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BOOK REVIEW

AMERICAN CONSTITUTIONAL LAW. By Laurence H. Tribe.
The Foundation Press, Inc., 1978. Pp. lxix, 1202. Price \$22.50.

ROBERT F. NAGEL†

Like Walt Whitman's *persona* in "Song of Myself," Professor Tribe's long-awaited treatise contains multitudes; any particular description can be contradicted by some aspect of the book. *American Constitutional Law*¹ is an innovative effort to infuse moral advocacy into legal scholarship, but it is also, in many places, a rather traditional hornbook.² Although the book is generally accurate and often brilliant, its treatment of some issues is misleading and limited.³ Tribe's writing is overtly opinionated and judgmental but

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¹ L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978).

² On the whole, the treatment of structural issues—for example, the chapters on the judicial power, the executive power, the legislative power, and the limits of state and local power—is more traditional than the treatment of substantive issues—for example, the equal protection clause. The more traditional sections will probably receive less public attention but are often excellent.

³ No real effort is made to deal at length with some issues, such as the anti-majoritarian difficulty and the relevance of institutional factors. Tribe states at the outset that he "will proceed on the premise of a relatively large judicial role more because it has become an historical given than because any ineluctable logic would have made an alternative course of history unthinkable or patently unwise." L. TRIBE, *supra* note 1, at 13. The limited treatment of other issues seems to have resulted from the certainty of Tribe's views. For example, Tribe declares that there is "little to be said" for the decision in *Bakke v. Regents of Univ. of Cal.*, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *aff'd in part, rev'd in part*, 98 S. Ct. 2733 (1978). L. TRIBE, *supra* note 1, at 1048. Similarly, "little can be said in reply to Justice Marshall's" dissenting comment in *Milliken v. Bradley*, 418 U.S. 717, 814-15 (1974), to the effect that the decision might lead to urban residential segregation. L. TRIBE, *supra* note 1, at 1042. (Of course, a great deal has been said in favor of the *Bakke* result; and substantial research has been done on the question whether demands for school desegregation might themselves be creating housing segregation. See generally Rossell, Ravitch & Armor, *Busing and "White Flight,"* 53 PUB. INTEREST 109 (1978). Discussion of other issues is limited by Tribe's emphasis on imaginative interpretations of cases over more traditional explanations. It is doubtful that the student reading Tribe's discussion of *National League of Cities v. Usery*, 426 U.S. 833 (1976), will come away with much awareness of the connections between that decision and the inter-governmental immunity cases. L. TRIBE, *supra* note 1, at 308-18. Ruth Bader Ginsburg has expressed puzzlement at Tribe's "extravagant . . . treatment" of this case, which he interprets as silent support for a "theory of individual rights to certain basic services exercisable against state and local governments." Ginsburg, Book Review, 92 HARV. L. REV. 340, 344 (1978).

also strives for even-handed evaluation.⁴ His analyses are useful and provocative but will also be impenetrable and treacherous for the uncritical student or judge.⁵ Although usually honest, the book

The book is rarely misleading in its substantive treatment of major constitutional concepts. (An exception is the unfortunate failure to distinguish between the concepts of constitutional balance, which emphasizes interference and function-blurring among the branches of government, and separation of powers, which emphasizes independence and abstract functional differentiation. See M. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 315-50 (1967).) But Tribe's frequent use of adjectives in describing specific issues can be misleading. For instance, he states that the law is "clear" that full procedural protections are required before a prisoner can be given "aversive conditioning." The footnotes, however, point only to a student note and two lower court opinions that preceded the major Supreme Court decisions dealing with procedural due process in the prisons. L. TRIBE, *supra* note 1, at 912 nn.8 & 9.

Finally, it is both limited and misleading to use adjectives to divert attention from analytical difficulties. Tribe considers it merely "paradoxical" that constitutional objections to coercive prison therapies increase in direct proportion to the therapeutic value of the treatment. *Id.* 911-12. A difficulty with Tribe's position that disenfranchisement of prisoners should be constitutionally impermissible is labeled a "subliminal tension." *Id.* 772 n.5.

⁴ Tribe is fair enough to criticize his own prior defense of *Roe v. Wade*, 410 U.S. 113 (1973). L. TRIBE, *supra* note 1, at 928. He expresses doubts about the wisdom of defining constitutional "rights of personhood," a concept used throughout the book. *Id.* 892. Tribe even admits doubts about the "modern tendency" to treat each constitutional provision as "a set of values whose internal structure may be coherently elucidated." (He adds, with some understatement, that it is "difficult not to indulge the modern tendency.") *Id.* 463. At certain points in the book, he makes imaginative efforts to view cases sympathetically from the perspective of their historical period; for such a treatment of *Lochner v. New York*, 198 U.S. 45 (1905), see L. TRIBE, *supra* note 1, at 439.

However, many of Tribe's efforts at even-handedness are strained. He lukewarmly praises a dissent that argues that the burden of proving frivolity in federal *in forma pauperis* actions should not rest with the government as "not completely unpersuasive." *Id.* 1104. The Burger Court is somewhat grudgingly described as "not without its own elements of decency and concern." *Id.* 1135. Such faint efforts at even-handed assessment should be contrasted with the uncategorical and even condescending tone of many of his evaluations: for example, his statements that a color-blind equal protection standard would be "fundamentally misguided," *id.* 1048, and that the majority in *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973), is "to be commended for achieving a significant degree of surface plausibility." L. TRIBE, *supra* note 1, at 1122.

⁵ The book will be difficult to use for a number of reasons. First, evaluative material is often presented in an overview format before the cases are described, so that the reader is given Tribe's viewpoint before he has seen the material with which he can assess the validity of those opinions. Second, the book is packed with cross-references; a full understanding of particular chapters will be difficult without some familiarity with other chapters or even the whole book. For example, first amendment principles are cross-referenced with the pregnancy disability equal protection cases in an attempt to show that both doctrines rest on values such as the promotion of "breathing space" and "room for freely chosen role change." *Id.* 1074. Third, the order in which some material is presented will create difficulties. For example, state action is covered last, and rights of political participation (including many equal protection cases, of course) are covered before equal protection. Finally, some of the material is simply hard to follow. Particularly obscure, I thought, were part of the discussion of *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), L. TRIBE, *supra* note 1, at 988-89, the chapter on Model VII, "Structural Justice," *id.* 1137-46, and the chapter on state action, *id.* 1147-74.

is also sometimes propagandistic.⁶ Occasionally suggestive of radical ideology, Tribe's positions can also be politically moderate.⁷ Like Whitman's writing, Professor Tribe's is exuberant, detailed, innocent, momentous, and even silly in places.

Of the many characteristics of this large and sophisticated book, I wish to single out one for attention here. Although Tribe's arguments can be exotic—even mystical⁸—and although some of his specific positions are not conventionally accepted, one of the most important aspects of this book is the extent to which it forcefully and openly exploits an approach to constitutional law that is widely shared by judges and legal scholars. This approach, which will be described in section I, assumes that constitutional law is fundamentally the application of reason to public issues; it attempts to create from the lawyer's skill of intelligent, conscious argumentation a moral charter capable of ordering almost any aspect of human conduct. Because Tribe is so able and enthusiastic in presenting a comprehensive synthesis of the methods and products of this approach, he unwittingly reveals the quixotic habits of thought upon which the increasingly pervasive influence of constitutional law rests. To the extent that *American Constitutional Law* powerfully captures—even, perhaps, caricatures—the essence of the

⁶ The recurrent arguments that doctrine should not be used to hide underlying moral judgments were especially honest and useful. See, e.g., *id.* 571-74, 890-92, 991. However, Tribe's use of adjectives is frequently propagandistic. For example, the one-man, one-vote principle is described as a "straightforward notion." *Id.* 740. See also note 3 *supra*. Moreover, Tribe occasionally offers gratuitous examples of cultural bias. It is "clear" to him that "many of the concerns expressed by opponents [of the Equal Rights Amendment] are exaggerated, and that much opposition . . . derives from an unwillingness to accept those new responsibilities which may accompany the . . . new rights." L. TRIBE, *supra* note 1, at 1075. Tribe also opines, "[the] suppression of the obscene persists because it tells us something about ourselves that some of us, at least, would prefer not to know." *Id.* 669.

⁷ For example, Tribe offers a tolerant assessment of the Burger Court's performance in protecting the constitutional rights of the poor:

The vision animating this mix of aspirations is plainly not an egalitarian one, but it is not without its own elements of decency and concern; whatever the doctrinal strains, the Burger Court will not refuse lifelines to those about to drown, even if it will throw them from a point perched safely above the disquieting signs of distress—a point from which the struggle to survive may not always be visible at all.

Id. 1135 (footnote omitted). He also shows a certain amount of sympathy for the rights of communities to control their members for "moral" purposes. *Id.* 898.

⁸ See, e.g., Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1974). In the treatise, the same characteristic appears in Tribe's rather grand formulations of constitutional values, see text accompanying notes 14-22 *infra*, and in his insistence that those values represent a "shared social vision," see note 56 *infra*. Romanticism is not inconsistent with Tribe's "rationalism," the characteristic emphasized in this Review. See notes 60 & 67 *infra*.

modern enterprise of the same name, the book should seriously embarrass the enterprise. The effort to establish a virtuous social order by the force of intelligence, exercised by an elite of lawyer-philosophers, represents a dangerously narrow view of the governmental process. If the book gives pause to some of the lawyers, judges, and scholars who are busily engaged in exercising and rationalizing their own disproportionate influence on the nation's affairs, it will have accomplished an unintended but useful result.

I. TRIBE AND CONSTITUTIONAL RATIONALISM

Some of the trappings of the book push a modernistic intellectual style past what can be taken seriously. Does modern rationalism honor experimentalism? Then the venerable "antimajoritarian difficulty" may be dealt with by a delphic account of a key-pecking experiment on pigeons that tends to show that pigeons, at least (how suggestive!), can be taught to delay gratification.⁹ Does mathematics connote intellectual rigor? Then simple diagramming may be labeled "triangulating,"¹⁰ and the process of defining acceptable legislative objectives may be described as arriving at an "acceptable set of [the] allowable definitions of harm";¹¹ even the future course of human progress can be plotted, making "the trajectory of change . . . apparent."¹² Is scientific theorizing dependent on model-building? Then constitutional law may be organized around descriptive categories impressively called "models."¹³ Is psychology stylish and even (perhaps) scientific? Then the first amendment protects the "right to shape the 'self' that one presents to the world"¹⁴ and the right to limit "life's informational traces."¹⁵ Do the sciences, at the edges of their development, employ strange, provocative terminology such as the term "anti-matter" in modern physics? Then modern constitutional theory must have "anti-doc-trine."¹⁶

⁹ L. TRIBE, *supra* note 1, at 10.

¹⁰ *Id.* 112.

¹¹ *Id.* 981. See also *id.* 938-41, 975.

¹² *Id.* 1138.

¹³ The book divides constitutional law into seven categories: "The Model of Separated and Divided Powers," "The Model of Implied Limitations on Government," "The Model of Settled Expectations," "The Model of Governmental Regularity," "The Model of Preferred Rights," "The Model of Equal Protection," and a "Model of Structural Justice."

¹⁴ *Id.* 966.

¹⁵ *Id.* 974.

¹⁶ *Id.* 1149.

This overlay of fancy terminology is only stylistic and—aside from the possibility of implying a false similarity between law and science—would seem to be only a matter of taste. However, these trappings are also suggestive of a deeper and more widely shared defect: an over-estimation of the place of rationalism in government.

Modern constitutional analysis is sophisticated. Constitutional text and history are almost never decisive; they provide only a starting point for moral discourse by lawyers and judges on the appropriateness of the possible rules of law. The moral argumentation, however, is (usually) not divorced entirely from the Constitution. The preferred method of analysis is to examine text, history, political theory, social facts, and other sources in order to identify a value that should be accorded constitutional status. Because constitutional significance is not tied to specific language or history, the value is necessarily both important and vague; hence, almost any issue can have constitutional dimensions, and the value alone cannot explain case outcomes. The value is tied to the facts of cases by an intricate structure of intermediate doctrine that is announced and modified in the case law. The doctrines are sufficiently complicated and elastic to permit adaptation to changing social or moral conditions and to allow for a degree of outcome determinativeness. Constitutional analysis, then, involves the articulation of basic social values and the manipulation of doctrine; in this manner, specific decisions can be legitimized by reference to basic rules that have been consented to by hypothesis and to intermediate doctrines that gain their moral authority from the development of case law and from rational explanation.

Professor Tribe's analyses illustrate, with a vengeance, the freedom and significance that characterize constitutional argument in such a system. In Tribe's view, the values protected by procedural due process (the "primary encounter with the decisionmaker"¹⁷) are nothing less than "personal dignity and autonomy"¹⁸ and "the minimization of subservience and helplessness."¹⁹ The right of association should be understood as "facilitating the emergence of relationships that meet the human need for closeness, trust, and love . . . without which there can be no hope of solving the persistent problem of autonomy and community."²⁰ Equal protection

¹⁷ *Id.* 557.

¹⁸ *Id.* 560.

¹⁹ *Id.*

²⁰ *Id.* 988.

prevents the imposition of "traditional roles,"²¹ and ultimately preserves "equality and autonomy."²² The first amendment protects those choices that constitute an "individual's psyche."²³ In short, the various preferred rights should be described at no less a level of generality than that of protections of "personhood,"²⁴ of "the essence of personality,"²⁵ of "the essential dignity and worth of every human being,"²⁶ and of "the elements of being human."²⁷ If these constitutional objectives sound romantic, Tribe makes an impressive case that the Supreme Court consciously seeks traces of grand values in constitutional provisions and then explodes the meaning of those provisions so that they stand for the grand value itself.

As Tribe demonstrates, constitutional values are stated at exalted levels of abstraction partly because modern sophistication, having liberated judges from the confines of text and history, has liberated constitutional values from specificity as well.²⁸ The exalted nature of the values is also a corollary to assumptions about constitutionalism itself: the Constitution, Tribe and others suggest, necessarily must address the most serious public concerns, and must achieve a result that can be seen as virtuous in order to be worthy

²¹ *Id.* 1068.

²² *Id.* 1012.

²³ *Id.* 910.

²⁴ *Id.* 914.

²⁵ *Id.* 892.

²⁶ *Id.* 969 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

²⁷ *Id.* 574.

²⁸ For an example of the treatment of history, see Tribe's account of the meaning of the religion clauses. *Id.* 813, 814 n.5, 815. More generally he explains:

Both the Court and various commentators have explored the historical background of the first amendment in order to guide interpretation of the two religion clauses, but here as elsewhere, "too literal [a] quest for the advice of the Founding Fathers" is often futile. The historical record is ambiguous, and many of today's problems were of course never envisioned by any of the Framers. Under these circumstances, one can only examine the human values and historical purposes underlying the religion clauses to decide what doctrinal framework might best realize those values and purposes today.

Id. 816 (footnotes omitted).

Tribe does not ignore the value of textual analysis, but states that it "invites . . . collaborative inquiry . . . into the contemporary contents . . . of freedom, fairness, and fraternity." *Id.* 566. Ultimately, Tribe finds not only history and text, but also doctrine, philosophy, sociology, religion, and astronomy insufficient bases for constitutional interpretation—proper results can be achieved only by rational analysis of consequences. See *id.* 890-91.

of its fundamental status.²⁹ Any "imperfections" in the document must be remedied by interpretation.

If a value is stated abstractly enough, it will have broad relevance to human affairs, important or petty. As Tribe demonstrates, American constitutional law is becoming pervasive; it does not necessarily decide all issues, but almost all issues must at least be subjected to constitutional analysis. The Constitution influences decisions about the details of aid to parochial schools,³⁰ almost any aspect of the political process,³¹ school dress codes,³² ombudsmen,³³ psychiatric treatment,³⁴ motorcycle helmets,³⁵ the distribution of wealth,³⁶ sexual preferences,³⁷ beer-drinking,³⁸ hair length,³⁹ dying,⁴⁰ family life⁴¹—the list is virtually endless.

Neither Tribe nor modern judges are so naive as to believe that grandly stated values can directly determine case outcomes. That the courts have embarked on the "larger enterprise of identifying the elements of being human"⁴² surely does not fully explain why a husband's right to raise a child is less important than a wife's right to abort that child;⁴³ the "deeper concerns of personhood"⁴⁴

²⁹ In discussing *Griswold v. Connecticut*, 381 U.S. 479 (1965), Tribe quotes Professor Charles Black with approval:

If our constitutional law could permit such a thing to happen, then we might almost as well not have any law of constitutional limitations, partly because the thing is so outrageous in itself, and partly because a constitutional law inadequate to deal with such an outrage would be too feeble, in method and doctrine, to deal with a very great amount of equally outrageous material. Virtually all the intimacies, privacies and autonomies of life would be regulable by the legislature

L. TRIBE, *supra* note 1, at 571 (citation omitted).

³⁰ For example, textbooks can be supplied to the pupils (not to the schools), and can be stored on school premises "at times," but projectors, maps, globes, etc. cannot be supplied even to parents. *Id.* 842. Public support can be provided for guidance and various forms of therapy, but such services must be provided off school grounds. However, locations close to the school are constitutionally acceptable. *Id.* 843.

³¹ In this realm, constitutional decisionmaking includes not only such structural considerations as legislative apportionment, but also judgments about how quickly the legislature should respond to demands for change. See note 72 *infra*.

³² L. TRIBE, *supra* note 1, at 958-59.

³³ *Id.* 562.

³⁴ *Id.* 910-13.

³⁵ *Id.* 938-41.

³⁶ *Id.* 1116-35.

³⁷ *Id.* 941-48.

³⁸ *Id.* 1065-66.

³⁹ *Id.* 961-64.

⁴⁰ *Id.* 934-37.

⁴¹ *Id.* 985-90.

⁴² *Id.* 574.

⁴³ *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (holding spousal consent provision of state abortion law unconstitutional).

⁴⁴ L. TRIBE, *supra* note 1, at 650.

have only an obscure relevance to whether Stanley should be prohibited from reading obscenity in his home.⁴⁵ Thus Tribe describes in imaginative detail how the generality of the value and the specificity of the case can begin to be connected by doctrine. The artful use of doctrine helps to bridge the gap, or at least appears to, by posing such questions as whether a group is an ordinary loser in the political process or a "discrete and insular minority";⁴⁶ whether the decisionmakers' motivations were merely dubious or "invidious";⁴⁷ whether a governmental interest is "legitimate" or "compelling";⁴⁸ whether speech is "track one" or "track two";⁴⁹ whether a legislative classification is "suspect," "semi-suspect," or merely "sensitive."⁵⁰ Constitutional values are not absolute, and judges "balance" interests or identify "less restrictive alternatives."⁵¹ Not every issue is finally determined by the Constitution, but every issue can be classified as triggering "mere rationality," "intermediate review," or "strict scrutiny."⁵² The gap between the general value and the specific case is bridged by an avalanche of explanation, the complexity and awkwardness of which Tribe savors even when it is entirely unhelpful: "As we will see . . . , the reference to less restrictive alternatives in the context of facial overbreadth challenges, particularly where government has acted in terms of expressive content and is thus subjected to track-one scrutiny, is essentially conclusory" ⁵³

Prolix constitutional doctrine provides room for maneuvering; while erecting doctrinal explanations, a sensitive eye can be cast on the outcome of the case. That realization appears to add some cynicism to the elaborateness of the moral discourse:

The eventual unfolding of doctrine in this area will confront one methodological problem. . . . Insofar as the right of personhood is limited to liberties long revered as fundamental in our society, it makes all the difference in the world what level of generality one employs to test the

⁴⁵ *Stanley v. Georgia*, 394 U.S. 557 (1969).

⁴⁶ Are users of mind-altering drugs a discrete and insular minority? See L. TRIBE, *supra* note 1, at 908-10, 937. Are homosexuals? See *id.* 944-46; text accompanying notes 54-55 *infra*.

⁴⁷ *Id.* 1028-32.

⁴⁸ *Id.* 791.

⁴⁹ *Id.* 580-84.

⁵⁰ *Id.* 1080, 1090.

⁵¹ See, e.g., *id.* 722, 846, 999 n.17.

⁵² See, e.g., *id.* 1000-60; 1082-97.

⁵³ *Id.* 687.

pedigree of an asserted liberty claim. *Plainly, the history of homosexuality has been largely a history of disapproval and disgrace; indeed, it would not be wholly implausible to suggest . . . that homosexuals form virtually a discrete and insular minority. . . . It is crucial, in asking whether an alleged right forms part of a traditional liberty, to define the liberty at a high enough level of generality to permit unconventional variants to claim protection. . . . The proper question, then, is whether the intimacy of private sexual acts reflects a traditionally revered liberty . . .*⁵⁴

Thus homosexuality becomes one of the traditional liberties; but Tribe, earnest in his argument, denies that this formulation is a "mere concoction for litigation purposes."⁵⁵

Modern constitutional analysis results in a pervasive moral code of the sort one might expect to emerge as the piecemeal product of individual decisions or the elective process. But Tribe assumes that the constitutional code in its abstract form has been consented to, not in that it represents an original social contract, but in that it is a "shared social vision."⁵⁶ In this scheme, the actual constitutional outcome gains its moral force from the exercise of intelligence, from the reasonableness of the court's analysis and explanation in its decision:

Although relevant factors can be identified, neither the artistry nor the archaeology of constitutional doctrine can determine finally the extent to which such a right of personhood, and of enough privacy to develop and function as an individual and to share intimacies with others, can be asserted against governmental control or deliberate governmental indifference. To make sense for constitutional law out of the smorgasbord of philosophy, sociology, religion, history, and even astronomy upon which our humanity subsists, we must turn from absolute propositions and dichotomies so as to place each allegedly protected action, and each allegedly invalid intrusion, in its social context. The inquiry must examine likely results. It must seek out submerged classifications or differential impacts. . . . In each case, it will be necessary to ask: Who

⁵⁴ *Id.* 944-46 (emphasis added).

⁵⁵ *Id.* 946.

⁵⁶ *Id.* 999. Whether the "shared" quality of the vision is an attribute to be measured or is a postulate remains unclear. See Ely, *Forward: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 43-52 (1978).

is being hurt? Who benefits? By what process is the rule imposed? For what reasons?⁵⁷

Constitutional decisionmaking as described and advocated by Professor Tribe has a readily identifiable place in modern intellectual traditions: Professor Michael Oakeshott has described the general approach as "rationalism."⁵⁸ "Rational" conduct, which should not be confused with "sensible" or "efficient" conduct,⁵⁹ is "behavior *deliberately* directed to the achievement of a *formulated* purpose and governed solely by that purpose."⁶⁰ Constitutional rationalism is a variable, free-floating demand that the objectives of policies be consciously articulated, that information concerning the "likely results" of policies be gathered and analyzed, and that the "reasons" for the chosen policies be justifiable.⁶¹

In short, the enterprise of American constitutional law justifies its broad influence on public policy by identifying rationalism with legitimacy, somewhat as the law generally tends to confuse good argument with good policy. No doubt, nearly any system for enforcing constitutional values requires some use of the intellectual methods of rationalism, and the critics of rationalism acknowledge that it has a useful (but limited) place in the formulation of public

⁵⁷ *Id.* 890-91.

⁵⁸ M. OAKESHOTT, *RATIONALISM IN POLITICS* (1962).

⁵⁹ Indeed, an extended effort has been made to show that conscious, goal-directed decisionmaking is often irrational in the sense that it is relatively unlikely to achieve or maximize desired outcomes. See C. LINDBLOM, *THE INTELLIGENCE OF DEMOCRACY* (1965). The term "rationalism" should not be misunderstood as a general synonym for all intellectual methods of moral inquiry, for Oakeshott himself engages in a highly intellectual form of moral discourse.

⁶⁰ M. OAKESHOTT, *supra* note 58, at 83 (emphasis in original). Oakeshott's description of rationalism is subtle and difficult to summarize. He describes the rationalist as

the *enemy* of authority, of prejudice, of the merely traditional, customary or habitual. [T]here is no opinion, no habit, no belief . . . that he hesitates to question . . . and to judge . . . by what he calls his "reason"; . . . the Rationalist never doubts the power of his "reason" . . . to determine the worth of a thing . . . or the propriety of an action.

Id. 1-2 (emphasis in original). The rationalist deals in "technical knowledge" that is "susceptible of formulation in rules, principles, directions, maxims—comprehensively, in propositions." *Id.* 10. Since the rationalist seeks to categorize moral sensibilities into abstract statements, he has a fascination with doctrine: "[The rationalist believes that] in order to participate in politics and expect a hearing, it is necessary to have . . . a doctrine; not to have a doctrine appears frivolous . . ." *Id.* 22. Tribe's coupling of a highly rationalistic style with rather grand and romantic statements of constitutional values is presaged by Oakeshott, who refers to "[t]he odd generation of rationalism in politics . . . by sovereign power out of romanticism." *Id.* 7.

⁶¹ For an example of Tribe's conception of constitutional rationalism, see L. TRIBE, *supra* note 1, at 890-91.

policy.⁶² However, if the democratic process requires significant departures from the methods of rationalism, the exuberant demand for pervasive rationalism in government begins to sound, like Whitman, naive and self-important.

II. CONSTITUTIONAL RATIONALISM AND THE DEMOCRATIC PROCESS

Although rationalism is no doubt compatible with traditional judicial methods, an unconfined demand for rationalism in government is not desirable or realistic in a democracy. Treating social choices as a series of intellectual problems is reassuring to many in the educated classes, but, as Tribe's book illustrates, rationalism tends to denigrate important values and severely limits the usefulness of the legislative process.

A. *Constitutional Rationalism and Public Policy*

1. *Policies not asserted to further independently articulated values are disfavored.* Because rationalism emphasizes the conscious evaluation of whether a policy will achieve its objective, policies for which such analysis is unnecessary are unappreciated. If a governmental decision is based on a value that is not usefully articulated independently from the decision itself, the exercise of matching means (policies) to ends (objectives) is disappointingly unnecessary. With a policy implementing a personal taste, for example, the objective is indistinguishable from the policy. If a school requires boys to wear short hair because the school officials think that short hair looks good on boys, it is unnecessary to ask whether the policy will achieve its objective. Constitutional rationalism, therefore, implicitly disfavors policies that are best justified on the basis of preference alone.⁶³ The defendants in the hair-length litigation

⁶² Oakeshott, for example, acknowledges that the rationalist's "technical" knowledge has a place in any activity. M. OAKESHOTT, *supra* note 58, at 7-12. Lindblom also is careful to acknowledge that there is a place for more than one kind of decisionmaking. C. LINDBLOM, *supra* note 59, at 13.

⁶³ Tribe states:

Any acceptable set of allowable definitions of harm would seem to rule out, as an ordinarily inadmissible reason to restrict fundamental rights, the "harm" of finding a person or act unpleasant to behold or to contemplate. If simply finding another's appearance or habits offensive . . . were enough to justify exclusionary regulation, rights of personhood . . . would be at an end.

L. TRIBE, *supra* note 1, at 981. See also *id.* 965.

described by Tribe were aware of the judicial solicitude for means-ends analysis and attempted to justify their policy by reference to some objective other than personal preference. They desperately sought to link long hair to communist conspiracies or to confusion in the use of restrooms. The foolishness of such justifications does not demonstrate that the policy is "wrong," but that the courts are imposing an inapposite demand for some justification other than "personal distaste."⁶⁴ Tribe's somewhat arrogant suggestion that judicial protection of long hair might help the public "come to its senses"⁶⁵ confuses the judicial suppression of local authority over matters of taste with intellectual or, perhaps, aesthetic enlightenment.

Personal preferences are not necessarily inferior bases for public policy, a fact that rationalists tend to recognize only when their own strong preferences are at stake.⁶⁶ An asserted interest in protecting potential human life, for example, although not trivial by any standard, need not be justified by reference to any external value or result. Finding a connection between an independently-stated objective and a "rational" policy yields a satisfying sense of reasonableness, but the policy is not intrinsically better than one that is justified entirely by preference or taste. The reason for favoring the independent objective, after all, is often a matter of preference, too. For instance, to adopt a policy permitting abortion on the grounds that such a right will result in women being able to avoid "distressful" lives, or even to achieve "personhood," is ultimately an indirect expression of preference for those results. At any rate, to the extent that constitutional rationalism forces decisionmakers to explain their decisions in terms of relatively remote relationships between policies and their objectives, absurd objectives will be postulated and important values can be unfairly trivialized.⁶⁷ Constitu-

⁶⁴ *Id.* 963.

⁶⁵ *Id.* 964.

⁶⁶ In some places Tribe argues that certain constitutional values need no instrumental justification. For example, procedural due process is said to be intrinsically important for the opportunity to confront the decisionmaker without regard to other values such as accuracy of fact-finding. *Id.* 554.

⁶⁷ At one point, Tribe acknowledges that "nothing in . . . [*Roe v. Wade*] provides a satisfactory explanation of why the fetal interest should not be deemed overriding prior to viability" *Id.* 927. However, he later explains:

Thus, on the record before it, and in view of realities too commonplace to be ignored, the Court might understandably have viewed restrictive abortion laws less as meaningful protections for unborn life than as relatively pointless and economically skewed expressions of outdated worry about the health of the women . . . coupled with disapproval of their moral choices

tional rationalism therefore interferes heavily with the democratic process on those issues that are least amenable to rational solution—issues that involve the divergent personal preferences of competing interest groups.

2. *Policies based on tradition are disfavored.* Rationalism tends to disapprove of policies that are based on tradition because traditional policies are seen as being reflexive rather than as being the products of conscious thought.⁶⁸ Thus Tribe holds that “the differential treatment of men and women is constitutional only when it is demonstrable that the difference is not the accidental consequence of a tradition-bound way of thinking . . . but is intentionally and reasonably designed.”⁶⁹ The “irrational” quality of reliance on traditional values is so intolerable to the constitutional rationalist that the absence of social change is itself evidence that the political system is malfunctioning. Accordingly, Tribe argues that the intermediate level of equal protection review should be triggered “when the legislative and administrative processes seem systemically resistant to change.”⁷⁰

Obviously, it is possible for a person to resist change for no reason other than his appreciation of the present;⁷¹ for such a per-

Id. 931. Thus Tribe discredits the asserted state interest partly by assessing it as if it were not a value in itself but as an ineffective (“pointless”) means for achieving some independent objective (health or the morality of personal responsibility).

Oddly, the rationalist’s impulse to identify independent objectives can cause him to strain in the formulation even of objectives of which he approves. Thus Tribe insistently attempts to relate perfectly sensible (if modest) constitutional values to some *other* values; for example, the “intrinsic” value of procedural due process in permitting individuals to “talk back” to decisionmakers cannot be left to stand or fall on its own—the value is later related to the larger and different values of “personal dignity and autonomy.” *Id.* 560. Hence Tribe’s constant postulation of romantic constitutional values, see text accompanying notes 18-27 *supra*, can be seen to be consistent with the rationalist’s demand for means-ends analysis. See note 60 *supra*. With respect to the implications of constitutional rationalism on moral justifications for governmental policy, see text accompanying notes 77-80 *infra*.

⁶⁸ M. OAKESHOTT, *supra* note 58, at 1. Oakeshott argues that the rationalist is unlikely properly to understand or value traditions: “Like a foreigner or a man out of his social class, he is bewildered by a tradition . . . of which he knows only the surface And he conceives a contempt for what he does not understand” *Id.* 31. For indications that both Tribe and the Court hold the traditions of at least some classes in contempt, see note 74 *infra*.

⁶⁹ L. TRIBE, *supra* note 1, at 1070. Tribe describes the constitutional “evil” to be avoided as “a traditional way of thinking about females.” *Id.* 1087 (citation omitted). See also *id.* 1068, 1080.

⁷⁰ *Id.* 1091-92.

⁷¹ For a sympathetic account of this conservative impulse, see M. OAKESHOTT, *supra* note 58, at 168-96.

son, to attempt to "perpetuate habitual assumptions by blocking . . . exposure" to the consequences of change is not, as Tribe suggests, somehow illegitimate,⁷² but a normal effort to protect perceived self-interest. That representative government might reflect such preferences (and thus expose some people to the risks of "rigidity to change"⁷³) is no more objectionable than a majoritarian preference for discovering the consequences of change (thus exposing the conservative person to unwanted risks).

The felt interests of those who hold affection for tradition are likely to be systematically ignored by constitutional rationalists. Indeed, the Court has demonstrated considerable insensitivity to traditional values regarding the relationship between parent and child, between husband and wife, between the sexes, and in other areas.⁷⁴ Customs, traditions, and their accompanying styles of thought (pejoratively termed "stereotypes" by constitutional rationalists) should not, of course, always win or always lose in the political process. However, to envision the Constitution as requiring a continuing presumptive hostility to the past creates a serious danger that courts will prevent people from building a coherent knowledge and sense of morality.⁷⁵ Moreover, it carries the risk that certain groups will come to see the Constitution as an alien

⁷² L. TRIBE, *supra* note 1, at 1091. There is good reason to conclude that Tribe partially identifies "rigidity" according to whether he disapproves of the outcome of the legislative process, not by evidence of any lack of responsiveness. The fact that prior to *Roe v. Wade*, 410 U.S. 113 (1973), there was considerable legislative activity regarding abortion laws would seem to indicate that the legislative process was not reluctant to deal with that issue. Tribe, however, suggests that the "entanglement of religious issues in the process"—not illegitimate in itself—somehow rendered the process too "rigid." The term "rigid" in this context apparently does not refer to a failure to respond to constituent concerns, but to a failure to respond to the correct constituents. *See id.* 929-30.

⁷³ *Id.* 1091.

⁷⁴ Most notable, perhaps, are the Court's assertions that neither a fetus' father nor a pregnant girl's parents have any interest in the abortion decision that is distinct from the interest of the state itself. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67-75 (1976). Decisions in other areas raise similar questions. Serious commentary has suggested that some school desegregation orders have been prompted by a class-bias that prevents judges from crediting the traditional goals of the working class. *See, e.g., L. RUBIN, BUSING AND BACKLASH* 149-52 (1972). The Court has been so insensitive to the traditional punitive aspect of the criminal law that on one occasion it neglected to mention retribution at all when itemizing the legitimate purposes of incarceration. *Pell v. Procunier*, 417 U.S. 817, 822-23 (1974) ("legitimate" penal objectives are deterrence, protection of society, and rehabilitation). For similar insensitivities, see *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977) (insensitivity to protection of "potential life"); *Elrod v. Burns*, 427 U.S. 347 (1976) (insensitivity to "special needs" of partisan politics).

⁷⁵ *See M. OAKESHOTT, supra* note 58, at 105.

document, used by segments of the educated classes to belittle and undermine their ways of life.⁷⁶

3. *Policies that have complex or vague objectives are disfavored.* Rationalism searches for conclusive answers to questions and "consequently the question must be formulated in such a way that it admits of such an answer."⁷⁷ If the values behind a rule are too subtle or varied for easy articulation and measurement, the rationalist will tend to oversimplify the objective so that its accomplishment can be accurately assessed.⁷⁸ Tribe, for example, finds only frustration in defending the Supreme Court's recent creation of a constitutional right to abortion as long as he acknowledges the state's moral purpose of protecting future life; but if the objectives of restrictive abortion laws can be recast as "economically skewed expressions of outdated worry about the health of the women" he finds the defense much easier.⁷⁹ Because some of society's important interests, such as the maintenance of a moral climate, are necessarily pursued in an indirect and partial way, constitutional rationalism tends to undervalue, ignore, or distort important values.⁸⁰

4. *Policies justified after implementation are disfavored.* Tribe states, "However weighty an objective, however closely it might fit the challenged rule, and however persuasively it is currently articulated . . . that objective should not be credited . . . if there are convincing reasons to believe that the objective is being supplied purely by hindsight" ⁸¹ On its face breathtakingly foolish, this requirement is comprehensible only as an expression of the assumptions of rationalism. The fundamental objective of rationalism is not a rule that is (or turns out to be) wise or fair; the objective is the rational formulation of policy. If the value was not articulated

⁷⁶ An argument has been made that the abortion issue, for example, is essentially a matter of class differences, see Skerry, *The Class Conflict Over Abortion*, 52 PUB. INTEREST 69 (1978). See also L. RUBIN, *supra* note 74 (class aspects of desegregation decisions). For other comments on the class bias in Supreme Court decisions, see Ely, *supra* note 56, at 12; Tushnet, . . . *And Only Wealth Will Buy You Justice—Some Notes on the Supreme Court 1972 Term*, 1974 WIS. L. REV. 177.

⁷⁷ M. OAKESHOTT, *supra* note 58, at 84.

⁷⁸ *Id.* See generally Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).

⁷⁹ L. TRIBE, *supra* note 1, at 931. See note 67 *supra*.

⁸⁰ For an example, see note 67 *supra*.

⁸¹ L. TRIBE, *supra* note 1, at 1085.

before the policy was adopted, conscious analysis could not have been employed in formulating the policy.⁸²

One view of morality holds that moral values cannot be known independently of the activities to which they refer, for "the objects of our desires are known to us in the activity of seeking them."⁸³ Even if policy objectives sometimes can be adequately stated prior to implementation, it is nevertheless clear that important values can also be discovered during the performance of an activity. Constitutional rationalism disfavors such values and frustrates policies that are no less important for having been justified by experience.

Even if it were true that all important values could be known and stated in advance of implementation of a policy, a practical decisionmaker might well embark on some activities before finally formulating his objective. Because the potential consequences of an important program are often unlimited, decisionmakers often lack the resources to gather or evaluate all the relevant information.⁸⁴ Accordingly, it is often desirable to begin a tentative program and incrementally to reformulate both the objectives and the means chosen for their achievement in light of actual experience.⁸⁵ The reformulated objectives can differ dramatically from the original, tentative objective.⁸⁶ Constitutionalism that requires a decisionmaker to identify consequences (and relate them to an articulated value) before acting can result in the abandonment of potentially useful activity.

5. *Policies without empirical validation are disfavored.* The process of "rational" policy formation requires that alternate means be compared and that policies be justified as achieving some preferred mix of the relevant values. Therefore, even when courts permit decisionmakers to discover their objectives post hoc, courts will often insist that evidence be furnished that the policy actually

⁸² Tribe seeks to justify the rule on the grounds that the decisionmaker will be encouraged to "ventilate more fully the considerations underlying those enactments." *Id.* 1086. He adds that even were the rule to encourage the false creation of a record in anticipation of litigation, it still "deprives the enacting body of nothing it *deliberately (and properly)* sought." *Id.* (emphasis added).

⁸³ M. OAKESHOTT, *supra* note 58, at 105. Cf. C. LINDBLOM, *supra* note 59, at 142 (discussing impossibility of declaring and considering all values and consequences before implementation of policy decisions).

⁸⁴ *Id.* 137-39.

⁸⁵ *Id.* 146-47.

⁸⁶ For a provocative argument on the need to disregard the known costs of an activity in order to discover unknowable potential benefits, see Gilder, *Prometheus Bound*, HARPER'S MAGAZINE, Sept. 1978, at 35.

achieves its purpose. The requirement of what Tribe calls a "close fit"⁸⁷ between ends and means is only one form of the demand for validation. The requirement that a rule be the "least restrictive alternative" for achieving a governmental objective permits courts to speculate—on the basis of their own knowledge or empirical evidence—whether (and how effectively) a different policy might achieve the same social goal.

These demands—that decisions be justified by proof of their consequences or by proof that the same consequences could not be achieved some other way—disadvantage policies with effects that are difficult to isolate and identify. There is, however, no reason to assume that important social decisions will be limited to those areas for which information is readily available and susceptible to conclusive analysis. Indeed, the more important the policy, the more likely it is that it will have far-reaching impacts that are difficult to measure. In such areas, decisionmakers typically must act in the absence of full information.⁸⁸ This phenomenon is equally applicable to judicial decisionmaking. In *Craig v. Boren*,⁸⁹ the Court demanded hard statistics on the relative frequency of drunken driving by males and females in order to determine whether a gender-based statute on the sale of beer was justified; its own decision, however, was based on speculation as to the effects of stereotyping on the sexes. Similarly, when courts seek to determine whether alternative means exist for the achievement of governmental objectives, the potentially unlimited number of policy alternatives and consequences renders full information prohibitively expensive. When they engage in such analysis, therefore, courts do not demand actual proof that other policies can achieve the desired goal; instead, they rely on judicial notice and speculation.⁹⁰ The difference between courts and other decisionmakers in this regard is that courts often are no longer involved in the controversy when information about the effects of their policies does begin to become available; or, if still involved, courts have special reasons for being unreceptive to the new information.⁹¹ At any rate, requir-

⁸⁷ L. TRIBE, *supra* note 1, at 1083.

⁸⁸ C. LINDBLOM, *supra* note 59, at 139-42.

⁸⁹ 429 U.S. 190 (1976).

⁹⁰ *E.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 637 (1969) (state can prevent fraud in welfare programs by newcomers by "investigation" and "cooperation among state welfare departments.").

⁹¹ The courts may become uninvolved simply because the "case" has been terminated. Even when new cases are initiated, many characteristics of the judicial process discourage receptivity to new information. The original decision may have been rationalized as a matter of principle. In addition, the need for

ing a close empirical "fit" between policy and objective could subvert highly important judicial policies, just as it subverts important legislative policies.

B. *Constitutional Rationalism and the Legislative Process*

Professor Tribe dismisses institutional questions as having only limited relevance because the "Constitution's implicit vision of a just society" is binding on legislators as well as on judges.⁹² Because Tribe treats the Constitution as a moral code with potential relevance to any issue, this dismissal amounts to an admonition that legislators should generally utilize the same decisionmaking methodology as judges. Tribe's general advocacy of active judicial review would assure that the results of the legislative process do in fact reflect a "rational" approach to policymaking. Constitutional rationalism, then, is not only to be imposed on all decisionmakers by judicial review, but ultimately is to be internalized by them as well.

If the failure of legislators to act "rationally" triggers and controls active constitutional scrutiny, the judiciary inevitably will be very busy tidying up government. Legislators do not always know or articulate moral objectives before enacting programs and frequently rationalize them to their constituents only afterwards. When legislators do announce values before adopting programs, the announced values are often either concocted or, at least, subject to being altered to reflect subsequent experience with the policy. They attempt to accommodate complex and hopelessly conflicting values in the same policy. After announcing grand objectives, they quickly alter or renounce these goals in subsequent legislation. They respond to wildly irrational arguments and even to power unadorned by intellectual argumentation. No legislator hears or knows of all the affected interests before a decision. Legislators

decisional consistency discourages acknowledgement of new information even when the original decision was overtly based on empirical information. For example, school desegregation orders are still entered on the premise that separate schooling instills a feeling of inferiority in minority students that affects educational performance, see *Brown v. Board of Educ.*, 347 U.S. 483, 494 n.11 (1954), despite the discrediting of the original data upon which that premise was based. See material cited in P. BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 461 n.20 (1975). Moreover, a single judge or panel of judges provides only limited points of access for new information and a limited number of perspectives (and, therefore, less sensitivity to the importance of new information). For a general discussion of the tendencies of central, unitary decisionmakers to be rigid in their use of new information, see C. LINDBLOM, *supra* note 59, at 196-98, 230-31.

⁹² L. TRIBE, *supra* note 1, at 13-14.

rarely possess in advance full information about the consequences of a decision, and they do not necessarily pay any attention to the information they do have. Compared to the detached, careful evaluation of briefs and evidence in light of an explicit, consistent set of legal values that is the ideal of the judicial process, the legislative process is a nightmare of irrational decisionmaking.

Legislative "irrationality," however, provides real advantages to a democratic system.⁹³ If values need not be formally articulated and consistently pursued, legislators can serve many interests at once. Strongly held interests are unlikely to be ignored. Legislators are free to respond to intensity as well as to articulateness, so that groups whose values are difficult to formalize or explain, but are nonetheless strongly held, can be accommodated without embarrassment. Even if no one objective is fully achieved, many groups can be partially satisfied and can therefore be expected to retain some sense of loyalty to the governmental process. Because negotiation and trading "across substantive fields" are encouraged the hard sacrifices that different allocations of resources require are implicitly recognized.⁹⁴ In the bartering process, people with widely divergent interests are compelled to deal with each other and to recognize the probable costs that their own preferences will inflict on others; thus new understandings and new values emerge as citizens experience firsthand the processes of self-government.⁹⁵ Because compromise is necessary and abstract argument is of limited

⁹³ Most of the discussion in this paragraph is based heavily on the work of Lindblom, especially chapters 13-15 of *THE INTELLIGENCE OF DEMOCRACY*. C. LINDBLOM, *supra* note 59, at 192-246.

⁹⁴ This point is elaborated with regard to environmental decisions in E. HAEFELE, *REPRESENTATIVE GOVERNMENT & ENVIRONMENTAL MANAGEMENT* 131 (1973). It is also developed in C. LINDBLOM, *supra* note 59, at 87-101, 151-61, 293-310.

⁹⁵ One might expect the principled and argumentative atmosphere of the courtroom to discourage flexible value formation. Lindblom's discussion of the deficiencies of "central coordination" is suggestive:

[When] all decision-making power with respect to reconciliation of decisions is in the hands of one decision maker, the decision makers whose decisions are to be reconciled can make any demands on other decision makers they wish with little cost to themselves. They need not face up to the implications of their demands for others. It is the central coordinator's responsibility to make their demands effective if he rules in their favor; and it is his responsibility to consider implications for others.

Id. 213. See also *id.* 206. For a slightly different argument to the effect that informal, decentralized decisionmaking is likely to contribute to change and growth in values, see M. OAKESHOTT, *supra* note 58, at 4, 21, 64-66. Tribe himself admits a momentary doubt about the rigidity of principled constitutional values when he speaks of the "hubris" and conservatism "in designing and defending any absolute right." L. TRIBE, *supra* note 1, at 892.

value, groups are encouraged to find the common ground in their positions, rather than to insist on apparently irreconcilable differences of principle. When legislators are free to act "irrationally," they can act even when full information about the consequences of their decisions is unavailable. Because values need not be abstractly identified before action, and because legislators can attempt only partial effectuation of those values that are identified, government can experiment with possible solutions, retaining the capacity for quick reversal in the face of evidence of failure. Because information is received and evaluated by a large number of individuals (with differing sensitivities), a legislative body can respond rapidly to a wide range of perceived imperfections in the initial policy. The risks of taking action in an imperfectly understood world can thereby be minimized.

The legislative process need not be romanticized. It works imperfectly and looks worse. But attempts to evaluate the integrity of the legislative process and its products by the unconstrained standards of constitutional rationalism threaten to sacrifice much of the usefulness that legislatures offer democracy.

III. CONCLUSION

Professor Tribe and, increasingly, the courts bring "the social, political, legal and institutional inheritance of . . . society before the tribunal of . . . intellect."⁹⁶ For the Constitution to impose such review on a limited number of issues is one thing; the power of intellect to erect a pervasively just society is another. Lawyers and judges will not, perhaps, be inclined to perceive or learn from the excesses in *American Constitutional Law* because the book is a celebration of the legal profession's own methods and influence. The politics of rationalism, Oakeshott observed, "are the politics of the politically inexperienced":⁹⁷

How appropriate rationalist politics are to the man who, not brought up or educated to their exercise, finds himself in a position to exert political initiative and authority, requires no emphasis. His need of it is so great that he will have no incentive to be skeptical about the possibility of a magic technique of politics which will remove the handicap of his lack of political education. The offer of such a technique will seem to him the offer of salvation itself;

⁹⁶ M. OAKESHOTT, *supra* note 58, at 4.

⁹⁷ *Id.* 23.

to be told that the necessary knowledge is to be found, complete and self-contained, in a book . . . will seem, like salvation, something almost too good to be true.⁹⁸

Judges, law clerks, litigants' lawyers, and law professors are usually isolated from, and often ignorant of, many of the realities of the political process, yet they exert enormous influence over public policy. It seems likely, then, that many in our profession will strive hard to see this very impressive but fundamentally limited book as salvation itself.

⁹⁸ *Id.*