of the Congress in 1985-86 may simply suggest that the members of Congress are devising new rules for "counting" majorities and maintaining electoral support in the new fragmented politics.

Constitutional adaptation and flexibility—even informal change—is above all a question of the will and inventiveness of individuals. It is, quite simply, a matter of leadership. Men and women make government work, and they make constitutions work, too. By the same token, we are not apt to have much effective government with a President who does not like government, whether effective or not. Effective government in a democracy is at bottom a matter of organizing mass popular support behind public policy. For better or worse, American institutions of government are enormously responsive and sensitive to political opinion. That imperative transcends even the institutional arrangements of the Constitution.

## GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY. By Laurence H. Tribe.[1] New York: Random House. 1985. Pp. xii, 171. $17.95.

*Richard E. Morgan*[2]

Few would deny that Laurence H. Tribe is one of the most sophisticated defenders of judicial activism writing today. This little book is intended to convince the general reader that Ronald Reagan should not be allowed to place nominees of his choice on the Supreme Court without careful Senate inquiry into their views on contemporary constitutional issues. Fair enough. (Although one wonders whether Professor Tribe would be urging such vigilance on the Senators if another administration were seeking doctrinal clones for Justice Brennan.) And Tribe develops an excellent case for close senatorial scrutiny of the "constitutional visions" of Supreme Court nominees.

He begins by debunking the idea—which has wormed its way into the conventional wisdom of political scientists, historians, and other students of the Court over the past several decades—that Presidents cannot really do much to reshape the Supreme Court by nominating persons with views similar to their own. As Tribe effectively demonstrates, this is, at best, a half-truth.

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Many of the famous examples of Justices surprising the President who nominated them, turn out, on closer examination, to be examples of presidential inattention or yielding to short-term political considerations. If James Madison, for instance, was surprised by Justice Story's commitment to Federalist principles, "he had only himself to blame, for most of Madison's [Democratic Republican] party, including his mentor Thomas Jefferson, had warned him not to nominate Story for just this reason." And Woodrow Wilson, knowing James McReynolds's "conservative streak," wanted him out of the Cabinet so much that he kicked him upstairs, where McReynolds "spent twenty-six years voting against everything Woodrow Wilson stood for, and compiling a record as perhaps the most reactionary and certainly the most obnoxious man who ever served on the Court."

To the list of errors by inattention out of expediency may be added the two great Eisenhower blunders (Earl Warren and William Brennan), and Gerald Ford's nomination of John Paul Stevens. To restore the prestige of a Justice Department tained by Watergate and the intelligence scandals, Ford sought out Edward Levi, Dean of the University Chicago Law School and a man held in the highest esteem by American's legal elite. Levi did, indeed, help raise morale and return the Department and the FBI to respectability, but his politics were markedly left of Ford's. Even though Justice Douglas's resignation could not have taken the White House altogether by surprise, the President's men were intellectually unprepared. Under pressure for a noncontroversial, "consensus" nomination to advance their unelected President's themes of "healing" and "bringing together," the White House deferred to Levi (even though he was not one of them politically), and the Attorney General produced a distinguished Chicago practitioner and former Wiley Rutledge clerk with virtually no public track record on constitutional issues. That Stevens's performance must often disappoint Gerald Ford and those who were his closest advisors is nobody's fault but their own.

On the other side, Tribe marshals impressive examples of intellectually effective nominating strategies. Washington and Adams managed to put in place a nationalist majority that survived three decades into the nineteenth century. Jackson created a majority that would champion state banks over the hated Second Bank of the United States in *Briscoe v. Bank of Kentucky*.[3] Lincoln, having five nominations to work with, was rewarded by a majority that accepted the legal theories on which his conduct of the Civil War was

3. 36 U.S. (11 Pet.) 257 (1837).

based, "even those most constitutionally suspect". And, in the example of examples, Franklin D. Roosevelt created a Court in his own name. It jettisoned dual federalism, and the bad, old substantive due process of "liberty of contract," and debouched into a new doctrinal territory of enhanced protection for human (nonproperty) rights.

> It took F.D.R. six years to remake the Supreme Court completely. But it was the nomination power, and not the Court-packing plan, that did the job. . . . [W]hen the opportunity to make appointments to the Court does arise, the prospect for constitutional changes of far-ranging impact should never be underestimated.

Against this background Professor Tribe makes the further important point that the Supreme Court Justices *should* come to the bench with ideas about what the Constitution means, and that the Senators (and the rest of us) are properly concerned with what these ideas are.

> The Supreme Court has room neither for Justices who are afraid to *defend* their ideas nor for those who *have* no ideas. After all, by the time of nomination, a would-be Justice ought to have opinions and convictions on the full range of topics of constitutional importance. A blank slate is not the sign of an open mind, but of an empty one—of immaturity and inexperience, and perhaps even of indifference.

Seeking promises or precise commitments during the confirmation process is, of course, both offensive and counterproductive—"litmus tests are a poor method of investigating a candidate's substantive constitutional philosophy". But Tribe concludes that "the range of opinion among judges, scholars, and lawyers on supposedly settled issues of constitutional law is so broad that outer limits need to be set considerably short of the absurd." Thus chapter six is entitled "Policing the Outer Limits," and is divided into sections in which the Senators are urged to probe "the nominee's vision of what the Constitution means," and "the nominee's view of the Supreme Court's role."

All this makes such good sense that this reviewer is emboldened to undertake an experiment—to consider how, on the evidence of the substantive constitutional arguments presented in this book, Professor Tribe himself might shape up as a nominee. Is his constitutional vision within the "outer limits"? The stakes are very high, as Tribe is at pains to remind us, and so the inquiry is not only fair, it powerfully suggests itself.

There is, first, something curious about many of the particular cases Professor Tribe chooses to make his general point about the Supreme Court's recent contributions to the quality of American civilization. Whatever position one takes on the vexed question of state regulation of abortions, simple candor requires the recognition

that *Roe v. Wade* was a massively controversial decision (second only, perhaps, to *Dred Scott*) and that it continues to be so. A dubious contribution to say the least. Or consider *Kolender v. Lawson*,[4] which stripped California police of the power to require identification of suspicious persons on the streets. Does Professor Tribe really suppose that the vast majority of his countrymen regard such conduct as a grievous intrusion into personal privacy? Does he see an aggressively asserted anonymity in the fact of reasonable police inquiry as a contribution to the quality of life in late twentieth century America? Again and again Tribe's choice of positive outcomes appears perverse in the light of what we can learn of majority preferences.[5]

Furthermore, there are some instances in which the treatment of cases is not as scrupulous as one might wish. *Meyer v. Nebraska*[6] and *Pierce v. Society of Sisters*,[7] for instance, are presented as examples of the "ultraconservative Court of the early twentieth century" upholding "rights of free speech and free exercise of religion." As Philip Kurland demonstrated more than twenty years ago they are nothing of the kind.[8] Rather, the opinions by the despised Justice McReynolds were based squarely on liberty of contract (the bad, old substantive due process), which Professor Tribe elsewhere deplores.

But these are quibbles. The genius of the Court is its capacity to stand against majority sentiment when necessary, and it is likely that *Meyer* and *Pierce* would be decided on different grounds if heard today. Such things do not place a nominee beyond the "outer limits." What does, perhaps, is Tribe's conception of the Supreme Court's role in the American governmental system. Of *Roe v. Wade*, Tribe writes that "if the Supreme Court had refused to hear *Roe* at all, it would have effectively *delegated* the fate of mother and unborn child alike to shifting political majorities in the fifty state legislatures." The choice of verb is crucial. Certainly the Court's refusal would have *left* the question of abortion to the state legislatures. It would have left it there because that is where our historical constitutional arrangements placed it. To say that the Supreme Court's refusal to withdraw something from the control of the states is a "delegation" is tantamount to saying that there are no authori-

4. 461 U.S. 352 (1983).

5. H. McCLOSKY & A. BRILL, DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES (1983).

6. 262 U.S. 390 (1923).

7. 268 U.S. 510 (1925).

8. P. KURLAND, RELIGION AND THE LAW 26-31 (1961).

tative decisions about the structure of American government before the Supreme Court acts.

And, for Tribe, this is only the beginning. Do adults have the right to refuse life-sustaining medical treatment? Who makes such decisions for children or comatose patients? Who should be deemed competent to choose between life and death for those not competent to make the decision themselves? Should it be a family decision? Should it be in the hands of experts—physicians or hospital commitees? We learn that "the Supreme Court, as the final arbiter of the Constitution's meaning, cannot long avoid these issues." Professor Tribe does appear ready to allow elected officials to have a crack at these questions first, but the outcomes there will then be reviewed by the Court to see if they square with "fundamental values."

Indeed, Laurence Tribe appears to live in a devouring present of pressing moral issues where what counts is never *who* decides but only whether the decision is the right one. And by this view of the American system of government, the Court, as guardian of fundamental values, is at the apex of the system, policing the wisdom of the other, inevitably subordinate, structures. Not only is this a vision that would be unrecognized to the framers of the Constitution, it would have been unrecognizable to any politically literate American before 1960 or so.

Further, consider Professor Tribe's obscurantist view of our substantive constitutional heritage. After suggesting that it will be up to the Supreme Court to act as "playwright and director" of American politics, deciding "which roles will be played by whom," which decisions will be made by government and which by the private sector, which by lawmakers and which by private persons, he proceeds to announce that "[h]owever decisions like these are to be made, no conscientious student of the Constitution and its framing can pretend that more than a few of them have already been made for us by those who wrote and ratified the Constitution of the United States." Within the confines of a book review it is not open to me to explore all the ways in which this statement is misleading. In fact, a serious student of the Constitution, while never supposing that *any* decisions have been "made for us" by the framers, will find a wealth of relevant guidance on contemporary questions in the history of the framing and subsequent interpretation of the Constitution. The serious student will find himself powerfully moved toward certain answers while others are forbidden him. What is important here, is that Tribe makes no serious effort to support his statement. It is naked assertion. One searches in vain in this book

for any real address by Professor Tribe to the framing or the thought of the framers. Indeed, the same thing is true when the search is expanded to Professor Tribe's scholarly work as represented in *Constitutional Choices*.

This carelessness toward history and tradition leads us to a final troubling aspect of Laurence Tribe's constitutional vision—his argument that interpretation of the Constitution is impossible. Intention cannot guide judges in the way *Federalist No. 78* insists it can—not only because the thought of the framers is largely irrelevant to the issues of our time, not only because there are differences in theme and emphasis within the literature of our framing and constitutional development, but because interpretation is inherently impossible. (Annoyingly, Tribe insists on referring to interpretivism as "strict constructionism." "Strict constructionism" is either Jefferson's approach to reading the necessary and proper clause, or Richard Nixon's term for interpretivism. As used by Tribe it is either mistaken or a low blow.)

Consider the following: "The central flaw of strict constructionism is that words are inherently indeterminate—they can often be given more than one plausible meaning." The two parts of the sentence will not keep house together. To say that a word may be given more than one plausible meaning is not to say that the word is indeterminate. Words may and do have multiple meanings and nuances. But within the rhetorical conventions of a particular period, it is often perfectly possible to establish core meanings and demonstrate why plausibility sharply declines as an interpreter attempts to move away from the core meaning toward strained, peripheral meanings that may be more congenial to him as policy. The point is that some ways of reading the Constitution have binding force because they capture accurately what it was that the framers and successor generations were about; they draw legitimacy from the terms of our basic intergenerational political compact. Other versions of the same language only pretended to such legitimacy because they rest on relatively less plausible constructions of the words.

Of course there are always close and arguable cases; but recognizing that is very different from Professor Tribe's pose of studied agnosticism toward history and toward language. All choices, he is telling us, are inevitably subjective, and legitimacy is not derived from *who* makes the decision and *how* (the matters to which constitutions are principally addressed). Nor are decisions justified or necessarily explained in terms of the traditions and the prior agreement of our people (because that is an impossible enterprise).

Rather they are justified by their being made correctly in reference to necessarily nebulous "fundamental values."

To Tribe's credit, there is no flinching. In *Constitutional Choices* he writes that "I find all legitimating theories not simply amusing in their pretensions but, in the end, as dangerous as they are unconvincing."[9] Since a Constitution is, at the simplest level, a set of legitimating procedures embodying a legitimating theory, it becomes clear that Professor Tribe's quarrel is not really with interpretivists, and not even with the Constitution of the United States, but with the basic ideas of constitutionalism and majority rule.

What does one make of a distinguished constitutional lawyer who doubts the possibility of constitutionalism, and whose core commitment seems to be to a radical subjectivism? Professor Tribe protests that his position does not amount to "a policy of 'anything goes' ", but he never succeeds in explaining why it does not—indeed, he makes little effort to do so.

One hopes that a conscientious Senator, instructed by this book and confronted by such a nominee, would vote against confirmation.

## CONSERVATIVES IN COURT. By Lee Epstein.[1] Knoxville, Tenn.: University of Tennessee Press. 1985. Pp. xii, 204. $17.95.

*Alan B. Morrison*[2]

I began reading this book with some apprehensions. The works listed on the back cover as "of related interest" suggested a substantial possibility of a conservative bias, at least on the publisher's part, and the title page indicated that the book was funded in part by the Andrew W. Mellon Foundation, which is known to be supportive of conservative organizations. I was concerned that the book would be a paean to the conservative movement and that it would fail to take a hard look at what was occurring in these organizations. I was nonetheless hopeful that it would provide substantial new data about these organizations—how they operate, what they are doing, how they are financed, and how their success can be measured by some objective standard.

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9. L. TRIBE, CONSTITUTIONAL CHOICES 6 (1985).

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