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Book Reviews

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Senators, Save This Honorable Court?

GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY. By *Laurence H. Tribe*. New York: Random House. 1985. Pp. xix, 171. $17.95.

*Reviewed by Lackland H. Bloom, Jr.**

It makes a difference who is appointed to the Supreme Court. That, in a nutshell, is Professor Laurence Tribe's not too shocking conclusion in *God Save This Honorable Court*. Within its pages Tribe shows that an individual Justice may dramatically affect the development and direction of constitutional analysis. Because President Ronald Reagan may have an opportunity to fill several vacancies on the Court, Tribe is concerned about the significant impact such appointments could have on the future of the Court, the Constitution, and, of course, the Country—an impact the effects of which would endure well beyond the expiration of the President's term of office. Thus, as Tribe concedes, publication of his book and the fact that President Reagan may soon have an opportunity to appoint one or more Justices to the Court are directly related (p. ix).

Professor Tribe is afraid that this (or a future) President will "misuse" the nomination process to the great detriment of the Court and the Constitution. As a check on this potential abuse of power, Tribe, after reviewing the role of the Court and the nature and history of the appointment process (chapters one-five), recommends that the Senate should vigilantly employ its advice and consent power[1] to maintain a "balanced" Supreme Court (chapters six-eight).

After his Prologue, entitled "The Greying of the Court"—which reveals the exact significance of the ages of many Justices on this Supreme Court (pp. xv-xix), Tribe begins *God Save This Honorable Court* by reviewing the pervasive role that the Court plays in our society (pp. 3-30). He then attempts to show how the views of a single Justice can have a decisive impact on the resolution of important constitutional issues (pp. 31-40). Next, Tribe debunks three "myths" which he maintains foster a misunderstanding both of the role of the Court (as the interpreter of the Constitution) and also of

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1 U.S. CONST. art. II, § 2, cl. 2.

the judicial appointment process itself: "The Myth of the Strict Constructionist" (pp. 41-49), "The Myth of the Surprised President" (pp. 50-76), and "The Myth of the Spineless Senate" (pp. 77-92). The remainder of the book is devoted to an examination of the Senate's role in scrutinizing individual nominees (pp. 93-105) and in ensuring a "balanced" Court (pp. 106-24), and, to an explanation of why the Senate is peculiarly qualified to provide a significant check on the President in this context (pp. 125-37). Tribe also includes an Epilogue (pp. 138-41) in which he advises "all of us" to "find ways . . . to make ourselves heard" whenever a Supreme Court Justice is appointed (p. 141).[2]

Tribe validly points out that the characteristics of a particular Supreme Court Justice, including his or her intellect, legal skills, values, and philosophy of judicial review and constitutional interpretation, can have a profound impact on the development and direction of constitutional law. However, in the process of explaining why this is so, he outlines a substantive approach to constitutional law which is heavily biased in favor of an expansive conception of individual rights (pp. 1-30, 111-24).[3] More significantly, in addressing "The Myth of the Strict Constructionist," Tribe claims that the words of the Constitution itself as well as the Framer's original intent often prove unhelpful in resolving difficult, crucial constitutional questions (pp. 42-47). Rejecting the "fallacy" of original intent, Tribe argues that the Court must "inject a lot a substantive meaning into the words and the structure" of the Constitution (p. 48).

The nature and limitations of the Supreme Court's role as interpreter of the Constitution is perhaps the most controversial issue in all of constitutional law.[4] Some have criticized the type of open-ended and creative approach to constitutional interpretation espoused by Tribe.[5] But the lay reader, for whom Tribe's book is

2 *God Save This Honorable Court* also contains a list of all nominees to the Supreme Court (pp. 142-51) and "A Mini-Guide to the Background Literature" (pp. 152-53).

3 Tribe sets forth his substantive theories of constitutional law with far more sophistication and in much greater detail in L. TRIBE, CONSTITUTIONAL CHOICES (1985) and L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978).

4 The literature on this issue is overwhelming. *See generally* M. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS (1982); J. ELY, DEMOCRACY AND DISTRUST (1980); J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); *Symposium: Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 259 (1981); *Symposium: Judicial Review and the Constitution—The Text and Beyond*, 8 U. DAYTON L. REV. 443 (1983); *Symposium: Judicial Review Versus Democracy*, 42 OHIO ST. L.J. 1 (1981). Tribe purports not to be particularly interested in the issue (at least at the theoretical level). *See* L. TRIBE, CONSTITUTIONAL CHOICES 1-8 (1985). Nevertheless, the question is thoroughly implicated in virtually everything he writes.

5 *See* Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 353-60 (1981); Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.—C.L. L. REV. 117, 117-20

primarily intended, may be unaware of the serious and continuing academic debate on this issue. Consequently, many such readers may accept Tribe's analysis as the settled and accepted norm. Moreover, for those readers who do view Tribe's analysis of constitutional interpretation as the correct one, the perceived danger of adverse consequences resulting from the appointment of Justices who fail to share Tribe's approach will seem all the more ominous.

Tribe devotes an entire chapter to the task of debunking "The Myth of the Surprised President" (chapter four). This "myth" involves the notion that Presidents generally have been unsuccessful in influencing the direction of the Court through the appointment process (since they have not been able to predict how nominees would behave—what "constitutional choices" they would make—once appointed) (p. 50). If this notion were true, citizens need not unduly concern themselves with the values and the judicial philosophy of Supreme Court nominees. As a practical matter, there would be little likelihood that a President would be able to "pack" the Court even if he had the opportunity to appoint several Justices. Thus, President Harry Truman believed that "packing the Supreme Court simply can't be done. . . . [He] tried and it won't work. . . . Whenever you put a man on the Supreme Court he ceases to be your friend" (p. 51).

Despite a few, often cited counter-examples, Tribe argues that past Presidents were able to significantly alter the direction of the Court *when they chose their Justices carefully and with that aim in mind* (pp. 74-76). President Reagan has made no secret of his desire to fill judicial vacancies with persons who profess a judicial philosophy which he considers appropriate.[6] Nevertheless, in vanquishing this particular "myth," Tribe destroys little more than a straw man. He never tells us who, if anyone (other than Truman), believed in the myth in the first place. Others have noted that on occasion, Presidents have been surprised by the judicial behavior of their nominees.[7] But the point of their observations is not that Presidents are unable to influence the direction of the Court. Rather, they merely reveal that, since Presidents are *sometimes* surprised, the nomination power does not provide an *airtight* majoritarian check on the Court. As Tribe points out, even this usually occurs only when they have

(1978). *See generally* Van Alstyne, *Interpreting* This *Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209, 227-35 (1983).

6 Browning, *Reagan Molds the Federal Court in His Own Image*, 71 A.B.A. J. 60 (Aug. 1985); Friedman & Wermeil, *Reagan Appointments to the Federal Bench Worry U.S. Liberals*, Wall St. J., Sept. 6, 1985, at 1, col. 1; Press & McDaniel, *Judging the Judges*, Newsweek, Oct. 14, 1985, at 73.

7 *See, e.g.*, J. CHOPER, *supra* note 4, at 50.

failed to give much thought to the likely, long term judicial behavior of a nominee (pp. 50-54).

Tribe next disposes of "The Myth of the Spineless Senate" (chapter five) which involves the belief that the Senate has played a relatively deferential role in the appointment process. Although Tribe's debunking provides some interesting historical anecdotes, the reader must again ask: "Who believed this myth in the first place?" (especially since, as Tribe relates, the Senate has rejected or forced the withdrawal of *several* nominees in the recent past (pp. 81-83, 86-89)). Perhaps Tribe is really concerned with debunking the myth that the Senate does not reject nominees on the basis of their philosophies, values, or political beliefs—as opposed to their character, temperament, or legal skills. He does show that, on occasion, the Senate has utilized the former factors as well as purely political considerations; however, Tribe recognizes that this has not been a consistent practice (pp. 85-89).

The heart of *God Save This Honorable Court* is Tribe's thesis that the Senate should play a very active, indeed, a "major" role in scrutinizing nominees to the Court (pp. 93-137).[8] Tribe argues that the Senate is under a *constitutional duty* to reject a nominee when it is sufficiently dissatisfied with his or her philosophy of constitutional law or judicial review (pp. 93-105). For instance, he argues that the Senate is *obligated* to reject a nominee who would consider overturning such significant judicially created doctrines as incorporation of the Bill of Rights against the states or one person-one vote legislative reapportionment, because these holdings of prior Supreme Court Justices are part of the American vision of liberty *per se* (pp. 94-96).[9]

Tribe seems to believe that as a matter of constitutional law, certain landmark precedents and doctrines become so well accepted as part of our heritage that not only do they become constitutionally insulated from reversal, but, in addition, a potential nominee *may not even talk about reconsidering them without forfeiting the chance to serve on the Court*: "Some constitutional landmarks are so crucial to our sense of what America is all about," argues Tribe, "that their dismantling should be considered off-limits, and candidates who would be at all likely to upend them should therefore be considered unfit" (p. 94). As long as these landmark decisions have

8 See Rees, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913 (1983), for another recent argument favoring a more active role by the Senate. Professor Rees is presently Special Counsel (in charge of screening potential nominees for the federal judiciary) to the United States Attorney General.

9 Tribe also argues that a Senator would be constitutionally bound to reject a nominee who would not respect the people's right to amend the Constitution or who would support the wholesale abolition of private property (pp. 96-97).

ultimately gained widespread acceptance in either the public forum or the legal profession, that the doctrines were once controversial and the subject of vigorous judicial and academic debate at the time of their adoption does not appear to have any significance.[10]

At least in *these* instances the majority of the Court did carry the day and quite probably reached the "right" decisions as well. As a matter of public policy (reflected in the doctrine of stare decisis), it may be wise to conclude that these matters are definitively resolved and ought not be reconsidered. Consequently, one can legitimately argue that a Senator should feel free to vote against a nominee who "would be at all likely" to overrule these decisions. This is no basis, however, for concluding that a Senator is constitutionally *obligated* to vote against a nominee who rejects particular Supreme Court interpretations of the Constitution—no matter how well accepted these doctrines have become.[11] Rather, a Senator's decision to vote to confirm or reject a Supreme Court nominee is a matter wholly committed to his or her discretion. As such, he or she may legitimately base that decision on anything from a principled analysis of the nominee's constitutional philosophy to political retaliation or personal pique. No Senator is constitutionally compelled to consider the factors that Tribe emphasizes simply because the selection of Supreme Court Justices is important and doing so would be what some consider a wise and responsible course of action.

Tribe acknowledges that there are relatively few precedents that are "so crucial to our sense of what America is all about that their dismantling should be considered off-limits" (p. 94). His critique of the present Court suggests that there are more than a few precedents that *he* would like to see dismantled (pp. 111-24). Assuming that there are some precedents that have become central to our national self-identity, it is not at all clear that either constitutional law scholars or members of the Senate would agree on which decisions so qualify. Rather than attempt to identify them in advance and immunize them from reconsideration through the appointment process, it would be more realistic to simply recognize that if the President nominates, and the Senate confirms, several

10 In the cases involved, distinguished Justices published strong and at least arguably persuasive dissents which questioned the constitutional legitimacy of the Court's results as well as its methodology. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 171 (1968) (Harlan, J., dissenting) (incorporation); Reynolds v. Simms, 376 U.S. 533, 589 (1964) (Harlan, J. dissenting) (reapportionment); Baker v. Carr, 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting) (reapportionment).

11 If Tribe is arguing that a Senator would be constitutionally obligated to reject the nominee, the breach of that duty presumably would not give rise to any judicially enforceable remedy. *Cf. Ex parte* Lévitt, 302 U.S. 633 (1938) (private citizen does not have standing to challenge appointment of Supreme Court Justice as violative of article I, section 6, clause 2).

Justices who acknowledge that they are inclined to overrule a particular decision, and if the Court does in fact overrule the decision, then, almost as a matter of definition, it was not particularly crucial to our self-identity as a nation.

Tribe also argues that a Senator should be under a "special duty" to reject a potential Justice whose nomination is based solely on his or her views on a specific issue (such as abortion) (pp. 96-100). One would hope that Presidents will nominate persons with broad perspectives to the Court. But if a President sends such a single issue nominee to the Senate, a Senator should be free to reject the nominee on this basis *or* to vote in favor of the nominee *because* he or she approves of the nominee's position on the issue. From time to time, issues will come before the Court which may well overshadow virtually all remaining business of the day. In the past the constitutionality of slavery, segregation, and the New Deal legislation were such issues. At present abortion is, for many, such an issue. If at a particular time a Senator or his or her constituents believes that such an issue is present, he or she should be able to cast a vote on that basis.

As an example of the way in which a Senator should scrutinize the judicial and constitutional philosophy of a potential Justice, Tribe argues that a Senator should not vote in favor of a nominee who would oppose *Roe v. Wade*,[12] the Court's primary abortion decision, "because the Bill of Rights does not *explicitly* set forth a woman's substantive right to control her own body . . ." (p. 98). While it would certainly be perfectly proper for a Senator to reject a nominee on this basis, he or she should scarcely feel "constitutionally compelled" to turn away any nominee who professes such a philosophy—even if it is a philosophy of interpretation which Professor Tribe considers simplistic or unduly restrictive. Surely a Senator can have a true "regard for the Constitution as preserving a public system of private rights" (p. 99) and at the same time reject Tribe's approach to constitutional interpretation.

Tribe indicates that a Senator "should be vigorous in inquiring into" whether a nominee has a well-developed judicial philosophy of constitutional interpretation (pp. 100-02). Here again, Tribe's view is subject to criticism. Although a philosophy of constitutional law may be a *desirable* trait in a Supreme Court nominee, it should not be an ironclad requirement. A developed theory of constitutional interpretation may often indicate thoughtfulness and wisdom, but it may also be a sign of stagnation or dogmatism. Tribe himself recognizes that "[p]erhaps the most important qualification

12 410 U.S. 113 (1973).

for being a Supreme Court Justice is the possession of an open mind" (p. 103).

More importantly, few persons besides federal judges, public law litigators, and constitutional law teachers have the time or inclination to develop a coherent theory of constitutional law and interpretation prior to appointment to the Supreme Court. Although none of these groups should be ignored when nominations for the Court are made, it would be unfortunate to all but automatically eliminate from consideration the vast remainder of highly capable lawyers who have not devoted their careers to the analysis of constitutional questions. Given the size and scope of the Court's docket, even the most sophisticated constitutional scholar still has much to learn upon appointment to the Court.

Tribe would also require a Senator to reject a nominee who either has "no respect whatever for precedent" or at the other extreme believes that constitutional precedent may never be reexamined (p. 102). As a practical matter, it is unlikely that a person who professes either approach would gain nomination in the first instance. As a matter of policy, it would be both proper and sensible for a Senator to reject a nominee who takes either of these extreme views. But again, this is not to say that a Senator *must* vote against a nominee who so interprets the role of stare decisis. Such a candidate is not *constitutionally* disqualified from serving on the Court. Many of our judges have exhibited a weakened respect for precedent both in the common law and constitutional contexts.[13] Whether this is good or bad, it would prove futile and unwise to attempt to constitutionally perpetuate (through the confirmation process) as the *only* acceptable methodology the present middle of the road conception of the role of stare decisis.

Tribe proposes that the Senate should attempt to ensure that the Court maintains its "overall balance" by rejecting nominees who would tip the Court too strongly in the direction of a particular faction (pp. 106-10). According to Tribe, if liberal and conservative wings are held in check by a moderate center, the Court is less likely to adopt an "improper" (ideologically oriented) approach to the Constitution. As a matter of policy, such an approach seems desirable. It does raise a few problems however.

First, ignoring the problem of defining just when the Court is properly balanced, Tribe's general approach to constitutional interpretation tends to undermine the acceptance of a balanced Court as the norm. If the Court continues to confront the controversial and

13 *See* Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 387-91 (1981); Monaghan, *Taking Suprme Court Opinions Seriously*, 39 MD. L. REV. 1 (1979); Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467.

politically charged issues of the day (as it so often has in the past), and, if it employs the open-ended and creative mode of interpretation that Professor Tribe favors (pp. 41-49), it would not be surprising if the President, the Senate, and the public came increasingly to view the Court as a highly effective political instrument as opposed to a neutral and principled body. In such an environment, both the President and many Senators may be tempted to try to "pack" the Court with Justices predisposed toward their own policies and values at the expense of "overall balance." If the Court is perceived as largely political in nature, it would be difficult to focus the appointment process on considerations of principle rather than expedience. Ironically, a balanced Court might well emerge in such an atmosphere as a result of political compromise. However, that result would be a matter of happenstance rather than design.

Secondly, Tribe and others criticize the present Court for its lack of direction (pp. 123-24).[14] But that is an all but inevitable by-product of a relatively "well-balanced" Court. As long as the liberal and conservative wings are divided by a few moderate swing votes, the Court is unlikely to develop coherent lines of precedent (since one or more of the Justices in the center can be expected to respond to subtle factual variations by shifting their votes from one faction to another).[15] Perhaps this is a healthy means of checking the Court. But it is not cost free. Moreover, it is pointless to criticize the Court for doctrinal confusion and at the same time favor a compositional check which would render it all the more difficult for the Court to achieve clarity and consistency.

Thirdly, to some extent, balance is in the eye of the beholder. Tribe indicates that in many respects he is less than pleased with the present Court (pp. 111-24) and *presumably* must consider it *inadequately* balanced. Others no doubt disagree; or agree, but for entirely different reasons. Whether a person believes that the Court is balanced turns on what he or she believes the Court should be doing and where it should be going. To say that Senators should only confirm Justices appointed to balance the Court may only belabor their task.

Lastly, if it is desirable to preserve a balanced Court, such an approach must be followed regardless of existing political circumstances. No one is justified in arguing for balance when one's political opponents are in control of the appointment process and for

14 *See* Tribe, *First Amendment Trends: Ad Hoc Doctrines Do Not a Constitution Make*, in 4 THE SUPREME COURT: TRENDS AND DEVELOPMENTS 209-13 (1983); Blasi, *The Rootless Activism of the Burger Court*, in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 198-217 (V. Blasi ed. 1983); Howard, *The Burger Court: A Judicial Nonet Plays the Enigma Variations*, 43 LAW & CONTEMP. PROB. 7 (Summer 1980).

15 *See generally* Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

the presidental power to pack the Court with Justices of a kindred philosophy when the tables are turned.

Tribe may be accused of writing a morality play in which the President is cast as the villain. Basically, he argues that it is the role of the Senate (not God) to "Save This Honorable Court" from the imprudent and politically motivated nominations of the President. He contends that the Senate is institutionally well suited to serve as a meaningful check on the President's nominating power. The Senate is so suited because it is "more diverse, more representative, more accountable" (p. 132). All that may well be true, but it does not necessarily follow that the Senate as a whole or that a significant group of Senators will (or should) approach Supreme Court nominations with a different perspective than the President's.

Whether the Senate serves as an independent check—instead of a mere rubber stamp—is likely to turn largely on the dynamics of the existing political climate. It is questionable whether the Senate can be expected to provide a consistent check over time. More importantly, it is probable that the Senate will be most deferential precisely when there may be the greatest need for an independent check; that is, when the President is enjoying great popularity and public support. It is in such an atmosphere that a confident President may be tempted to place his stamp on the Court in a very decisive manner. Indeed, Tribe's historical analysis of the Senate's role (pp. 79-89), along with common sense, suggests that the Senate will most likely oppose only a relatively weak and unpopular President. Ironically, in recognition of political realities, such a President may be less inclined to press his or her luck with controversial nominations.

Conclusion

God Save This Honorable Court provides a timely and useful contribution to the current debate concerning the appointment of Justices to the Supreme Court. The primary impetus for the publication of the book at this time, if not for many of its conclusions, seems to be Tribe's realistic fear that the Court may soon be delivered into hands which are unlikely to be favorably disposed to his own well-developed constitutional philosophy. If so, it is tempting to write off his whole thesis on the ground that it would seem far less appealing to its author if the White House were in liberal hands and the Senate were dominated by conservative recalcitrants! Be that as it may, the book is valuable in that it reminds us that the Senate has a significant role to play in the appointment process and that it is not limited to consideration of whether a nominee is dishonest or stupid.

Although a Senator should not feel constitutionally bound to take account of the considerations that Tribe emphasizes or to apply them in the same manner as he would, these factors are undeniably relevant to the selection of Justices. As a matter of policy, such views ought to, and probably will, be factored into the decisions of conscientious Senators. While it is unlikely that the Senate will consistently take its responsibility in the appointment process as seriously as Tribe urges it to, the very reminder that it can is a step in the right direction.

The Myth of the Tighter Circle

GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY. By *Laurence H. Tribe*. New York: Random House. 1985. Pp. xix, 171. $17.95.

*Reviewed by John F. Maguire**

Today the American Republic faces an actuarial fact of no small significance. There is an emergent probability that the President, during the current term, will be called upon to nominate several jurisprudents to seats on the United States Supreme Court. Today's Supreme Court is the first Court in our nation's history ever to have a majority of members over age seventy-six. As Professor Laurence Tribe of Harvard Law School reckons it: Given that, actuarially, "the five oldest Justices still have an average life expectancy of seven years," and assuming that none of the current Justices retires or dies, "on November 3, 1986—almost two years to the day after Ronald Reagan's reelection—these eight men and one woman will become the oldest Supreme Court in our nation's history. . . . Before the the next presidential election, five of the Justices will be eighty or older" (p. xv).

Given the strong likelihood that several Court vacancies will open up before this term is over, we should give serious thought to the difficult, yet fundamentally important, political problems associated with the Supreme Court appointment process. In Professor Tribe's sense of urgency in this matter, there is nothing excessive:

> Not since F.D.R. appointed seven Justices in four years has the nation faced the prospect of so drastic a change as it does today in the arbiter of our Constitution. Almost inevitably a bench filled with older Justices leads to a spate of appointments that can radically reshape the Court. The first "old Court" in our nation's history, the Supreme Court of 1828 with an average age of sixty-three, was rocked by six nominations by President Andrew Jackson over the course of his two terms. Similarly, when the Court's average age neared sixty-nine in the spring of 1861, a major change awaited. Within the three-year period that followed, Abraham Lincoln named five Justices of his choosing. But the oldest Court prior to the one Roosevelt faced was the 1909 Court, which President William Howard Taft encountered. In just one term, Taft filled six vacancies—still the record for one term of a President (p. xviii).

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By contrast, "[t]he appointment process has proceeded at a relaxed pace over the past quarter century as the Court has grown older, producing only about half as many new Justices as were added to the Court in the first quarter of this century" (p. xix). But in the prognostication of Professor Tribe, "this lull is only the calm before the constitutional storm that surely lies ahead" (p. xix). The "relative tranquillity" of the two most recent appointments—those of Justices John Paul Stevens and Sandra Day O'Connor—is a misleading circumstance. A storm is on the horizon.

I. The Appointment Process Demythologized

Before we get caught in the turbulence of this storm, we should, Tribe urges, make sure that our thinking is free of certain myths about the appointment process. There is, first of all, The Myth of Relative Inconsequence:[1] "[E]ach individual Justice, or even a pair of new members, is said to be swallowed up by the institution of the Court, and is therefore not in a position to reshape its course" (p. 31). Professor Tribe explodes this myth with ease. In truth, "[a]bout one-fifth of the Court's cases in the decade from 1974 to 1984 were decided on a 5-4 basis" (p. 32); this, even as this Court has been, and is now, undisturbed by the "sharp and deep" schismogenetic developments that have characterized previous Courts. Moreover, the history of previous Courts proves the consequential character of Supreme Court appointments. Very much alive in our collective legal memory is the gigantomachian struggle, near to the turn of the century and in the early 1900s, between, on one side, those Justices who subscribed to a *laissez faire* economism in their interpretation of the Constitution, and on the other side, those Justices who defended the constitutionality of measures protecting men, women, and children from the health and life-maintenance deficits induced by unrestrained capitalist development. At first, the *laissez faire* line determined the Court's trajectory, but the Court's old-liberal or "conservative" economic rulings were often handed down in 5-4 decisions. "For example, the 1895 decision to hold the income tax unconstitutional in *Pollock v. Farmers Loan and Trust Co.*, the 1905 decision to strike down a New York maximum hours law for laborers in *Lochner v. New York*, and the 1918 ruling that invalidated a federal child labor statute in *Hammer v. Dagenhart*, were all 5 to 4" (p. 32). Then came the New Deal rulings, which

> likewise turned on 5-4 votes. For example, the Court's early 1930s concessions to the New Deal—upholding a Minnesota mortgage moratorium in *Home Building & Loan v. Blaisdell*, sus-

1 This myth is discussed in chapter two, "What Difference Can a Justice or Two Make?" (I have felt free to give this myth a name.)

> taining a New York price control on milk in *Nebbia v. New York*, and upholding Congress's repudiation of the gold standard in the *Gold Clause Cases*—each turned on the vote of a single Justice. When the Court then struck out at the New Deal in 1935 and 1936, it invalidated the Railroad Retirement Act and a New York minimum wage law by a single-vote margin. Finally, when the famous 1937 turn-about occurred, the Court, by similar 5-4 votes, sustained a Washington minimum wage law in *West Coast Hotel v. Parrish* and the National Labor Relations Act in *NLRB v. Jones & Laughlin Steel Corp.* (pp. 32-33).

We need not discuss here such landmark criminal defense rulings as *Mapp v. Ohio*, *Malloy v. Hogan*, *Escobedo v. Illinois*, *Miranda v. Arizona*, *Furman v. Georgia*, and *Woodson v. North Carolina*, save to say that all of these cases were also decided by 5-4 margins. As were the cases of *University of California v. Bakke* (upholding certain affirmative action programs but ruling out the use of numerical "quotas" to aid minority students) and *Lynch v. Donnelly* (upholding the constitutionality of city-sponsored nativity scenes)—to mention only two more (pp. 33-34).

Each Justice counts. Had the Senate not rejected Herbert Hoover's nominee John Parker (tainted by a number of anti-labor decisions, Parker, a federal judge from North Carolina was rejected by a 41-39 vote), the "more moderate" Owen Roberts would not have been appointed to the Court. Roberts was the Justice who switched his vote on the minimum wage laws in 1937, bolting from the Court's "Four Horsemen" (Justices Van Devanter, Sutherland, Butler, and McReynolds) (p. 34). As we shall see, Tribe places a special importance on the Senate's rejection of Parker.

There is also "The Myth of the Strict Constructionist" (pp. 41-49). Some would argue that the many 5-4 splits would be sharply reduced—and that one or two Justices would not make much difference—if only the Justices adhered to strict constructionism; if only appointees confined themselves to text-bound "correct reading" of the Constitution, or at the most, to *exegesis*. In actual fact, however, jurisprudential *eisegesis*—in Tribe's phrase, "put[ting] meaning *into* the Constitution" (pp. 42-43)—is a transcendental-pragmatic necessity in constitutional adjudication. "The Supreme Court just cannot avoid the painful duty of exercising judgment so as to give concrete meaning to the fluid Constitution . . ." (p. 47). The archexample adduced by Tribe is the infamous discourse of Chief Justice Taney. "When Chief Justice Taney declared that blacks were an 'inferior class of beings' that could 'justly and lawfully be reduced to slavery for the white man's benefit,' he claimed that this was not *his* opinion but a conclusion dictated by the language of the Constitution . . ." (p. 47). Here I would add that had Justice Taney extended legal recognition of personhood to Dred Scott, this rec-

ognition would not have been *his* opinion in the sense of being "merely his own"; it would have been a conclusion dictated by the ontological status of the controverted "being" in question. This consideration becomes relevant when, under the *Roe v. Wade*[2] ruling, preborn infants are treated as an inferior class of beings.

Next, Tribe confutes "The Myth of the Surprised President" (pp. 50-76). Like the myth of the strict constructionist, the myth of a President surprised by the decisions of his appointee, serves to "lull us into a state of passive acceptance of the Presidents' nominations on the premise that the substantive views of the nominees have no predictable effect on their future votes as Justices or on the outcome of the Supreme Court decisions that shape our lives" (p. 50). Reviewing the record, Tribe shows that, although Presidents have on occasion been surprised by their appointees' decisions, "all in all" the use of the nominating power by such Presidents as Washington, Adams, Jackson, Lincoln, Grant, Cleveland, Harrison, Taft, Roosevelt, Truman, Eisenhower (notwithstanding his remark that, yes, he made two mistakes as President, "and they are both sitting on the Supreme Court": Justices Earl Warren and William Brennan (p. 51)), and Nixon, shows that "a determined President who takes the trouble to pick his Justices with care, who selects them with an eye to their demonstrated views on subjects of concern to him, and who has several opportunities to make appointments, . . . can, with fair success, build the Court of his dreams" (p. 76).

Finally, Tribe examines "The Myth of the Spineless Senate" (pp. 77-92). According to this myth, the Senate may chafe at the President's Court plans, but in the end the Senate defers and gives the President "the man he wants." Such, it is believed, has been the custom, and such, then, is the way it will go. Quite to the contrary: "Almost *one out of every five nominees* to the Court," Tribe points out, "has failed to gain the Senate's 'consent.' No other nomination that a President makes receives more rigorous scrutiny" (p. 78). Rejected by the Senate were Washington's nominee John Rutledge (tainted by his opposition to the Jay Treaty (p. 79)), Madison's nominee Alexander Wolcott ("he was not up to snuff" (p. 81)), Polk's George Woodward (tainted by support he gave to the American Nativist agenda, which proposed inordinately restrictive immigration measures and measures which discriminated against new ethnic groups (p. 87)), Buchanan's Jeremiah Black (tainted by his opposition to outright abolition of slavery (p. 88)), Nixon's Clement Haynsworth (a poor civil rights record, plus conflict of interest violations (pp. 82, 88-89)), and Nixon's G. Harrold Carswell (1948 campaign pledges to support white supremacy (p.

2 410 U.S. 113 (1973).

89); as a federal judge, added new depth to the meaning of shallow in reasoned legal discourse (p. 82); as a United States Attorney, helped convert a public golf course into a private club so that it could continue to exclude blacks (p. 89)).

Although finally confirmed, Buchanan's nominee Nathan Clifford is an especially noteworthy case. Nominated in the wake of the *Dred Scott* decision in 1857, Clifford was a defender of slavery. A bitter five-week battle was waged against his nomination by Senate abolitionists; only after the Democrats finally closed ranks, and then only with the absence of Republican Senators Sumner and Cameron, was Clifford confirmed, by the narrow margin of 26 to 23 (pp. 87-88).

In the light of this history, Professor Tribe strongly urges the Senate not to succumb to the myth of its own passivity or "spinelessness" (pp. 91-92). But more: The Senate should positively engage itself in straightening out the High Court's curvature of the spine. In this connection, the Senate's rejection of Herbert Hoover's nominee John Parker is especially instructive. Nominated in March of 1930, federal judge John Parker of North Carolina met with strong opposition within the Senate. In the notorious *Red Jacket Mining Co.* case, Parker wrote an opinion for the Fourth Circuit Court of Appeals upholding a "yellow dog" contract the terms of which exacted a worker's pledge never to join a union. This opinion raised the question of Parker's philosophical fitness for the Supreme Court.

> Opponents argued that Parker should have been strong enough to see that yellow dog contracts were unjust and to rule just that, despite precedents to the contrary. The pro-labor campaign to reject Parker was thus based not on any claims of incompetence by Parker, but on an abhorrence of the anti-labor judicial doctrine of the 1920s, and an objection to the highly conservative, anti-labor majority that already existed on the Supreme Court (p. 90).

One might interpret the Senate's 41-to-39 vote rejecting Parker as an instance of the Senate's seeking the common good of persons, but Tribe makes another argument: He interprets the Parker rejection as an instance of the Senate's "seeking a balance on the Court" (p. 90). This idea of "balance" is the *idée maîtresse* of Tribe's theory of the appointment process. According to Tribe, for the sake of constitutional order, not only should there be an equilibration of power between the three branches of government; and not only should there be an equilibration of power between the President's nominating power and the Senate's confirming power, but there should also be an equilibration of power *within* the Supreme Court. To ensure that this is the case, both the President

and the Senate, according to Tribe, have a special responsibility to ask "how confirmation of the individual Justice would affect the *overall balance* of the Court" (p. 106).

This theory is portentously novel. As Professor Tribe forthrightly admits, an equilibration standard for Supreme Court nominees "shifts the focus" away from the qualification standard. Indeed, "[t]his shift in focus may mean that nominees who fall *within* the President's and a given Senator's circles of acceptability, when considered on their own merits, will fall *outside* the tighter circle drawn by a Senator when considering the context of the nominee's appointment" (p. 106).

Let us take a closer look at this tighter circle. According to Tribe:

> [T]he President, the Senate, and individual Senators should consider what impact a particular appointment would have in the context of the distribution of judicial inclinations that characterizes the Court at the time that appointment is made. One important aim, although too few Presidents have actively pursued it, should be to produce a healthy mix of competing views (pp. 106-07).

Notice that on this view the balance of the President's nominating power and the Senate's confirming power does not suffice. Something more is needed. Equilibration is to be carried one step further. Both the President and the members of the Senate must consider the effect of the individual appointment on the internal equilibrium of the Court itself.

The equilibration standard's interest in diversity and balance on the Court "certainly does not justify a Senate refusal to confirm a nominee to whom the Senators' only objection is that the candidate would not have been *their* first or even second choice" (p. 107). That would lead to a paralysis in the appointment process. On the other hand, and here we get some sense of the radius, if you will, of Tribe's "tighter circle,"

> if the appointment of a particular nominee would push the Court in a substantive direction that a Senator conscientiously deems undesirable because it would upset the Court's equilibrium or exacerbate what he views as an already excessive conservative *or* liberal bias, then that Senator can and should vote against confirmation. To vote otherwise would be to abdicate a solemn trust (p. 107).

(Let me open up a parenthesis here to confess that I do not see quite how this concern for equilibrating the Court squares with the history Tribe recounts (pp. 31-40); this history testifies to the often decisive vote of a single Justice.)

I accept Tribe's demythologization of the appointment pro-

cess, but I would argue that Professor Tribe, for his part, has created another myth. I will call it The Myth of the Tighter Circle. The Myth of the Tighter Circle means a radical transmutation of the classical liberal-republican ideal of equilibrated powers (legislative, executive, judicial) into a "solemn trust" on the part of the Legislature's Upper Chamber and on the part of the Executive to equilibrate the High Judiciary. The Myth of the Tighter Circle means an introjection of the balance-of-powers doctrine of state into the composition of the Supreme Court bench, and therefore into the *subjective intent* of the President and members of the Senate.

II. The Myth of the Tighter Circle

It is, surely, very interesting to note that Laurence Tribe takes up a position diametrically opposite to that held by Alexander Hamilton. In order "to create the kind of balanced Supreme Court we desire," (p. 133) Tribe looks to the Senate, whose "virtues of diversity" he celebrates.

> Unlike the President, who can never be more than one person at a time, the Senate as a body has a hundred different heads. The Senate comprises members from all fifty states, and will usually include members of both genders, many different religious and ethnic backgrounds, and, sometimes, members of different races. Senators are of different ages and come from different occupations and different backgrounds (p. 133).

Senators come from different political parties, and therefore reflect, to a certain extent, different political philosophies. In short, since the seventeenth amendment's provision for direct election of the Senate, this body has pride of place in the division of the appointment power (p. 132). Thus Tribe concludes: "[W]ith respect to Supreme Court appointments, this is the common denominator of the Senate's virtues as compared with the President's: the Senate is more diverse, more representative, more accountable" (p. 132).

By contrast, Hamilton, in *Federalist 76*, explained the advantages of the division of the appointment power in this way: If the President is responsible for selecting the nominee,

> [h]e will on this account feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them. He will have *fewer* personal attachments to gratify than a body of men, who may each be supposed to have an equal number, and will be so much the less liable to be misled by the sentiments of friendship and of affection. A single well directed man by a single understanding, cannot be distracted and warped by that diversity of views, feelings and interests, which frequently distract

and warp the resolutions of a collective body.[3]

The point here is not to contrast Hamilton's distrust of the Senate with Tribe's distrust of the President, but to note that the "single understanding" of Hamilton's "well directed man" is not founded on a desire to balance the Court. It is enough that a balance obtain between the three branches of government. No tighter circle than the circle of acceptability intervenes.

There is a shift here in legitimation principles. Hamilton brings to the bare words of article II, section 2, clause 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . . .") the political-ordering principle of the common good, to which the "single understanding" of "a single well directed man" is ordained. Tribe, by contrast, brings to the Constitution's text *another* legitimation principle. Thus, the will of the "well directed" President and the wills of the "well directed" Senators are ordained by the ordering principle of the common good *and* these wills are ordained by the ordering principle of a "balanced Court." This "and" places the two ordering principles at an equal ranking. Or worse: The ordering principle of the common good is rendered subordinate to the neoteric principle of balancing the Court, so that the "single understandings" of Presidents and Senators (understandings of the common good of Court and Country) may still fall outside the Court-balancing requirement.

As Jürgen Habermas has astutely observed, the political-ordering principle of the separation and balance of powers can be put to "counter-enlightenment" use.[4] This occurs when the resolution of issues pertaining to the common good of persons is withdrawn from practical discourse *because this resolution is said to be subordinate to an interest in balancing*. In order to remedy this abuse, Habermas suggests that the separation and balancing of powers "may be legitimately introduced *only* where the domains of interests to be regulated cannot be justified discursively and thus require compromise."[5] Perhaps this is too rigoristic. I would prefer to say that the separation and balancing of powers may be legitimately introduced *on condition that* it be subordinate to the common good, as the "good of order" is subordinate to the ordering of good. Within this perspective, I would agree with Habermas that use of the balancing principle to restrict—or, in Tribe's terms, "tighten"—the

3 THE FEDERALIST No. 76, at 511 (A. Hamilton) (J. Cooke ed. 1961) (emphasis in original).

4 J. HABERMAS, LEGITIMATION CRISIS 111 (1975).

5 *Id.* at 112 (emphasis added).

application of the principle of the common good of persons, is a maneuver against enlightenment and emancipation.

Now, I submit that the issue of the right of workers to organize into unions can be resolved discursively, as can the issue of whether or not Afro-Americans are persons, as in fact can the issue of whether or not preborn infants are persons. Each of these issues involves the common good of persons; indeed, the latter two issues involve the extraordinary issue as to who "counts" as a person. (I use the term "counts" here advisedly: In *Roe v. Wade*, Justice Blackmun wrote: "We are not aware that in the taking of any census under [the apportionment] clause, a fetus has ever been counted";[6] although living human existents, black Americans, also, were not "counted" as persons in the *Dred Scott* era.) Now, if it is the "single understanding" of the President and of members of the Senate that *Roe v. Wade* is bad law—execrably bad law—as once it was the "single understanding" of Lincoln, together with members of the Senate, that *Dred Scott* was bad law, then why *add* the tighter circle? Why *add* the further criterion of balancing the Court?

Habermas has already anticipated the answer. Tribe introduces the equilibration standard into the determination of the composition of the Court bench on the misapprehension that a certain discursively resolvable issue *cannot* be resolved discursively. However, if an issue pertaining to the common good of persons (e.g., the issue of the right of workers to associate; the issue of black Americans' right to be recognized as persons) can, and should, be resolved discursively (that is, by right reason), then the individual issue in question should not be removed from the domain of judicial discourse (practical reasoning) to the outlands of "raw judicial power."[7] Nor, *pace* Professor Tribe, does it do much good to compensate for this removal by equilibrating the "raw judicial power" deployed to resolve the issue. This applies to the specific issue Tribe would remove from the domain of discursive rationality, namely, the issue whether preborn infants are persons and therefore cognizable as such at law, or not. Key to Tribe's thinking then, is the 1973 *Roe v. Wade* decision, "the decision that is most often invoked as the focus of concern about how a Supreme Court nominee might vote in the future" (p. 98).

III. Professor Tribe's *Parti Pris*

Tribe's attitude toward nominees who would reject *Roe v. Wade* as bad law is equivocal. On the one hand, he goes so far as to say that "if the President insists—unwisely and improperly—on nomi-

6 410 U.S. at 157 n.53.

7 410 U.S. at 222 (White, J., dissenting).

nating only those who express a politically approved view of a single issue, such as the 'right to life' . . . , or only those who are found acceptable by a specific political or moral constituency, then each Senator has a special duty not to confirm" (p. 98). From this one might conclude that Tribe regards the "right to life" issue as a "single issue." Indeed, he suggests that had President Andrew Jackson not nominated, and had the Senate not confirmed, a "single issue" nominee, the anti-Bank of the United States activist Roger Brooke Taney, the disastrous opinion in *Dred Scott v. Sandford* might have been avoided (p. 98). If this signals a fairly complete oblivion to the substantive analogy between *Dred Scott* and *Roe v. Wade* on the legal issue of personhood; if it underestimates how disastrous withdrawal of legal protection from preborn infants has been, it does not mean—it turns out—that Tribe thinks the "right to life" is a "single issue." In fact, Tribe would have a nominee who would reaffirm *Roe v. Wade* be "prepared to explain how that nominee reconciles a woman's liberty to end fetal life with the law's protection of *other* helpless human beings from what may seem to be equally justified destruction" (p. 99).

On the other hand, no little of the difficulty with which we are grappling grows out of Tribe's failure to acknowledge the nominee who opposes *Roe v. Wade* on *the same ground* that the opponents of *Dred Scott v. Sandford* opposed that infamous decision, namely, on the ground that the Court failed to recognize certain human existents as persons and therefore as the subjects of fundamental human rights. Tribe can manage to concede only the following: "There is nothing necessarily improper in an objection to *Roe v. Wade* based on a judgment that the Supreme Court gave insufficient weight to the value of fetal life, or on a protest that the Supreme Court gave too much deference to mainstream medical opinion" (p. 98). In reply to which, careful students will exclaim: *Latet anquis in herba*! Danger lurks in this spot of grass! In the first place, the protest that the Supreme Court erred in placing the abortion liberty on professional medical expertise plus privacy, comes at a moment when that expertise attests to the continuous species-being of the fetus in the womb. Tribe himself has argued that "by placing the right to end pregnancy on the wrong basis, on a basis of professional expertise plus personal privacy, the Court boxed itself into a corner, all but gutting the core meaning of the right originally proclaimed."[8] He regrets that the Court bothered with the status of the unborn infant at all. I am constrained to say that in our acutely saddening times, I know of no more wretched a rationale for prena-

8 Tribe, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve*, 36 HASTINGS L.J. 155, 170 (1984).

tal infanticide than Tribe's egalitarian argument that if "[m]en don't have to be involuntary incubators, even for their own children," then neither should women.[9] Yes, Tribe will allow an anti-*Roe* nominee to protest that the Supreme Court relied too much on medical expertise. He has already placed himself beyond the question of the ontological status of preborn infants. He would rather inquire of the pro-*Roe* nominee whether that nominee would "agree with *Roe* on the quite different ground that even if the unborn *are* persons, our laws do not generally compel adults, even parents, to sacrifice their bodies to keep others—even their own children—alive" (p. 99).

In the second place, Tribe's concession that there is nothing necessarily improper in an objection to *Roe* "based on the judgment that the Supreme Court gave insufficient weight to the value of fetal life" (p. 98) very poorly conceals the suppression of the question of the ontological status of this life. It is quite strictly analogous to conceding that, yes, there is nothing necessarily improper in an objection to *Dred Scott* based on the judgment that the Supreme Court simply gave *insufficient weight* to the "value" of the lives of black slaves.

But in too much controversy the truth is lost. In contradicting Professor Tribe's views, I do not want to lose sight of his apparent equivocation—induced perhaps by his own assimilation of the evidence—for he writes: "[T]he more people have learned about the fetus as a growing being with brain waves and familiar human features, the stronger have been the feelings of many that the woman's freedom is pitted against a genuine baby's life" (p. 17). The feeling is also growing stronger that, however *unfamiliar* the infant's features, *all* living human bodies are persons, and should be recognized as such.

IV. That the Offices of Justice Shall Go to Those Who Are Good for Them

In Bertolt Brecht's play *The Caucasian Chalk Circle*,[10] Chief Judge Azdak of Nukha, a town in Azerbaijan, presides over a contestation between two women, both claiming to be the true mother of a little boy—a boy, we are told, so little that he is able to speak no more than 20 words. After taking testimony from both sides, Judge Azdak declares: "The Court has listened to your case, and has come to no decision as to who the real mother is; therefore, I, the

9 *Id.* at 169. *See also* Tribe, *The Abortion Funding Conundrum*, 99 HARV. L. REV. 330, 337 (1985).

10 B. BRECHT, THE CAUCASIAN CHALK CIRCLE (revised English version by E. Bentley) (Evergreen Black Cat ed. 1966).

judge, am obliged to *choose* a mother for the child."[11] Azdak instructs an adjutant to get a piece of chalk and draw a circle on the floor; he has the boy placed in the middle of the circle. He tells the two women: "Stand near the circle, both of you. . . . Now each of you take the child by one hand. . . . The true mother is she who can pull the child out of the circle."[12]

It requires, I suspect, Brecht's adumbration of Azdak to hit off the combination of truth and absurdity in Oliver Wendell Holmes' dictum that in law cases the major unexpressed premise is the judge himself. Here let us simply note how the story of the Chalk Circle bears on the model of the Supreme Court appointment process advanced in *God Save This Honorable Court*. One cannot help noticing that, in an ideal space, Professor Tribe traces out his own chalk circle, at the center of which he situates the infant in question, i.e., the Preborn Infant, who is also located in ideal space in the specific sense that the Infant is recognized as having no more *being* than that of a quasi-noumenal referent to "theories" (mere "theories") of "personhood." Indeed, considered in itself, Tribe's Preborn Infant appears to *be* no more than an item of ideology, a "value" perhaps, but a "value" always to be weighed against a woman's and the medical profession's liberty to end fetal life.

In fine, some questions cannot be reduced to circles of equilibrated power. In Azdak's court, one of the women succeeds in pulling the child out of the circle on her side; the other woman, Grusha, simply lets go. "What's the matter with you?" Azdak demands. "You didn't pull." "I brought him up!" exclaims Grusha. "Shall I also tear him to bits? I can't!" At this, Azdak rises and pronounces: "And in this manner the Court has determined the true mother. Grusha, take your child and be off."[13]

A good story for those whose responsibility it is to pass judgment on the suitability of candidates for judicial office. Let these judges of judges

> Take note what men of old concluded:
> That what there is shall go to those who are good for it,
> Children to the motherly, that they prosper,
> Carts to good drivers, that they be driven well,
> The valley to the waterers, that it yield fruit.[14]

11 *Id.* at 126.
12 *Id.*
13 *Id.* at 126-27.
14 *Id.* at 128.