

Review Essay

Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations

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, 172. \$17.95.

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Professor Laurence H. Tribe calls *God Save This Honorable Court* “the untold story of how the selection of our Justices has helped chart the course of American history.”¹ Although he acknowledges that there have been prior political histories of Supreme Court appointments and their impact, he does not regard these studies as “the work of anyone steeped in constitutional law either as a scholar of the subject or as an advocate before the Court.”² And, as his publisher reminds us, Tribe has achieved distinction in both capacities.³ Thus, Tribe offers to fill the need he perceives for a study of Supreme Court appointments “informed by the perceptions that only a thorough familiarity with the law could provide.”⁴

In setting out to debunk several “myths” about the appointment pro-

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1. L. TRIBE, *GOD SAVE THIS HONORABLE COURT* ix (1985) [hereinafter cited by page number only].

2. P. x.

3. P. 172 (“About the Author”) and dust jacket.

4. P. x.

cess,⁵ Tribe is as much the advocate as the academic: His central contention is that in reviewing a Supreme Court nomination the Senate must actively consider the nominee's ideology.⁶ Given what Tribe calls the "greying" of the present Court,⁷ and the consequent possibility that President Reagan will appoint several new justices, this is a most timely thesis. Indeed, Tribe accelerated the book's completion in large part to respond to an October 1984 speech in which Justice (now Chief Justice-designate) Rehnquist⁸ declared that Presidents have enjoyed only "partial success" in packing the Supreme Court with justices of favorable outlook.⁹ The Justice's remarks, Tribe feared, could well "lower the public's guard, and lessen the Senate's vigilance" when future Supreme Court nominations are made.¹⁰

But Professor Tribe does not plead that this slender volume is a hasty piece of work. He began it long before the Rehnquist speech,¹¹ and much of it, he notes, "represents . . . , more years of research and of reflection about the Supreme Court and its role than I care to confess."¹² Given such extensive effort by so eminent a scholar, one might expect a notable contribution. The book fails to meet that expectation, and fails badly.

Tribe's principal thesis is that a Senator should apply a two-part test in determining the ideological fitness of a nominee for the Supreme Court. First, the nominee must adhere to the "American vision . . . of a just society."¹³ In other words, some views are so extreme in our society that a Senator would justifiably regard as unfit a nominee who holds them. With that broad statement I agree, but for reasons discussed below I would define the class of acceptable views more broadly than Tribe does. In any event, there have been very few nominees who would fail even Tribe's more rigorous version of this standard; arguably, there have been none. The cutting edge of Tribe's test, then, is the second part: The nominee must not appear likely to upset the "overall balance" of the Court's ideology. In this essay, I will present in some detail reasons why I regard this standard as unworkable and improvident.

Two of the principal defects in Tribe's argument are his misleading use

5. Pp. x-xi, xvii.

6. Pp. 106-37.

7. Pp. xv-xvi.

8. [Editors' Note: This essay was written before Chief Justice Burger's announcement of his retirement, and thus before President Reagan's consequent nominations of Justice Rehnquist as Chief Justice and Judge Scalia as Associate Justice.]

9. W. Rehnquist, Presidential Appointments to the Supreme Court 4-5 (address delivered at University of Minnesota College of Law, Oct. 19, 1984).

10. P. x.

11. *Id.*

12. P. xi.

13. P. 96 (emphasis omitted).

of history and his failure to recognize the double-edged cut of his test. Because the remarkable dedication to this book foreshadows both of these problems, it warrants close examination:

TO CHIEF JUSTICE JOHN MARSHALL

whose exalted place in our country's history might have been filled by a qualified, but less visionary, judge had the Senate not rejected President George Washington's nomination of John Rutledge.¹⁴

These are arresting words. John Marshall never Chief Justice! That is a parade of horrors all by itself. The natural inference to draw from Tribe's language is that Marshall filled the vacancy created by the rejection of Rutledge.¹⁵ Only those who know some early Supreme Court history will recall that it was Oliver Ellsworth, not John Marshall, whom Washington nominated after Rutledge's defeat;¹⁶ only after Ellsworth resigned, more than four years later, did Washington's successor John Adams name Marshall to the Supreme Bench.

But Tribe appears to be inviting us to indulge in retrospective speculation as to what would have happened had Rutledge been confirmed in 1795. If we accept his invitation, the critical fact is that Rutledge died in June 1800, just a few months before Ellsworth resigned; both events occurred while Adams was President. Thus, Tribe's suggestion that Rutledge "might . . . have held [the Chief Justiceship] into the 1800s," is at best only technically correct.¹⁷ (Perhaps Tribe is speculating that the joys of riding circuit, although a factor that dissuaded John Jay from reassuming the seat, would have extended Rutledge's life.¹⁸) One cannot be anything close to certain,¹⁹ but the best guess is that Rutledge's successor

14. P. vii.

15. Rutledge actually served a few months as Chief Justice, because Washington had given him a recess appointment.

16. Others will find out soon enough, because Tribe fills out the back of his book, pp. 142-51, with a useful table, taken from *THE SUPREME COURT: JUSTICE AND THE LAW* (M. Wormser 3d ed. 1983), providing information on all Supreme Court nominations from the beginning of the Court. In his text, Tribe acknowledges the interregnum between Jay and Marshall, but in a curious way apparently suggesting that Marshall's nomination in 1801 was somehow linked to Ellsworth's in 1796. Pp. 55 ("Ellsworth's prompt [sic] resignation paved the way" for the Marshall nomination), & 79 ("Ellsworth [kept] the nation's highest judicial seat warm just long enough for President Adams to name John Marshall . . .").

17. P. 79.

18. Letter from Jay to Adams (Jan. 2, 1801), reprinted in 4 *THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY* 284-86 (H. Johnston ed. 1893) (declining nomination, primarily because of Congress's failure to reform judicial system); Turner, *The Appointment of Chief Justice Marshall*, 17 *WM. & MARY Q.* (3d ser.) 143, 149-53 (1960) (Jay evidently took with little seriousness judicial reform bill, which would have freed justices of circuit duties, and indeed took far more seriously failure to pass bill notwithstanding approaching end of 6th Congress). For a discussion of the Justices' circuit riding responsibilities in this era, see F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 87 (1927).

19. It is difficult to know with any confidence how the Moving Finger would have written one

would have been none other than John Marshall—who might thus have been able to begin filling his exalted place in our country's history a little sooner.²⁰

And even if we could say in any meaningful sense that Rutledge's rejection contributed to Marshall's selection, it is difficult to discern what bearing this hypothesized fact might have on the standard that the Senate should use in reviewing Supreme Court nominations. Surely Tribe does not mean to suggest that Senators voting on Rutledge's nomination should have been prescient as to whether Rutledge or Washington's then unknown second choice would be more likely to leave the Court at just the right time to be succeeded by a visionary Chief. Nor can he mean that the Senate should confirm only nominees as "visionary" as Marshall; under that standard the Court would rarely have a single member, much less a quorum. Rather, Tribe's implication must be that the Senate's rejection of a nominee based on his substantive views, as in the case of Rutledge,²¹ can lead to the selection of a great judge like Marshall.

And so it might. But the reader is entitled to wonder from the very start about the flip side. If the Senate exercises ideological opposition without extreme restraint, might this not more often lead in the long run to the rejection of nominees like Brandeis and Hughes—two of "this century's most esteemed Justices," according to Tribe²²—and to the selection of mediocrities?

It is hardly surprising that Tribe's dedication does not address this concern. What is startling is that the rest of his book ignores it—as well as much of the historical evidence that gives it weight.

line had it written an earlier line somewhat differently. Or, as Tribe puts it, "how do we forecast the past?" P. 34. Cf. O. KHAYYAM, *THE RUBAIYAT* stanza 71 (E. FitzGerald trans.) (4th ed. 1879) (continuous postwriting motion of Moving Finger; incapacity of piety, wit, or tears to erase or alter such writing).

20. To play the speculative game well requires some care. Rutledge died on June 21. Ellsworth, who was in France, resigned on September 30, but Adams apparently did not receive his letter until December 15. G. HASKINS & H. JOHNSON, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER: JOHN MARSHALL: 1801-1815*, at 103 n.158 (1981) (Volume II of the Oliver Wendell Holmes Devise). The political situation changed markedly between June and December; in particular, it became evident that Adams would not be reelected. *Id.* at 103. On the other hand, even had the vacancy occurred in June, Adams would not have been able to fill it permanently until November at the earliest; the Senate had adjourned on May 14, 10 *ANNALS OF CONG.* 183-84 (J. Gales ed. 1800), and did not again have a quorum until November 21, *id.* at 721-22. There is thus little basis for believing that the relevant sequence of events—an offer to John Jay, Jay's declination, and then the nomination of Marshall—would have been different had it begun earlier, shortly after Rutledge's death.

21. Pp. 79-80.

22. P. 85.

I. FRAMEWORK

On several matters I have no quarrel with Tribe. Indeed, my chief complaint about the first three chapters is not that they err but that they belabor the obvious. The principal themes of these chapters are, or at any rate should be, commonplaces in modern America: The work of the Supreme Court is crucial to the nation; even a single Justice can make a substantial difference in its results; and the substantive views of a Justice on economic, social, and political matters profoundly affect how he will perform his function.²³ We can thus take as common ground the nearly syllogistic conclusion that the ideology of a Supreme Court Justice may have a crucial impact on the nation.

This proposition, however, does not in itself indicate to what extent, if any, the Senate should consider a nominee's ideology in making its confirmation decision. In assessing this issue, we can again begin with agreement. First, Tribe is certainly correct in asserting that the Senate would not be justified in

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. In Supreme Court appointments the Constitution allows only the President his "druthers." Allowing each Senator to confirm solely from the Senator's own "short list" would prescribe paralysis in the Supreme Court appointment process.²⁴

23. Perhaps Attorney General Meese disagrees with the last of these propositions, but in general it can be aptly said that "we are all realists now." Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1152, 1152 (1985); Friedman, *The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond*, 5 CARDOZO L. REV. 1, 44-45, 83-84 (1983).

24. P. 107 (emphasis in original). In this passage, Tribe recognizes that by the nature of the appointment process, the functions of the Senate and the President cannot be the same. Given this fundamental role distinction, Tribe's characterization of the Senate as an "equal partner" in the appointment process, p. 132, has little meaning, *cf.* p. 93 ("[T]he Constitution gives the appointment power to the President and the Senate *together*; one nominates and the other confirms.") (emphasis in original). As Tribe acknowledges in another context, "[t]he appointment process requires the Senate only to react, not to create." P. 131. *See also* THE FEDERALIST NO. 76, at 405 (A. Hamilton) (New American Library ed. 1961) (taking narrow view of Senate's role in appointment process); *id.* No. 66 (A. Hamilton); J. GROSSMAN, *LAWYERS AND JUDGES: THE ABA AND THE POLITICS OF JUDICIAL SELECTION* 172 (1965) ("As interpreted by Hamilton, the Senate's function was not to choose judges, but rather to consent to their selection by the President.").

Neither a summary characterization such as "equal partner" nor the brief language of art. II, § 2, cl. 2 of the Constitution is of much help in determining what standards the Senate should use in performing that reactive function. In the context of political officers, whose appointments are governed by the same constitutional language, the wide discretion of the President is generally conceded. *See pp.* 78, 134-35. This, of course, does not compel the conclusion that the President should have the same latitude in nominating Justices; different considerations apply in the two contexts. But it does undercut, or at least render irrelevant, the argument sometimes made that the constitutional language suggests no difference between the criteria to be used by the President and those to be used by the Senate in the judicial appointment process. *See* Rees, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913, 937-38 (1983) ("early drafts of

At the other extreme, I accept Tribe's assertion that the Senate would be justified in rejecting as unfit a nominee who does not subscribe to certain broad principles that are "crucial to our sense of what America is all about."²⁵ Or, in Tribe's alternative phrasing, a nominee to the Supreme Court must adhere to "the *American* vision . . . of a just society."²⁶ In the abstract, that is a hard statement to contest—to the extent we can agree on what that "American vision" is. Certainly it does not encompass approval of apartheid. But what other ideological positions, less extreme but still abhorrent to some, should it exclude? This is a difficult problem, and it cannot be resolved by a slogan.

According to Tribe, "any judicial nominee who favored overturning the legislative apportionment cases and who denounced any role at all for the federal judiciary in preserving the fundamental democratic principle of 'one person, one vote'" should not be approved by the Senate.²⁷ Yet, I seriously wonder whether the jurisprudence of Justices Frankfurter and Harlan,²⁸ though long rejected by a majority of the Court, is so perverse that any otherwise suitable nominee should be disqualified simply for adhering to it.²⁹ Similarly, Tribe would disqualify "nominees who would overrule *Roe [v. Wade]*³⁰ simply because they privately regard the fetus as a 'person' and would defend all such persons regardless of the effect on a woman's rights."³¹ I agree with Tribe that such a view of personhood is

article II provided for appointment by the Senate alone, and nothing in the records of the Federal Constitutional Convention suggests that the change to nomination by the President and confirmation by the Senate was intended to produce a change in the factors that the Senate was supposed to consider."); Black, *A Note on Senatorial Consideration of Supreme Court Nominations*, 79 *YALE L.J.* 657, 658-59 (1970). Tribe contends at some length that, as compared to the President, the Senate is "now more diverse, more representative, more accountable." P. 132. Certainly it is more diverse; whether it tends better than the Presidency to reflect the temper of the electorate and whether it is more accountable are more difficult questions. On the other side of the ledger, in some respects the Senate is a less suitable forum than the executive for consideration of potential Supreme Court Justices. See *infra* text accompanying note 181. Whether or not one can reasonably conclude that the President or the Senate is "better" suited for such consideration, such a conclusion does not undercut the crucial factor stated above—that the Constitution gives the President a selective function, and the Congress a reactive one, and the two are significantly different.

25. P. 94. I also agree that "[s]uch outer boundaries exist on both ends of the traditional political spectrum, and may appropriately look a bit different to each member of the Senate," and that on some boundaries nearly all should be able to agree. *Id.* I would draw the boundaries broader than would Tribe, however. See *infra* Part III(C).

26. P. 96 (emphasis in original).

27. *Id.*

28. See *Baker v. Carr*, 369 U.S. 186, 266, 330 (1962) (Frankfurter & Harlan, JJ., dissenting) (contending that apportionment of state legislatures should not be justiciable).

29. In addition, reasonable judges who find the justiciability question untroubling may find it far from incontrovertible that "one person, one vote" should be a universal rule of our polity. See *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 748 (1964) (Stewart, J., dissenting, with concurrence of Clark, J.) ("What the Court has done is to convert a particular political philosophy into a constitutional rule . . .").

30. 410 U.S. 113 (1973).

31. P. 98.

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wrongheaded, but there seem to be a lot of folks who buy it, and I am not prepared to say that Tribe and I, but not they, are blessed with the “American vision.”

Indeed, I suspect that, if the bounds of the “American vision” are narrowed, the effect will be more often to keep off the Court those who, like Louis Brandeis, have views that appear radical to much of the Senate. Tribe, at least faithful to his theory in this respect, characterizes the political opposition to Brandeis as “legitimate.”³² But that in itself should give us pause, suggesting that Tribe’s test would tend to bar the novel, radical thinker who over time might have the most to offer the Court. Suppose, for example, that the nominee is the eminently able Laurence Tribe, who has contended that the Constitution should be read as guaranteeing rights of affirmative governmental action in providing health care, housing, employment, and education.³³ Suppose also that a substantial bloc of Senators shares—as much of America evidently does—the “American vision” currently espoused by President Reagan, in particular his abhorrence of “big government.” Could Professor Tribe say, under his test, that a filibuster against his nomination would be improper?

Even if a nominee passes through the “American vision” screen, another—the “overall balance” test³⁴—awaits him under the Tribe system: A Senator should vote against a nomination if he conscientiously believes that it would “upset the Court’s equilibrium or exacerbate what he views as an already excessive conservative *or* liberal bias.”³⁵

“Balance” and “equilibrium” are, of course, squishy terms. Because Tribe answers a “resounding yes” to the question of whether the present Court reflects a “balance worth saving,”³⁶ consider this plausible elaboration on the last hypothetical: The membership of the present Court remains unchanged until the departure in 1990 of Justice Rehnquist, when President Cuomo nominates Professor Tribe to the Court.³⁷ Should the nomination be rejected because it would upset a “balance worth saving”?

I doubt that, even speaking from the perspective of the Reagan years, Tribe would answer this question affirmatively. Nor, I believe, would he say that a liberal Senator of 1943 should have voted against confirming Wiley Rutledge because the Court had an “already excessive liberal

32. P. 91.

33. See Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1066 (1977).

34. P. 106.

35. P. 107 (emphasis in original).

36. P. 111.

37. It appears that Tribe would be a serious contender for the Court if Governor Cuomo or Senators Kennedy or Hart were to become President. See p. 172 (“About the Author”) & dust jacket.

bias"—whatever that means—or that a liberal Senator of 1967 should have voted against Thurgood Marshall for the same reason.

No, Tribe's concern is not with so elusive a concept as "balance." Rather, his goal is to ensure that, to the extent possible, the Court is composed of Justices who think the way he does. This becomes manifest when Tribe explains at length his rather surprising view that the balance on the present Court is worth saving. Time and again, he expresses fear that new Justices might "propel the Court over the cliff on which it is precariously perched" into the abyss of right-wing error;³⁸ at the same time, he obviously would welcome a far more liberal Court.³⁹

Although Tribe tends to assume that his readers agree with his views,⁴⁰ I suspect that he is in a distinct minority in many of the constitutional issues that he discusses.⁴¹ And if Senators whose substantive views accord with Tribe's are to vote against a nominee likely to push the Court in a direction they do not want, Senators of opposing views—who might think the Court already leans too far to the left—would be entitled to follow the same practice. The result would be that any Senator would vote against any nominee whose views he disliked, or at least any nominee whose views he disliked very much. If Tribe is in the minority, as I suspect, then over the long run his standard would tend to work against the implementation of his views more often than in favor of them; indeed, few of us can

38. P. 113; *accord* pp. 114, 115, 116, 118, 119, 120, 121, 122.

39. *See, e.g.*, p. 111 (listing areas in which the Burger Court has been deficient from liberal point of view).

40. *See, e.g.*, discussions at pp. 12, 21–22, and 22, respectively, of *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) ("bad news" that four Justices dissented), *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) (by passing subsequent legislation Congress "effectively [told] the Supreme Court that it had made a glaring mistake" in allowing an "obviously discriminatory" practice), and *Grove City College v. Bell*, 104 S.Ct. 1211 (1984) (7-2 decision presented as example of how "sometimes the Congress finds the Supreme Court's statutory misinterpretations more difficult to overturn").

Tribe appears to assume that his readers share not merely liberal views but *his* particular views. Note in particular his conclusory discussion of two highly significant cases that are as controversial within as between political camps. He presents *Buckley v. Valeo*, 424 U.S. 1 (1976), as an illustration to impress readers of how the Burger Court has shown "insensitivity to legislative attempts to promote equality." P. 117. He does not indicate that many of those who challenged the campaign finance act at issue in that case—including such plaintiffs as Eugene J. McCarthy, Stewart R. Mott, and the New York Civil Liberties Union, Inc., *see Buckley*, 424 U.S. at 7–8; *Buckley v. Valeo*, 519 F.2d 821, 833 n.1 (D.C. Cir. 1975)—are hardly insensitive to attempts to promote equality. Similarly, he alludes to *INS v. Chadha*, 462 U.S. 919 (1983), as an illustration of the Burger Court's "distressing tendency to side with the President in resolving controversies over the separation of powers." P. 118. He does not reveal that the *Chadha* litigation was successfully conducted by Ralph Nader's Public Interest Litigation Group, or that many liberals welcomed the Court's decision because they saw the legislative veto as an invitation to Congress to abdicate its responsibility.

41. *See, e.g.*, pp. 8–9 (vigorously supporting exclusionary rule), 116 (criticizing male-only military registration law), 111 (criticizing the Burger Court, *inter alia*, for being "insensitive to the rights of prisoners and criminal defendants . . . too deferential to executive and bureaucratic authority . . . [and] unenthusiastic in defense of rights of free expression where the poor and discontented are concerned").

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have confidence that over the long run our views on controversial questions will prevail substantially more often than not in open political battle. In general, ideological opposition of the sort that Tribe proposes would politicize the selection process more than it would shift the Court either to the left or right.⁴²

Before accepting such a political free-for-all, a careful analysis of its costs and benefits is appropriate. The benefit of rejecting a Supreme Court nominee on ideological grounds is obvious: It keeps off the Supreme Court a nominee who might cast votes that the Senate believes would be unacceptable and even dangerous. For several reasons, I believe this benefit is less significant and less certain than might appear. Part II of this essay reviews the historical record to present some of these considerations. Part III continues discussion of the benefit side of the ledger and also contends that Tribe underestimates the costs of ideological opposition to Supreme Court nominations. Finally, Part III offers a test, far more restrained than Tribe's, that I believe gives proper weight to both the costs and benefits of such opposition.

II. HISTORY

Section A of this part demonstrates that the ideological stance of a Justice, particularly over the long run, is often difficult to predict at the time of his nomination. Section B shows that, in large part because of limitations on the power of any President to shape the Court in his own image, ideological review is rarely necessary to prevent the Court from becoming extremist. Section C contends that, as judged with the perspective of historical hindsight, ideological review has not on balance improved the ideological make-up of the Court significantly, if at all; nor is it likely that more intense ideological review would have caused any substantial improvement of this nature.

A. *Surprised Presidents and Senators*

No matter how important a Justice's substantive views may be, ideological consideration at the time of his nomination is futile to the extent that it is impossible to predict what those views will be over the course of his career on the Court. A Justice's ideological performance, of course, is not as unpredictable as the flip of a coin; Franklin Roosevelt was not simply

42. Not surprisingly, both liberal and conservative Senators have taken the view, when the nominee has been to their liking, that ideological opposition is inappropriate, but have not consistently adhered to that view when they have disliked the nominee. Friedman, *supra* note 23, at 90; *see also* Powe, Book Review, 54 *TEX. L. REV.* 891, 892 (1976) (Senator Philip Hart "abandoned his position held at the Fortas hearings when the realization hit him and the other liberals that Republican presidents are also allowed Supreme Court appointments.").

lucky that all his nominees looked benignly on the exercise of governmental power to address economic problems, and one would have been justified in betting heavily that William Rehnquist would take an ideological position on the Court to the right of Thurgood Marshall. Most Justices fit at least very roughly the expectations that Presidents and Senators have at the time of nomination. But in this Section I will show that there have been a substantial number of surprises, enough so that a Senator considering opposition should take into account the real possibility that his ideological prediction will prove to be unduly pessimistic.

Tribe does not agree and takes up cudgels against what he calls "the myth of the surprised President." Although "rude surprises have occurred," he says, "they are few,"⁴³ "[f]or the most part, and especially in areas of particular and known concern to a President, Justices have been loyal to the ideals and perspectives of the men who have nominated them."⁴⁴

But this conclusion is of limited relevance in assessing the proper Senate role in reviewing nominees for the Court. If we want to judge the efficacy of ideological Senate opposition to Court nominees, the real question is whether Senators, not Presidents, have been surprised by the subsequent ideological orientation of Justices. Focusing on the question of Presidential, rather than Senatorial, surprise serves Tribe's advocacy purpose. For one thing, the President is better situated than the Senate to avoid surprise.⁴⁵ More significantly, Tribe's limited focus offers him an argument for writing off much evidence that appears unfavorable to his thesis. Did James C. McReynolds turn out far more conservative than had been expected and Earl Warren far more progressive? No problem, says Tribe—Presidents Wilson and Eisenhower were not surprised, because they simply were not concentrating on ideology when they made the nominations.⁴⁶ Indeed, suggests Tribe, to the extent that Presidents have considered substantive views at all in making their nominations, most have focused not on long term matters of approach and philosophy but on immediate political and doctrinal issues. On those clear and present issues, Tribe argues at length, Presidents have had a very high rate of success;⁴⁷ on others that may arise over the long term, he briefly acknowledges, the record has been much spottier.⁴⁸

This curious emphasis points to another limitation on the relevance of

43. P. 76.

44. P. 50.

45. See *infra* text accompanying note 181.

46. Pp. 52 (Eisenhower and Warren), 53 (Wilson and McReynolds).

47. Pp. 50-76.

48. Pp. 74-75.

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Tribe's conclusion: As he acknowledges elsewhere,⁴⁹ issues that are *not* given much consideration at the time a Justice is nominated often turn out to matter most over the course of a career on the Bench. A Justice is likely to sit on the Court long after the issues that raged at the time of his nomination have faded;⁵⁰ indeed, the issues that are uppermost in the minds of the President and the public at the time of the nomination might be only a small part of the Court's work even during the years immediately following.⁵¹ We all know that pigeonholes like "Federalist," "liberal," and "conservative" are very misleading, covering a multitude of differences and confusing a nominee's judicial and political views. But in predicting a nominee's long-term judicial outlook, beyond the issues already of concern, one often cannot reasonably hope to do much more than place him in some such broad category.⁵²

Having focused his inquiry on Presidential surprise and on issues of known and particular concern, Tribe simply ignores many of the cases in which a Justice's career on the Supreme Bench has belied even very general predictions made at the time of his nomination. Nowhere do we learn from Tribe that Justice John McLean, by drifting in the direction of the Whigs, "moved as far from the camp of Jackson, who had appointed him, as did Story from that of James Madison,"⁵³ that another Jackson appointee, Roger B. Taney, so continued the jurisprudence of his predecessor that Henry Clay, who had bitterly opposed the nomination, later told him, "I am satisfied now that no man in the United States could have

49. Pp. 97-98; *see also* Tribe, *Amending the Constitution by Default*, N.Y. Times, Sept. 29, 1985, § IV, at 21, col. 2 ("There can be no single issue justices.").

50. *E.g.*, pp. 97-98 (Taney wrote *Dred Scott* opinion long after there ceased to be cases relating to Bank of United States.). Consider also the far different judicial careers of Justices Samuel Freeman Miller and Stephen J. Field, both Lincoln appointees and both members of the Court for decades after the Civil War. *See, e.g.*, Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 57 (1873) (Miller, J., writing for majority); *id.* at 83 (Field, J., dissenting).

51. Again, Taney is a good illustration. *See, e.g.*, Letter from J. Turner to Editor, N.Y. Times, Oct. 18, 1985, at A30, col. 4 ("lifblood of the bank had been drained," with federal deposits withdrawn and federal charter about to expire, by time Taney was appointed Chief Justice). Similarly, if one explains Richard Nixon's appointments, as Tribe does, pp. 53, 71, solely in terms of the "law and order" issue, then one should acknowledge that only a minority of the Burger Court's most significant decisions have been in that area. *See, e.g.*, U.S. v. Nixon, 418 U.S. 683 (1974) (unanimous opinion written by Burger, C.J., and with concurrence of two other Nixon appointees); *Roe v. Wade*, 410 U.S. 113 (1973) (three Nixon Justices in majority, including author of majority opinion); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (per Burger, C.J.). In general, the Burger Court has been characterized by continuity with the jurisprudence of the Warren Court as much as or more than by retrenchment. *See generally* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (V. Blasi ed. 1983). Even in the area of criminal law, the Burger Court has cut back much less than was anticipated, and in some cases has even invigorated, doctrines established by the Warren Court. *See* Kamisar, *The Warren Court (Was It Really So Defense-Minded?)*, *The Burger Court (Is It Really So Prosecution-Oriented?)*, and *Police Investigatory Practices*, in *id.* at 62-91.

52. *See infra* notes 109-13 and accompanying text.

53. C. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD: 1836-64, at 47 (1974) (Volume V of the Oliver Wendell Holmes Devise).

been selected more abundantly able to wear the ermine which Chief Justice Marshall honored;⁵⁴ that Harlan Fiske Stone, a rather conservative Attorney General under Calvin Coolidge whose appointment to the Court was urged by William Howard Taft, moved so dramatically in the liberal direction that the great fighting progressive George Norris came to regret his leading role in opposing confirmation;⁵⁵ that several progressive Senators "quietly expressed regrets" for their opposition to the nomination as Chief Justice of Charles Evans Hughes, who proved to be far more moderate than they had expected, and in some areas decidedly liberal;⁵⁶ that at least two of Franklin Roosevelt's appointees, Stanley Reed and Felix Frankfurter, proved to be far more conservative than might have appeared when they were nominated;⁵⁷ that Byron R. White, the only appointee of John F. Kennedy to serve an extended term on the Court, has on the whole been mildly conservative; or that in some respects Harry A. Blackmun, a Nixon appointee, has proven surprisingly liberal.⁵⁸

But even within his own focus on Presidents' surprise as to issues of known and particular concern to them, Tribe treats evidence unfavorable to his thesis rather cavalierly, sometimes belittling it, sometimes mischaracterizing it, and sometimes ignoring it.⁵⁹

The early Republicans. As Tribe acknowledges, Joseph Story, appointed by the Democratic-Republican James Madison, "proved to be an

54. C. SWISHER, ROGER B. TANEY 450 (1935).

55. R. NEUBERGER & S. KAHN, INTEGRITY: THE LIFE OF GEORGE W. NORRIS 342-43 (1937).

56. 2 M. PUSEY, CHARLES EVANS HUGHES 661 (1951).

57. During his nineteen years on the Court, Reed, a former New Deal Solicitor General, accepted modern social and economic legislation, and he joined in the Court's civil rights jurisprudence. But he exercised a moderating influence on the Court. He was a 'center judge,' occupying generally a middle position between the Court's conservative and liberal wings, between the apostles of judicial activism and self-restraint. . . . In the area of civil liberties, which got increasingly more attention the longer he stayed on the Court, Reed was less likely to favor the use of judicial power, and more inclined to support the government and public order against the claims of individual right and freedom.

Pritchett, *Stanley Reed*, in 3 L. FRIEDMAN & F. ISRAEL, THE JUSTICES OF THE SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS 2371, 2373 (1969).

Frankfurter began in his first decade on the Court, and continued throughout his career, to disappoint liberals and to give unexpected satisfaction to conservatives. Jaffe, *The Judicial Universe of Mr. Justice Frankfurter*, 62 HARV. L. REV. 357, 357 (1949); Sacks, *Felix Frankfurter*, in 3 L. FRIEDMAN & F. ISRAEL, *supra*, at 2399, 2416. Naturally, attempting to classify Frankfurter on a liberal-conservative continuum is hopeless and perhaps sterile; the point is that Frankfurter failed to conform to the predictions and perceptions about him made when he was nominated.

58. Tribe does assert that "Justice Blackmun has been quite liberal on racial issues coming before the Court and has been a key figure in the Court's development of pro-choice principles in the abortion area." P. 35. But Tribe makes this point in another context, in which he is discussing not the surprise issue but the question of what effect rejecting one nominee might have; Tribe's point is that Blackmun has proved to have more acceptable views than Nixon's prior nominee for the seat, G. Harrold Carswell. Interestingly, Tribe does not compare Blackmun to Nixon's first nominee for the seat, Clement F. Haynsworth, whom Tribe later describes as "a judge of some distinction . . . whose integrity may . . . have been unfairly denigrated." P. 82.

59. See also, in addition to the discussion below, *supra* note 51 ("law and order" orientation of Burger Court has been less than was anticipated).

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even more committed Federalist than Chief Justice Marshall.” But, Tribe explains, Madison “had only himself to blame,” for he had been warned by members of his party, and especially by Thomas Jefferson, that Story had Federalistic tendencies.⁶⁰ This explanation is far too glib. It is true that Story had already given some evidence of such tendencies,⁶¹ although Jefferson seems to have based his judgment primarily on the ambiguous stand that Story, largely in response to constituency pressure, took on the Embargo Laws.⁶² But Madison, who was resolved to appoint a Republican,⁶³ did not act incomprehensibly in choosing Story. The nominee had been a Republican member of Congress and Speaker of the Massachusetts House of Representatives, and his nomination was received with contempt by most of the Federalists of his state, who regarded him as a distasteful partisan.⁶⁴ Nor, it appears, was Madison alone in his assessment; although there may have been little enthusiasm for Story in the Senate—which was “completely controlled” by the Republicans yet had overwhelmingly rejected Madison’s prior appointment of Alexander Wolcott⁶⁵—the nomination was confirmed, apparently without difficulty, in three days.⁶⁶

So score one for Jefferson the Kibitzer. But when the Sage himself was on the firing line rather than the sideline, his aim was not so sure. Certainly he was highly motivated to pick Justices who shared his point of view. And yet, as Tribe acknowledges, Jefferson’s three appointees—as well as Madison’s two and the one chosen by the third Republican President, James Monroe—“over a thirty-year period . . . filed not one dissent to the key Federalist rulings of the Marshall Court.”⁶⁷ Tribe’s explanation, that the six “were either mesmerized or overwhelmed by Chief Justice Marshall,”⁶⁸ not only ignores the conclusion of the most thorough study of the early Marshall Court,⁶⁹ but also hobbles his own thesis: If

60. P. 53. Cf. R. NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY* 70-71 (1985) (nationalistic tendencies more acceptable to Madison than to Jefferson).

61. 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 417-19 (rev. ed. 1926).

62. Dunne, *Joseph Story*, in 1 L. FRIEDMAN & F. ISRAEL, *supra* note 57, at 433, 437-38; G. HASKINS & H. JOHNSON, *supra* note 20, at 392-93.

63. 1 C. WARREN, *supra* note 61, at 414.

64. *See id.* at 415-417.

65. P. 81.

66. *See* pp. 142-43; 1 C. WARREN, *supra* note 61, at 415.

67. P. 56. *See* pp. 142-43. This is perhaps a greater concession than is warranted, *see* *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 449 (1827) (Thompson, J., dissenting); *Fairfax’s Devisee v. Hunter’s Lessee*, 11 U.S. (7 Cranch) 603, 628 (1813) (Johnson, J., dissenting), but not by very much.

68. P. 56.

69. G. HASKINS & H. JOHNSON, *supra* note 20, at 394 (“When one examines the conduct of all of the Jeffersonian-Republican appointees, there is little basis for supposing a pervasive and all-encompassing ‘influence’ by Chief Justice Marshall. Indeed, if Republican judges became neo-Federalists, that seems to have been a natural development from their past experiences and commitments.”).

one Chief can bludgeon six Justices into submission for an extended period, a President can have no confidence that his nominees' ideological performance will conform to his expectations.⁷⁰

*Andrew Jackson.*⁷¹ Tribe emphasizes, perhaps somewhat more than the facts justify, the role of Andrew Jackson's struggle against the second Bank of the United States in guiding his appointments.⁷² It might seem embarrassing, then, that a Jackson appointee, Henry Baldwin, provided the swing vote in *Craig v. Missouri*,⁷³ a decision of great political importance that gave a boost to the Bank by invalidating loan certificates issued by state banks. But Tribe attempts to escape: "Although [he] joined the majority, Baldwin had taken his seat on the Court only a few weeks before the decision was rendered; he later recanted."⁷⁴ Again, Tribe's facile explanation does not suffice. That Baldwin's anti-Jackson vote came so soon after he joined the Court might well suggest not that it was unsurprising, but that sometimes surprises occur quickly. And if in fact Baldwin later "recanted,"⁷⁵ it only reemphasizes what we all know—that Justices sometimes change their minds, sometimes surprisingly so.

Abraham Lincoln. Tribe contends that Abraham Lincoln's five Court appointees were faithful to his wartime policies. This is true only to a

70. Moreover, Tribe's theory does not help to explain those instances in which Marshall's colleagues took a federalist stance without his participation, see *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813), or took one more extreme than his own, see *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 222 (1824) (Johnson, J., concurring); *G. HASKINS & H. JOHNSON*, *supra* note 20, at 393-94 (probable moderating influence of Marshall on Story's federalist views).

71. In a trivial but rather amusing error, Tribe refers to Jackson as a "native son" of Tennessee. P. 57. In fact, "Jackson has been accredited with eight birthplaces or one more than Homer"—and none of them in Tennessee. M. JAMES, *ANDREW JACKSON: THE BORDER CAPTAIN* 368 n.17 (1933). James offers a comprehensive discussion of the "seasoned controversy" between the two chief contenders, North Carolina and South Carolina, and supports the latter's claim. *Id.* at 368-74.

72. Pp. 56-58, 97. It is true, of course, that "[i]n 1833 and 1834 there was no more precise test of loyalty to the Jackson Administration" than one's attitude toward the second Bank. C. SWISHER, *supra* note 53, at 54. But by the time Jackson nominated Taney for the Chief Justiceship in December, 1835, and even more so by the time of Jackson's last two nominations in March, 1837, the issue receded, in large part because it would have been all but impossible for judicial events to undo Jackson's victory over the Bank. See Letter from J. Turner to Editor, *N.Y. Times*, *supra* note 51. The Court's decision in *Briscoe v. Bank of Kentucky*, 36 U.S. (11 Pet.) 257 (1837), which Tribe emphasizes as having driven a nail in the Bank's coffin, p. 58, aroused less interest than might have been expected when it was argued earlier that year. C. SWISHER, *supra* note 53, at 106. Indeed, "even Whigs were fully aware that the country needed the currency provided by state bank notes [the validity of which was at issue in *Briscoe*], and needed it all the more now that the Bank of the United States had been reduced to the level of, or transformed into, a mere state bank in Pennsylvania." *Id.* at 107-08.

73. 29 U.S. (4 Pet.) 410 (1830).

74. P. 57.

75. Tribe contends that *Briscoe v. Bank of Kentucky*, 36 U.S. (11 Pet.) 257 (1837), "essentially reversed" *Craig*. P. 58. Perhaps so, but Baldwin himself contended that the facts of the two cases were distinguishable, and that Marshall, as well as he, would have voted the other way in *Craig* if its facts more closely resembled those in *Briscoe*. 2 C. WARREN, *supra* note 61, at 27-28.

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limited extent, and Tribe presents the evidence in a rather tilted way.⁷⁶ Most striking is his treatment of the celebrated episode concerning the Legal Tender Acts, the fiscal keystone of Lincoln's Administration. Tribe acknowledges that two of Lincoln's nominees joined the 4-3 majority invalidating the Acts in *Hepburn v. Griswold*,⁷⁷ but he uses the litigator's ploy of emphasizing the best face of bad evidence: "[T]he three dissenting Justices were all Lincoln appointees—*only two* of his five appointees voted to invalidate the Legal Tender Acts."⁷⁸ The technique should not distract us; surely the big story is not that three Lincoln appointees supported this key legislation but that two did not. And the even bigger story is that one of the two was Chief Justice Salmon P. Chase, who as Lincoln's Secretary of the Treasury had helped draft the Acts. Tribe mentions that fact,⁷⁹ but he does not acknowledge the irony that Chase was chosen in large part because of his presumed reliability on the legal tender issue.⁸⁰ Lincoln explained the nomination by commenting that

we wish for a Chief Justice who will sustain what has been done in regard to emancipation and the legal tenders. We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it. Therefore we must take a man whose opinions are known.⁸¹

Whether Chase's turnabout was a genuine act of moral courage or, as was generally perceived at the time, simply a maneuver in his attempt to gain the Democratic Presidential nomination,⁸² is an interesting question.

76. For example, Tribe misleadingly plays down the contemporary significance of *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). See Friedman, *supra* note 23, at 9-10 & n. 41 (discussing powerful Congressional reaction to *Milligan*); 1 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-88, at 185-229 (1971) (Volume VI of the Oliver Wendell Holmes Devise) (discussing public reaction to *Milligan*). Further, Tribe rather surprisingly claims *Texas v. White*, 74 U.S. (7 Wall.) 700 (1869), as a prime example of how the Lincoln appointees validated Lincoln's constitutional theories. Pp. 60-61. Even assuming that Chief Justice Chase's opinion for the majority should be read as such an endorsement, the Lincoln appointees split 3-2 on the case while the more senior Justices split 2-1. Only with some work could one deduce these facts from Tribe. P. 61.

77. 75 U.S. (8 Wall.) 603 (1870).

78. P. 62 (emphasis added).

79. P. 61.

80. Cf. 1 C. FAIRMAN, *supra* note 76, at 689 ("how simple and right the resort to legal tender notes was made to appear in a speech by Secretary Chase . . .").

81. Quoted in 2 G. BOUTWELL, REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS 29 (1902). Interestingly, Judge Mikva quotes the next-to-last sentence of this passage in support of his position that the President and Senate should not ask a nominee probing questions to elicit his ideological views but may appropriately take into account his views previously expressed. Mikva, *Judge Picking*, 10 DIST. LAWYER 37, 40 (1985). Given the dramatic turnabout by Chase, the nominee chosen by Lincoln on this basis, there is considerable irony in Judge Mikva's use of the quotation.

82. See Friedman, *supra* note 23, at 17 & n. 95; B. SCHWARTZ, FROM CONFEDERATION TO NATION: THE AMERICAN CONSTITUTION, 1835-1877, at 226 (1973).

But there is no denying that it was a dramatic, and surprising, failure of Lincoln's strategy.⁸³

Theodore Roosevelt. Perhaps more than any previous President, Theodore Roosevelt carefully evaluated the substantive views of potential Supreme Court nominees.⁸⁴ As he explained to his close friend Henry Cabot Lodge, "I should hold myself as guilty of an irreparable wrong to the nation if I should put [on the Court] any man who was not absolutely sane and sound on the great national policies for which we stand in public life."⁸⁵ And yet his first appointee, Oliver Wendell Holmes, Jr., while still a very junior Justice wrote a narrow-minded dissent in *Northern Securities Co. v. United States*,⁸⁶ the most important trust-busting case brought by the Roosevelt Administration. Roosevelt reportedly exclaimed, "I could carve out of a banana a judge with more backbone than that!"⁸⁷

Tribe shrugs off this well-known incident, first by noting—rather incongruously, given his prior argument about the potential importance of dissents⁸⁸—that "Holmes's opinion was a dissent that did not alter the outcome a bit."⁸⁹ More seriously, Tribe contends that "on the other issues dear to President Roosevelt's heart . . . Justice Holmes cast consistently progressive votes and gave his President every reason to be pleased."⁹⁰ Somehow, however, Roosevelt himself did not see it that way; four years after the appointment he wrote to Lodge that Holmes was "a bitter disap-

83. With the votes of two new members chosen by President Grant, the Court soon overruled *Hepburn* in *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1871). But this does not justify Tribe's characterization of the entire legal tender episode as a triumph of perspicacity in selecting Justices. The two new Justices, William Strong and Joseph Bradley, had been considered for vacancies long before the Grant Administration knew how *Hepburn* would be decided. 1 C. FAIRMAN, *supra* note 76, at 719-32; Fairman, *Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases*, 54 HARV. L. REV. 977, 978-79 (1941). Although Tribe may be correct that Strong's and Bradley's likely stance on the Act was an important factor in the decision to nominate them, it would have been difficult for Grant to pick two qualified Republican lawyers who did not believe the Act constitutional. C. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 53 (1928); 2 C. WARREN, *supra* note 61, at 517-18. Indeed, one of the two Lincoln appointees who voted against the Act, Stephen J. Field, was a Democrat, 1 C. FAIRMAN, *supra* note 76, at 4, and the other, Chase, was an aspirant for the Democratic nomination for the Presidency, *id.* at 521, 527-57, 1465-66; B. SCHWARTZ, *supra* note 82, at 226. That the other five Republican appointees voted in favor of the Act was no surprise. See 1 C. FAIRMAN, *supra* note 76, at 698-700 (nearly uniform rejection of challenges before state courts; virtually all Republican judges sustained statute, while Democrats opposed it); 2 C. WARREN, *supra* note 61, at 499-500 (anticipation before *Hepburn* that Act would be upheld).

84. Friedman, *supra* note 23, at 41-42.

85. 1 SELECTIONS FROM THE CORRESPONDENCE OF THEODORE ROOSEVELT AND HENRY CABOT LODGE, 1884-1918, at 519 (H. Lodge ed. 1925) [hereinafter cited as ROOSEVELT-LODGE LETTERS].

86. 193 U.S. 197 (1904).

87. W. HARBAUGH, *POWER AND RESPONSIBILITY: THE LIFE AND TIMES OF THEODORE ROOSEVELT* 161 (1961).

88. Pp. 36-37; see *infra* text accompanying notes 188-90.

89. P. 52.

90. *Id.*

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pointment, *not because of any one decision but because of his general attitude.*⁹¹ Tribe fails even to mention this remarkable, and well-known, confession.⁹²

Nor does Tribe discuss Roosevelt's second appointee, William R. Day, whose "position in [the Court's] ideological lineup remained equivocal" throughout nearly two decades on the Court "because of the curiously ambivalent legal philosophy which he brought with him to the bench."⁹³ In particular, although in other contexts Tribe emphasizes *Hammer v. Dagenhart*⁹⁴ as a particularly notorious 5-4 decision,⁹⁵ he does not point out that this Roosevelt appointee authored the majority opinion, which took a highly un-Rooseveltian view of the federal power over interstate commerce. Nor does he mention *The Employers' Liability Cases*,⁹⁶ another case in which Day provided the swing vote, this time to invalidate an important enactment⁹⁷ signed by Roosevelt himself.⁹⁸

Harry Truman. In one of the most celebrated cases in American history, two of Harry Truman's four appointees joined the majority holding that Truman's seizure of the nation's steel mills was unconstitutional.⁹⁹ Tribe dismisses this incident, because in his view the steel crisis was "wholly unpredictable" at the time of the appointments, raising an "as yet unforeseen issue."¹⁰⁰ Rather, Tribe argues, in choosing his Justices, Tru-

91. Letter from Roosevelt to Lodge (Sept. 4, 1906), reprinted in 5 THE LETTERS OF THEODORE ROOSEVELT 396 (E. Morison ed. 1952) [hereinafter cited as LETTERS OF TR] (emphasis added).

92. Although Holmes certainly did cast many votes that should have pleased Roosevelt, Holmes's *Northern Securities* dissent cannot be dismissed as a stray departure from an otherwise "consistent" path in accord with Roosevelt's views. See *United States v. Johnson*, 221 U.S. 488 (1911) (adopting over a dissent a narrow view of one of the prohibitions of Roosevelt's Pure Food and Drug Act); *Dr. Miles Medical Co. v. John D. Park & Sons, Co.*, 220 U.S. 373, 409 (1911) (dissenting from application of Sherman Act to resale price maintenance and displaying misunderstanding of fundamental economics); *Bailey v. Alabama*, 219 U.S. 219, 245 (1911) (dissenting from holding that scheme designed to bind agricultural workers to employers was peonage proscribed by Thirteenth Amendment and federal statute). See also *infra* note 131 (Roosevelt's view on peonage).

93. *Watts, William R. Day*, in 3 L. FRIEDMAN & F. ISRAEL, *supra* note 57, 1773, at 1783-84.

94. 247 U.S. 251 (1918).

95. Pp. 32, 65.

96. 207 U.S. 463 (1908).

97. The Employers' Liability Act of June 11, 1906, 34 Stat. 232.

98. Roosevelt's final appointee, William H. Moody, gave every indication that he was cut out of the Roosevelt mold, but a crippling illness forced Moody to leave the Court after less than four years. *Watts, William Moody*, in 3 L. FRIEDMAN & F. ISRAEL, *supra* note 57, 1801, at 1816-21. Roosevelt selected Moody only after being dissuaded, primarily on narrow partisan grounds, see *infra* text accompanying note 129, from appointing Horace Lurton, who eventually did reach the Court and followed a substantially less progressive path. See A. BICKEL & B. SCHMIDT, *HISTORY OF THE SUPREME COURT: THE JUDICIARY AND RESPONSIBLE GOVERNMENT: 1910-1921*, at 335-39 (Volume IX of the Oliver Wendell Holmes Devise).

99. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Justices Burton and Clark joined the majority, while Chief Justice Vinson and Justice Minton dissented. It was probably in large part because of this vote that Truman later levied a characteristically pungent assessment of Clark, and of Clark's nomination as the worst mistake he ever made. M. MILLER, *PLAIN SPEAKING* 225-26 (1973).

100. P. 69.

man "cared about three things: support for government regulatory authority, sympathy for the civil rights of blacks, and a stern appreciation of the needs of internal security during the Cold War. He got what he wanted."¹⁰¹

For several reasons, this attempted demurrer fails. For one thing, even accepting as true Tribe's assertion that the monumental *Steel Seizure* issue was unforeseeable at the time of the nominations, it gives away too much of his case. That is, the unforeseeability argument reemphasizes a crucial factor limiting the importance of a President's ability to predict how his nominees will stand on issues already apparent: Over the long run, the issues *not* apparent at the time of nomination will likely prove to be equally, if not more, significant.

Second, Tribe's premise, that the basic issue in the *Steel Seizure* case was unforeseeable when Truman made his nominations, is false. As Justice Frankfurter's well-known concurrence demonstrates, there had been numerous Presidential seizures of industrial plants and facilities throughout history, including at least three in the 1940's under circumstances comparable to those of the steel seizure.¹⁰² And certainly the broader question of the breadth of nonstatutory Presidential powers was a live one.¹⁰³ To suggest that in making his nominations Truman considered other issues to the exclusion of this one ignores both the legal context of the time and the nature of Harry Truman.

Finally, even assuming the truth of Tribe's other unsupported proposition—that the three issues he lists were the only ones considered by Truman in making his nominations—the conclusion that Truman "got what he wanted" is overstated. Tribe lists eight decisions in which Truman appointees voted on the side of civil rights for blacks.¹⁰⁴ He does not mention that, in all eight, all the non-Truman appointees also voted on that side of that case; *all eight* were unanimous decisions. Nor does he mention that in *Morgan v. Virginia*,¹⁰⁵ the first important civil rights decision of Truman's term, Justice Burton—the only Truman appointee already on the Bench—was the *only* dissenter from the Court's holding that Virginia's "Jim Crow" law was unconstitutional as applied to buses moving in interstate commerce. And in pointing to the participation in *Brown v. Board of Education*¹⁰⁶ of "[t]he three Truman appointees still on the

101. *Id.*

102. 343 U.S. at 612-13, 613 app. II (Frankfurter, J., concurring).

103. *See, e.g.*, *United States v. Belmont*, 301 U.S. 324 (1937); 39 Op. Att'y Gen. 484, 485-88 (1940) (relying, in part, on constitutional rather than statutory power to support acquisition by executive agreement of rights to establish military bases abroad).

104. P. 69.

105. 328 U.S. 373 (1946).

106. 347 U.S. 483 (1954).

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Court in 1954,"¹⁰⁷ Tribe does not mention the role very nearly played by Chief Justice Vinson, the Truman appointee who had just departed. Justice Frankfurter, a member of the *Brown* Court,

was certain that the Chief Justice had been the chief obstacle to the Court's prospects of reaching a humanitarian and judicially defensible settlement of the monumental segregation cases. In view of Vinson's passing just before the *Brown* reargument, Frankfurter remarked to a former law clerk, "This is the first indication I have ever had that there is a God."¹⁰⁸

* * *

In sum, even on issues of known and particular concern at the time of nomination, surprises are not rare. On other issues, one cannot reasonably hope to do more than draw a very wide circle within which the new Justice is expected to fit, and even that prediction cannot be made with great confidence.

Just as issues change, so do Justices. Sometimes, as in the case of Harlan Stone, this seems to be largely because the Court exposes a Justice to a new set of influences;¹⁰⁹ sometimes, as was probably true in the case of Earl Warren, it may be because the Court protects a Justice from an old set of pressures;¹¹⁰ sometimes, as Tribe acknowledges, change is the natural and desirable product of time and growth.¹¹¹ Moreover, it is often difficult to ascertain fully what a nominee's attitudes truly are even at the time of nomination. A good illustration of this is the Hughes nomination of 1930. As visible a public figure as Hughes had been, his corporate law practice led many progressives to assume that he would be a reactionary Chief Justice. A lesson wisely drawn from the episode is that the place to

107. P. 69.

108. R. KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 656 (1975). Thirty pages earlier—in a totally different context, in which Tribe uses Vinson's reluctance to help show the difference that one Justice can make—Tribe does offer the milder statement that "most observers believed that . . . Vinson was ambivalent about the constitutionality of school segregation, and uncertain about what position he would take . . ." P. 37.

109. The influence of Justices Holmes and Brandeis appears to have accounted in large part for Stone's transformation. See Beard, *Prefatory Note to S. KONEFSKY, CHIEF JUSTICE STONE AND THE SUPREME COURT* xix-xx (1945). See generally A. MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* 219-20, 304-07 (1956) (describing Stone's early relationship with Brandeis and later alliance with Brandeis and Holmes).

110. It is a good guess that Warren would have been a different type of Chief Justice had he remained subject to the pressures of California conservatives.

111. Pp. 103 ("Perhaps the most important qualification for being a Supreme Court Justice is the possession of an open mind."), 74-75, 101. Such change may be largely attributable to the better opportunity that the Supreme Bench offers for careful reflection. See *McGrath v. Kristensen*, 340 U.S. 162, 177-78 (1950) (Jackson, J., concurring) (listing several "ways of gracefully and good-naturedly surrendering former views to a better considered position").

look for understanding of a nominee's judicial attitudes is "not in his file of clients or in his safe-deposit box but at the books in his private library at home."¹¹² But a mind-probing inquiry is a difficult one to make accurately, and especially in an open forum like the Senate.¹¹³

B. *A President's Impact*

In contending that "a President with any skill and a little luck . . . can, with fair success, build the Court of his dreams,"¹¹⁴ Tribe overreaches mightily. Of course, the strawman with which Tribe does battle—that "Presidents cannot influence the Supreme Court through careful appointments"¹¹⁵—is equally overdrawn. A more accurate assessment is that a President can usually move the Court somewhat in the direction he wants, with the extent and consistency of that movement depending in large part on the President's luck; usually the movement is incremental, and a single President can almost never make the Court extreme. We do not need ideological review of Supreme Court nominations by the Senate as a backstop to prevent the Court from veering off in a dangerous direction.

Naturally, a President's ability to affect the Court increases with the number of appointments he makes, but to get its way any number of Justices less than a majority must still persuade other colleagues. Tribe errs, or at least stretches, in saying that "[i]t is far from uncommon for . . . a majority of the Court to be the result of a single President's nominations."¹¹⁶ Since 1869, when the number of seats on the Court was last set

112. Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 359 (1941).

113. See *infra* text accompanying note 181. Part of the problem is that many nominees refuse to discuss questions of judicial philosophy or constitutional law at their confirmation hearings, often assertedly out of fear that such statements either would appear improper or might later require recusal. Tribe recognizes the dangers of too particular an inquiry, and endorses Justice O'Connor's refusal to predict how she would vote in future abortion cases. P. 101. And yet Tribe recommends that the Senate make an extremely detailed inquiry into a nominee's views on some important issues of the day, such as abortion. See pp. 98-100. One problem with a "too-deep probing" into the nominee's views on specific issues is that it "might be understood as seeking assurance of particular results in individual cases, [which] is clearly an improper interference with the judicial function." McKay, *Selection of United States Supreme Court Justices*, 9 U. KAN. L. REV. 109, 131 (1960). On the other hand, if the Senate contents itself with the broader species of questioning suggested by Tribe, such as, "Does the nominee believe that the increasing complexity and danger of our world require giving the President more discretionary power?" p. 104, it is unlikely that the questioning will derive very much that is useful for decisionmaking. Interestingly, even during the Reagan Administration some liberal Senators have opposed the idea that the Senate should delve too deeply into the ideology of judicial nominees. See Kerry, *On Prejudicing Justice*, 81 HARV. L. REC. 13 (Oct. 18, 1985). Evidently, these Senators fear that pressure from the ideological right is more likely to affect the Administration's nominating policy than is pressure from Democrats. See also Mikva, *supra* note 81, at 40 (arguing that, although it is appropriate for Senators to seek judges who in long run will do what Senators believe is best, Senate must exercise great restraint in questioning nominees on ideological matters).

114. P. 76.

115. P. 51.

116. P. 109.

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at nine,¹¹⁷ only two Presidents, William Howard Taft and Franklin Roosevelt, have appointed a majority of the Justices during a single Administration, and only one more, Dwight Eisenhower, has done so during two terms in office.¹¹⁸

Even if a majority of the Justices is chosen by one President, two other factors constrain the majority's ability to lead the Court to new frontiers. First, in all likelihood the combined strength of death, resignation, and retirement will soon dissolve the majority. Only between March 13, 1912 and July 12, 1914 was a majority on the Bench thanks to Taft;¹¹⁹ the Eisenhower majority extended only from May 5, 1959 to April 1, 1962. Roosevelt alone held a majority over an extended period, from January 15, 1940 to October 15, 1954, if nominees from both his second and third terms are counted.

Second, it is unlikely that a one-President majority on the Court will consistently pull together in the same direction, and especially unlikely that it will do so to an extreme degree. This is attributable partly to the consideration discussed in Section A, that some Justices tend to go off in unanticipated directions, partly to the relatively slight emphasis placed on ideology by some Presidents in selecting Justices,¹²⁰ and partly to the relatively moderate ideology of most Presidents. Thus, the period of Eisenhower majority on the Court, far from being one of stodgy conservatism, coincided roughly with the blossoming of the Warren Court. The Roosevelt Court, of course, was solid in support of expanding state and federal economic power. Even on this issue, however, the change was accomplished mainly by Justices appointed by previous Presidents,¹²¹ and as the constitutional front moved to new ground, the Court became both personally and substantively fractious.¹²² The last five Roosevelt Justices—Black, Reed, Frankfurter, Douglas, and Jackson—did not constitute in the aggregate either a united or an extreme phalanx.

117. Act of April 10, 1869, 16 Stat. 44.

118. The data used in this and the following paragraphs are taken from the table reprinted by Tribe, pp. 142-51.

119. I do not count Chief Justice White in this computation, because Taft did not put him on the Court, but only moved him from an Associate's chair to the center seat. If White is counted, the period of Taft hegemony runs slightly more than five years, from December 15, 1910 to January 2, 1916.

120. See p. 52 (Eisenhower).

121. The so-called Revolution of 1937 was achieved before any of Roosevelt's nominees joined the Court. The new Justices were, of course, critical in consolidating the changes, but even if they had voted in the same proportions as did their senior colleagues, the results would not have changed in such important cases as *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940) (5-0 vote by Roosevelt appointees; 3-1 by others), and *U.S. v. Darby*, 313 U.S. 1 (1941) (5-0 vote by Roosevelt appointees; 3-0 vote by others, one week after retirement of McReynolds, who presumably would have dissented), both of which Tribe discusses, at pp. 68, 24, respectively.

122. See A. MASON, *supra* note 109, at 606-47.

The case of the Taft appointees is somewhat less familiar. Perhaps that is why Tribe misstates it so badly:

Although he was not as dogmatic in his conservatism as the late nineteenth-century Presidents, Taft was determined to avoid nominees of the liberal stamp of Learned Hand, Louis Brandeis, or Benjamin Cardozo. Taft regarded these potential candidates as nothing less than "destroyers of the Constitution." Taft's selections buttressed the appointments of Presidents Harrison and Cleveland and ensured that the Court would remain insensitive and even hostile to the interests of working people and reformers throughout the first third of the twentieth century.¹²³

And later, Tribe adds: "Taft's domination of Supreme Court appointments through the offices of both President and Chief Justice led to a consistently conservative, anti-labor, anti-New Deal Court of his own design."¹²⁴

First, let's clear away some underbrush. Taft loathed Brandeis's views, but it is absurd to think that, with any Republican President and Senate of the time, the radical Boston lawyer could have been a "potential candidate." As for Hand and Cardozo, both were in their thirties when Taft became President, and neither was then a potential candidate for the Supreme Court; in fact, far from displaying hostility to Hand, Taft appointed the young lawyer to a District Court seat. True, Taft as Chief Justice counseled Warren Harding against nominating Hand and expressed reluctance concerning Cardozo. That was more than a decade later, however, when Taft was a different and much more ideologically rigid man,¹²⁵ and even then he expressed great respect for Cardozo.¹²⁶ Tribe greatly distorts Taft's role as Chief Justice in filling the Court.¹²⁷

123. P. 65.

124. P. 129; *see also* the rather heroic extension on p. 135 ("the three decades of Taft's dominance of the selection process").

125. A. BICKEL & B. SCHMIDT, *supra* note 98, at 5-7, 9.

126. Tribe writes that Taft "smeared the alternative choices [to Pierce Butler]—dismissing the eminent Judge Benjamin Cardozo as a 'Jew and a Democrat' . . ." P. 129. This is a distortion of Taft's letter to Harding, Dec. 4, 1922, William Howard Taft Papers (Library of Congress), which he wrote *after* the Butler nomination and which related to another vacancy:

The best Judge in the State of New York I suppose is Judge Cardozo. I have a letter from Arthur Hadley recommending him. I enclose it. Cardozo is a Jew and a Democrat. I don't think he would always side with Brandeis, but he is what they call a progressive judge. He is an able man. His uncle, I think it was, was the Judge Cardozo who was impeached for bribery back in Tweed's days, [in fact, it was Cardozo's father, who resigned just in time to avoid impeachment] but this Judge has no spot on his record. I have assumed that you did not desire to appoint two Democrats [Butler was a Democrat]—certainly not now, and therefore that he was not on the eligible list.

127. Taft did not dominate Supreme Court appointments when he was Chief Justice. Although he was successful in discouraging the candidacies of those he did not want to see on the Court, he did not have a good record in getting his favorites on the Court. A. MASON, WILLIAM HOWARD TAFT:

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But this should not be distracting. The story on which to focus concerns the Supreme Court appointments that Taft made when he was in the White House.

Tribe's conclusory declaration notwithstanding, Taft was "relatively little intent on a candidate's precise ideological orientation,"¹²⁸ and in the aggregate his appointees moved the Court noticeably to the left. In 1909 he appointed Horace Lurton, whom Theodore Roosevelt had nearly nominated three years earlier. It was principally fear of partisan resistance that had dissuaded Roosevelt,¹²⁹ who in a letter to Lodge described Lurton in glowing terms:

He is right on the negro question; he is right on the power of the Federal Government; he is right on the insular business; he is right about corporations; and he is right about labor.¹³⁰

Plainly, no one perceived as a hardline conservative could earn such praise from TR.¹³¹

Taft's second appointee, in 1910, was Charles Evans Hughes, the fighting Governor of New York, who was one of the leading progressive politicians of the day.¹³² Hughes resigned to run for President six years later,

CHIEF JUSTICE 171-72 (1965); Murphy, *In His Own Image: Mr. Chief Justice Taft and Supreme Court Appointments*, 1961 SUP. CT. REV. 159, 188. Tribe errs rather drastically in stating that Taft "pressured" Harding into nominating George Sutherland and Pierce Butler. P. 65. Sutherland, a close Harding adviser, would have been appointed without Taft's influence; indeed, Sutherland had been promised the first vacancy, which instead went to Taft. A. MASON, *supra*, at 171; Murphy, *supra*, at 167. Taft enthusiastically supported the selection of Butler, "but he would have been as well, if not better, pleased with John W. Davis." A. MASON, *supra*, at 168, 171; see Murphy, *supra*, at 168-70 (before turning to Butler, Taft pressed for Davis or Nathan Miller); *cf. id.* at 188 (Butler, alone among the Associates appointed while Taft was Chief, was "Taft's choice"). He approved, but was not particularly enthusiastic, about the appointment of Edward Sanford. A. MASON, *supra*, at 163-64, 171; Murphy, *supra*, at 182. Interestingly, the one nomination that Tribe does *not* mention is that of Harlan Fiske Stone. Taft, probably claiming more than the facts warranted, proudly told his son, "I rather forced the President into the appointment." Murphy, *supra*, at 186. One cannot help but surmise that Tribe's failure to mention Taft's support of Stone is related to the fact that Stone turned out to be a very progressive Justice, and "one of this century's most esteemed," p. 85.

128. A. BICKEL & B. SCHMIDT, *supra* note 98, at 9.

129. *Id.* at 8; Friedman, *supra* note 23, at 42.

130. 2 ROOSEVELT-LODGE LETTERS, *supra* note 85, at 228.

131. Roosevelt was mildly, and by no means uniformly, progressive on racial matters. See W. GATEWOOD, *THEODORE ROOSEVELT AND THE ART OF CONTROVERSY* 37-39 (1970). But on the subject of peonage, which he regarded as being the crucial aspect of the "Negro question" and a reprehensible attempt to reintroduce slavery into the South, he was positively tigerish, and the issue often guided his Southern judicial appointments. See Letter to Lyman Abbott, June 22, 1903, 3 LETTERS OF TR, *supra* note 91, at 501-02; Letter to Carl Schurz, Dec. 24, 1903, *id.* at 680; Letter to James Ford Rhodes, Nov. 29, 1904, 4 LETTERS OF TR, *supra* note 91, at 1050-51; letter to Henry Smith Pritchett, Dec. 14, 1904, *id.* at 1067-68. On racial matters, Roosevelt seems to have misjudged Lurton, see A. BICKEL & B. SCHMIDT, *supra* note 98, at 79, 339—another Presidential surprise. In fact, the only two dissenters in the great anti-peonage case of *Bailey v. Alabama*, 219 U.S. 219 (1911), were Holmes—a TR appointee—and Lurton.

132. See generally R. WESSER, *CHARLES EVANS HUGHES: POLITICS AND REFORM IN NEW YORK, 1905-1910* (1967).

after one of the most remarkable and progressive short tenures in the Court's history.¹³³

In December 1910, Taft received an almost universally enthusiastic reaction¹³⁴ by promoting Edward D. White, who had been an able and moderate Associate Justice,¹³⁵ to the center seat. At the same time he added to the Court Joseph R. Lamar and Willis Van Devanter. The response to these nominations was more muted because neither man was well-known, but generally favorable because, to most observers, neither man appeared particularly likely to buttress the forces of reaction.¹³⁶ On the same day, Taft made five nominations to the newly created Commerce Court and two to the Interstate Commerce Commission. "At a minimum," Professor Bickel has aptly written, "the general tone of opinion about the appointments as a whole may be characterized by the comment of the *Kansas City Times*, a Progressive newspaper: 'Some are obviously admirable; none is obviously wrong.'"¹³⁷

As for Taft's last nomination, Tribe says that the President

was less concerned with Mahlon Pitney's dubious intellectual gifts than with the nominee's rigidly conservative political philosophy A handful of Senators more concerned about legal acumen managed to hold up confirmation for a month [As Chief Justice] Taft began to see the wisdom of those Senators who had fought the nomination [and] publicly pronounced Pitney to be a "weak member" of the Court to whom he could "not assign cases."¹³⁸

Tribe concentrates several errors into this brief passage:

(1) At the time of his nomination in 1912, Pitney did not appear to have a "rigidly conservative political philosophy." He had, in fact, "dis-

133. A. BICKEL & B. SCHMIDT, *supra* note 98, at 398; F. RODELL, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1780 TO 1955*, at 223 (1955); Note, *Governor on the Bench: Charles Evans Hughes as Associate Justice*, 89 HARV. L. REV. 961 (1976).

134. Friedman, *supra* note 23, at 68.

135. See A. BICKEL & B. SCHMIDT, *supra* note 98, at 38. For example, White dissented in *Lochner v. New York*, 198 U.S. 45 (1905), and *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), and gave a crucial vote to the majority in *Champion v. Ames*, 188 U.S. 321 (1903). He did not, however, consistently cast votes on the side considered progressive. Watts, *Edward Douglass White*, in 3 L. FRIEDMAN & F. ISRAEL, *supra* note 57, at 1631, 1644-49. Tribe grudgingly concedes that White was less doctrinaire than the other appointees of Grover Cleveland. P. 63.

136. See A. BICKEL & B. SCHMIDT, *supra* note 98, at 41:

There was not much scope in the cases [on which Lamar sat as a justice of the Supreme Court of Georgia]. And yet there were some opinions at this stage of Lamar's career—as there were not to be in his few years as a Justice—that are barely identifiable as mildly progressive in tone and direction.

Van Devanter, before coming to the Supreme Court, was almost exclusively a politician and technician, a sound and brilliant lawyer, with a flat and sensible style; only in the 1920's and 1930's did his ideological commitment emerge. See *id.* at 49-52, 326.

137. *Id.* at 61 (footnote omitted).

138. Pp. 82-83.

played a generally hospitable attitude” toward “the few measures of social and economic regulation” that had come before him as a high New Jersey judge.¹³⁹ One important decision, *George Jonas Glass Co. v. Glass Blowers’ Association*,¹⁴⁰ betrayed Pitney’s hardnosed attitude toward unions, but that case stood out by itself in Pitney’s record. “No wonder Taft could see nothing objectionable in [that record], and probably no cause to fear that anyone else would find it objectionable.”¹⁴¹

(2) The opposition to Pitney was not based on his perceived lack of ability. In fact, Pitney was regarded nearly universally as an eminent judge.¹⁴² Rather, the opposition was based almost totally on the *Jonas* case.¹⁴³ But the unions and progressive Senators failed to unite in protest against the nomination; indeed, William Borah of Idaho led the forces in its favor, and most progressive newspapers supported it. Thus, Pitney was confirmed in 23 days.¹⁴⁴

(3) Although Pitney was far from a giant, he was a respectable judge and—putting ideology aside—a good one.¹⁴⁵ Far from belittling Pitney, Taft as Chief Justice manifested respect for him.¹⁴⁶ True, in 1922 Taft—in a letter to his brother, not publicly—described Pitney as a “weak member” of the Court. But that was after Pitney had suffered a breakdown in his health, including the beginnings of the arterial degeneration that soon after brought on a massive stroke and eventually killed him. In the same letter, Taft also described as weak—all on grounds of age or health—Justices McKenna, Day and, yes, Holmes.¹⁴⁷

139. A. BICKEL & B. SCHMIDT, *supra* note 98, at 333 (footnote omitted).

140. 77 N.J. Eq. 219 (1908).

141. A. BICKEL & B. SCHMIDT, *supra* note 98, at 334.

142. *Id.* at 330 (quoting *The Outlook*, Mar. 2, 1912); *The New Supreme-Court Justice*, 44 LITERARY DIG. 410, 410 (1912).

143. A. BICKEL & B. SCHMIDT, *supra* note 98, at 330–34; Friedman, *supra* note 23, at 72 & n.465.

144. A. BICKEL & B. SCHMIDT, *supra* note 98, at 324–32; Friedman, *supra* note 23, at 72–73.

145. A. BICKEL & B. SCHMIDT, *supra* note 98, at 334; 1 M. PUSEY, *supra* note 56 (“high regard of his brethren”).

146. A. MASON, *supra* note 127, at 212 (1965) (“For a while Taft could turn to Mahlon Pitney for advice.”) (footnote omitted). Mason’s judgment is based at least in part on a letter, Taft to Pitney, Mar. 31, 1922, William Howard Taft Papers (Library of Congress) (accepting suggestions, made in a letter of Pitney to Taft, March 30, 1922, for changes in an opinion, and saying, perhaps out of politeness, “I can not say what a comfort it is to have you and brother Van Devanter go over my work.”).

147. Some of the context of Taft’s letter must be given to realize just how badly Tribe mangles it: Our Court is not in a strong condition. [Holmes has been doing his work, but is ill with asthma.] Pitney, too, had a nervous breakdown last year, and he has a good many cases on his hands which he is not getting rid of. Day had the grip, and while he continues work—and they all do in the sense that they attend conference—they are the weak members of the Court to whom I cannot assign cases. The worst and most embarrassing member, however, is the oldest member, McKenna. . . . In my judgment, both Holmes and McKenna ought to retire. Letter of William Howard Taft to Horace D. Taft, Apr. 17, 1922, William Howard Taft Papers (Library of Congress).

Taft's nominees, in short, ranged from moderately conservative to decidedly progressive, from capable to outstanding. The net effect was not to rigidify the Court but to move it noticeably in the progressive direction. Indeed, the Taft nominations ushered in a brief period in which the Court as a whole appeared to be mildly progressive—not consistently or extremely so, to be sure, but markedly so in comparison to the Court of a few years before or a few years after.¹⁴⁸

The Taft nominations thus fit easily in the general pattern. An individual President can nudge the Court, and even achieve dramatic short-term results, but it is difficult for him to fashion the Court in his image over the long-term and nearly impossible for him to make the Court extreme. Of course, the nominations of two or more successive Presidents may move the Court in the same direction; as Tribe points out, "even Supreme Courts whose composition is the work of several presidential hands can be remarkably uniform in outlook Supreme Courts of varied origin have given us decisions that are remarkably monolithic."¹⁴⁹ But if such a monolith is erected over decades, and is the product of different Presidents elected in different eras, it is generally difficult to characterize as extreme.¹⁵⁰ And even if we believe the extremist label sometimes does fit the Court, we must still ask the question to which we now turn: Would things really turn out any better if the Senate took a more active ideological role?

C. *The Senate's Impact*

Another of the "myths" that Tribe contests is that of "the spineless Senate"—"that the Senate has historically treated Supreme Court nominations much like a President's choice of Attorney General or even of Postmaster General, usually deferring and giving the Chief Executive the 'man he wants.'"¹⁵¹ Again, Tribe does battle with straw; if anyone really

148. See A. BICKEL & B. SCHMIDT, *supra* note 98, at 201-02, 316-17 (many progressive decisions rendered in 1910-14 period, but not representing general capacity of accommodation to changing conditions; effect of personnel changes during Wilson Administration was to make Court less progressive); F. RODELL, *supra* note 133, at 188:

[A]fter Fuller was succeeded in 1910 by White, . . . the Court relaxed for six or seven years its *laissez faire* rigidity . . . until America entered the first World War. That this comparatively liberal interlude almost precisely coincided with the first of Charles Evans Hughes's two terms of service on the high bench was not entirely coincidental. . . .

149. P. 109.

150. Indeed, the "remarkably uniform" outlooks of various Presidents' appointees tends to undercut Tribe's contention that a President can have confidence that his appointees will support his outlook.

Significantly, although the present Court is dominated by the presence of four nominees of Richard Nixon and one of Ronald Reagan, Tribe does not regard it as extreme. On the contrary, he contends that "there is much to applaud in its jurisprudence" and answers a "resounding yes" to the question of whether it reflects a "balance . . . worth saving." P. 111.

151. P. 78.

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believes in this myth, a glance at the back of Charles Warren's classic history of the Supreme Court¹⁵² should be sufficient to show that at times the Senate has been downright ornery. Nor would one have to delve very deep into Warren to confirm that Senatorial opposition has often been based on what Tribe calls the "political, judicial, and economic philosophies" of the nominees.¹⁵³ The more difficult questions are whether, viewed from the historical perspective, such ideological review has done substantial good, and whether more of it would have been a good thing.

Determining whether a political act has worked for well or ill is, of course, a highly subjective matter, unless we are looking back across a sufficient historical distance to yield a measure of consensus. Consider therefore the half century or so ending in 1937. This is a crucial test era, for there now seems to be universal agreement that the Court then performed poorly in many respects, its decisions hindering more often than fostering social progress. But certainly—putting aside for the moment the 1930's—the Senate did not use its power over Court nominees to alter that situation. And if the Senate had been more aggressive, it almost certainly would have made the Court less, rather than more, progressive.

For example, Tribe makes much of the conservative appointments of Benjamin Harrison and Grover Cleveland.¹⁵⁴ But he does not suggest that, had the Senate played a greater role in selecting the Justices during this period, the complexion of the Court would have changed. Nor could he, for the Senate of the late nineteenth century was a conservative body, the least popular institution in government, because it appeared to be the most powerful and insistent in thwarting the public will.¹⁵⁵

Nor did that situation change dramatically with the new century; Theodore Roosevelt needed all his extraordinary resourcefulness to achieve his remarkable legislative record over the resistance of an often hostile Congress dominated in both houses by the Old Guard.¹⁵⁶ In 1906 TR nominated William H. Moody in the face of warnings that Moody's strenuous progressivism would raise objections in the Senate. The opposition soon collapsed, notwithstanding a notable lack of enthusiasm for Moody in the Senate, because in that era Senators were not disposed to struggle with Presidents over the personnel of the Court.¹⁵⁷ That same attitude helped account for the quick evaporation of the traces of Senate opposition, all

152. 2 C. WARREN, *supra* note 61, at 757–63.

153. P. 92.

154. Pp. 63–64, 65.

155. D. ROTHMAN, *POLITICS AND POWER: THE UNITED STATES SENATE, 1869–1901*, at 243–49 (1966).

156. *See, e.g.*, W. HARBAUGH, *supra* note 87, at 235–52, 363–68; J. BLUM, *THE REPUBLICAN ROOSEVELT* 87–105 (1954) (2d ed. 1977).

157. Friedman, *supra* note 23, at 47, 67.

from Southern conservatives, to Hughes in 1910.¹⁵⁸ But it did not prevent a battle royal six years later.

"There is no doubt," concedes Tribe, "that the Senate has sometimes abused its power. The unsuccessful opposition to Woodrow Wilson's nomination of Louis Brandeis in 1916 was fueled as much by anti-Semitism as by legitimate objections to the nominee's progressive philosophy."¹⁵⁹ And thus, in the blink of an eye, Tribe disposes of what still stands as the bitterest nomination controversy in the history of the Court.

The Brandeis affair simply cannot be "distinguished away" from modern concerns because it involved anti-Semitism, which presumably is now unlikely to reappear with such virulence in a confirmation battle. Although much was made of Brandeis's Jewishness, it played a subsidiary role in the dispute,¹⁶⁰ primarily to emphasize in the minds of some opponents¹⁶¹ that Brandeis was an outsider—"not a fit person to be a member of the Supreme Court"¹⁶² because he did not adhere to the unwritten code of the legal establishment.¹⁶³ At base, the episode was ideological, "a fight for the soul of the Supreme Court."¹⁶⁴ And for our present purpose, two facts stand out. First, in that struggle it was the nominee, not his Senate opponents, who represented the progressive forces in society and the prospect of a Court more attuned to the public will.¹⁶⁵ Second, had the President not applied his full political weight, the opposition might have prevailed,¹⁶⁶ thus keeping off the Court "one of this century's most esteemed Justices."¹⁶⁷

Not until Herbert Hoover became President did the Senate object to a

158. N.Y. Times, Apr. 27, 1910, at 2, col. 4.

159. P. 91.

160. A. BICKEL & B. SCHMIDT, *supra* note 98, at 367 ("The attacks on Brandeis were personal and ideological, with a leavening of anti-Semitism"); A. MASON, *BRANDEIS: A FREE MAN'S LIFE* 468-69, 483, 490, 505-08 (1946). To some extent, fears of appearing anti-Semitic might have inhibited potential opponents of Brandeis. See A. TODD, *JUSTICE ON TRIAL* 81 (1964).

161. Certainly not all; for example, the most vociferous opponent to Brandeis, former President Taft, appears to have been free of any traces of anti-Semitism. A. TODD, *supra* note 160, at 216-17, 256-57.

162. This was the opinion offered by Elihu Root, then president of the American Bar Association, and six former presidents. *Id.* at 159.

163. See A. MASON, *supra* note 160, at 507-08; A. TODD, *supra* note 160, at 249-50; A. BICKEL & B. SCHMIDT, *supra* note 98, at 375.

164. A. BICKEL & B. SCHMIDT, *supra* note 98, at 367.

165. Only part of the Senate that considered Brandeis was chosen by popular election under the Seventeenth Amendment to the Constitution; as Tribe says, p. 132, the electoral process for both the President and the Senate is far more democratic now than it was in earlier years. See also *supra* note 24.

166. See J. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* 111-112 (1953); A. TODD, *supra* note 160, at 212-15, 229-34, 239-41. Although the final margin of victory was wide, the key vote was the 10-8 tally in the Judiciary Committee. The committee vote was strictly by party, and the floor vote nearly so; Wilson's pressure dragged some reluctant Democrats into line. A. MASON, *supra* note 160, at 501-05.

167. P. 85.

nominee as being too little, rather than too much, in the progressive camp.¹⁶⁸ But consider the results and the near results. The opposition to Hughes in 1930 failed, but it was nevertheless very substantial.¹⁶⁹ As we have seen,¹⁷⁰ that opposition was misguided; considering Hughes's subsequent career and the range of Hoover's potential backup choices for the vacancy, it might also have been disastrous.

Later the same year, the Senate rejected Circuit Judge John J. Parker, who was perceived as being hostile to blacks and labor. In his place Hoover nominated Owen J. Roberts, who was readily accepted by the Senate in large part because his vigorous prosecution of the Teapot Dome scandal gave the impression that he was a progressive.¹⁷¹ This episode in particular provides an important test—recent enough for the issues to be familiar, distant enough to be viewed with perspective, with a rejection based purely on perceived substantive views followed by confirmation of a nominee satisfactory to the Senate. Three times Tribe parades the substitution of Roberts for Parker as a demonstration of the good that Senate rejection can do. Tribe's argument, a truly astonishing one, is that Roberts's "famous 'switch in time' vote of 1937 . . . helped defuse the Court-packing crisis."¹⁷² It is only pardonable curiosity to ask whether Justice Roberts in his pre-switch incarnation may have been responsible in some substantial degree for *precipitating* the crisis, and whether Parker might have opposed the Court's right wing, even before 1937 and even without the necessity of a switch.

Both answers are quite clearly affirmative. Although even before 1937 Roberts sometimes displayed a moderate side,¹⁷³ in several highly-charged cases of great political significance he cast a decisive vote on the side of the Court's conservative Four Horsemen,¹⁷⁴ the crisis might have been averted

168. Perhaps the nomination of Mahlon Pitney is an exception, but there the progressives were divided and the opposition was narrowly based. See *supra* text accompanying notes 139–44.

169. Apart from including this episode in the table at the back of his book, see pp. 148–49 (52-26 confirmation vote), Tribe mentions it not at all.

170. See *supra* text accompanying notes 56 and 112.

171. See Anderson, *The Supreme Court Victory*, 130 *NATION* 598, 599 (1930); Burner, *Owen J. Roberts*, 3 *L. FRIEDMAN & F. ISRAEL, supra* note 57, at 2251, 2255; 105 *LITERARY DIG.* 9 (May 24, 1930).

172. P. 91; *accord* pp. 34, 135. Roberts, it appears, did not switch his vote on the minimum wage issue in response to Roosevelt's Court-packing plan. See Frankfurter, *Mr. Justice Roberts*, 104 *U. PA. L. REV.* 311 (1955). However, sometime between *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936), and *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), he dramatically changed his stance on this issue.

173. See, e.g., *Nebbia v. New York*, 291 U.S. 502 (1934) (upholding statute setting retail milk prices). Even after 1937, Roberts remained essentially a conservative judge, see, e.g., *Smith v. Allwright*, 321 U.S. 649, 666 (1944) (Roberts, J., dissenting).

174. Probably the most important examples are *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (invalidating minimum wage law), and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating Bituminous Coal Conservation Act of 1935). Others include *R.R. Retirement Bd. v. Alton*, 295 U.S. 330 (1935) (invalidating compulsory retirement and pension plan for interstate carri-

had a more consistently progressive Justice been in his place. And, with the switch of one vote in the Senate, Parker might very well have been that Justice.¹⁷⁵ It now seems clear that the Senate judged Parker's views on race¹⁷⁶ and labor¹⁷⁷ too harshly, and his distinguished and generally liberal record over the next twenty-eight years on the Fourth Circuit¹⁷⁸

ers), and *Ashton v. Cameron County Water Improvement Dist. No. One*, 298 U.S. 513 (1936) (invalidating statute granting bankruptcy relief for governmental units). It is noteworthy that, in each of these cases, Hughes—whom the progressives had opposed in 1930—joined the Court's three liberals in dissent, although in *Carter* he agreed with the majority with respect to part of the statute at issue. In *U.S. v. Butler*, 297 U.S. 53 (1936), one of the most important cases in bringing on the crisis, Roberts and Hughes joined the conservatives in holding the first Agricultural Adjustment Act unconstitutional.

175. Medina, *John Johnston Parker 1885-1958*, 38 N.C. L. Rev. 299, 303-04 (1958) (likely that several key cases would have been decided differently, and that Roosevelt would not have offered Court-packing plan, had Parker been confirmed).

176. The racial opposition was based entirely on a disparaging statement by Parker concerning the prospect of a greater black role in politics. Parker made the statement in 1920, while running as the Republican candidate for Governor of North Carolina, in response to Democrats' charges that he was trying to organize blacks as a political force. Parker received a strong black vote in the election, and his nomination to the Court was supported by leading blacks in North Carolina. *Confirmation of Hon. John J. Parker to be an Associate Justice of the Supreme Court of the United States: Hearing before the Subcom. of the Sen. Comm. on the Judiciary*, 71st Cong., 1st Sess. 76-79 (1930), reprinted in 9 R. MERSKY & J. JACOBSTEIN, *THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-1975* (1977). Parker's opponents ignored not only his own self-serving denial of prejudice, see *Congressional Record*, 71st Cong., 2d sess., at 7794, but also *City of Richmond v. Deans*, 37 F.2d 712 (4th Cir. 1930) (per curiam), the one case in which he had already ruled on a constitutional question involving racial matters. There the court, with Parker presiding, invalidated a discriminatory zoning ordinance; the outcome followed, but was not totally controlled by, Supreme Court precedent.

After his rejection, Parker had—with one glaring exception—a progressive record on racial issues. In *Brotherhood of Locomotive Firemen v. Tunstall*, 163 F.2d 289 (4th Cir.), cert. denied, 332 U.S. 841 (1947), after the Supreme Court, 323 U.S. 210 (1944), reversed a per curiam decision denying jurisdiction, 140 F.2d 35 (4th Cir. 1930), Parker wrote for the court in upholding a damages verdict for a black workman against a union that had discriminatorily refused to represent him in collective bargaining. In *Rice v. Elmore*, 165 F.2d 387 (4th Cir. 1947), cert. denied, 333 U.S. 875 (1948), he wrote for the Court in invalidating a primary held under discriminatory party rules. His opinion compares favorably to the dissent of Justice Roberts in *Smith v. Allwright*, 321 U.S. 649, 666 (1944)—and, for that matter, to Roberts's opinion for the Court in *Grovey v. Townsend*, 295 U.S. 45 (1935). While ordering equal facilities in public schools, Parker refused absent Supreme Court leadership to order desegregation, *Briggs v. Elliott*, 103 F. Supp. 920 (D.S.C. 1952), rev'd by *Brown v. Board of Educ.*, 347 U.S. 483 (1954), but he was vigorous in enforcing the rule of *Brown*, see, e.g., *Allen v. County School Bd.*, 249 F.2d 462 (4th Cir. 1957).

177. The labor opposition was based almost entirely on International Organization, United Mine Workers v. *Red Jacket Consol. Coal & Coke Co.*, 18 F.2d 839 (4th Cir. 1927), in which Parker wrote for the Court in upholding an injunction that, *inter alia*, forbade the union from inducing workers to breach "yellow dog" contracts. On this point, Parker deemed *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917), as controlling, see 18 F.2d at 848-49, a judgment that was at least defensible, see 2 G. HAYNES, *THE SENATE OF THE UNITED STATES 758-59 n.4* (1938). Although there is not evident in *Red Jacket* any strain to avoid *Hitchman*, neither does it manifest the hostility to unions that labor perceived. Ironically, organized labor "later criticized Roberts acidly," Burner, *supra* note 171, at 2255.

178. See Warren, *John J. Parker*, 33 N.Y.U. L. Rev. 649, 650 (1958) ("His philosophy was that of a practical liberal . . . He would truly have been a great Justice of [the Supreme] Court."); Medina, *supra* note 175, at 303 (Justice Stone's "point of view was strikingly similar to that of Judge Parker, both on the subject of the power to deal with economic threats and the power of the courts to safeguard the rights of individuals vis-a-vis the government"); *id.* at 306 ("a massive record of sound

supports the generally held view that his rejection was a grievous error.¹⁷⁹ Apart from offering the conclusory and evidently inaccurate declaration that "Justice Roberts was, of course, less wedded to the wisdom of the past,"¹⁸⁰ Tribe does nothing to dispel this view.

The 1930 confirmation episodes highlight the fact that, in attempting to judge what a nominee's views will likely be on the Supreme Court, the Senate will often err; indeed, the progressives in 1930 batted oh-for-three, placing Hughes and Parker too far to the right and Roberts too far to the left.¹⁸¹ By now, this should not be surprising. In trying to assess and predict the outlook of a nominee, the Senate is burdened with all the same problems that face a President, and potentially more: The Senate is less likely than the President and his advisers to know the nominee intimately, less able to consider the nominee's record reflectively, and more subject to interest group pressures that may magnify stray events and nominees' past statements beyond their real significance.

III. SUMMING UP THE LEDGER

Part II has reviewed the historical record to show that the benefits of ideological opposition to Supreme Court nominees are less than may appear. This part will examine other, less historically oriented considera-

law"); Burris, *The Senate Rejects a Judge: A Study of the John J. Parker Case* 30 (1962) ("distinguished and liberal record"); N.Y. Times, Mar. 18, 1958, at p. 29, col. 1 ("reputation as one of the most distinguished jurists on the Federal bench"); cf. W. DOUGLAS, *THE COURT YEARS, 1939-1975*, at 16-17, 191 (1980) ("differences between Parker and Roberts in the broad sweep of the law were not marked"; "each sat way to the right of center," but Parker was "much the superior judge"). After his rejection, Parker "wrote decisions welcomed by New Dealers, notably one upholding the constitutionality of loans by the Public Works Administration," N.Y. Times, *supra*, at 29, col. 1. In that case, *Greenwood County v. Duke Power Co.*, 81 F.2d 986 (4th Cir. 1936), *rev'd on other grounds*, 299 U.S. 259 (1936), and *Duke Power Co. v. Greenwood County*, 91 F.2d 665 (1937), *aff'd*, 302 U.S. 485 (1938), Parker applied, over dissent, a broad view of the federal spending power.

Some sense of Parker's remarkable career on the Fourth Circuit can be gleaned from the proceedings held in his memory by that court, *In Memoriam: Honorable John Johnston Parker* (Apr. 22, 1958) reprinted in 253 F.2d. [hereinafter cited as *Proceedings*]. For summaries of Parker's jurisprudence by judges who knew him well, see Watkins, *A Great Judge and a Great American: Chief Judge John J. Parker, 1885-1958*, 44 A.B.A.J. 448, 449 (1958) (Parker's participation in numerous decisions involving expanding federal powers of economic regulation demonstrated his belief that age-old principles must be adapted to meet changing conditions); Phillips, *A Tribute to Judge John J. Parker—"The Gladsome Light of Jurisprudence,"* 37 N.C.L. REV. 1, 15-16 (1958) (same).

179. Warren, *supra* note 178, at 650 (Parker's "practical liberal" philosophy "has been attested to by many of the Senators whose votes . . . prevented him from being confirmed"); *Proceedings, supra* note 178, at 14 ("Many who opposed confirmation of his nomination were to acknowledge publicly that they had made a regrettable and serious mistake."); Burris, *supra* note 178, at 30 ("It is now generally conceded that Parker was wrongly condemned."); H. ABRAHAM, *JUSTICES AND PRESIDENTS* 200 (2d ed. 1985) (Parker rejection "now all but universally regarded not only as unfair and regrettable but as a blunder"); W. DOUGLAS, *supra* note 178, at 17 (concluding on basis of Parker-Roberts episode that "the wisdom of the Senate is not always apparent"); *see id.* at 191.

180. P. 91.

181. In 1937, Senator Burton K. Wheeler acknowledged the wrong guesses on both Hughes and Roberts. W. DOUGLAS, *GO EAST, YOUNG MAN: THE EARLY YEARS* 320 (1974).

tions that also limit the benefit gained by opposing a nominee of distasteful views. It will then look at the cost side of the ledger, and finally offer a standard for determining when ideological opposition is appropriate.

A. *The Benefit Side, Continued*

The President's second bite. Even if the Senate does reject the first nominee, usually the same President will name the second.¹⁸² And, unless the President is willing to back down, the viewpoint of the second nominee may not be dramatically different from that of the first. Unless the Senate is willing to endure a stalemate, during which there will be an empty seat on the Supreme Bench, it may then be the one forced to retreat. Thus, the Senate of 1930, having endured two bruising confirmation battles in confirming Hughes and rejecting Parker, was eager to perceive Roberts as a progressive.¹⁸³ Thus too, after defeating Clement F. Haynsworth and G. Harrold Carswell, Richard Nixon's first two nominees for a vacancy, Senate liberals appeared eager to confirm Harry A. Blackmun and thus avoid a third fight.¹⁸⁴ To the extent that the battles against Haynsworth and Carswell were actually fought on ideological turf,¹⁸⁵ the Senate campaign could not be claimed as a clear success, because Blackmun—whatever he may have since become—appeared at the time to be a rather conservative judge.¹⁸⁶ Perhaps Morris Udall had this episode in mind after the nomination of his fellow Arizonan, Sandra Day O'Connor, when he wrote: "My Democratic friends ought to be grateful . . . It's

182. This need not be true when the nomination is toward the end of a Presidential term. Not surprisingly, a disproportionate number of rejections have occurred during the last year of a President's administration. Resistance during that year thus offers opponents of a nomination somewhat greater hope of advancing their objectives than in other years. In addition, they can then offer the argument that a nomination with such long-term potential significance should be made by a President with a fresh mandate.

183. See *supra* text accompanying note 171.

184. See McConnell, *Haynsworth and Carswell: A New Senate Standard of Excellence*, 59 *Ky. L.J.* 7, 24-28 (1970).

185. See Grossman & Wasby, *The Senate and Supreme Court Nominations: Some Reflections*, 1972 *DUKE L.J.* 557, 577 (conflict of interest issue in Haynsworth case may have "provided a convenient justification for opposition generated in fact by ideological or political considerations"; "the liberal-conservative orientation, not party or region of the voting senators, was the important determinant of voting behavior" on Haynsworth and Carswell).

186. See *N.Y. Times*, April 15, 1970, at 34, col. 4 (Judge Blackmun "appears strikingly like Mr. Burger in judicial philosophy."); Jenkins, *A Candid Talk with Justice Blackmun*, *N.Y. Times Magazine*, Feb. 20, 1983, p. 20, at 22 ("Justice Blackmun was initially typecast as the subordinate half of the 'Minnesota Twins,' and therefore an appendage of the Chief Justice. . . . No longer a conservative, Justice Blackmun has become a pragmatic, strongly independent jurist who more often than not votes with the Court's two more liberal Justices."). Statistics give some indication of Justice Blackmun's ideological transformation. In the 1971 term, Justice Blackmun voted with Justice Rehnquist (then in his first term on the Court) 81.0% of the time and with Justice Brennan only 48.3% of the time. *The Supreme Court, 1983 Term*, 98 *HARV. L. REV.* 87, 308. In the 1984 term, Justice Blackmun voted with Justice Rehnquist 70.3% of the time and with Justice Brennan 79.2% of the time. *The Supreme Court, 1984 Term*, 99 *HARV. L. REV.* 120, 323.

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almost inconceivable to me that they could do any better. Ronald Reagan isn't going to appoint liberal Democrats."¹⁸⁷

The lone wolf's limited bite. A single Justice, no matter how extreme, cannot make the Court itself extremist. Of course, as I have already acknowledged, a single Justice can have an important impact on the nation;¹⁸⁸ to demonstrate this point convincingly requires little more than the recitation of a long series of 5-4 decisions dating back to the mid-19th century.¹⁸⁹ But Tribe carries his argument further, pointing out that "one Justice can often make much more than one vote's difference." A Justice can do this, Tribe argues, principally by acting as a catalyst, leading the Court to "new frontiers of constitutional law" through the use of what Tribe aptly calls "persuasive judicial skills."¹⁹⁰

That is certainly true enough, but Tribe's phrase suggests its own crucial limitations: For the most part, a single Justice can exert power transcending his vote only by persuading other Justices,¹⁹¹ and his views can prevail only if at least half of the Court agrees with him. The vote of an extremist Justice counts no more than those of his more moderate colleagues—and no more than would the vote of a second-choice appointee of the same President.

True, a Justice may affect the law crucially even without persuading his own colleagues, by writing a persuasive dissent or concurrence that successfully "appeal[s] to the brooding spirit of the law, to the intelligence of a future day."¹⁹² But this impact will occur only if the opinion has persuasive power and, in general, only if it persuades the majority of a latter-day Court.

No one denies that a single Justice, any Justice, can have enormous impact on the nation; it is highly unlikely, however, that a single extremist Justice will have an extreme impact.

Balance over the long run. Over the long run, Senatorial opposition is unlikely to move the Court much in one direction or the other, for the Senate may be to the right of the President about as often as it is to the

187. Udall, *A Master Stroke*, Wash. Post, July 13, 1981, at A13, col. 2.

188. See *supra* text accompanying note 23; p. 31. Tribe contests, p. 31, the comments by Justice Rehnquist, *supra* note 9, at 24, that "Supreme Court appointments almost invariably come 'one at a time,'" and that the Court is "far more dominated by centrifugal forces, pushing towards individuality and independence, than it is by centripetal forces pulling for hierarchical ordering and institutional unity." Unlike Tribe, I do not believe that Justice Rehnquist meant by these points to "deny . . . the idea that one or two Justices can make a major difference at the Court." P. 31. But they do support the view that, while a single Justice may have a major impact, he cannot singlehandedly make the Court extreme.

189. Pp. 32-34.

190. P. 36.

191. One important exception to this statement, and its impact on the Senate's role in reviewing nominees for the Court, are discussed *infra*, Part III(C).

192. C. HUGHES, *supra* note 83, at 68.

left.¹⁹³ Indeed, a Senator deciding whether to reject a nominee whose substantive views he finds distasteful might well take into account the possibility that, as viewed from the perspective of later years, he would find the nominee's views to be correct, or at least more acceptable.¹⁹⁴ It is not a bad thing to exercise some humility in dealing with difficult issues of long-term significance.¹⁹⁵

B. *The Cost Side*

The considerations discussed in Part II and in Section A of this Part limit the benefit of ideological opposition, but they do not by themselves demonstrate that the Senate should refrain from such opposition. However difficult prediction is, the Senate can probably do it better by exercising its considered judgment than, say, by flipping a coin. And it is an essential part of our constitutional structure that the Senate exercise that judgment rather than rubber stamp decisions made by the President.

Thus, if there were no costs to ideological resistance, I would still regard it as worthwhile for whatever value it might have. In some contexts, however, it is appropriate for one branch to defer to the choices of another, at least within broad bounds, because refusal to defer carries potential costs.¹⁹⁶ And active ideological opposition to Supreme Court nominations does not come cost-free.

One cost of rejecting a Supreme Court nominee is obvious: For a time, the Court is not at full strength. Accordingly, it may hesitate to decide its most controversial cases, and in some cases fewer than five votes will determine the disposition. That cost is usually acceptable, but it may become less so if the Senate digs in its heels and repeatedly blocks the President's attempts to fill a vacancy—a possibility that is much greater when opposition is based on ideology rather than on competence or temperament. And this cost of ideological resistance may become least tolerable precisely when the apparent benefit is greatest—when several vacancies give a single President an opportunity to change the complexion of the Court very

193. Moreover, ideological opposition from one side of the political spectrum is likely to help generate similar opposition in later cases from the other side. *Cf.* McConnell, *supra* note 184, at 9 (Senate considered Haynsworth nomination in light of "recent precedent for senatorial questioning" set by Senate's consideration of nomination of Abe Fortas to be Chief Justice).

194. *Cf.* p. 58 ("It is a sobering postscript . . . that Jackson's jihad against the Bank of the United States had a very real and genuinely ironic impact on the farmers, laborers and common people for whom he took up the sword . . . [because it played] a large part in triggering the devastating economic depression of 1837.").

195. *See* p. 103 (quoting Oliver Cromwell's plea, "Brethren, by the bowels of Christ I beseech you, bethink you that you may be mistaken.").

196. *See, e.g., infra* text accompanying note 191, 202-03 (Court's responsibility at times to defer to other branches).

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substantially—for then failure to confirm nominees would leave the Court debilitated.

There is another cost of ideological resistance, more subtle yet more significant, that Tribe never considers. Perceptions of the Court substantially shape the nature of the confirmation process, and history and logic strongly suggest that the relationship also runs the other way.¹⁹⁷ Rarely is public attention focused on the Court as intensely as during a confirmation struggle. Extended debates, both within the Senate and beyond, concerning recent decisions and the political philosophy of a nominee cannot help but diminish the Court's reputation as an independent institution and impress upon the public—and indeed on the Court itself—a political perception of its role. As the experience of the Reconstruction Era indicates, when Senators treat the Court as a political institution expected to hew to a particular ideological line, the public is likely to see the Court in the same light.¹⁹⁸ And so is the Court itself; both the memory and the anticipation of confirmation battles can substantially affect the actual role of the Court. A Justice who reaches the Court only in the face of doubts concerning his ideological acceptability may bear scars that will affect his judicial behavior.¹⁹⁹ Perhaps more clearly and importantly, if unpopular Supreme Court decisions tend to lead to nasty confirmation controversies that put the Court in an unfavorable light, then it is natural to expect that the Court will be less willing to render such decisions.

To most of us—including Tribe, I believe—such a chilling effect would be unfortunate. Even to the extent that the Court may be considered a policymaking institution, we do not accord it power because it is politically accountable; on the contrary, it is the Court's independence that we prize. The Court is useful in our system of government, able to play a role distinct from those of the political branches, precisely because it is, and is perceived to be, different from those branches.²⁰⁰

This distinction has two aspects. On the one side is the assertive aspect: Because the Court is removed from ordinary political pressures, it is better

197. Friedman, *supra* note 23, at 84 & n. 550.

198. *See id.* at 5–26.

199. *See* Mikva, *supra* note 81, at 39 (“What the Senate ought not to do is determine, through questioning, a nominee's views on emerging constitutional doctrine, or issues likely to face courts in the near future. Why? Because these questions are really a signal to a nominee that he will become a judge only if he promises to be obsequious, to be a yes man to the powers that be.”); R. Friedman, Charles Evans Hughes as Chief Justice, 1930–1941, at 145a (1978) (unpublished thesis, Oxford University) (Hughes's assignment practices as Chief Justice were affected by his recollection of the different receptions that liberals accorded his nomination and that of Roberts); McKay, *supra* note 113, at 131.

200. The recent unhappy experience of the California Supreme Court illustrates vividly how the image of even a very distinguished court can be badly tarnished by close political review. Of course, the review of the California court is more potent than that of the United States Supreme Court because it operates on the court's sitting, as well as prospective, members.

able than the other branches to render unpopular decisions, and thus to perform what may be its most important constitutional role—protecting the rights of individuals and the politically weak.²⁰¹

On the other side is the passive aspect: Because the Court is not chosen democratically, it must not insert its judgment on matters of policy in place of that of the political branches. Thus, a Justice properly performing his function cannot give force to those policy views without restraint. Tribe recognizes this: "That there is much a judge could *not* properly do in the [Constitution's] name is true enough."²⁰² And in another context he points out that "sometimes the Court best guarantees our rights by deferring to, rather than overruling, the political branches."²⁰³ That, indeed, is the chief lesson of the crisis that culminated in 1937. Acknowledging that a judge's philosophical and political beliefs profoundly influence his decisions does not require us to regard him as an ordinary high political officer.

Both aspects of this distinction are crucial; if the distinction between the judiciary and the political branches blurs, so will the role of the Court.²⁰⁴ And if the Senate treats a Supreme Court nomination as an ordinary political matter, albeit one of great national significance, the distinction is sure to blur.

C. *An Alternative Standard*

The foregoing analysis suggests to me that, in general, the long-run benefit of ideological opposition is too uncertain and too limited to be worth the very substantial costs that it entails. But a Senator should not put ideological considerations totally out of mind. He should satisfy himself that the nominee does not hold views that the Senator regards as so repugnant that he perceives harm merely in giving the nominee the opportunity to air them from the platform of the Supreme Court. If the nominee fails to meet this test, then I believe the balance of costs and benefits swings the other way and the Senator should vote against confirmation.

This standard takes into account the educational function that is a by-

201. See Mikva, *supra* note 81, at 39 ("The line we are concerned about in judicial selection is between a judge who constantly remembers who appointed him and a judge who remembers that popular decisions can be made easily by the popular branches of the government, but that his function is to protect minority rights from majority passions.").

202. P. 48 (emphasis in original).

203. P. 10.

204. See Mikva, *supra* note 81, at 40 ("When the Court is perceived as an apolitical, wise, and impartial tribunal, the American people have evinced a willingness to abide by its decisions. But if the Court is viewed simply as a Congress in black robes, the Court's ability to perform its constitutional function is threatened.").

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product of the Court's decisions. All Supreme Court opinions, even lone dissents, have a measure of authority in the public eye by virtue of their high source. They thus lend legitimacy to the views they espouse. All beliefs are worthy of expression in our society, but some should not be expressed from one of the nine seats on the Supreme Court. One Justice holding such views can do significant harm even without the concurrence of other Justices.

Moreover, if the nominee has expressed such views already, it is not as likely as in the ordinary case that the Senate's assessment of the nominee's outlook is mistaken; nor is it likely that the nominee will have an ideological conversion once on the Bench. Unless the President himself is an equally fervent extremist, rejection of such a nomination is unlikely to create a deadlock. Furthermore, although individual Senators would naturally vary in their application of this standard, they need not fear that invoking it would later haunt them by inviting retaliation from the other side of the political fence; a Senator should be well satisfied if the standard is applied equally to extremists of the left or right. Such a nominee should be rejected without fear of harming the selection process or the Court itself.

But the category of beliefs covered by this standard is a narrow one, including only those that a Senator considers beyond the realm of rational political discourse in the nation, not those—such as abortion—at the heart of the controversy. Surely a nominee holding such abhorrent views will rarely be named, and it must be rarer still that a nominee would fail this standard and yet satisfy the Senate with respect to his ability, temperament, and integrity. Those should be the principal criteria that the Senate uses in reviewing Supreme Court nominations.

I do not pretend that considerations of ideology are always clearly distinct from those of ability and temperament, or even from those of integrity. In some cases, a Senator who espouses the standard I suggest but who dislikes the nominee's views may be able to say, "Anybody who takes that position clearly doesn't understand the Constitution," or "If that's her attitude toward precedent, she doesn't have the judicial temperament that the Court needs." But the prospect of some slippage in applying my standard does not render the standard invalid; although there is no way to eliminate ideology from the review of Supreme Court nominations, a Senator adhering conscientiously to an austere attitude can narrowly confine its role.

If the Senate follows this approach, it will of course occasionally abandon the opportunity to prevent a decision or line of decisions that it deems unfavorable. Such self-restraint demands of the Senate a sense of constitutional courage: It must recognize that some choices in our government are

meant to be the province of other branches; it must have faith that improper choices can eventually be corrected by the constitutional processes; and it must believe that assuring desired judicial results is less important than preserving the structural integrity of our government.

*The Editors dedicate this issue to
Justice Stewart, for his distinguished
service to his country.*

