On Judicial Interpretation

The “parlor game” of appealing to the Founding Fathers

by PAUL M. BARRETT

O T UNTIL page 201 of his erudit e book The Invisible Constitution does Laurence H. Tribe drop the name of a one-time research assistant: “a remarkable young man who was then my student but who has since gone on to astonishing and inspiring achievements in his own right, Barack Obama.” The reference is entirely gratuitous and a little embarrassing for a reader who admires Tribe’s intellect and was hoping he’d get through his slender text (it’s only 211 pages, excluding notes and appendices) without advertising his relationship with the most famous former editor of the Harvard Law Review.

I am not implying that Tribe—’62, G ’63, J.D. ’66, Loeb University Professor and professor of constitutional law, author of numerous influential scholarly books and articles, and celebrated advocate who has argued more than three dozen cases before the Supreme Court of the United States—went out of his way to lavish praise on his one-time acolyte in hopes that Obama would soon be in a position to nominate justices to the highest court in the land. Not at all.

After reading this penetrating volume, I am confident that Tribe, a perennial presence on potential nominee lists during the Clinton years, has decided, once and for all, to take his name out of contention. How do I know this? Well, first there’s the very subject of the book, published last fall, a couple of months before Election Day. Tribe argues that without something called the “invisible Constitution,” neither we—nor the jurists in black robes—can understand the plain written one. “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.”

Picture the confirmation hearing before the Senate Judiciary Committee. A Republican leans into his microphone and asks, “So, Professor Tribe, can you explain to us which of your ‘recovered memories’ and ‘imagined experiences’ you would bring to bear when deciding whether to preserve Roe v. Wade or extend a constitutional right to marriage for same-sex couples?”

That wouldn’t be the end of it, either. Tribe has made the bold choice of illustrating his book with six glossy pages of jurisprudential doodles: winsome renderings in bright blue, green, and yellow Magic Marker of a half-dozen methods for “constructing” the invisible Constitution. These he has entitled “Geometric Construction,” “Geodesic Construction,” “Gyroscopic Construction,” and three other types of construction that begin with the letter “G.”

It’s hard to capture in words the glee that young Republican Senate staffers would experience as they skipped off to a Capitol Hill Kinko’s to reproduce easel-mounted versions of the scholar’s artworks, each of which he helpfully signed “LT 2/08,” leaving little room to claim that his publisher slipped in the illustrations as some sort of joke. The blown-up sketches would never get out of the television shot. Even Dick Cheney’s crew would have to classify the ensuing interrogation as torture.

But I AM NOT HERE (exclusively) to tease Professor Tribe. His book, dubious illustrations notwithstanding, is a serious and helpful meditation on constitutional interpretation. The fact that it probably kills any chance he’d have to put his provocative ideas into practice on the federal bench is a sad reflection not on Tribe, but on our shallow judicial politics.

Tribe argues persuasively that the most conservative jurists on the closely divided Supreme Court—chiefly Antonin Scalia, LL.B. ’60, and Clarence Thomas—get it wrong when it comes to deciphering our foundational legal document. The originalists, as they are known, contend that judges can look only to the literal words of the Constitution and the “original” understanding of those words held by the men who wrote and ratified them. That’s why the conservatives find it laughable that anyone could ground in the Constitution a woman’s right to choose to seek an abortion. The Constitution doesn’t mention abortion. The Founding Fathers would never have countenanced the act. Case closed.

Not so fast, Tribe says. Jurists of all stripes derive their interpretive principles from sources out-
As for the doodles—well, some of them I just didn’t get. For all its vectors and protractor-drawn circles, Geometric Construction left me baffled. (Don’t feel bad if you have the same reaction; after all, Tribe’s undergraduate concentration was mathematics.)

Geodesic Construction, by contrast, is much easier to understand. Tribe has scribbled a many-faceted form similar to

Tribe’s liberal version of the invisible Constitution is no secret, and he does not elaborate much on the substance of his views in this book. He believes that judges—whether they lean left or right—inevitably champion the values they perceive as underlying or animating the ambiguous admonitions and protections outlined in the Constitution. In articulating those values, judges give meaning to a phrase like “equal protection.” For him those words, applied to questions of racial relations, can be used not only to strike down intentional segregation but also to uphold race-conscious policies (“affirmative action”) that seek to remedy the lingering injustices of slavery and Jim Crow. For Justice Scalia, equal protection suggests that race can never be taken into account in any way in forming public policies. That’s a legitimate argument. Tribe’s undergraduate concentration was mathematics.

The Case for Big Government, by Jeff Madrick, M.B.A. ’71 (Princeton, $22.95). The editor of Challenge argues that “active and sizable government has been essential to growth and prosperity,” in a book that anticipated recent headlines.

Wired for War, by P.W. Singer, Ph.D. ’01 (Penguin, $27.95). Those drones over Afghanistan and Pakistan, says the Brookings Institution senior fellow, are but the leading edge of robotic conflict in the twenty-first century.


The Crisis of the Twelfth Century, by Thomas N. Bisson, Lea professor of medieval history emeritus (Princeton, $39.50). Amid collapsed leadership and governance, threats to social order and peace, new approaches to power and legitimacy arose. A sweeping scholarly history of Western Christendom.

The Piano Teacher, by Janice Y. K. Lee ’94 (Viking, $25.95). A debut novel of “romance, secrecy, and betrayal,” as the publisher puts it, in World War II and a decade later, set in Hong Kong, where the author (formerly of Elle and Mirabella magazines) was born and now lives.


More Than Just Race, by William Julius Wilson, Geyser University Professor (W.W. Norton, $24.95). Wilson’s latest installment in a career-long investigation of ghettos, low-skilled black men, and the fragmentation of African-American families—and of the changes needed to alter the status quo.

All Other Nights, by Dara Horn ’99 (W.W. Norton, $24.95). A different sort of Civil War romance, this novel begins with Jacob Rappaport planning a poisoning at Passover in New Orleans.

The Scientific Life, by Steven Shapin, Ford professor of the history of science (Chicago, $29). A densely reasoned examination of the moral life of scientists and why it matters, as they practice in the academy, within corporations, and as entrepreneurs in pursuit of riches.


China between Empires, by Mark Edward Lewis, JF ’86 (Harvard, $29.95). A Stanford scholar on the formative pre-Buddhist period of the Northern and Southern dynasties.
Second-Life Photography

Three years ago, Lee Smith ’69, associate vice president for legal affairs at the University of Texas, his wife, Michelle, and their 19-year-old daughter, Allison, visited Al Akhawayn University in Ifrane, Morocco, where Allison eventually enrolled for a year. For Smith, it was his first time back in Morocco since 1975, when he lived there for two months, staying “until either my health or my money ran out,” as he recalls. Though he had been a passionate photographer in college, when “my camera was a permanent extension of my hand,” he had not done any serious photography for 30 years. Meanwhile, digital technology had revolutionized the field that Smith had abandoned out of frustration with his lack of a darkroom and the control of the final image that it offers—a function that darkrooms have now largely ceded to computer software.

During his 1975 Moroccan sojourn, Smith took no pictures, partly because he had been told that its people were averse to being photographed. But on his return trip, he carried a five-megapixel Pentax camera and a determination to “take pictures I could show somebody.” He discovered that Moroccans didn’t mind photographers, that digital photography had arrived, and that “I still had an eye.” Furthermore, he could fine-tune his prints on a computer. “Everything that had turned me off to photography was gone,” he declares. “Now, I’m a second-life photographer.”

“I have always loved the photo essay,” he adds. (In college, he created a number of them for Harvard Yearbook Publications, where he was managing editor as a senior; he has also had photographs published in Time and Cosmopolitan.) In recent years he has made a third voyage to Morocco and two trips to Guatemala, pursuing what he calls “cultural photography.” He asks, “What would a Moroccan see in Morocco? I wanted to become a reflection of that, shooting things a Moroccan would look at and say, ‘This is my culture’—not just something an outsider would be impressed by. I need to see it from their point of view; I can’t just be in a bus somewhere taking a picture.”

To do this, a photographer needs to melt invisibly into the surroundings while remaining present and engaged. Smith’s physical appearance, which he calls “visually ambiguous,” helps: though he’s identified as an African American in the United States, his ethnic heritage, which includes Native American and European elements, has led some to peg him as Peruvian or Italian. “Pakistanis see me and think I am Indian,” he explains, “and Indians see me and assume I am Pakistani.” Furthermore, he adds, “I have never met a stranger.” In Guatemala, for example, he spent time every day with a Mayan woman named Ruth, who sold textiles in the village market. “Her friends, the women who did the weaving, became my friends,” Smith says. “For some reason people open themselves to me and welcome me into their lives.”

Exhibition spaces have also welcomed him to their walls. In the past two years, Smith’s 20-by-30-inch prints have hung in eight different venues, from New York to his hometown of Austin (see www.imagesofmorocco.com). As a “second-life photographer,” he often reflects on a bit of advice he got from Ansel Adams in 1970, but was “too self-absorbed to understand,” he says. “Ansel said, ‘If you want to be a successful photographer, get a job selling shoes.’ What he meant was, if you want to discover your art, find a day job that pays the rent and puts food on the table, because if you depend on photography to do that, you will be consumed by taking the pictures people pay you for, and will never discover your own art. Maybe practicing law is something like selling shoes.”

~CRAIG LAMBERT

Photographs by Lee Smith

the geodesic domes made famous by Buckminster Fuller ’17. He suggests that a large body of famous constitutional rulings make more sense if they are seen as the triangular facets that comprise the geodesic surface. Beneath the facet that is the landmark Miranda v. Arizona decision that yielded “You have the right to remain silent,” and other warnings to criminal suspects, lies the core Fifth Amendment protection against coerced self-incrimination. Beneath the decisions establishing the “exclusionary rule”—which requires courts to throw out evidence, even if true and relevant, that has been gathered in an unconstitutional manner—lies the need to give practical force to protections such as that against self-incrimination.

Tribe does not insist that these particular facets are the only possible ways to shield the constitutional values in question. But he does maintain that there was nothing illegitimate about the Supreme Court employing the invisible Constitution, via Geodesic Construction, to give the visible one practical effect and meaning.

The nation, I think it’s safe to say, will not have the opportunity to hear Laurence Tribe explain his six “G’s” as a nominee before the Judiciary Committee. Barack Obama seems like a pragmatist who will send up candidates for the court more likely to win broad approval. But I kind of wish the Democrats would call Tribe as an expert witness to talk about how we think about the Constitution, seen and unseen. We’d all learn a lot.

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