



The Invisible Constitution

September 17, 2008

Legal scholar Laurence Tribe spoke on newest volume from Oxford's Inalienable Rights series, titled *The Invisible Constitution*. Tribe discussed how some of our most cherished and widely held beliefs about constitutional rights are not part of the written document but can only be deduced from it. Laurence Tribe is Carl M. Loeb University Professor of Law at Harvard Law School.

ARCHIVIST ALLEN WEINSTEIN: Good evening, ladies and gentlemen. I can't hear you. Good evening.

AUDIENCE: Good evening.

WEINSTEIN: Is that the best you can do? Good evening.

AUDIENCE: Good evening!

WEINSTEIN: Thank you. At least we woke up the folks in the back row there, so that's good. I'm Allen Weinstein. I'm the Archivist of the United States. And welcome to all of you to the National Archives on Constitution Day. And I cannot think of a more appropriate, more effective, more brilliant speaker for us to have today than Professor Laurence Tribe. He'll be coming out shortly. We observe, as you know, the 221st anniversary of the signing of the U.S. Constitution, which set forth the structure for our government structure, which has lasted for more than 2 centuries, virtually unchanged in its framework. I have had almost—I have representatives of just about the 3 branches of government today, so I feel very Constitutional. I began this morning at the White House with a lot of schoolchildren wonderful kids looking at the exhibit from the National Constitution Center in Philadelphia and giving their own views on what democracy needed next. It was a very wonderful occasion put together, of course, by Mrs. Bush. And this afternoon, I testified before Congress. So I can say that I've done my legislative obligations for the last 24 hours.

I kept looking around for a judge. And the point is, if the election results had turned out differently, I would have had a Supreme Court judge as well because he's speaking to us



tonight and maybe speaking to us again from another place. So the framers, of course, of the Constitution could not foresee today's political landscape. So we continually debate how the Constitution they wrote should be applied to contemporary issues. What did the Founding Fathers really mean by the words they used in the Constitution? What did they not mean? What words did they not use? And how and should these words be interpreted? In certain instances, however, the Constitution, is silent. Some of it was deliberate on the part of the framers, and some of the silence has been punctured either by amendments 27 of them or by new judicial interpretations over the years. 27 changes in a 221-year-old document.

Is that something or is that something? But I'll leave all that for Professor Tribe to explain. Our speaker tonight--let me say a few words about him, not that I think I have to for this audience. Our speaker tonight is Laurence Tribe, the Carl M. Loeb university professor of law at Harvard Law School, and himself a graduate, as my wife is, of that school. Professor Tribe is one of the country's best-known scholars in American Constitutional law and a frequent presence before the United States Supreme Court. One of his dozens of appearances before the High Court,

I would remind you, and I don't think I have to remind you, was on behalf of Vice President Albert Gore in the court battle over the disputed 2000 presidential election. He's also a familiar and sought after commentator on Constitutional law and the Supreme Court in print, on television. And in addition, of course, he consults regularly or I should say that Congress consults regularly with him on the Constitutional impact of proposed legislation and already enacted laws. Our guest is also the author of a number of books that have put him in the forefront of debates over the role of the Supreme Court. They include "God Save This Honorable Court," which examines the nomination process for Supreme Court nominees, and "Abortion: The Clash of Absolutes," a look at one of the most divisive political issues of our time.

He will be talking, among other subjects, about his latest book tonight called "The Invisible Constitution," an incredibly provocative book, as you'll discover, which invites us to look at the U.S. Constitution and our democracy in a very new way. And, well, I'll leave it at that, and say that after his lecture a lecture for 30 or 40 minutes, we'll then take 15 or 20 minutes of questions. He will then be signing books, autographing them outside. And so all of you will have a chance to meet him and to enjoy the provocative, the articulate, the brilliant Laurence Tribe.

[Applause]

LAURENCE TRIBE: Thank you. Thank you, Mr. Weinstein, and thank you all very much for being here on such a lovely early fall evening. I think you're making quite a sacrifice. I hope you won't regret it.



It is a great pleasure and privilege to talk with you tonight in this historic place on this truly historic occasion, the 221st anniversary of the signing of the Constitution of the United States by its framers. And of no historic significance but not coincidentally, one day before the Oxford Press officially publishes my latest book, "The Invisible Constitution."

My title, and I haven't seen it advertised outside, but I'm sure that some of you were told what it would be, is "The Constitution has Left the Building." Now, that is at once an outdated reference to a cultural icon, Elvis Presley, and a somewhat and deliberately ambiguous reference to the cultural and legal icon that most of us assume is still located in this revered building the Constitution of the United States.

Now, in the process of explaining why I say I "assume," I do want to convey a sense of what my book is about and why I think it's particularly timely to be discussing it today just 48 days before a presidential election that is likely to have a profound impact on what the Constitution as a living framework, and not simply an artifact preserved in pristine condition under glass, means in our lives and in the life of this exceptional republic. Now, to get started, I want to invite all of you to join me in turning back the clock to the long hot Philadelphia summer of 1787. After the Constitutional Convention had completed its revolutionary work, meeting in secret and as I'm sure you all know, departing radically from the limited mandate given to it to make relatively minor changes in the Articles of Confederation the Constitution was signed in a ceremony whose ultimate fate surely could not have been predicted by any of the 55 delegates who had convened in Philadelphia. And it's really hard for me in this historic place to resist briefly tracing the trajectory of the Constitution as an almost sacred object, the most nearly wholly secular artifact of our republic, by tracking its movement as a physical text, something that I suspect a number of you have not undertaken to do. It departed at 11:00 in the morning on September 17 221 years ago today going by stagecoach from Philadelphia to New York City. And as the Brits advanced on Washington in August of 1814, it was stuffed into a linen sack and carried to Virginia. For nearly half a century, it was stored in an old green cabinet together with 7 ancient swords in a basement in Washington out of public view. It wasn't until after the Civil War that the parchment stored in that cabinet was brought out of hiding for public viewing, situated right next to the Declaration of Independence at the 1876 exposition in Philadelphia celebrating the 100th anniversary of the Declaration. The State Department displayed it there until its transfer in 1921 to the Library of Congress, where it remained until being brought to the National Archives in 1952, where it has been displayed under thick glass under temperature-controlled conditions for the 56 years since. I didn't get here early enough to see it today. I last saw it here myself on its 199th birthday, which was the day that William Rehnquist, a moderate by comparison with some jurists who have since taken the bench, was sworn in as the late chief justice of the United States.

Some years ago, right around the time that an extraordinarily promising Harvard Law student You might have heard of him--named Barack Obama--was my research assistant.



I learned to my dismay and I remember talking to Barack about it that the fading parchment that was then and still lying in state at the Archives, the document widely reprinted ever since 1878 as the United States Constitution, was not, in fact, the Constitution that the States ratified in a rolling process that began in 1787 and culminated in 1789 as the Constitution of the United States. And it's worth pausing at least briefly to explain how that came to be.

You see, on September 15, the delegates voted to accept the draft that was circulated by the Committee of Style 3 days earlier and voted to print 500 copies of it in a process that took 3 days. They didn't have rapid Xeroxing then. It was completed on September 18.

But a day before the printing process was complete in engrossed parchment, which is just a fancy word for a hand-copied parchment copied from the draft the delegates had accepted, was physically signed by 39 of the 42 delegates that were present. And it was that parchment that was sent by stagecoach the next morning to New York, where Congress was then in session.

It was that September 17th handwritten parchment that was read aloud to members of Congress, who by then had received their own printed copies. And as the handwritten parchment was read, congressmen followed along in their September 18 print, noting no discrepancies, perhaps because when it was read aloud, punctuation was not included in the reading. But there were significant punctuational differences. And lest anyone think that a discrepancy of that kind is trivial, let me offer just a single example to the contrary. Article 1, Section 8, paragraph 1, says--and I quote-- "The Congress shall have power to lay and collect taxes," comma. I wish I were Victor Borge and I could give a a...[imitates whip cracking sound] instead of a "comma." "...to pay the debts and provide "for the common defense and general welfare." Now, if the comma following the phrase "to lay and collect taxes," had instead been a semicolon, which Borge would go... [imitates squishing noise] Congress would have been given sweeping law-making power to provide for the general welfare, a source of power vastly broader than even the commerce clause has ever conferred, one, in fact, so boundless that 2 centuries of still ongoing struggle over the limits of national legislative authority and the reserve powers of the States would have all been rendered beside the point. In fact, Gouverneur Morris, chief draftsman of the Committee on Style, it turns out, tried to sneak in a semicolon at that point, but he was overridden. And the result is that the "general welfare" clause, as generally understood merely qualifies Congress' power to raise and spend revenues. It can tax and spend in the general welfare, but to regulate, it must find a particular head of authority, broadly defined, at least after John Marshall's opinion in "McCulloch v. Maryland."

Now, it turns out slightly anticlimactically that both the September 17 handwritten parchment and the September 18 print contained the comma rather than the semicolon, but there are other less crucial but potentially material respects in which the 2 versions



differ. I won't go through them, and I won't try to explain how some of them how might someday become relevant.

The point is that it is the September 17 parchment that now lies in the archives. But it was the September 18 print that was eventually ratified as the Constitution. Now, the reason--we can be pretty certain--that it was that print that the States ratified is that when Congress voted 10 days later, on September 28, to send the proposed constitution to the people for ratification by conventions in any 9 of the 13 states, it reprinted 100 copies of the September 18 print for distribution to the conventions. No one in any of the ratifying conventions in any of the 13 original states even had access to what you see in this building, to the signed parchment of September 17. It was the September 28 reprint of the September 18 print that was reproduced in lots of 10,000 for mass distribution to the people.

Now, the point of this rather convoluted, even twisted, tale isn't to persuade any of you that we've been living under a phony constitution for these many years. "Breaking news!" Happily, none of the differences in punctuation seems to have had operational import.

And even the ones that I can imagine might have some import are not going to be apocalyptic. As Yale's Akhil Amar puts it, "The National Archives version," namely the September 17 version, "is probably good enough for government work."

[Laughter]

My point in going through all of this is to reflect on what it would mean to insist that the September 18 print rather than the September 17 parchment is the authentic Constitution, what it would mean for our view of the Constitution generally, not what it would mean with respect to this or that comma or semicolon. After all, the September 18 print that was ratified has faded into obscurity--I don't even know at the moment where most of those prints are-- by the time the September 17 parchment was gloriously displayed next to our Declaration of Independence on the centennial of that Declaration. What would it mean to say that the September 18 print is the real Constitution, even though it's the September 17 parchment that gives us chills whenever we look through the tinted glass here at the archives. Now, in searching for the meaning of that observation, we presumably begin with the text itself. In a provision that happily is identical in the two versions, Article 7 of the Constitution provides that the ratification of the conventions of 9 states, "shall be sufficient for the establishment of this Constitution between the states so ratifying the same." So it is ratification, acceptance by the people assembled in state conventions that transformed the September 18 print from a mere proposal into binding law and indeed into what the Constitution in Article 6 calls "the supreme law of the land."

Now, if you happen to have read the marvelous book by Douglas Hofstadter, "Godel, Escher, Bach"--even if you haven't, if you've thought a little bit about the paradox of things



referring to themselves, you'll know that there is always paradox in self-reference. If you say on a piece of paper, "The statement on the other side of this paper is false," and then on the other side it says, "The statement on the other side of this paper is false," you won't have an easy time falling asleep. It is particularly paradoxical for something to become binding as the supreme law of the land just by its own say-so. I mean, we could write a constitution and say, "This is the supreme law of the United States." Some of you might want to exercise that power. It probably wouldn't make much difference. After all, the rule of ratification set out in Article 7 itself--9 out of 13 will be enough--itself violated the terms of the charter under whose auspices the rule was written, the Articles of Confederation, which had required unanimity for any Constitutional change. So the fact that it was ratified in the way it specified it had to be ratified but in violation of the way those who convened the Constitutional Convention had in their articles specified something should have to be ratified if it amends the Constitution doesn't in itself make it the law. Maybe it's the ideal of popular sovereignty--a more general ideal than formal ratification, and which both the Federalists and the anti-Federalists shared in the 1780s that can help explain why many of our forebears in the late 18th century regarded this September 18 print as our supreme law despite the violation of the Articles of Confederation. That is, it had come to be popularly accepted, even though the mode of ratification was of dubious legality. But the fact that the state conventions that ratified it were chosen and accountable to only white property-holding males truly prevents most of us from enthusiastically treating the September 18 version as the law of the land simply by virtue of the formal fact that it had been ratified by conventions in several states.

It seems to me that the Constitution we accept as our own, which I think is really more likely, after all, to be the September 17 version enshrined in the archives and viewed by generations of Americans than the September 18 version that was actually ratified by the States but ultimately ignored by history, the Constitution we accept as our own I think is ours because and to the degree that we have embraced it as ours over the long and sometimes bloody history of our republic. It is what "we the people," to quote the majestic words of the preamble, have made our own over the course of the challenging project that the preamble set out, a project to form "a more perfect union," an ongoing, rolling, continuing, unfinished process.

Each time the text has been formally amended, from the first 10 amendments all ratified in 1791, to the 27th, finally ratified in 1992, although proposed along with the first 10 in 1789, each time its text has been formally amended, the amendments thereby adopted have become in the language of Article 5 "valid to all intents and purposes as part of this Constitution." Think of those words, "this Constitution," you'll see that that's a single that each succeeding generation has been unable to escape deciding what constitution it was that they were in part amending but in part also readopting. That's why provisions like the 19th Amendment--enfranchising women--even though they don't formally amend the reference to men in section 2 of the 14th Amendment, have a reference back in history.



The Constitution is like the night sky. You look at the constellations. You see the stars. The light from the stars comes to you from different eras maybe millions of years apart. And the constellations that you superimpose upon those stars are constructs of the human mind. They're not to be found in the results of anything that the Hubble telescope can uncover. The deeper point of the textual tale that I've told is that in the sense most relevant to our lives as a people. The Constitution by which we govern ourselves is neither the dead parchment of September 17, holy though it may be, in a secular sense, downstairs here in this building nor the equally inert September 18 print on which the ratifiers physically gazed before they voted for it in the years leading to 1789. Rather, the real Constitution, I would submit, is the living law as ratified, amended, interpreted over time and thereby absorbed into an ongoing organic tradition that forms and frames our political order. In fact, I think it's only because the Constitution is subject to a process of continuing revision both in its literal text through the formal amendment process and in our understanding of the larger framework of which that text is but a skeleton and a shadow that we may accept it as our supreme law without ceding to long dead heroes an unalterable and unconscionable control over our political and legal destiny. It's only because the Constitution's acceptance has by now reached far beyond the dead hand extended by the white-propertied males who originally drafted and ratified it that the binding force of the Constitution to which we swear allegiance today derives from something deeper and more consonant with principles of democracy and equal dignity than the Constitution's troublesome historical origins might suggest.

Over a century ago, James Russell Lowell warned that too many had come to see the Constitution as a machine that would go of itself. Twenty years later, Woodrow Wilson, the last Constitutional law professor--until possibly Senator Obama--to become president of the United States, recognized that the Constitution is best understood not as a machine at all but as a living thing. What he did not add was that it's a living thing with no body or mind, no moving parts or organs or spirit separate from the bodies and minds and spirits of the people themselves, people whose constant vigilance--and I noticed when I was coming into the building that statement "Eternal vigilance is the price of liberty," appropriate to have on the archives--people whose constant vigilance is the lifeblood of Constitutional survival.

Just over 20 years ago, The "Wall Street Journal" recounted the results of a Constitutional convention that was held in Colonial Williamsburg by some 52 Virginia high school students. A 16-year-old kid from Fredericksburg summed up one of the central lessons that the 2-day pseudo-convention taught. "It's more a question of what people do with it "than it is the document itself," the teenager said. If we could only learn that lesson. You know, the world is littered with lovely-sounding constitutions, nearly all of them proclaiming and preaching humane high-minded visions: "no torture," "human dignity," "freedom of speech," "freedom of thought," yet ours is among the very few that represent practice as well as preaching, and at least most American governments and American administrations have taken the Constitution as a serious guide to practice, not all.



I don't need to get too political to indicate that I have a modest view of the current administration's fidelity to the Constitution. The debate over original intent, which obviously could consume not just a lecture but a course, several courses, the debate over original intent is the lodestar for Constitutional interpretation, I think is at bottom, a debate between those who would encase the Constitution as an untouchable relic evidencing the specific thoughts and concrete ideas of the Madisons and Hamiltons of our past--great men, surely, but men great enough to know that they didn't have all the answers--and those who would engage the Constitution as a more open-ended and evolving source of law whose legitimacy derives from the living dialogue of which it is a part rather than strictly from the historical consensus that it's supposedly expressed. Now, I don't doubt that ours is a written constitution. And I recognize that its very written-ness has long been a source of national pride and of the text's iconic status. And when what it writes is clear, like saying, "The president must be 35 years old" or "There are 2 houses of Congress," that is essentially the end of the matter. But many of the precepts and principles that nearly all of us would, I think, quite surely identify as facets of our constitution are not only not explicitly written, many of them are not even readily inferable from what is written. They're not written at all in parchment or in print, but in the blood spilled on the field of battle or in the muscle memory of our national heritage. The axiom, for example, that ours is "a government of laws, not men." Where does one find that written in the Constitution? Nowhere. It's in the Massachusetts constitution. And even though as a good citizen of Massachusetts, I'm proud of it, I certainly would not make the mistake Justice Scalia has occasionally made saying, that that language is essentially in our constitution. The language isn't there, but the principle is. Well, what about the axiom that no state may secede from the Union? Think about that one. It's a prominent feature of the Constitution not much discussed. It's assumed new relevance in the wake of debates about Kosovo and Georgia and South Ossetia and even the history of the Alaskan Independence Party.

[Scattered laughter]

But that axiom is one written, again, not in ink on any piece of paper but on the battlefields of Gettysburg and throughout the American republic. Or consider the postulate that there are limits to the degree that government may dictate how we use our bodies, raise our children, define our families, and enter and exit this earthly life. That's a very widely agreed upon postulate. It's application in particular cases, Does it or does it not extend to the right to end a pregnancy? Endlessly controversial. But those who say that the underlying principle that there are limits to government power over personal life is not part of our constitution, because you can't find it written down can't possibly mean what they say, because they all agree that there are limits. They just disagree with what they are, upon the degree with which government can commandeer our lives.

That principle is not in the Constitution's text, but it's etched in the very marrow of its skeletal structure. And this is not simply a left-leaning principle. This is not simply a fancy way of saying, "Aha! There is a right of privacy after all. Bork is wrong, Scalia is wrong.



End of argument." Principles that are particularly beloved of the American Right, like States' rights, they, too, were not written in the Constitution. The most important decisions of the Supreme Court, holding that Congress, even if it acts within the ambit of its literal authority, cannot commandeer the States, treat them as mere units of the national government, are principles that are not written down. The majority essentially admitted it. And when the liberal justices jumped up and down and said, "Where do you find that in the Constitution?," they were guilty of the same hypocrisy that the conservative justices are guilty of when they accuse the liberals who are talking about the right of privacy of making things up out of old cloth. Much of what is in the Constitution is intrinsically invisible. It wasn't written down. And, in fact, the proposition that not all of the Constitution's core postulates can possibly be read in its visible text is the message of the text itself, a text that proclaims its own unfinished, incomplete character.

The Ninth Amendment expressly specifies that the failure of the framers to spell out certain rights, in so many words, cannot be used to justify the authoritative conclusion that no such rights exist. Now, the story that I lay out in my book, "The Invisible Constitution," is essentially the story of how these tacit, unstated postulates of the Constitution's overall plan, postulates that are vital to the visions of Left and Right alike and that are indispensable to the Constitution's enduring strength and its vitality might best be unpacked and understood. How are we to understand what's in the invisible Constitution in order to help make it more visible? Those postulates, to adapt a phrase that has achieved some currency in our politics, are neither blue nor red, they're American, they're purple. And in the book, I try to show that 6 different models, or perspectives, best explain the way we have grappled over time with what the Constitution means but doesn't actually say. And those of you who already have a copy of the book will find these 6 drawings that I sketched and that the Oxford Press was good enough to let me put in the book unchanged, so that although they're not very fancy or neat, they retain their vitality. And when I teach Constitutional law, I teach through diagrams and drawings. They depict the models. Three of them involve constructing, or building up, our understanding of the Constitution's unwritten message. In what I call the geometric model, which is constructed by linking the points and lines that the Constitution's language lays out; in what I call the geodesic model, which is built by formulating shields and standards like those of a geodesic dome, whose purpose is to translate relatively abstract Constitutional principles into practical rights and rules; and in what I call the global model, which is developed by reaching across national boundaries to learn from what other countries have made of their founding documents and principles.

The other 3 models involve deconstructing, or taking apart, our picture of the Constitution- in what I call the geological model, which is created, as the name suggests, by digging beneath what the Constitution says to unearth what must be presupposed or taken for granted in order to make its commands and prohibitions sensible; in what I call the gravitational model, expressed by identifying the ways in which the curvature of Constitutional space leads to limiting principles that we have to observe if we're to avoid



the slippery slope collapse of all personal and state and local autonomy into black holes of power; and in what I call the gyroscopic model, which is set spinning by describing how the forces that might otherwise unbalance the Constitution, either along the axis of time or along the axis of centralization, might be contained.

Of all those models, I can't say I have a favorite. You can see I named them all with a "G," which is no accident. I love alliteration. And as it happens, Gs happen to fit. But if I had a favorite. That's like saying, Which of your kids is your favorite? But if I had one, it would be the gravitational model, because its concept of curved Constitutional space is one that I developed in close collaboration with Barack Obama. That was the year he was my research assistant--1989-90. And he worked closely with me on both the Einsteinian work and the Heisenbergian work. The subtitle of that article was "What Lawyers can Learn from Modern Physics." Worked closely with me in interpreting and understanding the relevance of Einstein and Heisenberg for legal thought. How many presidents do you imagine who as law students could have contributed, and contributed in a big way, not just as go-fers, contributed intellectually to a project like that. That's one of the reasons I'm so impressed by the guy. Well, I won't try to elaborate those 6 models here, either my personal favorite or the other 5. To explore them, you'll need to read the book. I hope you buy it and get your friends to buy it--This is just the beginning of a little mini book tour that I'm doing--and look at the diagrams.

I want to close instead on a broader note before spending the remaining time until-- I guess we have maybe even till 8:10 or 8:15, if you have that many questions, but before I get to the Q & A, I want to close on a somewhat broader note. It seems to me as you reflect on our Constitution's story, most of it is a story of struggle to extend the writ of what it never quite says. It says that there shall be equal protection of the laws, but it doesn't say what that means. And the people who wrote those words thought that racial segregation of the public schools by law and of public railways by law was perfectly consonant with equal protection. But we don't think that anymore. Much of the story is the story of a struggle to extend what it doesn't quite say. The real framers were not only the propertied white gentlemen who met in Philadelphia but the many more women and men, poor and rich, black, white, red, brown, yellow who marched and bled, who sang and rode buses and sat in and sometimes died to make freedom ring. Their song did not take all of its lyrics from the Constitution's literal text. The Constitution furnished the score, we the people, its lyrics. Ours, I think, has been a season of ugly political recrimination verging on paralysis and pessimism. But if we are true to the invisible Constitution, that doesn't have to be our fate. As Lincoln famously ended his first inaugural, "I am loath to close. We are not enemies, but friends. We must not be enemies. Though passion may have strained, it must not break our bonds of affection. The mystic chords of memory, stretching from every battle-field, and patriot grave, to every living heart and hearthstone, all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature."



Thank you so much for listening.

[Applause]

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