Book Reviews

THE INDIVISIBLE CONSTITUTION

THE INVISIBLE CONSTITUTION. By Laurence H. Tribe.[1] Oxford, Oxford University Press. 2008. Pp. 304. $19.95.

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INTRODUCTION

In 1999, Laurence Tribe published volume one of the third edition of his magisterial treatise *American Constitutional Law*. In 2005, to considerable dismay, he announced that the second volume would not be forthcoming. Constitutional law was too unstable, he said, to permit the kind of synthesis to which the treatise aspired: "[W]e 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 going to count and, sadly, whose truths must be denied."[3]

The Invisible Constitution, his first book since that announcement, does not aim to synthesize doctrine. Indeed, it largely ignores doctrine. It is addressed not to the judge wondering how to rule in a difficult case but to the citizen or government official wondering what her constitutional rights and duties are (p. 5). Tribe's message to such a person is clear and simple: just because you can't see it, don't assume it isn't there. Much of the Constitution, Tribe argues, including some of the most important parts, is invisible.

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

"Invisible" is a catchy word, but perhaps not the most precise. Most of the phrases and ideas Tribe goes to identify as contained in the invisible Constitution are very visible; they are written down in judicial opinions and inscribed on monuments. What he means is extratextual, as he once says (p. 6), and when I use "invisible" in this review I will mean extratextual as well.

Tribe's claim, then, is that many of our most cherished principles and propositions of constitutional law cannot be found in the text. After arguing for the existence of this invisible Constitution, he goes on to describe modes of construction that may be used to "visualize and articulate the rules, principles, and rights that are part of our Constitution but are not discernible in or directly derivable from portions of its text" (p. 155).

In what follows, I will describe and evaluate these two projects: first, the argument for the existence of the invisible Constitution; second, the description of the modes of construction.

I. ARGUMENTS FOR EXISTENCE

Tribe uses a variety of different arguments to establish the existence of what he calls the invisible Constitution. The different types of argument correspond, though not always perfectly, to different types of constitutional propositions, which I will consider in turn.

A. NECESSITY: INTERPRETIVE RULES

At various points, Tribe argues that we know the invisible Constitution exists because it *must*, because without it the visible Constitution is fatally, even logically, incomplete. We need the invisible Constitution, he claims, to tell us "what text to accept as the *visible* Constitution" (p. 7). We need it to tell us whether amendments can require holistic revision of our reading of the Constitution—whether, for instance, the Nineteenth Amendment's prohibition of sex discrimination with respect to voting suggests that the Fourteenth Amendment equal protection clause should now be read to prohibit sex discrimination with respect to political rights more generally (pp. 69–70). We need it, Tribe might have added, to tell us to read the visible Constitution's sentences from left to right, and to assign its words their meanings in English rather than German.

This is partly true. We do need rules to tell us how to read the written Constitution, and those rules are not contained in its

words.[4] But it is an odd leap to suppose that an interpretive rule, necessary though it may be, is thereby part of what it explains. It is odd, that is, to suppose that the principle that sentences are to be read left to right is part of the Constitution. We do not do this with other texts—the left-to-right principle would not commonly be called part of the invisible *Moby Dick*—and it is not clear why the Constitution is different.

Tribe has one more argument from necessity, which relies on the purportedly self-refuting nature of the denial of the invisible Constitution. "Imagine," he suggests, "an unwritten metaconstitutional rule pointing to our Constitution and stating: '*In construing this Constitution, the reader must be confined to the enacted text*.'" If we suppose the rule is correct, we see that it negates itself. Thus it must be false, and thus, Tribe suggests, "any directive to confine oneself to the enacted text must be wrong" (p. 153).

Logic may thus seem to prove the existence of the invisible Constitution, but the same technique can prove other things, too. For instance, if you have a copy of Tribe's book, write in its margin "In construing the Constitution, one must not rely on marginal notes written in this book." If you suppose the rule is correct; it negates itself. May we now conclude that it is false and marginal notes are valid guides to interpretation? Write another making yourself President. If you don't have a copy of the book handy, a cocktail napkin will serve as well, *mutatis mutandis*.

Don't worry; you aren't really President. As Tribe concedes, the argument is "less than airtight" (p. 153). It fails because starting with a contradiction allows one to prove anything, and therefore no conclusion thus derived can be trusted. (For another example, consider the following pair of assertions: A: Both A and B are false; B: You are President.) The mere fact that one assertion leads us into logical puzzles cannot establish the truth of other unrelated assertions, especially assertions about the world.

4. Tribe argues further that they could not be, on the grounds that we would then need still more rules to tell us how to read them (p. 148). But this is a bit too clever. We might not need an infinite chain of rules after all; explanation, as Wittgenstein noted, comes to an end somewhere. And if the regress argument were sound, it would apply as well to the invisible interpretive rules. We would need not just the invisible Constitution telling us how to read the visible one but something else (the ineffable Constitution?) telling us how to understand the invisible one.

The argument from necessity is only partially successful, then, and it achieves less than Tribe believes. It shows that there must exist invisible *interpretive* rules, like "read left to right." But it does not establish that these rules are part of the Constitution, and it does not prove anything about the existence of invisible *substantive* rules, like "one person, one vote." The fact that the visible Constitution itself does not tell us to read left to right or the reverse does not imply that the invisible Constitution "must of necessity supply and define a significant part of what we perceive as the Constitution's meaning" (p. 154).

It is the substantive rules, however, that make the invisible Constitution worth talking about. Tribe has arguments for their existence as well. But these arguments, too, encounter some difficulties.

B. THE AUTHORITY OF THE MANY: UNCONTESTED SUBSTANCE

Tribe's main argument for the existence of substantive invisible propositions is that everyone accepts them. "Ask any person," he challenges at one point, whether the Constitution allows representatives to be chosen by districts with significantly different numbers of voters. "The vast majority of people," he continues, "would certainly be inclined to agree" that the one-person, one-vote principle is part of our Constitution (p. 120).

I suspect that this is true, but its significance is not entirely clear—especially since Tribe admits that this vast majority excludes "specialists in voting theory, many of whom would strongly dissent" (p. 121). Arguments from authority are not persuasive unless there is a good reason to take the purported authority as authoritative. If the idea is that the content of the Constitution is actually determined by what most people think, we have popular constitutionalism with a vengeance. We also have the possibility of some disturbing consequences. Asked whether the maxim "From each according to his ability, to each according to his need," is found in the Constitution, over two-thirds of Americans surveyed answered "yes" or "I don't know," with a plurality choosing "yes."[5] (The true source is Karl Marx.)

Perhaps the claim is just that if all or almost all relevant actors act as though a proposition is part of the Constitution, it is,

5. *See* COLUMBIA LAW SURVEY, AMERICANS' KNOWLEDGE OF THE U.S. CONSTITUTION (May 2002), *at* http://www2.law.columbia.edu/news/surveys/survey_constitution/fact_sheet.shtml.

in any sense that matters. This is also true. But at this point, the argument for the invisible Constitution is less argument than observation.

Of course, there is value to pointing out features of our constitutional practice that others neglect or forget. But the ostensive argument ("look, this is what we all do") limits the set of propositions of which we can be confident to those that are largely uncontested. Early in the book Tribe lists eight (p. 28). The selection is surprising. It includes the anti-commandeering principle developed in *Printz v. United States*[6] and *New York v. United States*,[7] which is not accepted by four Justices of the Supreme Court, and the principle that government may not torture people to extract information, which was so notoriously denied by the Bush Office of Legal Counsel.[8]

That is in part a quibble; there certainly are many substantive invisible propositions that command near-universal respect, including some important ones like one-person, one-vote. But including controverted propositions in the list may make it seem that the argument from authority achieves more than in fact it does. If we know that substantive invisible propositions exist only when everyone accepts them, we cannot use the argument to convince doubters—the argument is persuasive only when there are no doubters left. Contested substance is where the action is, and the authority of the many does not establish it.

C. TELEOLOGY: CONTESTED SUBSTANCE

Tribe does have arguments for contested substantive propositions. Notably, he analyzes the forms of arguments in their favor, the subject of the second part of his book and likewise the second of this review. In the first part of the book, however, he suggests generally that they must exist, or the Constitution would be dramatically worse. Many of our most cherished principles are invisible and were once contested; some still are. Reject the invisible constitution, he warns, and "a state may imprison someone for speech with which its officials disagree" (p. 112). It is only the invisible Constitution that stops the federal government from segregating schools on the basis of race (p.

6. 521 U.S. 898 (1997).
7. 505 U.S. 144 (1992).
8. *See generally* Kermit Roosevelt III, *Detention and Interrogation in the Post-9/11 World*, 42 SUFFOLK U. L. REV. 1 (2008).

113), or the President from detaining Americans indefinitely without judicial review (p. 95) and ordering torture as a means of interrogation (p. 97).

But perhaps things are not quite so bleak. In his haste to champion the invisible Constitution here, Tribe gives short shrift to the visible one, in terms of both its resources and its wisdom.[9] The Fourteenth Amendment does not apply its equal protection demand to the federal government, but was it wise of the Court to supplement it with an invisible, inverse Fourteenth Amendment that does? The idea that the federal government should have a freer hand than the states with respect to discrimination actually makes good sense for reasons of both structure and history.[10] It is not at all clear that *Bolling v. Sharpe*[11] has been a good thing for racial equality: as Richard Primus has observed, the main effect of subjecting the federal government to equal protection requirements has been to strike down federal affirmative action programs.[12] (And if invidious discrimination really seems a threat, the due process clause is not hopeless as a source of an antidiscrimination norm.[13])

So even if the written Constitution is limited, those limits may not be so bad. But is it as limited as Tribe suggests? Application of the Bill of Rights against the states is now uncontested. As Tribe points out, it has been achieved through a doctrinal legerdemain that bears no obvious connection to text: the rights that apply against the states have (somehow) been incorporated in the Fourteenth Amendment's Due Process Clause. The point is significant for both the existence and the legitimacy of the invisible Constitution. As Tribe argues, the enterprise of substantive due process—perhaps the invisible Constitution's most contentious project—looks less controversial if we remember that its primary effect has been to apply the Bill of Rights against the states. Few people, even those who are generally critical of substantive due process, would want to reject incorporation.

9. For an example of how far one can go with text, and an argument that the results thus produced are superior to much of what the Court achieves with invisible supplementation, see Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000).

10. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 522–23 (1989) (Scalia, J., concurring) (noting historical and structural arguments for greater deference to the federal government).

11. 347 U.S. 497 (1954).

12. *See* Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975 (2004).

13. *See generally* Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PENN. J. CONST. L. 983 (2006).

But in fact it may be possible to separate incorporation from the more controversial substantive due process rights. At least, the fact that the Court resorted to the invisible Constitution for incorporation does not necessarily mean that no visible alternative existed. Incorporation could instead be justified on textual grounds by the Privileges or Immunities Clause. The Supreme Court, of course, declined to take that path in *The Slaughterhouse Cases*,[14] but most academics disagree with that decision, and there is ample scholarship demonstrating that the incorporation reading of Privileges or Immunities is at least plausible.[15] We would probably still have the same arguments over what else counts as a privilege or immunity (privacy? abortion?), but the arguments would be relatively clearly linked to text.

So sticking to the visible Constitution would not necessarily undo incorporation. As for indefinite executive detention, its opponents need not rely solely on the invisible Constitution. Unilateral executive detention without legislative authorization or judicial review is the quintessential denial of liberty without due process of law, and it is hard to see how the Constitution's words are "inconclusive" (p. 95) on this point.

The torture question is harder. If "the very use of torture to extract information violates the Constitution," Tribe writes, "as those who see a policy condoning such torture as an affront to everything America stands for believe it does—it is the invisible Constitution and not anything in the text that it violates" (p. 97). This is true. On the other hand, it is a mistake, as Tribe elsewhere points out (p. 35), to suppose that the Constitution contains every proposition we would like it to.

Perhaps more to the point, the value added by the invisible Constitution to the anti-torture side is less than fully clear. The proposition that torture necessarily violates the Constitution is contested. It is clear, however, that torture is forbidden by federal law.[16] The Bush theory that the commander in chief, acting to defend the nation, can disregard this ban is not based on the text of the Constitution. If the President does have this dictatorial pre-eminence, if torture is permissible despite a congres-

14. 83 U.S. 36 (1873).

15. *See generally* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (2000).

16. *See* 18 U.S.C. § 2340A(a) (2001).

sional ban, it is the invisible Constitution and not anything in the text that makes it so.

Which is to say, if we're talking about contested substance, we must be aware that the invisible Constitution may have its nasty side. Torture affronts everything some people think America stands for, but others have different views. And as long as the vehicle for transmuting those views into higher law is invisible, there are very few constraints on their content.

What this means is that teleology is not such a good argument for the existence of invisible contested substantive propositions, even at the wholesale level. At the retail level, of course, there cannot be a knockdown argument for the existence of an individual contested proposition; if such an argument existed, the proposition would be uncontested.

Still, we can be confident that contested substantive propositions exist in general for the simple reason that they are the set from which uncontested propositions emerge. Contested substantive propositions of the invisible Constitution thus exist in the same sense that contested propositions about the visible one do: as part of an ongoing struggle over constitutional meaning. We cannot be sure which ones will prevail, but we know that some will.

D. ANALYSIS

Taken together, Tribe's arguments for existence succeed in establishing some things. There must be invisible interpretive rules, though they need not be constitutional. There are some invisible substantive principles, which we know because everyone agrees on them. And there are others on which not everyone agrees, although we cannot know which of these will win out in the long run. The invisible Constitution exists, but, with some limited exceptions, we do not really know what is in it.

Demonstrating even this much is an achievement. It shows that the claim, "The Constitution doesn't say that," should never end an argument. The reminder is valuable, for as Tribe notes, that claim is put forward more often than it should be, "by both the American Left and the American Right" (p. 39). Still, the 9th Amendment does the same thing, though with more limited scope, and the fact that "the Right and the Left alike invoke that invisible Constitution when it suits their aims" (p. 39) tells us something, too.

What it tells us is that no one really believes invisibility is a fatal flaw. This is not a problem for Tribe's argument, but it does tend to lessen the drama of the first part of the book. The protagonist may be invisible, but the antagonist is nonexistent. Perhaps Antonin Scalia, at his most hyperbolic, embraces an entirely uncompromising textualism, but even he knows when to let it go. (See, for instance, *Printz v. United States*.[17]) And while Scalian hyperbole can be catchy, entertaining, and even superficially persuasive, rebutting it is not worth an entire book, much less one by Laurence Tribe.

The more interesting question is how to decide whether a given contested substantive proposition is legitimately part of the invisible Constitution or not. Fortunately, Tribe does address this. His second "main goal" (p. 42) is to "exhibit the various modes of reasoning" used to perform the task.

II. CREATING THE INVISIBLE CONSTITUTION: MODES OF CONSTRUCTION

A. THE MODES

In the second part of the book, Tribe offers six "modes of construction," which he calls geometric, geodesic, global, geological, gravitational, and gyroscopic. These are fascinating, and one wishes he had allocated them more space. (He does include hand-drawn pictures illustrating the different modes, which you will not find in many books about constitutional law.)

1. Geometry

Geometric construction is what Charles Black and Philip Bobbitt termed structural argument. It is the process, Tribe says, of "'connecting the dots and extending the lines'" (p. 157). The geometric constructor starts with points identified by the text—say, the life, liberty, and property protected by the Due Process Clauses—and connects them to reveal the principle that "ours is a government of laws, not men" (p. 158). Specific textual commitments, Tribe suggests, are the fixed stars of the sky; geometric construction turns a collection of isolated points into a constellation bearing a larger meaning (p. 171).

17. 521 U.S. 898 (1997) (applying a nontextual restriction on federal power to prevent "commandeering" of state executive officers).

2. Geodesy

Geodesic construction is what has sometimes been called prophylaxis or constitutional implementation.[18] It is the construction of rules to protect or enforce underlying rights or principles. The requirement that police give suspects a *Miranda* warning in order to later admit a confession into evidence, for instance, is not identical to the Fifth Amendment's prohibition on the use of coerced confessions. *Miranda* goes beyond the Fifth Amendment in some cases, for many confessions given without *Miranda* warnings might be perfectly voluntary. But the *Miranda* requirement serves to protect the underlying constitutional right: it offers a clear rule that police can follow and judges review, and if police do follow it, the likelihood of a coerced confession is much reduced. Such "augmenting rules," Tribe writes, should be considered "part of the invisible Constitution, without some version of which the visible Constitution would cease to have much force" (p. 176).

3. Globalism

The global mode of construction involves "the comparison of our national experience with the experiences and experiments of other nations and of international groupings, institutions, and practices" (p. 181). There has been much debate recently over the propriety of looking to foreign sources in making decisions under the United States Constitution, and Tribe gives us a taste of some of the more outrageous statements. Professor John McGinnis has testified to Congress that the citation of foreign cases is "chic" to "cognoscenti" but risks alienating citizens (p. 187). Robert Bork identified citation of foreign sources as part of an "international culture war" engineered by "faux intellectuals" who share "a toxic measure of anti-Americanism" (p. 185). (Bork's stridency on the issue makes it all the more interesting that the seat for which he was nominated ended up going to Anthony Kennedy, one of the Justices most receptive to foreign insights.)

Tribe calmly deflates this overheated rhetoric, pointing out that citation of foreign sources is a tradition that dates back to at least the early nineteenth century (p. 185). Such solid Americans as William Rehnquist and Antonin Scalia have cited foreign

18. *See, e.g.,* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001); David Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988).

sources, though Scalia is also one of the fiercest critics of the practice (pp. 185–86). Tribe concludes that "most of us would probably acknowledge that there is much to be said for learning from other nations and from the world community as we seek to flesh out the skeleton of basic human rights that has always undergirded our own Constitution's protections for life and liberty . . ." (pp. 183–84).

4. Geology

Geological construction attempts to dig down from textual provisions to discover their "underlying presuppositions and premises" (p. 189). It then returns to the surface, using the underlying premise to construct nontextual supplements to specific textual rights. This, Tribe suggest, is the method used by the second Justice Harlan in his dissent in *Poe v. Ullman*,[19] where he "asked himself what could possibly be the point of the Fourth Amendment's protections" of privacy "if there were not some substantive limit on the degree to which government agencies and legislatures could micromanage the details of personal life behind the shield thereby created" (p. 189). (Geological and geometrical construction overlap.) Tribe also offers John Hart Ely's *Democracy and Distrust*[20] as an example of geological argument: an attempt that understands essentially the whole Constitution as premised on the value of democratic self-governance (pp. 191–92).

5. Gravity

Gravitational construction, Tribe says, could also be called the "anti-slippery-slope mode" (p. 198). It asks how accepting particular propositions of constitutional law would shape "the 'space' occupied by the Constitution" (p. 203). This mode of argument, Tribe believes, supports the Supreme Court's decision in *United States v. Lopez*,[21] where the Court held that Congress's power under the Commerce Clause did not allow it to criminalize mere possession of guns near schools. A "plausible answer" to the question of what would follow from accepting such authority, Tribe says, is that "the resulting space would collapse into the black hole of illimitable national authority over all of

19. 367 U.S. 497, 522 (Harlan, J., dissenting).
20. JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).
21. 514 U.S. 549 (1995).

American society." Accepting the federal assertion of authority in *Lopez*, which was based on indirect effects on interstate commerce, would suggest the federal government can regulate anything, since (almost) anything can be said to have such effects. And since the existence of limits on the federal legislative power is one of the basic postulates of our government, without which "our Constitution would never have been ratified" (p. 203), *Lopez*'s articulation of such limits is plausible in Tribe's view as an example of gravitational construction.

6. Gyroscopy

Gyroscopic construction gets somewhat short shrift, only two full pages. The idea, Tribe says, "is that just as a spinning gyroscope . . . is governed by vectors of force that give it stability, . . . so the Constitution embodies vector forces both centripetal (pulling toward the center) and centrifugal (pulling outward) that ensure a measure of stability" (p. 207). Or to put it in more conventional legal terms, the Constitution both holds the Union together (hence the anti-secession principle, which Tribe several times observes is written in blood rather than ink) and protects the authority of the states against the national government. Stability is also enhanced by "the principle that carefully considered constitutional interpretations issued by the organs of government should not be revisited absent circumstances more compelling than a mere change in the identity of the individuals who authored the interpretation in question" (p. 208). Thus, stare decisis arguments also count as part of gyroscopic construction.

B. ANALYSIS

The identification of the modes of construction is certainly the most creative part of the book, and there is a lot more to be said about them. Tribe has indicated in conversation that he plans to devote future efforts to that task. I offer here some preliminary thoughts, prefatory to a more complete and general summing-up in the last part of this review. I focus on the extent to which the modes of construction deserve the name—that is, the extent to which they actually do derive invisible substantive constitutional provisions.

Geometric construction is well known under the name of structural argument. Tribe's contribution here is to point out that while structural arguments start with text, they end by identifying non-textual propositions that are supposed to stand on an

equal footing with text. That makes them a good example of true invisible constitution arguments.

One cannot say quite the same thing about geodesic construction. The essence of geodesic construction is that it starts with constitutional meaning and adds on doctrine. The endpoint of geodesic construction is not supposed to stand on an equal footing with the starting point. Meaning and doctrine are quite different, and to say, as Tribe does, that doctrinal "augmenting rules" should be considered "part of the invisible Constitution" (p. 176) erases or at least neglects the distinction.

This conflation is counterproductive.[22] It makes it harder to understand, for instance, how the Court should view legislative attempts to offer alternatives to the Court's doctrine, the question that confronted it in *Dickerson v. United States*.[23] (The answer is that alternatives that are adequately effective at implementing the relevant meaning may well be allowed to substitute for the Court's doctrine, though the one Congress there proposed—scrapping the *Miranda* rule in favor of the old totality-of-the-circumstances test—was inadequate.) It makes it harder to see what is wrong with the Court's insistence that federal legislation under Section Five of the Fourteenth Amendment be measured against the Court's Section One doctrine in deciding whether it is an appropriate means to enforce Section One. (The answer is that that doctrine was crafted with the institutional competence of the judiciary, not the legislature, in mind.) And likewise, it makes it harder for a nonjudicial actor—ostensibly the target audience for this book (p. 5)—to understand what her rights and obligations are, and how they may differ from the rules courts follow.

Geodesic construction, then, is probably not usefully considered a genuine example of construction of the invisible Constitution. It constructs doctrine, and doctrine should not be considered part of the Constitution, visible or invisible.

Global construction is hard to evaluate without a more precise specification of how it operates. There are a number of reasons why a court deciding a case under the U.S. Constitution might consult foreign sources. It might, first, look to foreign ex-

22. For an attempt to demonstrate the utility of the distinction in analyzing doctrine, see Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005).

23. 530 U.S. 428 (2000).

perience for empirical propositions. Defending a ban on physician-assisted suicide, for instance, states offered the concern that elderly people who want to live might be pressured into ending their lives by relatives seeking to avoid medical expenses.[24] The experience of countries that have legalized the practice is certainly relevant to the question of how weighty this state interest is. What foreign sources are doing here, however, is assisting judges in applying American doctrine. They are not creating doctrine, and still less are they affecting the judges' view of constitutional meaning.

Second, one might look to the reasoning of foreign decisions for guidance on how to interpret vague provisions of the United States Constitution. If we understand the Constitution to enact at least some widely understood human rights—equality, say, or fundamental fairness—then we might well think that the musings of foreign judges on analogous foreign provisions are relevant. These could be given the weight their persuasive power deserves in figuring out what equality or fairness demand in the United States.

How much weight that is depends in part on what we think these general constitutional provisions are intended to embody. If one believes that they refer to concepts with objective contours, that questions about equality or fairness have right answers regardless of where or when they are asked, then foreign decisions should get more weight. If context-independent answers exist, the answers of foreign judges are directly relevant; they are answers to the same questions. Whether equality demands recognition of same-sex marriage, for instance, should be the same under U.S. or foreign law, as long as similar equality guarantees exist. And so the U.S. Supreme Court could view the decisions of foreign high courts as one federal circuit views the decisions of another.

But I find the idea of context-independent answers implausible, at least for the purposes of constitutional law. Whatever one thinks of the ontological status of moral concepts as a philosophical matter—regardless, that is, of whether one is a moral realist or moral relativist[25]—it seems unlikely that those who draft and ratify constitutions intend to be governed by some phi-

24. *See* Washington v. Glucksberg, 521 U.S. 702, 731–32 (1997).

25. For a discussion of moral realism and relativism in the context of an attack on the former, see RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 17–29 (1999).

losophically pure concept rather than the commonsense and context-sensitive understanding that they have at the time. They probably understand that future generations will differ with respect to particular applications of those concepts, and in choosing general language they license future generations to follow the views of the future and not the past. (Unless they are very stupid drafters, we can guess that this is actually what they expect to happen.) But they do not intend their own generation to be bound to a commitment they would not recognize as contained in the concept they invoke.

To ground this abstract discussion in the framework of a particular constitutional problem, the drafters and ratifiers of the Equal Protection Clause probably intended to prohibit what they recognized as invidious or oppressive discrimination. They presumably knew that future generations might differ over what kinds of discrimination were invidious or oppressive. And by choosing general language they gave the future the freedom to follow its own views on, for instance, racial segregation of public schools.[26] It was constitutionally correct, then, for judges in the nineteenth century to uphold racial segregation of schools (when most Americans, or at least most with a voice in politics, thought it reasonable) and for judges in the twentieth century to strike it down (when attitudes had shifted). It would not have been correct for judges in the nineteenth century to strike it down on the grounds that it was "really" invidious even though the dominant consensus deemed it reasonable, and it would be jumping the gun quite a bit for those judges to strike it down on the grounds that twentieth century Americans would find it invidious.

What does this mean for the relevance of foreign decisions? The past, proverbially, is a foreign country. With respect to foreign decisions and American constitutional law, we could also say the reverse. The views of foreign countries about the demands of an abstract concept such as fairness or equality are like the views of past (or future) generations of Americans. They are relevant, but they are not the views that matter most.

This is true for general principles such as equality or fairness, and perhaps more true for constitutional provisions that specifically invoke community standards. If we think that the

26. For further amplification of this view, see KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM 47–58 (2006); J.M Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 295–311 (2007).

constitutional prohibition on "cruel and unusual punishment" requires judges to determine how rare a punishment is, they should consider its incidence in the United States. It is easy to see why our Constitution would have a provision constraining outlier states or the federal government to meet a threshold standard of decency set by national consensus. It is much harder to imagine why we would have one that constrains America by international standards, and I do not think that this was the purpose of the 8th Amendment.

Global construction, then, requires a bit more specification before we can really evaluate it. We can, however, conclude that it is not likely to be a successful mode of constructing the invisible Constitution. There are unproblematic ways to learn from foreign experience, but the most unproblematic do not involve the construction of constitutional meaning. As far as constitutional meaning is concerned, the stronger argument is for not giving too much weight to foreign decisions. That is, in constitutional law there is something to be said for relativism—though the conservatives who decry citation of foreign sources would probably not welcome that label. Last, even the realist position, which uses foreign sources to support particular outcomes, is not really an invisible Constitution argument. It is simply applying vague text to particular circumstances.

Geological construction is similar to geometric, in that it starts with text and produces nontextual propositions of equivalent constitutional stature. It too is a solid example of invisible constitutional argumentation.

Gravitational construction is somewhat more troubling. It may well be that we can identify undesirable or unconstitutional end states, the black holes to which Tribe refers. A world in which the federal government regulates every detail of daily life on the basis of indirect effects on interstate commerce is one in which the Constitution has failed.

But identifying these prohibited end states tells us only where we should not go. It does not tell us how to avoid getting there. It does not tell us, in particular, that judicial supervision is appropriate, how aggressive such judicial supervision should be, or what form it should take. It is perfectly possible, for instance, to assert both that the federal government is one of limited powers and that judges should be at most very hesitant to second-guess a congressional determination that a given activity has a sufficient effect on interstate commerce to make its regulation necessary and proper to the regulation of interstate commerce. It

is possible, that is, to believe that the safeguards of federalism are political and not judicial in nature.[27] (The argument that prevails in *Lopez* is virtually identical to the one put forward against the First Bank of the United States by James Madison and Edmund Randolph, rejected by George Washington when he signed the bill, and by John Marshall, with respect to the Second Bank, in *McCulloch v. Maryland*.[28])

Tribe derides the idea that the "fickle realities of politics" may be trusted to prevent "totalitarian intrusions" (p. 204). But he may be placing too little faith in politics and too much in judges. In at least some circumstances—when the structure of the political system is sound—we may be relatively confident that the government will not do horrible things, or, if it does, that the democratic process will remedy those mistakes.[29] In those circumstances, if the government does do something that seems horrible, and the public endorses it, neither judges nor the invisible Constitution are likely to stand long in its way.[30]

Gravitational construction, then, also requires more fleshing-out if it is to be a sensible mode of constitutional development. We will need some way of telling when an apparent slippery slope is indeed to be feared, and when, to the contrary, power can be lodged with a government actor in the confidence that it will not be abused. When the fear is reasonable, we will need something to tell us what kinds of limits judges should erect. (Even if one thinks that *Lopez* is a needed judicial response to congressional abuse of the commerce power, one might take issue with the form of the restrictions it crafted.) And there is no *a priori* reason to think that these limits will be better

27. *See, e.g.,* United States v. Morrison, 529 U.S. 598, 647 (2000) (Souter, J., dissenting) (noting "the Founders' considered judgment that that politics, not judicial review, should mediate between state and national interests"); Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 556 (1985) ("The political process ensures that laws that unduly burden the States will not be promulgated.").

28. For a discussion of the arguments for and against the Bank, see PAUL BREST, ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 28–51 (5th ed. 2006).

29. *See* Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 300 (1991) (Scalia, J., concurring) ("Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.").

30. Or as Learned Hand put it, "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it." Learned Hand, *The Spirit of Liberty*, *in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 190 (Irving Dilliard ed., 3d ed. 1960).

understood as components of judicially-derived constitutional meaning, rather than judicially-crafted doctrine.

Gyroscopic construction is both interesting and sensible, and it derives true invisible Constitution principles. The Constitution is certainly intended to preserve both the states and the union, and such propositions as are necessary to those ends can fairly be inferred, though of course the degree of plausibility may vary from case to case. The method of reasoning by which courts have done so could be called structural, which gives the gyroscopic mode some affinity with the geometric and geological modes.

III. ON TAXONOMY

The first part of *The Invisible Constitution* is certainly correct, even undeniable. The invisible Constitution exists, and it is important. But the very undeniability of that conclusion reduces the payoff from the first part of the book. It is a valuable reminder for lazy and dogmatic textualists, but one hopes their numbers are relatively few.

The second part is far more debatable, as I have said, but also, and not coincidentally, far more interesting. To evaluate *The Invisible Constitution* as a whole, we need to consider what the two parts together achieve. And to get a clear picture of that, we need to locate it within the realm of constitutional scholarship.

Recently, scholars including myself have turned their focus away from arguing for or against particular propositions of constitutional law and towards the task of identifying different kinds of propositions.[31] They distinguish, for instance, between statements that reflect the *meaning* of the Constitution and statements that articulate *doctrine* courts use to implement that meaning.[32] For example, one might suppose that the Equal Protection Clause embodies the meaning that government decision-makers must weigh the interests of all affected people equally when considering some policy. One could then evaluate Equal Protection doctrine such as the tiers of scrutiny in terms of how well it serves the purpose of implementing this meaning.

31. For a survey of the scholarship, see Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 3–9 (2004).

32. *See* ROOSEVELT, *supra* note 26, at 37–47.

On its face, *The Invisible Constitution* falls into this increasingly popular category of constitutional taxonomy. But it does so in a very ambivalent way. Tribe's purpose in the first part is not to argue that it useful to distinguish between visible and invisible propositions of constitutional law. Indeed, it is almost the opposite. Tribe comes to praise the invisible Constitution and by the same token to bury the visible/invisible distinction. His argument is that the distinction matters much less than some would have you suppose.

In this he is certainly right. One might think that the invisible Constitution differs dramatically from the written one. One might think that it is, for instance, more malleable (because text constrains judges), less legitimate (because it was never ratified), and harder to identify (because it is invisible). But it turns out that the invisible Constitution is not actually very different on these criteria. This is largely because the visible Constitution is less constraining, less legitimate, and less easy to identify than is commonly supposed.

Text can constrain, of course, and sometimes it does. But many very important pieces of text, such as the First Amendment or the Equal Protection Clause, constrain very little. They operate, as Jack Balkin has put it, as frameworks that create a space for future generations to argue about the specific applications of general concepts.[33] They do not constrain to the extent of dictating right answers to difficult constitutional cases, and they were probably not intended to. Furthermore, when the Court wants to, it can run against the text for quite a ways—consider its sovereign immunity jurisprudence, or the *Slaughterhouse Cases*' interpretation of the Privileges or Immunities Clause.

Construction of the invisible Constitution, by comparison, operates under the same constraints that are most significant with respect to interpretation of the visible one. There are the professional norms of judges, their education, and the appointment process, which ensures that courts eventually come around to majority opinion.[34]

As for legitimacy, the legitimacy of the written Constitution is easy to overstate. The historical act of ratification is famously

33. *See* J.M. Balkin, *Framework Originalism and the Living Constitution*, NW. U. L. REV. (forthcoming 2009).

34. *See* J.M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 516 (2007).

difficult to translate into a present consent of the governed[35]; it was illegal under the Articles of Confederation[36]; and the Reconstruction Amendments are likewise procedurally less than pure.[37] If that is not enough, there is the fact that the doctrine doing the work in deciding cases was never ratified by the People at all; it was created by judges.

The legitimacy of the invisible Constitution is, from one perspective, enhanced by its apparent malleability. It offers a vehicle for nonjudicial and even nongovernmental actors to argue about constitutional meaning, about the core commitments of the American people. Creating a space for such argument is one of the main things the Constitution does, and it is by engaging in these arguments that each generation makes the Constitution its own.[38]

Last, the ease of identifying the visible Constitution is complicated by the fact that the textual Constitution does so little. Without doctrinal glosses on the text, the words of the Constitution will not resolve many cases, at least not many interesting ones. And there is even some dispute about which amendments were validly ratified—about the Reconstruction amendments, as noted above, and also about the Twenty-Seventh.[39]

In comparison, the invisible Constitution is just as easy to identify: generally speaking, one need only read Supreme Court opinions or the lintels of federal buildings. That is harder than reading the Constitution, but again, reading the Constitution will not tell us whether flag burning or nude dancing are protected by the First Amendment. We will need to consult the Supreme Court, or some other authority, to understand the text.

This is not to say that there are no differences. The invisible Constitution, generally speaking, is probably on average more malleable and less permanent than the visible one. People disagree about what America stands for, and it is to show that these disagreements have been resolved, at least partially, that we write things down. Winners write not just history but also constitutional amendments, as Reconstruction demonstrates.

35. For a survey of "dead hand" arguments, see Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606 (2008).

36. *See, e.g.,* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 41 (1991).

37. *See, e.g.,* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 99–252 (1998).

38. *See* Balkin, *supra* note 26, at 302.

39. *See generally* Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497 (1992).

When we are dealing with potentially contested propositions, then, it actually does matter whether they are visible or invisible. For one thing, some visible propositions simply cannot be contested; they are too clear. Many people oppose the Electoral College, to take one example, or limiting presidential eligibility to "natural born" citizens, to take another.[40] But no one argues that these are not features of our Constitution, and no one thinks that they can be removed without amendment. They are uncontested not because they are uncontroversial but because they are undeniable. (It is interesting, in this light, that the Reconstruction Republicans felt no need to add an amendment providing that no state may secede from the Union—perhaps sometimes the sword is mightier than the pen.)

Less clear visible propositions can of course be undermined or thwarted by determined judges. We have seen this happen with the Privileges or Immunities Clause, and arguably the Second Amendment as well. But there is still a difference, and here "invisible" is the *mot juste*. When the Court negates a textual provision, it can erase the clause in practical terms. But it cannot do so literally. There is evidence of the crime; the body remains behind, and there is always the possibility, however dim, of resurrection. Many people wait for the return of the Privileges or Immunities Clause, and the Second Amendment stirs again even now—indeed, the two clauses could be revived together, if the former becomes the preferred vehicle for incorporating the latter against the States.[41] Invisible propositions can be more cleanly wiped away. They may linger in dusty volumes of the U.S. Reports, but invisible propositions (consider those of *Lochner*) can be dismissed as heresy, which neglected clauses cannot.[42]

Still, these are differences of degree, rather than kind. Tribe is right that the visible/invisible distinction does not mean much. Knowing that a particular proposition of constitutional law is invisible, rather than visible, tells us almost nothing about it. We do not know whether it is substantive or interpretive, important

40. For a more complete listing of (what some people think are) objectionable constitutional provisions, see WILLIAM N. ESKRIDGE, JR. & SANFORD V. LEVINSON, CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES (1998).

41. *See* District of Columbia v. Heller, 554 U.S. —-, 128 S. Ct. 2783 (2008).

42. Text, as Richard Primus puts it, is highly "mobilizable" in the service of argument, while invisible propositions are less so. *See* Richard A. Primus, *Judicial Power and Mobilizable History*, 65 MD. L. REV. 171, 184–85 (2006).

or trivial, contested or uncontested, legitimate or illegitimate, true or false.

But given that the visible/invisible distinction is not especially significant, it is not clear that it is worth trying to catalogue distinctive modes of construction for the invisible Constitution. The second part of the book, which does so, is thus in some tension with the first, and indeed not all of its modes are best described as specifically dedicated to the invisible Constitution.

The solution, of course, is to expand the focus. If the visible/invisible distinction is not particularly helpful, let us abandon it. We can use *The Invisible Constitution* as a ladder, to be kicked away once we have ascended. We should consider modes of construction more generally. We should focus on distinctions that are useful (I think doctrine vs. meaning is a promising one). We should investigate the content of the Constitution as a whole.

Tribe has suggested in conversation that such is indeed his plan. The resulting book would not be called *The Invisible Constitution*. It would be called *The Constitution*, or perhaps *Constitutional Law*. *American Constitutional Law*, even. I do not mean the second volume of the third edition; I am ready to give up hoping for that. This book would not describe the lay of the land; it would take the field in the struggle over the content of the Constitution. It would be a synthetic presentation not of the Court's understanding, but of Tribe's. Many readers would like it better.