Book Reviews

The Invisible Constitution

By Laurence H. Tribe

*Reviewed by Paul Horwitz**

The Book of Hebrews tells us that faith is "the substance of things hoped for, the evidence of things unseen." Readers of this journal might expect from *any* book by Laurence Tribe, let alone one titled *The Invisible Constitution*, rather more of the former than the latter. They might be surprised. There is more than a little hint in this book of analysis driven by "things hoped for" and not proven. But much of this book focuses convincingly on "the evidence of things unseen"—of postulates and principles that are found nowhere in the Constitution in explicit terms, but which are every bit as authoritative, and necessary, as the written Constitution itself.

Early on, Tribe sums up his project: "This is a book about what is 'in' the United States Constitution but cannot be *seen* when one reads only its text." The "visible Constitution," he writes, "necessarily floats in a vast and deep—and, crucially, invisible—ocean of ideas, propositions, recovered memories, and imagined experiences that the Constitution as a whole puts us in a position to glimpse." The Constitution, for Tribe, is much more than the sum of its parts. It consists of invisible rules and principles—constitutional "dark matter"—that undergird the written text and without which the text, and the Constitution more broadly understood, would be a shadow of its proper self.

This approach to understanding the Constitution builds on what Tribe describes as the paradox of any written constitution. As constitutionalists have long recognized, the Constitution as a written text cannot legitimize itself. Even if it came packaged with an explicit set of instructions for how to interpret it, we would have to refer to a host of interpretive principles to understand it. We do so by reading in all the assumptions that faithful readers must employ. In the Constitution's case, that includes not only a careful parsing of the text, but an understanding of its history, its development, and the background assumptions—assumptions about the rule of law, federalism, and much more—that help the document make sense. In that sense, Tribe is right to say that "what holds us in [the Constitution's] grip, and what we treat as its meaning, cannot be found in the written text alone but resides only in much that one cannot perceive from reading it." The visible Constitution thus requires an invisible Constitution. In a somewhat contradictory fashion, Tribe derives textual support for his view from the Ninth and Tenth Amendments, which suggest a universe of extratextual rights retained by the states and the people.

Many of Tribe's examples are time-worn and familiar. Generations of law students have become painfully familiar with the aptly named dormant Commerce Clause, for example; when the Supreme Court held in 2005 that this unwritten constitutional principle was not altered by the Twenty-First Amendment, it presented a stark example of the invisible Constitution triumphing over the text itself.

Federalism is another word that appears nowhere in the Constitution, but whose impact stretches beyond the list of limitations on congressional power over the states found in Article I, section 10, as the anti-commandeering cases, with their reference to the "postulates" underlying the Constitution, demonstrate. Tribe also suggests that states may not secede from the Union, "an axiom written in blood rather than ink," a result of the Civil War. And Tribe is surely right to suggest that the debates over the meaning of the Fourteenth Amendment's guarantee of equal protection have as much to do with "the Constitution's invisible, unstated presuppositions" about the meaning of equality as with the text itself.

Not all of his examples are so uncontroversial. Tribe argues that "self-government writ large is the overarching theme of our Constitution," and this leads him to reconstruct a bold set of justifications for some of the most contested constitutional law issues over the last century. In partial defense of the Court's notorious decision in *Lochner v. New York*, he argues that in some circumstances "interpersonal arrangements are entitled, under the invisible Constitution of self-government, to presumptive protection from interference by the forces of government and officialdom." The problem with *Lochner*, he says, was simply that the employee-employer relationship in that case was not one of "genuine reciprocity and equality." But this defense of *Lochner* is, of course, largely a stalking horse for his defense of privacy rights, including the right to abortion and the right to engage in same-sex activities. The protection of these and similar rights, he says, "represent extensions of an axiom of respect for self-government that pervades the Constitution."

In large measure, Tribe's approach to the invisible Constitution is both attractive and at least somewhat necessary. Tribe acknowledges that the content of the invisible Constitution is subject to debate. He recognizes that the invisible Constitution may be malleable, but argues that its relatively consistent contours suggest that it is not simply "the legal equivalent of Play-Doh." He rejects some arguments, such as those for the existence of positive welfare rights, as too attenuated to be a clear part of the invisible Constitution. And although his most controversial readings may serve liberal jurisprudential interests, he suggests that the invisible Constitution ultimately contains elements that lean both right and left. His basic examples of the invisible Constitution are chosen with care and will not come as a shock to any reader of the Court's opinions. There is plenty of evidence in this book of "things unseen."

Nor is Tribe's book simply a knock at textualism or originalism or a brief for living constitutionalism. All but the most robotic forms of textualism and originalism recognize that the Constitution must be read in light of background understandings and "invisible" postulates. At most, this is a critique of wooden textualism or originalism, and of those who would ignore not just founding history, but subsequent history and popular consensus. At its core, *The Invisible Constitution* is really an argument for a reading of the Constitution which recognizes the importance of the constitutional superstructure and the need for meta-rules of constitutional interpretation. This is not

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new, although Tribe may take the argument in new directions; he certainly acknowledges the influence of Charles Black and his famous structural interpretation of the Constitution.

Surface attractions aside, however, there are aspects of Tribe's account of the invisible Constitution that will not convince doubters and should trouble even its adherents. At the level of specifics, not all of his examples are wholly convincing. His reading of *Lochner* and the privacy cases, for example, leaves much room for disagreement over whether the invisible Constitution really contains a presumption against relationships that involve "hierarchy and exploitation," and does not tell us when that presumption applies. His suggestion that government torture *must* be "categorically forbidden by the Constitution," although he thinks no constitutional provision forbids it, simply because it is "an affront to everything America stands for," presumes rather than proves its conclusion. And, having already argued that substantive due process rights would have been better located within the Fourteenth Amendment's Privileges or Immunities Clause, he leaps to the argument that we cannot now "stick to the text" of the Due Process Clause because to do so would condone a host of terrible results. Not so. To insist on "sticking to the text" in this instance is simply to insist on reading the *right* part of the text. It seems odd to allow the invisible Constitution to triumph here simply because the Court happened to misread the Privileges or Immunities Clause. To do so only distorts the actual text and prolongs the Court's error.

At a higher level of abstraction, there is a larger problem. Tribe may be right to say that it is impossible to "generate constitutional law entirely from within a constitutional text." Some meta-interpretive rules are surely necessary. Some of them may even be substantive rules, not just procedural ones. But Tribe does not justify the *breadth* of the substantive rules he proposes. We could just as easily imagine an approach to the invisible Constitution that emphasizes the primacy of the written text and strives to be as parsimonious as possible in generating unwritten substantive rules. Tribe's general point about the invisible Constitution may be true, but he hardly justifies the sweeping invisible principles that he proposes in these pages. They are "the substance of things hoped for," not "things unseen" but proven.

Moreover, some of Tribe's prose is as thick as molasses: pity the poor reader who encounters the quicksand of language discussing "the plane determined by the vertices of the 'life, liberty, property' triangle" and "the pyramid formed from that triangle when the axis indicated by the Take Care Clause of Article II is included." The book is also a marvel of repetition. Sentence after sentence in the first hundred pages announces what Tribe will be saying, what the book is about, what he has already done, and what he will not be doing. Shorn of its repetition, this short book could be shorter still.

That repetition comes at the expense of his last and most novel section, which introduces six "modes" of reading the invisible Constitution. These modes—playfully but unhelpfully illustrated with graphics drawn by Tribe himself—are dubbed the "geometric, geodesic, global, geological, gravitational, and gyroscopic" modes of constructing the invisible Constitution. Tribe says that his alliterative approach comes "at some loss in transparency of meaning." That is an understatement. This discussion, which is crammed into the last quarter of the book, is far less clear and convincing than it might be. It is a shame that the most original section of his book is also the least developed and persuasive.

That said, Tribe's aim is to provoke a discussion, not to end it. In that, *The Invisible Constitution* must be counted as a success, although perhaps not as great a success as he would hope. What is most persuasive in this book will come as no surprise to those—textualists and non-textualists alike—who already understand that the Constitution rests on broader interpretive principles; what is most innovative in the book may still be too underdeveloped to elicit much useful dialogue. But Tribe nevertheless does a fine job of demonstrating the necessity and value of plumbing the depths of the Constitution's "dark matter."

Law and the Long War

By Benjamin Wittes

Terror and Consent

By Philip Bobbitt

*Reviewed by Vincent J. Vitkowsky**

Public attention to the war on terror has waned. The financial crisis, general weariness, and a natural preference to live within the fiction that the threat is contained have all contributed to this state of affairs. Unfortunately, the terrorists' war on us continues.

In response to the September 11 attacks, the Bush Administration implemented a policy built primarily on the law of armed conflict and the exercise of executive authority. This was an appropriate paradigm for the immediate aftermath, when it was imperative to attack and neutralize al Qaeda. To that Administration's credit, for over seven years its efforts have been successful in protecting the U.S. at home.

But public advocacy explaining these choices was not a high priority for the Bush Administration. Over time these policy choices had two negative consequences. First, within the U.S., the treatment of terrorist suspects became politically divisive. The public dialogue has been dominated by misinformation, misunderstanding, and partisan posturing. Next, the nation's reputation in the international community suffered. Granted, protecting American lives is more important than promoting the illusion of an international consensus that, by the nature of reality, cannot fully exist. Yet more could have been done to engage our principal allies, whose support and cooperation are vital.

In the long run, the law of armed conflict is neither sufficiently comprehensive nor sufficiently nuanced to address the full threat. Even assuming that counterterrorism policy could be determined primarily by the Executive Branch, participation from Congress could provide considerable public acceptance and support. The next Administration should work with Congress to build a comprehensive legal architecture for counterterrorism.

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