to authorize and even mandate exactly the sort of federal “judicial activism” that they ordinarily denounce, even in cases involving apparent risks of executing innocent individuals; easy enough—and in some respects deserved—to toss back at them their solemn invocations of the “sanctity of marriage” in other settings when they are so quick to dismiss the protestations of love and duty on the part of a husband and guardian.

But even still, many of those who supported extraordinary federal intervention were deeply sincere. They will not soon forget how the legal system, and its judges in particular, failed to respond in any palpable way to their understanding of the world. To this segment of the Nation, the prevailing culture of deliberative process no doubt appeared as a callous and deeply anti-religious intellectualism, evident not only in the cool analyses of the neurologists who examined Ms. Schiavo and who testified so matter of factly concerning the processes through which much of her cerebral cortex had been destroyed, but even more evident in the just as cool work of both the Florida and federal judiciaries, repeatedly and accurately bringing to bear vocabularies within which all of the emotion that Congress and Terri Schiavo's parents and the clergy had called up quite simply disappeared—or worse, was deemed immaterial. Those for whom Schiavo's plight, or the plight of others caught up in similarly charged clashes of values, yield life-marking events will carry those events with them as part of the lens through which they understand constitutional appeals and categories, and part of the repertoire of rhetorical moves through which their feelings will be made known in future controversies.

To learn important lessons from something like the Schiavo experience, one needs to make an effort to understand not only the usual formulas of federalism, separation of powers, and the rule of law as indirect guarantors of rights through the decentralization and regularization of power—formulas that Judge Birch of the Eleventh Circuit, an Establishment Republican appointed by the first President Bush, went out of his way to criticize Congress and the second President Bush for flagrantly violating with the special Schiavo law they rushed to enact. One needs, too, an effort to internalize, and not merely to describe from the outside and at a distance, the perspective of those who thought it barbaric to withhold the simple sustenance that Schiavo's biological family desperately wanted to extend—a perspective that was inseparable from the idea of parental love and concern and one that, for most of those who held it, was fundamentally the product of religious faith that grounded a profound commitment to equal hope for all persons, however extreme their circumstances, and of a profound commitment as well to the duty to act in service to faith, even when such action required a departure from customary modes of lawmaking.

The terms within which we might somehow bring together these startlingly different and incommensurate points of view cry out for new modes of thinking and writing within constitutional law—if constitutional law is to remain a fully pertinent resource in considering cases of this sort.¹

Judged from this perspective, the very strengths of the treatise as a form are also its limitations. There are times, to borrow an image from our electoral politics, when a Treatise in Red would capture the constitutional zeitgeist, and times when a Treatise in Blue seems called for. At a time when our most creative and inspiring politicians are telling us, in hope, that we are not the Red States and the Blue States but the *United States of America*, the best that a treatise-writer might do is produce a Treatise in Purple.

¹ I am reminded here of Robert Cover's insights into the "jurispathic" character of law in *Nomos and Narrative*. To the degree one thinks Cover's the best way of approaching some of our current dilemmas, the limits of the unitary treatise form become all the clearer.

And that sort of work would paper over, before we fully grasp, the profound divisions that define our current circumstance.

* * * *

Some may think that I am overstating these fissures, these profound shifts and tensions in perspective and commitment. Indeed, there are times when I wonder myself whether the project I embarked upon a quarter century ago might continue implacably, as if intervening developments have been but natural and unexceptional points on a continuum. As I write this letter, I'm looking out at a mild sunrise over the Atlantic Ocean, across a lovely beach where the waves aren't yet strong enough even to form breakers. It's easy from where I sit to think of the great, enveloping sea of constitutional law in terms of ocean waves and currents, some visible on the surface, others perceptible—at first—only near the ocean floor. And indeed, much of what has been going on at the surface of the law in the period between my second edition and the present strikes me as a continuation, most of it welcome from my perspective, in trends evident for quite a long time now.

For instance, both the Court and the academy now pay much closer and more precise attention to constitutional text and especially to constitutional structure, something I've emphasized in my writing for well over a decade. To be sure, I've taken issue with how selectively such attention is at times focused on the reduction of congressional power and the enhancement of idealized images of "state sovereignty" that seem to me to disserve rather than to serve the underlying purposes of federalism (a point Justices Stevens and Breyer have of course made forcefully, joined at times by Justices Souter and Ginsburg). And even more importantly, I have expressed frustration over the failure of the "states' rights" wing of the Court to recognize the wisdom and necessity of using parallel structural and textual methods of constitutional construction to "connect the dots" in individual rights jurisprudence as well. Yet, despite that selectivity, somehow the Court has managed to render, if at times by disquietingly close votes, decisions reaffirming the core principles that I see as part of a complex that draws its design simultaneously from liberty (both of the ancients and of the moderns, in Justice Breyer's terms) and from equality. In that group of decisions, focusing just on the past decade, I'd certainly number *Romer v. Evans*, *Saenz v. Roe*, *Lawrence v. Texas*, and even the cautious position that emerges once one pays attention to who joined whom and with what footnote reservations, in the physician-assisted-suicide cases of *Washington v. Glucksberg* and *Vacco v. Quill*.²

² I suppose one could add *Stenberg v. Carhart*, the so-called "partial birth abortion" case, but I hesitate to include it (or other outgrowths of *Planned Parenthood of Pennsylvania v. Casey*) in this list of hopeful signs—partly because of the anger (justified, in my view) expressed in dissent from *Hill v. Colorado* by one of the Justices (Kennedy) who had joined the compromise position in *Casey* and who expressed a sense of betrayal in *Hill* at an opinion that treated a ban on uninvited approaches to persons near a health facility in order to engage in "oral protest" and "counseling" as *content-neutral* and that accordingly upheld, without the discipline of establishing that the measure could survive strict scrutiny (which I think it may well have survived, cf. *Burson v. Freeman*), a severe restriction on one of the few remaining ways that those who identify with what's increasingly calling itself the "culture of life" could express their views to those who were about to commit what they see as a grave wrong. (cont'd)

But it is sobering to recall how thin the majorities have been in some of these cases, even when they have not on the surface been 5-4. I'm afraid that these sharp splits on the Court reflect a much more fundamental and seemingly irreconcilable division within legal and popular culture that is not amenable to the treatment that a treatise might hope to give such cases. This division becomes most manifest when one attempts to elucidate some of the most important puzzles currently bedeviling constitutional law: whether there is a right to refuse medical treatment even for the purpose of hastening one's own death; how to honor the right to dictate, while sentient, what is to be done with one's body after medical science says nobody is "there" any longer but when loved ones insist there is a "there" there after all; or how to discern the line after which, if and when "viability" comes to seem unacceptably arbitrary and question-begging, the political community may be permitted to prevent or discourage all but some small subset of abortions. On these and many other questions—some of which we can't possibly imagine at this moment—I think the deep and thus far intractable divisions between wholly different ways of assessing truth and experiencing reality, divisions both cultural and religious in character, some epistemic and others strictly normative, have become too plain—and too pronounced—to paper over by routine appeals to the standard operating procedures of the legislative-judicial division of authority, the routine premises of the federal-state allocation of power, and the usual methods of extracting meaning from notoriously ambiguous texts.

Even if it doesn't belong on *this* list, however, *Stenberg* is symptomatic of the increasing prominence in constitutional controversy of competing symbols and images, a phenomenon with which I began grappling when I first analyzed the difference between the expressive, intrinsic role of legal rules and their purely instrumental, utilitarian role, in a 1971 essay on "trial by mathematics" and a 1972 essay on "policy analysis: science or ideology?"—a discussion I continued in several articles and a book in the mid-1970's dealing with the limits of instrumental rationality and of the "policy-analytic," technocratic perspective on public choice. That perspective is limited not only in its inattention to the ways in which technologies and legal arrangements may *express* and not simply *implement* existing values, but also in its inability to address the prospect that the technological and legal choices we make may *alter* those values and transform the very metric by which we assess the "costs" or "benefits" of what we have done. Although I was writing as early as 1969 about how psychopharmacology, human cloning, redesign of the human genetic material, and changes in the interface between people and the computer networks that extend their capacities and link them to one another, could well pose questions going to the very heart of what it means to be individual human beings "endowed by their Creator," in the language of our Declaration of Independence, with "certain inalienable rights," I put forward only the sketchiest of ideas for how legal institutions and constitutional principles could possibly cope with such prospects.

Part of my sense that this is not a propitious time for a new treatise grows directly out of the difficulty of framing constitutional methodologies that take satisfactory account of technological changes this profound now that it is plain that they are indeed upon us and are not merely subjects for speculative scholarship. For reasons similar to those voiced in 1996 by four Justices as grounds for caution in selecting analogies from traditional free speech discourse when dealing with government regulation of cable systems (*Denver Area Educational Telecommunications Consortium v. FCC* (Justice Breyer's plurality opinion, joined by Justices Stevens, O'Connor, and Souter, and Justice Souter's separate concurring opinion)), I've lost confidence in the course I recommended in my 1991 essay, *The Constitution in Cyberspace*, where I urged that preserving core constitutional norms in the face of radical technological change calls for the translation of those norms into principles sufficiently general and abstract to render them immune to distortion as technology spins out new options. Some of Larry Lessig's later work on "fidelity" in constitutional translation is to similar effect. Suffice it to say at this point: Easier said than done.

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The way in which the deeper questions presented themselves in the Schiavo case was unusually dramatic but is hardly unique. And in principle, we should be able to fashion models of legal inquiry that take into account the conflicts of symbol and feeling as well as the more familiar elements of constitutional discourse that arise in cases such as Schiavo's—but we haven't learned how to do it well yet.

Watching that episode unfold, I couldn't help recalling a case I was briefing in the Supreme Court of Japan just as the first edition of my treatise was going to press—a case whose outcome turned on how to characterize the choice of criteria for establishing the authenticity of the purported signature of the Nichiren Daishonen, the Buddha of the Nichiren Shoshu faith, on a 13th century wooden mandala. One side urged looking to the science of handwriting analysis to compare the marks on the mandala with signatures of undoubted authenticity on dozens of other 13th century scrolls; the other side, to the spiritual peace that one either did or didn't experience upon chanting "Nam yo ho renge kyo" in the presence of the mandala when properly enshrined in a suitable temple at the foot of Mt. Fuji. The question I had to brief: Was the *choice of criteria* itself inherently religious, thus rendering nonjusticiable a suit for refund of sums contributed by the faithful to the temple's construction?

For at least some such puzzles, I see in our own Constitution's language and architecture a strongly suggested solution that prioritizes the secular over the religious in the public realm: One sees it in Article VI, which commands all officers of every branch of the national and state governments to swear or affirm their fealty to the Constitution itself and to the republic it constitutes while simultaneously forbidding the administration of any "religious test" for any federal office or public trust. Even there, however, one faces the question of what beyond the canonical profession of fidelity to the Constitution remains "secular" and what becomes "religious": If including "under God" makes the pledge of allegiance improperly religious, how about including "the flag" for which "one nation indivisible" ostensibly stands, "with liberty and justice for all"? And just how can we tell? Or, to take another conundrum from Establishment Clause cases: How should one decide where to stand on the division within the Court between the emphasis on "strict separation" and the emphasis on "neutrality," assuming one could satisfactorily define either? Questions like these have for me the feel of something much deeper, much more potentially convulsive, than the standard differences in doctrine and perspective within the Court.

There was a time when I thought I could elide such issues by taking an eclectic, pluralistic approach to constitutional meaning. There were no provably right answers, however one might understand Ronald Dworkin's Herculean attempts, but there were clearly wrong ones, and among the plurality of right answers each branch could take its pick—providing that, in the end, with a range of flexibility sufficient to permit challenge to its views, the judiciary would carry the day. In my first two editions and in the first volume of the third, I tried to square the circle of determinate indeterminacy that way, drawing sustenance from the suggestion in *Katzenbach v. Morgan* that, subject to a floor the Court would set, Congress could use its authority under section five of the Fourteenth

Amendment to implement broader visions of constitutional interests in liberty and equality than the Court was prepared to impose on the nation judicially. And, in my own Tanner Lectures at Oxford several years ago, I was harshly critical of the increasingly frequent suggestions by the Court that it essentially *owns* the meaning of the Constitution.

Much as I find such proclamations of judicial hegemony distressing, I'm certainly not ready to accede to the far more radical ideas at the other extreme—that we might as well fall back on congressional supremacy, or on “popular constitutionalism” outside the political departments, or even on pure majoritarianism unfettered by constitutional constraints, in matters going to the validity of national (and perhaps also state) statutes. I would be surprised if the recent revival of interest in these long-discarded, one-dimensional forms were to be with us for very long. “The people, yes!” makes a stirring poem, but governance under law requires a measure of prose as well. Nevertheless, I think that I've been more dismissive than I should have been—especially in an era in which the divisions over the most basic premises run as deep as they seem to be running today—of efforts, however incomplete, to display the history of our constitutionalism with considerably more of an inflection on popular opinion, and on the many ways in which “the people” may voice and make felt their understanding of the Constitution's requirements, than my own largely judicial focus has made almost instinctive.³ In the end, I am left up in the air on the role that something properly regarded as “popular constitutionalism” should play.

Nor do I have what I think are compelling answers even to the narrower but still plainly urgent questions of judicial method, and the choices among competing modes of interpretation—choices too sharply lit now for a treatise-writer simply to punt, or to retreat to the usual dreary mix of “a bit of this and a bit of that.” I've often marveled at how some Justices—including a number I've admired over the years, like my old boss, Potter Stewart, and the successor to his seat, Sandra Day O'Connor—maintain an admirably judicious sense of what they are doing in deciding particular cases while consciously avoiding the adoption of an articulated set of general navigational principles, and how such Justices indeed serve with greater distinction and genuine openness to argument precisely because they resist formulating comprehensive frames of reference. It's much easier and feels more natural for me to identify with such Justices as Steve Breyer and Nino Scalia, who—each obviously in his own distinctive way—are self-conscious in reflecting on, and publicly articulating, how they see their task in constitutional interpretation.

Like Breyer and unlike Scalia, however, I see no escape from adopting some perspective (not necessarily “consequentialist” in the usual sense) *external to the*

³ Here I must nod in the directions of Bruce Ackerman and Akhil Amar, as well as Larry Kramer. In fact, having now read a most impressive (even if still quite critical) review by Larry Alexander and Lawrence Solum of Kramer's latest work, I think I owe him an apology for my overly reductionist dismissal, in a recent review, of his imaginative historical reconstruction. I still worry, however, that Kramer's battle cry in favor of some unspecified version of “the people's” authority to overturn the Court's constitutional views will register far higher on the Richter scale of politics and culture than any of the nuances that precede it, and so I continue to fear, despite Kramer's admirable motives, that unintended mischief may flow from what he may be thought by some to be advocating.

Constitution itself from which to decide questions not indisputably resolved one way or the other by the text and structure, not least among them the question of how rigidly to tie that text to a supposed “original meaning” fixed at the time of its promulgation.⁴

But if 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? Those are of course eternal questions that I trust nobody expects any Justice, much less a mere treatise-writer, to answer in some definitive way. But the questions are too near the surface now, and the consequences of answering them differently are too large, for them to be submerged or bracketed in a useful constitutional overview that purports to be more than a hornbook-like compendium of judicial results reached and reasons given.

The difference between my situation and that of the Justices is that, with the public authority that they have the enormous responsibility and privilege to wield, they must either *answer* those questions as best they can or *beg* them, admit it or not. Lacking the privilege and responsibility of any such authority, I have the compensating luxury of deciding that those large questions are simply “above my pay grade,” which is one way of viewing my decision to write and teach in contexts where it is acceptable to raise such questions without offering answers, and my decision to let the treatise I have written rest without publishing any further volumes or versions. What I *don’t* have is the luxury of purporting to finish a genuinely new third edition while avoiding the fundamental questions that are now so pressingly posed.

For all these reasons, I’ve reluctantly concluded that no treatise, in my sense of that term, can be true to this moment. This doesn’t mean that I see no work I would want to do. Litigation (sometimes) is precisely the right way to push constitutional thinking in new ways in response to problems already real. Public opinion matters—and thus I mean to continue writing and speaking about constitutional questions in venues that reach at least some parts of the public at large. Congressional testimony plainly remains important (whatever the role of Congress in defining individual rights might be). And distinctly academic writing—exploring particular Supreme Court decisions, investigating larger constitutional themes and problems, or experimenting with new forms of presentation and synthesis—remains something to which I am irresistibly drawn. The Constitution is, after all, still a relatively recent innovation, and there is no end in sight to our solemn obligation to honor its decree to “secure the Blessings of Liberty to ourselves and our Posterity.”

⁴ If Justice Scalia believes that his “original meaning” approach is literally *dictated* by binding text, as opposed to merely being commended by such desiderata as reducing the role played by a judge’s personal preferences—a consequence that I think is frustrated more than it is facilitated by the opacity of his method—then I think he’s making a basic linguistic and logical error of the kind intrinsic to any self-referential set of instructions (see Douglas Hofstadter’s wonderful study of the issue in logic, mathematics, literature and art, in his book, “*Gödel, Escher, Bach*”)—although Breyer trying to persuade Scalia of that proposition might be akin to Aristotle trying to convince Plato to abandon the forms.

But no new treatise now, I think: that is more likely to be work for my granddaughter.⁵

Laurence Tribe

⁵ Cf. Charles L. Black, Jr., "And Our Posterity," 102 Yale L.J. 1527 (1993).

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