Laurence H. Tribe

Constitutional Choices

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For Kerry and Mark

May they choose well

PREFACE

Constitutional choices must be made; to all of us belongs the challenge of making them wisely. We make them at many levels and in many ways. Judges must make them whenever choosing among alternative interpretations of the Constitution. Presidents and governors make them whenever choosing among judicial nominees of differing constitutional perspectives. Legislators must make such choices in confirming or rejecting these nominees, in voting for or against measures challenged as constitutionally infirm, and in proposing or disposing of possible constitutional amendments. As lawyers or as scholars, all of us must make constitutional choices in the cases and causes we argue, in the constitutional viewpoints and principles we espouse or reject, and in the stands we take upon learning of the decisions made by others. Such choices must be made as well by government bureaucrats charged with implementing the law, by writers who describe contemporary society, by historians who construct and reconstruct our past, by voters when they decide who will exercise the power to appoint our judges, and by all of us as we challenge or defend prevailing practices in the Constitution's name—whether as victims of those practices, as perpetrators of what others call injustice, or as those who think of themselves as neutral observers.

The Constitution is in part the sum of all these choices. But it is also more than that. It *must* be more if it is to be a source either of critique or of legitimation. Thus, just as the constitutional choices we make are channeled and constrained by who we are and by what we have lived through, so too they are constrained and channeled by a constitutional text and structure and history, by constitutional language and constitutional tradition, opening some paths and foreclos-

ing others. To ignore or defy those constraints is to pretend to a power that is not ours to wield. But to pretend that those constraints leave us no freedom, or must lead us all to the same conclusions, is to disclaim a responsibility that is inescapably our own.

I write in part out of a conviction that constitutional choices, whatever else their character, must be made and assessed as fundamental choices of principle, not as instrumental calculations of utility or as pseudo-scientific calibrations of social cost against social benefit —calculations and calibrations whose essence is to deny the decision maker's personal responsibility for choosing. The point deserves particular emphasis at a time when the Supreme Court, long our nation's principal expositor of the Constitution, is coming increasingly to resemble a judicial Office of Management and Budget, straining constitutional discourse through a managerial sieve in which the "costs" (usually tangible and visible) are supposedly "balanced" against the "benefits" (usually ephemeral and diffuse) of treating constitutional premises seriously,[1] and in which proposed constitutional rulings are examined less within a judicious framework of first principles than within a bureaucratic framework that asks only what each possible decision would add to, or subtract from, the decision maker's latest step.[2]

My reply to this grim metamorphosis of constitutional argument into a deferential adjunct of executive administration is not to propose an alternative method: the very idea of "method," with its illusory suggestion of the precise and the systematic, is mostly an outgrowth of technocratic thought and practice and is thus the antithesis of humane struggle with those commitments and visions that are the stuff of genuine constitutionalism. My reply to the trend I see in the Supreme Court's work is therefore not to propound any competing formula, but to proceed instead in a spirit that questions all formulas as devices for concealing the constitutional choices that we must make—and that we cannot responsibly pretend to "derive" by any neutral technique.

This book is about our making of such constitutional choices. It does not offer a theory of choice; rather, it is an experiment in choosing. By describing and analyzing, by advocating and criticizing, a range of constitutional choices across a spectrum of constitutional contexts, I hope to enrich our understanding of what the Constitution is and what it might be. This book seeks to achieve that goal by collecting a series of essays in constitutional law. The studies are meant to be

largely self-contained, but loosely connected; the whole will, I hope, add up to more than the sum of its several parts.

Although the sixteen essays fall naturally into three groups of chapters ("The Nature of the Enterprise," "The Separation and Division of Powers," and "The Structure of Substantive Rights"), the basic problems the essays address cut across the boundaries separating the essays into those three categories. In particular, the dangerous allure of proceduralism (chapters 1, 2, 3, 5, and 8), the paralyzing seduction of neutrality (chapters 1, 2, 13, and 15), and the morally anesthetizing imagery of the natural (chapters 4, 14, 15, and 16) are subjects not confined within a particular section.

Likewise, the hidden (and sometimes not-so-hidden) tilt of various constitutional doctrines toward the perpetuation of unjust hierarchies of race, gender, and class (chapters 5, 8, 12, 13, 14, 15, and 16) is the subject of part II almost as much as of part III. And the potential of various forms of constitutional argument to deflect judicial responsibility for crucial substantive choices onto external circumstances or remote actors unites many of the essays in all three parts of this collection (chapters 1, 2, 4, 5, 6, 10, 11, 15, and 16).

These essays touch both on enduring constitutional themes and on such contemporary matters as the Equal Rights Amendment (in chapters 3 and 15), a Human Life Amendment or Statute (in chapters 3 and 5), a Balanced Budget Amendment (in chapter 3), the War Powers Resolution (in chapter 6), regional banking (in chapter 10) and arbitrage bonds (in chapter 11), the contract rights of public bondholders and private pension beneficiaries (in chapter 12), and the implications of new medical technology for the abortion controversy (in chapter 15). Some of the essays in each part of this volume were inspired by problems I encountered in preparing congressional testimony (chapters 3, 4, 5, and 15), in consulting with particular clients (chapters 10 and 11), or in working on specific cases (chapters 3, 10, and 16). Most were inspired to some degree by puzzles I encountered in the course of teaching and reflecting on the evolution of constitutional law generally.

Living with the Constitution as an advocate and participant in various controversies—and so thinking about possible strategies of constitutional litigation and argument—has enriched my sense of what questions are worth asking, how questions that courts might wish to evade might be recast to make them less avoidable, and what might count as decent answers.

Much of what constitutional scholars write these days either focuses so closely on constitutional doctrine, or looks to matters so distant from doctrine, as to bear no real resemblance to *doing* constitutional law—to constructing constitutional arguments and counterarguments or exploring the premises and prospects of alternative constitutional approaches in concrete settings. Such constitutional *problem solving*, I recognize, is in less academic vogue nowadays than is discussion of constitutional *voice*: what it means for judges to expound the Constitution, how the vulnerability of judges relates to their authority, why their pronouncements succeed or fail in winning respect. Although such issues recur in the essays that follow, the core of my concern is the making of constitutional law itself—its tensions and tendencies; its puzzles and the patterns they make; its limits as a form of activity; in a word, its horizons.

Making those horizons more clearly visible, more amenable to understanding and critique, is my central aim. If I succeed in evaporating a cloud here or a layer of mist there and, thus, in displaying more lucidly a broader span of the constitutional horizon and its curvature, this volume will have achieved most of what I hoped to accomplish by writing it.

The treatise I published in 1978, *American Constitutional Law*, represented a more global effort; it was an attempt to roll the constitutional universe into a ball and show it as a unified whole. Although I do not at all regret that effort, and am in fact at work on a second edition that I hope will improve as well as update the first within a few years, time and events have replaced many of my certitudes with doubts, leaving me quite happy to defer a revised synthesis a while longer.

Publishing these essays in the meantime, rather than reducing and polishing them into pieces of that more comprehensive later work, has been a liberation for me. I would not wish to squirrel the essays away until they can be folded into a larger study, one in which they fit elegantly but no longer reflect my freshest thoughts on the issues they seek to treat. I would rather publish them now—rough edges only partly trimmed and links only tentatively forged—in the season of their completion.

Four of the essays in this collection and parts of two others have been published elsewhere in a slightly different form. Chapter 2 appeared as "The Puzzling Persistence of Process-Based Constitutional

Theories," 80 *Yale L.J.* 1063 (1980). Chapter 3 appeared in part as "A *Constitution* We Are Amending: In Defense of a Restrained Judicial Role," 97 *Harv. L. Rev.* 433 (1983). I first expressed some of the ideas in that essay in a lecture at the University of Washington Law School in October 1979 and developed others in an unpublished essay written jointly with William Fisher, J.D., Harvard Law School, 1982. I thank the students and faculty at the University of Washington, my new colleague Professor William Fisher, and David A. Sklansky, J.D., Harvard Law School, 1984, for helpful discussion of some of these ideas.

Chapter 4 consists substantially of the text of the Harris Lecture delivered on March 21, 1983, at the Indiana University Law School in Bloomington, published as "Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence," 57 *Indiana L.J.* 515 (1982). For that essay I owe much to Professor Kathleen Sullivan, J.D., Harvard Law School, 1981 (then my student, now my colleague); John M. Bredehoft, J.D., Harvard Law School, 1983; William C. Foutz, Jr., J.D., Harvard Law School, 1983; and James A. Kirkland, J.D., Harvard Law School, 1984. Chapter 5 expands on my testimony before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee, June 3, 1981, which was read into the Congressional Record by Senator Gary Hart of Colorado (127 Cong. Rec. S.6780 [daily ed. June 23, 1981]) and was published as "Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts," 16 *Harv. C.R.-C.L. L. Rev.* 129 (1981).

Chapter 6 appeared as "The Legislative Veto Decision: A Law By Any Other Name?" 21 *Harvard Journal on Legislation* 1 (1984). For research assistance on earlier versions of this analysis I am indebted to Brian Koukoutchos, J.D., Harvard Law School, 1983, and Thomas Rollins, J.D., Harvard Law School, 1982. Chapter 14 appeared in part as "Perspectives on Bakke: Equal Protection, Procedural Fairness, or Structural Justice?" 92 *Harv. L. Rev.* 864 (1979).

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J.D. '83; on Chapter 14, Brian Koukoutchos; on Chapter 15, Joan I. Greco; and on Chapter 15, William A. Hunter and Brian Koukoutchos.

For overall assistance in bringing these essays together as a book, I am deeply indebted to the persistent and insightful help of William A. Hunter, now a member of the Vermont State Senate. Will's perceptiveness and patience should stand him in good stead as he moves along what I am confident will be a progressive political trajectory.

For helping me to recognize that there really is a book here and not simply a series of related essays, I thank my wife, Carolyn, and my friend Robert Shrum. And finally, for the intellectual ferment and challenge that made this book possible, I thank my colleagues and students at Harvard Law School.

CONTENTS

PART III
THE STRUCTURE OF SUBSTANTIVE RIGHTS

I

THE NATURE OF THE ENTERPRISE

CHAPTER ONE

THE FUTILE SEARCH FOR LEGITIMACY

Saying anything at all about how constitutional choices in general might be validated as "legitimate" even if controversial seems nearly pointless these days; that is not this book's agenda. When it comes to legitimacy, all has been said already, and what has been said is all so deeply riddled with problems that it seems hardly worth restating, much less refuting or refining.

Who could disagree that constitutional decisions—choices among competing constitutional arguments and meanings—ought to, and necessarily do, represent something less whimsical and personal than the unconstrained "will of the judges"?[1] Yet who could believe that constitutional decisions and choices might reflect anything as external and eternal, impersonal and inexorable, as the "will of the law"?[2] For starters, anyone who claimed to *know* what the "will of the law" was on such troubling matters as the reflection of biological differences in legal categories or the relationship among children, parents, religious authorities, and political communities or the imposition of uniform federal standards on state and local government structures would properly be suspected of megalomania. And anyone who claims to know what the "will of the law" is on such even more perplexing matters as the relations among representative government, majority rule, minority status, and individual rights in our political system is likely to invite only polite chatter followed by prolonged inattention.

Yet I do not mean to play the cynic or the legal nihilist. I am neither. In truth, just as I am not writing for those who feel confident that canons of appropriate constitutional construction may be convincingly derived from some neutral source, so I am also not writing for those

who have convinced themselves that "anything goes" as long as it helps end what they see as injustice; that constitutional law is only a legitimating mask for what those in power can get away with; or that it is only a tame language in which those who might otherwise foment violent revolution can couch their demands in forms the regime might accept without losing face.

No one who is persuaded that the categories of constitutional discourse, or of law generally, are readily rendered determinate and certain—and no one who believes that those categories are inherently empty, infinitely malleable, and ultimately corrupt—need read any further. For all the writing and work I do ventures repeated acts of faith that more is at stake than that; that constitutional interpretation is a practice alive with choice but laden with content; and that this practice has both boundaries and moral significance not wholly reducible to, although never independent of, the ends for which it is deployed.

The customary gambit in attaching such moral significance to the enterprise of construing and enforcing the Constitution is to propound normative criteria for how that enterprise may legitimately be conducted—criteria of fidelity to constitutional text, to some sort of contemporary or historical consensus about meaning and purpose, to the preservation of some version of representive government thought to be implicit in the Constitution, to the defense of rights perceived as implicit in some distinctly American vision, or to any of a number of other suggested ideals. Those who struggle to ground anything as complex as judicial review in any such more deeply secure foundation seem to me destined to leave us, and themselves, unsatisfied—caught in an infinite regress in which each reply (say, "Because that is what the framers intended") begets but deeper questions about why the reply should count as an answer at all (as in, "Why should their mere intentions matter?").

So this is not a book proposing still more such criteria or even discussing previously advanced criteria of this sort in any great detail. Nor is this a book purporting to describe the forces of politics and culture that in fact *do* tend to constrain the constitutional enterprise as conducted by the various institutions that play a role in its evolution. Whatever light these essays cast on issues of that sort will at best be indirect—a light derived from one observer's efforts not to make constitutional law seem worth doing but simply to illuminate the choices involved in actually doing it.

5
THE FUTILE SEARCH FOR LEGITIMACY

I would be less than candid if I did not admit at this point that my reasons for proceeding in this way include one that is fairly personal: it's what I think I can do best. But I am also moved, I genuinely believe, by a sense of the ultimate futility of the quest for an Archimedean point outside ourselves from which the legitimacy of some form of judicial review or constitutional exegesis may be affirmed.

Even if we could settle on firm constitutional postulates, we would remain inescapably subjective in the application of those postulates to particular problems and issues. For, at *every* level of constitutional discourse—from controversy about which forms of argument (if any) "trump" others (does evidence of framers' intent trump inference from constitutional structure?), to controversy over the existence and nature of the overall mission (if any) of the Constitution (is it to enhance democracy or secure dignity? is it to encourage reform or preserve continuity?), to dispute over the meaning of particular constitutional phrases (what is an "unreasonable search or seizure" or "cruel and unusual punishment"?)—there is no escape from the need to make commitments to significant premises. And these may be premises that others do not share and that no one can claim to have "discovered" in a privileged place external to the disputants themselves and insulated from who they are and what groups they belong to.

Anyone who insists, for instance, that "fidelity to text" must be the core commitment of a constitutionalist must confront the indeterminacy of text and must justify giving to one or another vision of language such binding force over our lives. And anyone who argues that the only values courts may properly impose without fairly direct (how direct?) textual support are those of improved political representation[3] must make a choice no less "subjective" and contestable than one who insists upon the protection of personal dignity or the fulfillment of American ideals[4] as the only suitable lodestars for the mission of extratextual review.

That all of these supposedly distinct visions are collapsible into one another[5] vividly illustrates the subjectivity of the task of selecting and applying them. Worse, all of these visions presuppose a readily understood method or metric for measuring the relative distance between various proposed values or norms and whatever is supposed to count as the noncontroversial core of constitutional claims—the document's text, say, or the plain intent of the framers. Norms that are not close enough to this core, and only such norms, need meet the special demands such theories posit: for each theory, there exists a set of sub-