



New Mexico Law Review

10 N.M. L. Rev. 223 (Winter 1980 1980)

Winter 1980

Constitutional Law by John E. Nowak et al.; American Constitutional Law: A Structure for Liberty by Laurence H. Tribe

William F. Swindler

Recommended Citation

William F. Swindler, *Constitutional Law by John E. Nowak et al.; American Constitutional Law: A Structure for Liberty by Laurence H. Tribe*, 10 N.M. L. Rev. 223 (1980).

Available at: <https://digitalrepository.unm.edu/nmlr/vol10/iss1/14>

This Book Review is brought to you for free and open access by The University of New Mexico School of Law. For more information, please visit the *New Mexico Law Review* website: www.lawschool.unm.edu/nmlr

BOOK REVIEWS

CONSTITUTIONAL LAW

By JOHN E. NOWAK, RONALD D. ROTUNDA and J. NELSON YOUNG
St. Paul: West Publishing Co., 1978. Pp. 974.

AMERICAN CONSTITUTIONAL LAW: A STRUCTURE FOR LIBERTY By LAURENCE H. TRIBE

Brooklyn: Foundation Press, 1978. Pp. 1202.

The term "hornbook" has undergone several changes in connotation, if not in definition, over the years. From its original dictionary meaning—a collection of fundamentals—it became a series name for one law book publisher¹ and compelled preempted competitors to call their series textbooks, selected readings, or whatever.² All these books were intended to supplement the "classical" casebook,³ but two things happened which frustrated that objective. On the one hand, the exponential growth of materials in the law, and particularly in constitutional law, necessitated the growth of ever larger casebooks; and although the rationale for the collateral books was that they enabled the student to see the forest instead of the trees, they also grew in massiveness. The result has been that there is neither time nor energy in a single course, whether of one or more terms, to make effective use of both types of class material. A decade or more ago, curriculum-makers sought a solution to the problem by creating separate courses in such subjects as "basic" constitutional law, the Bill of Rights and civil liberties. Parkinson's law then automatically went into effect and two sets of equally huge casebooks and collateral volumes were created for each course.⁴

On the other hand, some fundamental changes have taken place in the content and character of the collateral, or "background" books

1. See, e.g., a somewhat patronizing review of an early hornbook which is labeled as "elementary" but "helpful." 53 Harv. L. Rev. 350 (1939).

2. Some of the "second generation" of these collateral books have combined background with case material. E.g., J. Barron and C. Dienes, *Constitutional Law: Principles and Policy* (1975); P. Brest, *Processes of Constitutional Decision Making* (1975).

3. See, e.g., the prefatory statement in one of the early hornbooks: "It is quite impossible to deal with the entire body of . . . constitutional law within the limits of a brief text." H. Rottschaeffer, *Preface to American Constitutional Law at v* (1939).

4. There has been some effort to limit the overlapping by two of the leading casebooks, which publish a single supplement for their "basic" and supplementary casebooks. E.g., N. Dowling & G. Gunther, *Cases and Materials on Constitutional Law* (7th ed. 1965) and G. Gunther & N. Dowling, *Cases and Materials on Individual Rights in Constitutional Law* (2d ed. 1976); W. Lockhart, Y. Kamisar and J. Choper, *Constitutional Law* (3d ed. 1970) and W. Lockhart, Y. Kamisar and J. Choper, *Cases and Materials on Constitutional Rights and Liberties* (3d ed. 1970).

themselves. Some of them have become mini-treatises⁵—provoking the fascinating thought that eventually we may come full cycle and see a new type of “hornbook,” a comparatively concise volume made up of those relatively few cases that really deserve the description of ruling case law.⁶ These new “hornbooks” will then supplement the volumes which attempt a comprehensive analysis of the meaning of it all.

Such unorthodox ruminations occur when two books such as these, the subject of the present review, are to be comparatively treated. To say that the volume by Nowak, Rotunda and Young is the latest example of the standard background reference is accurate enough—but it may sound unintentionally and unfortunately pejorative when one next describes the Tribe book as unique, *sui generis*, a preview of the future of constitutional study. It may be fairer to say that the first of these volumes has a function which is quite distinguishable from that of the second. The first, by three University of Illinois authors, is manifestly intended to provide background and perspective for “those areas of Constitutional Law which are most often studied and litigated today.”⁷ While the text meticulously distinguishes between “our interpretive view of issues, as opposed to factual accounts of the work of the Court,”⁸ the fact remains that it is essentially an overview of the principles documented in the primary classroom tool, the casebook. As long as the typical required course in constitutional law is taught the way it is, this kind of book is useful, even necessary, to provide the student with more than a narrow framework of decisional propositions.

Professor Tribe wrote with a different, disestablishmentarian objective. His is an activist work; the author candidly states his “openly avowed effort to construct a more just constitutional order.”⁹ Tribe states:

While addressing relevant issues of institutional capacities and roles, I do not stop at discussing the Court as the right or wrong forum to review a particular issue and render judgment; the more crucial question for me is whether the judgment itself was right or wrong as an element in the living development of constitutional justice.

....

5. One of the first was B. Schwartz, *Constitutional Law: A Textbook* (1972).

6. See the introductory comment in the first casebook by Christopher C. Langdell in 1871, that “the number of fundamental legal doctrines is much less than is commonly supposed.” *Langdell on Contracts* at i (1871).

7. J. Nowak, R. Rotunda and J. Young, *Preface* to *Constitutional Law* at xv (1978).

8. *Id.*

9. L. Tribe, *American Constitutional Law: A Structure for Liberty* at iii (1978).

... For me, the living morality of responsible scholarship points not at all to the classic formula of supposedly value-free detachment and allegedly unbiased description. Instead such morality points to an avowal of the substantive account of constitutional arguments and conclusions. I am convinced that attempts to treat constitutional doctrine neutrally elide important questions and obscure available answers.¹⁰

Clearly, the author of this treatise—or it may better be called a commentary rather than a treatise in the orthodox sense¹¹—is marching to a different drummer. Put another way, this is not so much a book on constitutional law as on constitutional jurisprudence. Courses on that subject have been a long time coming, and perhaps the book has now been written for which a course may be designed. Ronald Dworkin's work was seminal,¹² while others have grasped at or grappled with the general idea.¹³ Now at last we seem to be emerging from the overshadowing influence of Joseph Story's Commentaries, the rationale for which, in his own words, was "not ... to be ... any new plan of interpreting the theory of the Constitution, or of enlarging or narrowing its powers, by ingenious subtleties and learned doubts."¹⁴

Both volumes under review here offer fresh approaches to the subject. Nowak, Rotunda and Young, while using what by contrast to Tribe must be called the orthodox approach, devote the first part of their book to practical questions of jurisdiction and justiciability—something too many courses and casebooks tend to dismiss with less than adequate treatment.¹⁵ The two doctrines of abstention and preemption are too seldom given the attention they merit, but here they have been given their due.¹⁶ In the second part of the book the authors provide a comprehensive but concise and lucid discussion of the real fundamentals of the "basic" constitution, the constitutional powers of the executive and legislative branches of government¹⁷

10. *Id.* at iii-iv.

11. Two commentaries of the twentieth century have varied wildly in size, from the one-volume work by C. Antieau, *Commentaries on the Constitution* (1960) to the five-volume work of B. Schwartz, *A Commentary on the Constitution of the United States* (1963-1968).

12. R. Dworkin, *Taking Rights Seriously* (1977).

13. *E.g.*, authorities cited at notes 2 and 11 *supra*.

14. 1 J. Story, *Preface to Commentaries on the Constitution of the United States* at vi (1833).

15. Gunther provides a thorough treatment in his casebook on constitutional law, note 4 *supra*.

16. *E.g.*, the insightful discussion of *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) and its background. Nowak, *supra* note 7, at 90 n.6.

17. Nowak, *supra* note 7, at chs. 3-8.

and the state-federal equilibrium in the sharing of regulatory authority.¹⁸ The third part, and two-thirds proportion, of the book is concerned with the burgeoning field of individual rights and liberties.¹⁹ If this volume is to serve as collateral reading, the first chapter in Part Three ("Individual Liberties: An Overview") is an excellent means of rounding out a "basic" course, a practical value if the curriculum makes this the only required course in the subject.

If the Tribe volume may be called a work in constitutional jurisprudence, it should also be considered to be an example of a "neo-historical" school of jurisprudence.²⁰ Tribe has drafted seven models of constitutional analysis. The first six models extend from the early days of the Supreme Court to the high-watermark of the Warren years in 1965.²¹ The seventh model, contained in the final two chapters, represents a synthesis of the first six models and epitomizes the author's belief that a dynamic constitution will be a "structure for liberty." Democratic thought, implemented by the instrument drafted in 1787, is not a progression from burnt-out earlier stages having no further validity, but is a continuum of viable experiences which equip society to meet the future with assurance.

Even if many teachers conclude that this is not the collateral book for a required first course in "basic" constitutional law, every teacher and student would benefit from treating the first chapter ("Approaches to Constitutional Analysis") as required reading. The remainder of the volume could then serve as a text for a seminar in constitutional thought; if such a seminar does not exist, an advanced course in constitutional history would be a fair alternative. Tribe considers Model I (Separated and Divided Powers) to be the fundamental issue threshed out by the Marshall-Taney Court on the one side and the Jeffersonian-Jacksonian executive leadership on the other. The Civil War, the fourteenth amendment as initially construed and the first edition of Thomas M. Cooley's work in 1866²² comprise the generative forces of Model II (Implied Limitations on Government). An amalgam of the first two models continued as the orthodoxy until the Great Depression, when the shattering impact of that challenge to American constitutional theory made a kind of intellectual salvage operation imperative.²³

18. Nowak, *supra* note 7, at chs. 9-11. See especially pages 250-52 which summarize the dialogue between the late Justice Harlan F. Stone and the late Professor Noel T. Dowling, a statement on the rationale of regulatory power which has been too long unnoticed.

19. Nowak, *supra* note 7, at chs. 12-20.

20. E.g., W. Friedmann, *Legal Theory* chs. 17, 18 & 20 (5th ed. 1967).

21. Tribe, *supra* note 9, at chs. 2-16.

22. T. Cooley, *Constitutional Limitations* (1868).

23. The present reviewer has treated this same theme in detail in 1 W. Swindler, *Court*

It is therefore logical that the next four models would have emerged in relatively quick succession in the time period from 1937 to 1969.²⁴ There had to be a coming to terms with a new American society, born of the New Deal and annealed in World War II, which would form the basis for Tribe's development of Models III (Settled Expectations) and IV (Governmental Regularity). The turbulence of constitutional thought which characterized the last years of Chief Justice Hughes' tenure and the administrations of Stone and Vinson would, however, require setting a new course. This new course, in the early Warren period led to Tribe's development of Model V (Preferred Rights) and, finally, Model VI (Equal Protection).

Many—although by no means all²⁵—constitutional scholars will follow the author's argument to this point, albeit with varying degrees of qualification. And for a novel and provocative thesis like this to carry most colleagues with the author through sixteen out of eighteen chapters is no mean accomplishment. Even though the last two chapters are almost an invitation to discuss what lies ahead, Tribe retains the initiative at the end. Although his early chapters recurred to the matter of what he calls "the anti-majoritarian difficulty,"²⁶ Tribe's final chapters are evidence that he feels he has disposed of the matter. Like William O. Douglas, Tribe accepts the Constitution as a series of penumbras,²⁷ or conditional propositions—a "positive state" which is the ultimate embodiment of the people of the United States.²⁸

One need not subscribe to all of Tribe's doctrines to agree that this is a masterly contribution to knowledge. This book should perhaps be the second title in a bookshelf beside Dworkin, with other books, it is devoutly to be hoped, regularly to follow. New dimensions in the study of constitutional law are already being suggested;²⁹ the

and Constitution in the 20th Century—The Old Legality 1889-1932 (1969) and in 2 W. Swindler, *Court and Constitution in the 20th Century—The New Legality, 1932-1968* (1970).

24. See W. Swindler, *The Warren Court: Completion of a Constitutional Revolution*, 23 *Vand. L. Rev.* 205 (1970).

25. An example of a countercurrent in modern constitutional commentary can be found in R. Berger, *Government by Judiciary* (1977).

26. Tribe, *supra* note 9, at § §1-7 and 3-6.

27. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

28. Friedmann, *supra* note 20, at ch. 31.

29. *E.g.*, the 40-volume first series edited by P. Kurland and G. Kasper, *Landmark Records and Briefs of the Supreme Court: Constitutional Series*; and also Professor Paul R. Baier's provocative paper at the National Archives Conference on Legal History in September, 1978: "What is the Use of a Law Book Without Pictures or Conversations?" (published in condensed form in the Spring 1979 issue of the *Social Science Record of the New York State Council for the Social Sciences*).

perspectives afforded by the growing series of documentary collections portends new approaches to the subject in the coming decade. But both books discussed herein are a welcome present help in changing times. Nowak and colleagues have authored a valuable companion piece for the study of constitutional fundamentals: after all, most of us must learn to walk before we can run. When the curriculum of the average law school is ready for a special course in historical constitutional jurisprudence, we shall discover that Tribe has set a fast pace.

WILLIAM F. SWINDLER*

*John Marshall Professor of Law, Emeritus, College of William and Mary.