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Prologue to Power: Selecting Supreme Court Justices

James A. Thomson
Harvard University

BOOK REVIEW

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

*Reviewed by James A. Thomson**

I. INTRODUCTION

Ascent to the pinnacle—the Supreme Court of the United States— can be hazardous and uncertain. Getting there entails a fascinating blend of constitutional requirements[1]—nomination, advice, con-

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* Fulbright Fellow, Harvard Law School (1986–87). B.A. & L.L.B., University of Western Australia (1971 & 1974); LL.M. & S.J.D., Harvard University (1975 & 1981).

1. Unlike congressional representatives and Presidents, no qualifications for a Supreme Court Justice are prescribed by the Constitution or federal legislation. *See* U.S. CONST. art. I, § 2, cl. 2 & art. II, § 1, cl. 5 (qualifications for congressional representatives and Presidents). Legally and constitutionally a Justice of the United States Supreme Court can be an alien, a minor, or a layman. Senators and Representatives, during their term of office, are ineligible to "be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during" their congressional tenure. *Id.* at art. 1, § 6, cl. 2 (Ineligibility Clause). President Washington considered it his "duty . . . to declare that [he] deem [his first] nomination [of William Paterson to the Supreme Court] to have been null by the Constitution." 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, at 102 n.2 (rev. ed. 1926). Paterson's nomination occurred while he was a Senator and was in the period during which Congress enacted the Judiciary Act ch. XX, 1 Stat. 73 (1789). Paterson had been a member of the Senate Committee which drafted the Judiciary Act of 1789. J. GOEBEL, ANTECEDENTS AND BEGINNINGS TO 1801, at 458–59 (1971). Washington resubmitted the nomination after Paterson's senate term expired. 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 87–93 (M. Marcus & J. Perry ed. 1985) (documents relating to Paterson's appointment). Paterson was an Associate Justice from 1793 to 1806. The creation and emoluments provisions were unsuccessfully raised in relation to Hugo Black's eligibility for appointment to the Supreme Court. *See, e.g.*, G. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 52–55, 71, 79–80 (1977); V. HAMILTON, HUGO BLACK: THE ALABAMA YEARS 277–78, 299 (1972); C. WILLIAMS, HUGO L. BLACK: A STUDY IN THE JUDICIAL PROCESS 20–21 (1950). *See also Ex parte* Levitt, 302 U.S. 633 (1937) (petition challenging Justice Black's appointment on the basis of the emoluments provision of the Ineligibility Clause dismissed for lack of standing). *See generally To Reduce Compensation of the Office of Attorney General: Hearings on S. 2673 Before the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973); 119 CONG. REC. 38, 315–48 (1973).

sent, appointment,[2] oath or affirmation[3]—and politics.[4] Life tenure[5]

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2. The President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . . ." U.S. CONST. art. II, § 2, cl. 2. Nomination, advice, and consent do not apply to recess appointments. "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." *Id.* at art.II, § 2, cl. 3 (Recess Appointments Clause). The Court of Appeals for the Second Circuit has held that the Recess Appointments Clause can be utilized to appoint Supreme Court and federal judges and is an exception to Article III tenure and compensation requirements. United States v. Allocco, 305 F.2d 704, 708–09 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963); Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUMB. L. REV. 1758 (1984). *Contra* United States v. Woodley, 726 F.2d 1328, 1331–39 (9th Cir. 1983) *vacated*, 732 F.2d 111 (1984), *cert. denied*, 106 S. Ct. 1269 (1986); Note, *Answering the Unasked Question: Can Recess Appointees Constitutionally Exercise the Judicial Power of the United States?*, 54 U. CIN. L. REV. 631 (1985). *See generally* Note, *Constitutional Restrictions on the President's Power to Make Recess Appointments*, 79 NW. U.L. REV. 191 (1984) (recess appointments can only fill vacancies occurring during a Senate recess and be made in the recess when the vacancy occurs); Note, *Recess Appointments to the Supreme Court—Constitutional but Unwise?*, 10 STAN. L. REV. 124, 125 (1957) (list of recess appointments to the Supreme Court) [hereinafter *Recess Appointments*].

3. "[A]ll . . . judicial Officers both of the United States and of the several states shall be bound by Oath or Affirmation, to support this Constitution . . . ." U.S. CONST. art. VI, cl. 3. Supreme Court appointees also swear a judicial oath stating that they will "administer justice without respect to persons, and do equal right to the poor and to the rich . . . ." 28 U.S.C. § 453 (1982). These oaths were administered to Hugo Black in a "clandestine . . . proceeding" and it has been suggested that a reason for the "haste" in Black taking them was to prevent "an injunction against [Black] taking his judicial seat." G. DUNNE, *supra* note 1, at 62. *See also* V. HAMILTON, *supra* note 1, at 283–84 (prompt taking of oaths was a departure from custom).

4. An overview of Supreme Court appointments can be gleaned from H. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT (2d ed. 1985); D. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 44–84 (1986); G. SCHUBERT, CONSTITUTIONAL POLITICS 21–59 (1960); Frank, *The Appointment of Supreme Court Justices: Prestige, Principles and Politics*, 1941 WIS. L. REV. 172; Frank, *Supreme Court Justice Appointments: II*, 1941 WIS. L. REV. 343; Frank, *The Appointment of Supreme Court Justices: III*, 1941 WIS. L. REV. 461; Lively, *The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities*, 59 S. Cal. L. Rev. 551 (1986); J. Ashby, Supreme Court Appointments Since 1937 (1972) (Ph.D. thesis, University of Notre Dame); D. McHargue, Appointments to the Supreme Court of the United States: The Factors that have Affected Appointments, 1789–1932 (1949) (Ph.D. thesis, University of California at Los Angeles). In addition to biographies of individual Supreme Court justices, studies focusing upon particular appointments include D. DANELSKI, A SUPREME COURT JUSTICE IS APPOINTED (1964) (Pierce Butler's appointment); R. SHOGAN, A QUESTION OF JUDGMENT: THE FORTAS CASE AND THE STRUGGLE FOR THE SUPREME COURT (1972); A. TODD, JUSTICE ON TRIAL: THE CASE OF LOUIS C. BRANDEIS (1964); Kaufman, *Cardozo's Appointment to the Supreme Court*, 1 CARDOZO L. REV. 23 (1979); McHargue, *One of Nine—Mr. Justice Burton's Appointment to the Supreme Court*, 4 CASE W. RES. L. REV. 128 (1953). *See also* A. BICKEL & B. SCHMIDT, THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910–21, at 317–413 (1984) (appointments of Justices Pitney, McReynolds, Brandeis, and Clarke). William Howard Taft's influence on Supreme Court appointments is noted in *id.* at 3–64 (revising Bickel, *Mr. Taft Rehabilitates the Court*, 79 YALE L.J. 1 (1969)); McHargue, *President Taft's Appointments to the Supreme Court*, 12 J. OF POL. 478 (1950); Murphy, *In His Own Image: Mr. Chief Justice Taft and Supreme Court Appointments*, 1961 SUP. CT. REV. 159. *See generally* A. BLAUSTEIN & R. MERSKY, THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES 72–86, 122–26 (1978) (statistical evaluation of nominations, confirmations, and appointments).

and ultimate judicial authority to interpret the Constitution[6] are among the rewards bestowed upon Supreme Court Justices. Other accolades, prestige, veneration, and biographies might also follow.[7] Dispensing entitlement to membership of "the august Nine"[8] can, therefore, be per-

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5. "The Judges, both of the supreme and inferior courts, shall hold their Offices during good Behaviour . . . ." U.S. CONST. art. III, § 1. Three issues arise from this section: 1) the content of "good Behaviour," 2) the procedure to determine the breach of "good Behaviour," and 3) whether federal judges can be removed for misbehavior or only by "[i]mpeachment for, and [c]onviction of, [t]reason, [b]ribery, or other high [c]rimes and [m]isdemeanors." U.S. CONST. art. II, § 4. *See generally* R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 91–93, 122–80 (1973); Berger, *"Chilling Judicial Independence": A Scarecrow*, 64 CORNELL L. REV. 822 (1979); Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671 (1980); Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681 (1979); Note, *Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 94 YALE L.J. 1117 (1985). It has been suggested that the Article III tenure requirement should apply to state courts through the fourteenth amendment's due process clause. Redish & Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 496–98 (1985). *Compare* Thomson, *Removal of High Court and Federal Judges: Some Observations Concerning Section 72(ii) of the Australian Constitution*, 1984 AUSTL. CURRENT L. 36,033, 36,040 n.1 (judicial tenure India, Japan, Federal Republic of Germany, Malaysia, Canada, United Kingdom).

6. *See generally* G. GUNTHER, CONSTITUTIONAL LAW 21–28 (11th ed. 1985) (varying perceptions of the authoritativeness of Supreme Court decisions).

7. *See, e.g.*, H. ABRAHAM, THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE 470–82 (5th ed. 1986) (bibliography of biographies and autobiographies of Supreme Court Justices); 1–4 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789–1969: THEIR LIVES AND MAJOR OPINIONS (L. Friedman & F. Israel ed. 1969); 5 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1969–1978: THEIR LIVES AND MAJOR OPINIONS (L. Friedman ed. 1978). Prognostication concerning a Justice's place in the pantheon of American history is notoriously difficult. Judicial reputations rise and fall. *See* Rogat & O'Fallon, *Mr. Justice Holmes: A Dissenting Opinion—The Speech Cases*, 36 STAN. L. REV. 1349 (1984). At the other end of the spectrum see Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466 (1983); Easterbrook, *The Most Insignificant Justice: Further Evidence*, 50 U. CHI. L. REV. 481 (1983).

8. "Who in hell cares what anybody says about [constitutional questions] but the Final Five of the august Nine . . . ?" Letter from Judge Learned Hand to Justice Stone (Feb. 6, 1934) (quoted in A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 384 (1956)). Congressional legislation, not the Constitution, establishes the number of Supreme Court Justices. The current requirement is that "[t]he Supreme Court . . . consist of a Chief Justice . . . and eight associate justices . . . ." 28 U.S.C. § 1 (1982). Congress has varied that number: 1789–1807 (6); 1807–1837 (7); 1837–1863 (9); 1863–1866 (10); 1866–1869 (7); 1869–1986 (9). C. FAIRMAN, RECONSTRUCTION AND REUNION, 1864–88, at 2, 160–70, 487–88, 559–60 (1971); S. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS 48–63 (1968); Friedman, *The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond*, 5 CARDOZO L. REV. 1, 8–9, 22–24, 31–32 (1983). The 1937 attempt to increase the Court to 15 members is analyzed in P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 41–45 (2d ed. 1973); FRANKLIN D. ROOSEVELT AND THE SUPREME COURT (A. Cope & F. Krinsky rev. ed. 1969); Leuchtenburg, *Franklin D. Roosevelt's Supreme Court "Packing" Plan*, in ESSAYS ON THE NEW DEAL 69 (H. Hollingsworth & W. Holmes ed. 1969); Leuchtenburg, *FDR's Court-Packing Plan: A Second Life, A Second Death*, 1985 DUKE L.J. 673; Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347. In 1984, Chief Justice Burger recommended to Congress that the number of Justices be increased to 10. Dorsen, *Trends and Prospects in the United States Supreme Court*, 1986 PUB. L. 83, 84.

ceived as a task to be undertaken with requisite care and caution. To assist a multitude of questions, but not definitive answers, have been generated. What personal characteristics, intellectual and professional qualifications, and prior occupations have accompanied each Justice to the Supreme Court? How was their transition from a "mere mortal" to a Supreme Court Justice accomplished? What events and circumstances initiated, caused, contributed to, and encompassed their appointments? Why did others, available and touted as Supreme Court Justices, fail to gain presidential nomination[9] or senate confirmation?[10] From the reservoir of information garnered in response to such questions, can plausible and meaningful suggestions be promulgated to guide, if not to govern,[11] participants and observers along the pathways to a Supreme Court chair? Perpetuation of this technique—explication of the past to explore the future—is endorsed by *God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History*.[12] In a quest to formulate criteria for selecting and evaluating

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9. A variety of political and personal factors have been proffered to explain the classic example of Judge Learned Hand's failure to be nominated. *See* G. WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 262–63 (1976); Note, *The Politics of the Appointment Process: An Analysis of Why Learned Hand Was Never Appointed to the Supreme Court*, 25 STAN. L. REV. 251 (1973).

10. Conspicuous examples—John J. Parker, Clement F. Haynsworth, and G. Harold Carswell—of the failure to obtain Senate confirmation are analyzed in R. HARRIS, DECISION (1971) (Carswell confirmation); Grossman & Wasby, *Haynsworth and Parker: History Does Live Again*, 23 S.C.L. REV. 345 (1971); Mendelsohn, *Senate Confirmation of Supreme Court Appointments: The Nomination and Rejection of John J. Parker*, 14 HOW. L.J. 109 (1968); Watson, *The Defeat of Judge Parker: A Study in Pressure Groups and Politics*, 50 MISS. VALLEY HIST. REV. 213 (1963); W. Burns, John J. Parker and Supreme Court Policy: A Case Study in Judicial Control (1965) (unpublished thesis, University of North Carolina). *See generally* Friedman, *supra* note 8, at 1 (the Senate from 1789 to 1894 failed to confirm 21 Supreme Court nominees and from 1895 to 1983 failed to confirm 4 nominees); Goff, *The Rejection of United States Supreme Court Appointments*, 5 AM. J. LEGAL HIST. 357 (1961); Pierce, *A Vacancy on the Supreme Court: The Politics of Judicial Appointment 1893⌓94*, 39 TENN L. REV. 555 (1972) (Senate's consecutive rejection of President Cleveland's nominees—William Butler Hornblower and Wheeler Hazard Peckham).

11. Constitutional law issues may obtrude. For example, regarding issues concerning the Ineligibility Clause, *see supra* note 1 and accompanying text. For issues regarding Senate subpoenas, *see infra* note 71.

12. L. TRIBE, GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY (1985). Initial reactions include Barrett, Book Review, 17 WASH. MONTHLY, Dec. 1985, at 45; Bloom, Book Review, 61 NOTRE DAME L. REV. 289 (1986); Dellinger, Book Review, 193 NEW REPUBLIC, Dec. 16, 1985, at 38; Flaherty, Book Review, 50 PROGRESSIVE, April 1986, at 42, col. 2; Friedman, Book Review, 95 YALE L.J. 1283 (1986); Griswold, Book Review, 71 A.B.A. J. 85 (1985); Hartman, Book Review, 9 HARV. J.L. & PUB. POL'Y 719 (1986); Hatch, Book Review, 99 HARV. L. REV. 1347 (1986); Kennedy, Book Review, 37 HARV. L. SCH. BULL., Winter 1986, at 39; Kupfer, Book Review, 4 ANTIOCH L.J. 333 (1986); Maguire, Book Review, 61 NOTRE DAME L. REV. 299 (1986); Mikva, Book Review, 84 MICH. L. REV. 594 (1986); Miller, Book Review, 15 CAP. U.L. REV. 577 (1986); Morgan, Book Review, 3 CONST. COMM. 441 (1986); Payton, Book Review, 31 WAYNE L. REV. 675 (1986); Robinson, Rook Review,

prospective Supreme Court Justices,[13] Professor Tribe[14] resurrects pre-

48 Rev. of Pol. 463 (1986); Selig, Book Review, 21 LAND & WATER L. REV. 613 (1986). *See* Snouffer, *Tribe Urges Senate to Study Court Nominees*, 81 HARV. L. REC., Nov. 15, 1985, at 3 (reporting Tribe's subsequent comments made during his address of Oct. 31, 1985, entitled Trick or Treat: Constitutional Amendments Masquerading as Judicial Appointments); Tribe, *The Greying of the Court: Constitutional History's Halley's Comet*, 37 HARV. L. SCH. BULL., Fall 1985, at 2. A similar title, but journalistic account of the appointment process, is L. KOHLMEIER, "GOD SAVE THIS HONORABLE COURT!": THE SUPREME COURT CRISIS (1972) reviewed by Baldwin, Book Review, 1973 WIS. L. REV. 1212; Kahn, Book Review, 26 STAN. L. REV. 689 (1974).

13. L. TRIBE, *supra* note 12 (does not discuss appointments to federal and state courts). Federal court appointments are specifically discussed in S. GOLDMAN & T. JAHNIGE, THE FEDERAL COURTS AS A POLITICAL SYSTEM ch. 3 (2d ed. 1976); Fowler, *A Comparison of Initial Recommendation Procedures: Judicial Selection Under Reagan and Carter* 1 YALE L. & POL'Y REV. 299 (1983); Goldman, *Judicial Backgrounds, Recruitment, and the Party Variable: The Case of the Johnson and Nixon Appointees to the United States District and Appeals Courts*, 1974 ARIZ ST. L.J. 211; Goldman, *Reorganizing the Judiciary: The First Term Appointments*, 68 JUDICATURE 313 (1985); Goldman, *Carter's Judicial Appointments: A Lasting Legacy*, 64 Judicature 344 (1981); Goldman, *Characteristics of Eisenhower and Nixon Appointees to the Lower Federal Courts*, 18 W. POL. Q. 755 (1965); Pitts & Vinson, *Breaking Down the Barriers to the Federal Bench: Reshaping the Judicial Selection Process*, 28 HOW. L.J. 743 (1985); Slotnick, *The Paths to the Federal Bench: Gender, Race and Judicial Recruitment Variation*, 67 JUDICATURE 370 (1984); Slotnick, *Affirmative Action and Judicial Selection During the Carter Administration*, 1 YALE L. & POL'Y REV. 270 (1983); Solomon, *The Politics of Appointment and the Federal Courts' Role in Regulating America: U.S. Court of Appeals Judgeships from T.R. to F.D.R.*, 1984 AM. B. FOUND. RES. J. 285, 286–87 nn.5–6 (citing references); *Federal Judges: Hard to Get, Hard to Keep*, ECONOMIST, Feb.1–7, 1986, at 25, col. 2; Effron, *Tug-of-War Toughens on Judicial Picks*, Nat'l L.J., Mar. 31, 1986, at 1, col. 2; Weinraub, *Reagan Says He'll Use Vacancies to Discourage Judicial Activism*, N.Y. Times, Oct. 22, 1985, at 1, col. 3; Reston, *Reagan and the Courts: Building a Conservative Judiciary*, N.Y. Times, Sept. 18, 1985, at A27, col. 2 (appointment of more than 200 district and appellate court judges by President Reagan since 1981). For state court appointments, see L. BERKSON, S. BELLER & M. GRIMALDI, JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS (1981); Adamany & Dubois, *Electing State Judges*, 1976 WIS. L. REV. 731; Baum, *The Electoral Fates of Incumbent Judges in the Ohio Court of Common Pleas*, 66 JUDICATURE 420 (1983); Drinan, *Judicial Appointments for Life by the Executive Branch of Government: Reflections on the Massachusetts Experience*, 44 TEX. L. REV. 1103 (1966); Dubois, *State Trial Court Appointments: Does the Governor Make a Difference?*, 69 JUDICATURE 20 (1985); Hall, *Progressive Reform and the Decline of Democratic Accountabiltiy: The Popular Election of State Supreme Court Judges, 1850⌓1920*, 1984 AM. B. FOUND. RES. J. 345; Kagan, Infelise & Detlefsen, *American State Supreme Court Justices, 1900⌓1970*, 1984 AM. B. FOUND. RES. J. 371; Schroeder & Hall, *Twenty-Five Years' Experience with Merit Selection in Missouri*, 44 TEX. L. REV. 1088 (1966); Sheldon, *The Recruitment of Judges to the Washington Supreme Court: Past and Present*, 22 WILLAMETTE L. REV. 85 (1986); Winters, *Selection of Judges⌓An Historical Introduction*, 44 TEX L. REV. 1081 (1966). See generally Davidow, *Judicial Selection: The Search for Quality and Representativeness*, 31 CASE W. RES. L. REV. 409, 409 n.1 (1981) (citing references); Vandenberg, *Voluntary Merit Selection: Its History and Current Status*, 66 JUDICATURE 265 (1983). As to judicial appointment in other countries, see P. HOGG, CONSTITUTIONAL LAW OF CANADA 136–38, 148–50, 170–71, 185 (2d ed. 1985); LAW, POLITICS AND THE JUDCIAL PROCESS IN CANADA 61–96 (F.L. Morton ed. 1984); 2 H. SEEVVAI, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY 2186–88 (3d ed. 1984); Meador, *German Appellate Judges: Career Patterns and American-English Comparisons*, 67 JUDICIATURE 16 (1983); Mueller & Griffiths, *Judicial Fitness: A Comparative Study*, 52 JUDICIATURE 199 (1968); Schram, *The Recruitment of Judges for the West German Federal Courts*, 21 AM. J. COMP. L. 691 (1973); Thomson, *supra* note 5, at 36,041 n.8 (Australia); Vander, *The Appointment of Judges in Canada*, 7 ADVOC. Q. 129 (1986).

vious nomination and confirmation controversies, correlates pre-appointment predictions with post-appointment performance, and extols the consequences of the constitutional and political processes which culminate in the arrival of a new Justice or Chief Justice in the courtroom of the United States Supreme Court.

Two premises and their ramifications are utilized to justify this enterprise. First, *God Save This Honorable Court* suggests that the interpretation, meaning, and application of the Constitution inevitably depend upon who are the Justices.[15] An obvious consequence, therefore, ensues when new judges replace their immediate predecessors. At that juncture constitutional law becomes most vulnerable to change. This equation of personnel and constitutional law is least ambivalently revealed in the struggle for preeminence among competing versions of constitutional law when, as frequently occurs, one Justice determines for the nation which perspective of the Constitution is to prevail.[16] To suggest otherwise, Professor Tribe warns, is to become entangled in the myth of strict constructionism.[17] Second, *God Save This Honorable Court* relies upon the supposition that Supreme Court decisions involving the Constitution relentlessly affect every individual's life and the

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14. Details of Professor Tribe's career, publications, congressional testimony, and Supreme Court appearances are in Thomson, Book Review, 33 WAYNE L. REV. 229, 229 n.3, 230 n.4, 232 n.8 (1986).

15. L. TRIBE, *supra* note 12, at 42–43, 47–49. This theme pervades L. TRIBE, CONSTITUTIONAL CHOICES (1985) but does *not* mean that personal predilections govern judicial opinions. L. TRIBE, *supra* note 12, at 43 ("The Justices may not follow a policy of 'anything goes' so long as it helps put an end to what they personally consider to be injustice."). *See also* Note, *Richard Epstein on the Foundation of Takings Jurisprudence*, 9 HARV. L. REV. 791, 793 n.19 (1986) ("Even Laurence Tribe, the scholar most often cited as a proponent of . . . 'open-ended modernism,' denies the legitimacy of decisions based on nothing more than personal values."). Professor Tribe adumbrates constitutional law as a much more subtle, complex, and interesting enterprise. *See id.* at 793–97 (itemizing several theories of constitutional interpretation).

16. L. TRIBE, *supra* note 12, at 30–40, 71–72 (summary of 5–4 Supreme Court decisions). *See* Garcia v. San Antonio Metro. Transit Auth., 105 S.Ct. 1005 (1985) (5–4 decision overruling National League of Cities v. Usery, 426 U.S. 833 (1976)). Because Justice "Powell's *pivotal role* on the Court [has never] been so clear" it has been suggested that "[o]n domestic issues he may be *the most powerful man in America*." Dorsen, *supra* note 8, at 97 n.133 (quoting A.E. Dick Howard and Burt Neuborne) (emphasis added). *See also* Kobylka, *The Court, Justice Blackmun, and Federalism: A Subtle Movement with Potentially Great Ramifications*, 19 CREIGHTON L. REV. 9 (1985).

17. L. TRIBE, *supra* note 12, at 41–47. A contrary view is espoused in Berger, *Mark Tushnet's Critique of Interpretivism*, 51 GEO. WASH. L. REV. 532 (1983); Berger, *A Response to D.A.J. Richards' Defense of Freewheeling Constitutional Adjudication*, 59 IND. L.J. 339 (1984); Berger, *Paul Diamond Fails to "Meet Raoul Berger on Interpretivist Grounds"*, 43 OHIO ST. L. J. 285 (1982); Berger, *G. Edward White's Apology for Judicial Activism*, 63 TEX L. REV. 367 (1984); Berger, *Lawyering vs. Philosophizing: Facts or Fancies*, 8 U. DAYTON L. REV. 171 (1984); Berger, *New Theories of "Interpretations." The Activist Flight From the Constitution*, 47 OHIO ST. L. J. (1986).

powers of all facets of federal and state governments.[18] If the Supreme Court's answers to an almost limitless range of questions which can engender constitutional controversy[19] are predicated upon current judicial membership "the American way of life" will, to a considerable extent, be determined by those who happen, through the vagaries of the appointment process, to have become Supreme Court Justices.[20] Threatened with this destiny, the appointment agenda formulated in *God Save This Honorable Court* can be perceived as one of the endeavors[21] to obviate an osmosis of the Justices into "a bevy of Platonic Guardians"[22] ruling from the Supreme Court.[23]

Unflinching devotion to Professor Tribe's initial propositions has, however, never occurred. Contrasting attitudes can be mustered. No endeavors, descriptive or normative, concerning the Supreme Court's

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18. L. TRIBE, *supra* note 12, at 3–30, 138–39.

19. *Id.* Almost from the beginning it has been recognized that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 290 (Vintage Books ed. 1945). The first edition of DEMOCRACY IN AMERICA was published in 1835.

20. "[F]undamental choices about the sort of society we wish to become turn on *who* sits on the Court . . . ." L. TRIBE, *supra* note 12, at xviii (emphasis in original). A notorious example is discussed in L. TRIBE, *supra* note 12, at 59–60. *See also* Fairman, *Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases* (pts. 1–2), 54 HARV. L. REV. 977, 1128 (1941).

21. Attempts to formulate coherent theories of judicial review represent another method. A plethora of citations appears in Thomson, *Principles and Theories of Constitutional Interpretation and Adjudiciation: Some Preliminary Notes*, 13 MELB. U.L. REV. 597 (1982); Thomson, Book Review, 61 TEX. L. REV. 743 (1982) (reviewing M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY (1982)). *See also supra* notes 15 & 17 and accompanying text (theories of constitutional interpretation).

22. *See* L. HAND, THE BILL OF RIGHTS (1958). "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." *Id.* at 73. *See also* Estreicher, *Platonic Guardians of Democracy: John Hart Ely's Role for the Supreme Court in the Constitution's Open Texture*, 56 N.Y.U.L. REV. 547 (1981).

23. This perception is fueled by remarks like: "Since fundamental choices about what sort of society we wish to become turn on *who* sits on the [Supreme] Court, the aging of the Justices signals a potential constitutional revolution in the making." L. TRIBE, *supra* note 12, at xviii (emphasis in original). Does Professor Tribe, via the next Justices, want to forestall, neutralize, or push the revolution in a particular direction? *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978) (expounding Tribe's views regarding the content of constitutional law); L. Tribe, *supra* note 15. *See also* L. TRIBE, *supra* note 12, at 12, 16, 39–40, 71–74 (Tribe's critical assessment of the Burger Court). Tribe concedes that "the Burger Court . . . has not given away all of the hard won liberties . . . and there is much to applaud in its jurisprudence." *Id.* at 111. There are conflicting views about the Burger Court. *See* Dorsen, *supra* note 8; Nichol, Book Review, 98 HARV. L. REV. 315 (1984); Thomson, *State Constitutional Law: American Lessons for Australian Adventures*, 63 TEX. L. REV. 1225, 1264 n.238 (1985) (citing references); Symposium, *The Burger Court and American Institutions*, 60 NOTRE DAME L. REV. 827 (1985). Perhaps Professor Tribe would be much less apprehensive in Australia where conservatives, not liberals, are pessimistic about a similar "revolution in the making." Waterford, *Labor Could Change the High Court for Decades*, Canberra Times, May 26, 1986, at 2.

exercise of the power of judicial review occasion universal acclamation.[24] Professor Tribe's evocative and ingenious insights[25] are not, in this respect, exceptional.[26] Also debatable, in quantitative, if not qualitative, terms, is the impact of Supreme Court decisions. Apart from questions of compliance with judicial orders and decrees,[27] the correctness of unambiguous assumptions that Supreme Court decisions have an "enormous," "powerful," and "pervasive" impact on people's lives[28] may not withstand strict scrutiny. Apparently, the relationship between Supreme Court cases and society is a good deal more complex.[29] Diminution of the impact evaluation in *God Save This Honorable Court* may be required. Some susceptibility to modification does not, however, mean that the effort to extrapolate and apply principles to the judicial appointment process should be abandoned.[30]

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24. Criticism and counter-criticism pervade the literature. *See supra* notes 17 & 21. *See also* Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821 (1985) (response to critiques of constitutional theory); Saphire, *Constitutional Theory in Perspective: A Response to Professor Van Alstyne*, 78 NW. U.L. REV. 1435 (1984) (debate and disputation about judicial review is of theoretical and practical importance).

25. *See supra* notes 15 & 23.

26. Professor Tribe's constitutional law scholarship provokes a wide variety of responses. *See generally*, Oakes, Book Review, 99 HARV. L. REV. 862 (1986) (reviewing L. TRIBE, *supra* note 15); Tushnet, Book Review, 78 MICH. L. REV. 694 (1980) (reviewing L. TRIBE, *supra* note 23).

27. Obedience to Supreme Court decisions on various issues has fluctuated. *See, e.g.*, Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 528–33 (1980) (details of resistance to Supreme Court mandate to desegregate public schools and anti-defiance strategy); Johnson, *Compliance and Supreme Court Decision-Making*, 1977 WIS. L. REV. 170 (school prayer cases); Thomson, Book Review, 62 TEX. L. REV. 559, 652 n.12 (1983) (literature on conflicts with the court in the Civil War era, racial segregation, Nixon Tapes case, and after review of state court decisions). *See also infra* note 29 (impact of Supreme Court decisions).

28. L. TRIBE, *supra* note 12, at xvi, 3, 4. Tribe elaborates upon this impact thesis. *See id.* at 3–30, 138–39.

29. An indication of the possibilities can be garnered from THE IMPACT OF SUPREME COURT DECISIONS (T. Becker & M. Feely 2d ed. 1973); Hutchinson, Book Review, 1986 A.B.F. Res.J. 79, 82–95 (reviewing L. TRIBE, *supra* note 15); Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379.

30. Professor Tribe eschews the Framers' intentions concerning U.S. CONST. art. II, § 2, cl. 2. L. TRIBE, *supra* note 12, at 45–47, 132. Other authors consider the Framers' intention as ascertainable and useful. *See, e.g.*, D. HUTCHINSON, THE FOUNDATIONS OF THE CONSTITUTION 187, 188–90 (1928); Black, *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657, 660–62 (1970); Grossman & Wasby, *The Senate and Supreme Court Nominations: Some Reflections*, 1972 DUKE L.J. 557, 560–61; Kutner, *Advice and Dissent: Due Process of the Senate*, 23 DE PAUL L. REV. 658, 664–66 (1974); Rees, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913, 938, 941 (1983).

II. PRESIDENTIAL NOMINATION

Nomination of Supreme Court Justices is an exclusive and unilateral[31] presidential prerogative.[32] Prior to nomination, advice to the President concerning who should be nominated emanates from a multitude of solicited and unsolicited sources. Senators,[33] representatives, state politicians, presidential advisors and friends, interest groups, the Department of Justice,[34] the American Bar Association,[35] scholars,[36] and Justices[37] promote their favored candidate. Those under consideration are not excluded. Somewhat more discretely they also advocate their claims to a seat on the Supreme Court.[38] This need not cease

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31. The textual structure of U.S.CONST art. II, § 2, cl. 2 clearly indicates that nomination is a proposal process while appointment depends upon prior Senate advice and consent. *See supra* note 2.

32. Discussion of the nomination process and individual nominations occurs in R. SCIGLIANO, THE SUPREME COURT AND THE PRESIDENCY 85–147 (1971); Massaro, *LBJ and the Fortas Nomination for Chief Justice*, 97 POL. SCI. Q. 603 (1982–83); Thomas, *Reagan's Mr. Right*, TIME, June 30, 1986, at 24–26 (President Reagan's nomination of Justice Rehnquist as Chief Justice and Judge Scalia to fill the Rehnquist vacancy). Prospective nominees have refused or indicated that they would refuse a nomination. *See, e.g.*, L. BAKER, MIRANDA: CRIME, LAW AND POLITICS (1983). "Fortas even refused the [nomination] in writing. But [President Johnson] rarely took no for an answer. . . . To the best of Fortas's knowledge, he never actually said yes." *Id.* at 92. W. HARBAUGH, LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS 190–93 (1973) (Davis' refusals to permit himself to be considered for Supreme Court vacancies); A. MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 21–23 (1965); 1 H. PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT 240–47 (1939) (Taft's refusal of President T. Roosevelt's nomination offer).

33. Senator Borah's apparently pivotal role in Benjamin Cardozo's nomination by President Hoover is noted in L. TRIBE, *supra* note 12, at 80–81. *See also* Kaufman, *supra* note 4, at 41–42, 44–48 (a more critical evaluation of Borah's influence on Cardozo's nomination). *See also infra* note 67 (Senate's advice).

34. *See generally* Cooley, *The Department of Justice and Judicial Nomination*, 42 Judicature 86 (1958).

35. *See generally* A.B.A., STANDING COMMITTEE ON THE FEDERAL JUDICIARY AND HOW IT WORKS (1980); Grossman & Wasby,*supra* note 30, at 586–87 (A.B.A. Committee on Federal Judiciary evaluation of possible nominees); Marcotte, *Reagan's Judges*, 72 A.B.A.J. 22 (May 1986); Slotnick, *The ABA Standing Committee on Federal Judiciary: A Contemporary Assessment* (pts. 1 & 2), 66 JUDICATURE 349, 385 (1983).

36. GOD SAVE THIS HONORABLE COURT is a classic example.

37. *See* L. TRIBE, *supra* note 12, at 128–29. The preeminent example of Chief Justice Taft's influence is discussed in Murphy, *supra* note 4. Federal judges also offer advice about the principles the President should follow. *See, e.g.*, L. TRIBE, *supra* note 12 (referring to Kaufman, *Keeping Politics Out of the Court*, N.Y. Times, Dec. 9, 1984, § 6 (Magazine), at 72); Kaufman, *An Open Letter to President Reagan on Judge Picking*, 67 A.B.A.J. 443 (1981).

38. *See, e.g.*, A. BICKEL & B. SCHMIDT, *supra* note 4, at 48–58 (Van Devanter's successful campaign to obtain nomination from President Taft). "In their recent opinions and scholarly writings, [court of appeals judges Easterbrook, Posner, Bork, and Scalia are] sending President Reagan subtle but unmistakable signals, through slight changes in philosophy, that he is the man for" the next Supreme Court appointment. Macey, *Conservative Judgment Time*, Wall St. J., Aug. 23, 1985, at 14, col. 4, (quoted in Redish & Marshall, *supra* note 5, at 498 n.165).

Associate Justice Antonin Scalia, whatever his other qualifications, gained his present position in part because of his vigorous advocacy, while a member of the Court of Appeals for

when a nomination is made. Communication of a nomination to the Senate is not irrevocable. Withdrawal of Supreme Court nominations is a presidential option.[39]

God Save This Honorable Court magnifies two facets—preliminary principles and eventual consequences—of the nomination process. Arrival at a nomination does not, Professor Tribe appears to suggest, require the inculcation of a dichotomy between presidential whims and principled decision-making.[40] Some amalgam of personal preferences and principles might be satisfactory.[41] Even if talismanic principles can be agreed upon and acceptably applied to prospective nominees, should principles or standards postulated to assist Presidents in deciding whom to nominate to the Supreme Court differ from those which are enunciated to guide the Senate or individual Senators in determining whether to confirm a President's nominee?[42] While obvious justifications may exist to sustain some overlapping of criteria utilized

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the District of Columbia, of positions known to be congruent with the views of the Reagan Administration. One would have to believe Judge Scalia unworldly to believe that he was oblivious to the likely reception his opinions would receive among those with the power to appoint him to the Supreme Court.

Levinson, *For 14-Year, Nonrenewable Federal Judgeships*, N.Y. Times, Oct. 15, 1986, at A26. *See also* Thomas, *supra* note 32, at 26 (suggestion that Antonin Scalia wrote concurring and dissenting opinions on the United States Court of Appeals for the District of Columbia to "advertise" his complete agreement with President "Reagan's views"). As to the nominees' efforts to obtain Senate confirmation see *infra* note 89.

39. Withdrawn nominees and withdrawal dates are: William Paterson (Feb. 28, 1793), Reuben Walworth (June 17, 1844), Edward King (Feb. 7, 1845), George Williams (Jan. 8, 1874), Caleb Cushing (Jan. 13, 1874), and Abe Fortas (April 10, 1968). L. TRIBE, *supra* note 12, at 142–49. *See* Friedman, *supra* note 8, at 28–30 (discussing the Williams withdrawal). *See also* L. TRIBE, *supra* note 12, at 82 (discussing the Williams withdrawal).

40. L. TRIBE, *supra* note 12, at 68–70, 83–85 (discussing nominations of a President's cronies, pals, friends, and supporters). Professor Tribe accepts nominations of a President's personal acquaintances (for example Brandeis, Stone, and Frankfurter) if the nominees are also "first-rate academics," "accomplished and eclectic jurists," or "distinguished lawyers and public servants" and are "learned in the lessons of the Constitution's past, and . . . had [their] own broad vision of the Constitution's future." *Id.* at 85. Much more doubtful is whether anyone (and particularly a Brandeis or Frankfurter) could meet Professor Tribe's additional criterion that they "have earned respect across the *entire* breadth of the political and ideological spectrum." *Id.* (emphasis added).

41. For example, Professor Tribe considers that "[w]e have come to accept as fact that the President is free to nominate only those candidates who come within *his* broad circle of specifications." *Id.* at 93 (emphasis added).

42. The exclusive focus of GOD SAVE THIS HONORABLE COURT is upon Supreme Court appointments. For different criteria in relation to federal court judges see *supra* note 13. For different criteria in relation to non-judicial officers see Kutner, *supra* note 30, at 669–84 (cabinet officers, ambassadors, and independent agencies). Different roles in the confirmation process of cabinet officers are espoused in *id.* at 675 (the Senate should require "real and substantive evidence" of nominee's worth); Rees, *supra* note 30, at 943 (President's nomination should prevail except where Senators have "gravest reservations"). Reasons for greater Senate vigilance over Supreme Court as compared with executive office nominations are postulated by Black, *supra* note 30, at 660.

by Presidents and Senators to evaluate prospective Supreme Court Justices,[43] arguments have been proffered to suggest that confirmation can require different considerations to prevail in the Senate from those which persuaded the President.[44] Even if, as *God Save This Honorable Court* suggests, there is no overt or meaningful distinction,[45] application of similar principles, standards, or criteria can engender different results. Prolonged differentiation could be catastrophic.[46] That has not occurred. Although the Constitution might be inconvenient,[47] it is not "a suicide pact,"[48] and usually presidential and senatorial agreement eventually emerges.[49]

At least one assertion ought not to be transformed into a principle: The period following a presidential election in which a major or focal issue was the Supreme Court and its decisions[50] is the most propitious moment to assert that the President possesses a specific electoral mandate which ipso facto entitles his nominees to fill vacancies on the

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43. *See, e.g.*, Black, *supra* note 30, at 658 (overlap probably inevitable, perhaps, even mandatory). *See also* L. TRIBE, *supra* note 12, at 93–94 (appointment should *only* occur when the criteria used by both the President and Senate overlap).

44. *See, e.g.*, Rees, *supra* note 30, at 938 (discussing the framers' intentions and institutional differences between the presidential and legislative branches). *See also id.*, at 938–47 (the President and Senate should, however, apply the same criteria involving nominees' political, social, and economic philosophy).

45. Prefactory remarks to the rendition of principles refer conjunctively to the *President and Senate*. L. TRIBE, *supra* note 12, at 92, 107.

46. For discussions of real and hypothetical President/Senate "stand offs" see L. TRIBE, *supra* note 12, at 126–28, 130; Rees, *supra* note 30, at 939–43. *See also* Friedman, *supra* note 8, at 88 n.560 (suggestion that "an extended deadlock [which left the Supreme Court understaffed for a lengthy period] is not unthinkable in the context of nominations to the Court"). In Professor Tribe's view "the prospect of occasionally protracted confrontations" is not "a sufficient rationale" to support abdication of Senate activism in confirmation proceedings. L. TRIBE, *supra* note 12, at 130.

47. In the context of presidential power to remove officers appointed with Senate approval, Justice Brandeis, for example, proclaimed that "[t]he doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy." Myers v. United States, 272 U.S. 52, 293 (1926).

48. Rees, *supra* note 30, at 938.

49. *See, e.g.*, L. Tribe, *supra* note 12, at 126–27.

50. *Id.* at 134. (Supreme Court appointments were a major issue in 1936 presidential compaign); L. BAKER, *supra* note 32, at 221–55 (1968 Nixon law and order campaign); F. FRANKFURTER, *The Supreme Court and the Public*, in FELIX FRANKFURTER ON THE SUPREME COURT 218 (P. Kurland ed. 1970) (Theodore Roosevelt's sponsorship of judicial review as "a leading issue in [the 1912] presidential compaign"); Murphy & Tanenhaus, *Public Opinion and Supreme Court: The Goldwater Campaign*, 32 PUB. OPINION Q. 31 (1968); Rees, *supra* note 30, at 937 (changing the federal judiciary was a Nixon campaign issue); Morris, *Will the Judges stay sewn up?*, The Times (London), Aug. 3, 1984, at 12 (Walter Mondale, the unsuccessful Democratic Party candidate considered "[t]he battle for the Supreme Court . . . one of the most important issues in the 1984 [presidential] election.").

Court.[51] Inherent problems bedeviling ascertainment of voter motivation[52] combined with a similar but countervailing claim concerning electoral justification for Senate superiority in the appointment process[53] may suffice to blunt the thrust of executive power. Exclusive concentration on the arena of Supreme Court appointments[54] may, however, entice a distorted perspective of nomination and confirmation relationships and, therefore, obscure subtle nuances. A wider framework than judicial and nonjudicial appointments[55] might be necessary. Some acquaintance with the entire spectrum of contacts between Presidents and the Senate, and fluctuations in their relative dominance and decline,[56] would illuminate the operation of the doctrine of separation of powers, reveal the interplay of checks and balances, and produce an overall context from which to assess principles articulated by Professor Tribe. Conspicuously, *God Save This Honorable Court* does not endeavor to capture this broader contextual dimension.

Decimation, however, is prevalent. No longer will constitutional law or politics be able to parade Supreme Court Justices to sustain the notion that preliminary presidential success entails eventual defeat. *God Save This Honorable Court* vanquishes the "myth" that Presidents are surprised by the judicial performance of their nominees.[57] Critical and detailed evaluation of the classic tales of presidential regrets—Theodore Roosevelt's sentiments concerning Justice Holmes[58]

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51. Professor Tribe claims that "[i]n this century, only the election of F.D.R. in 1936 could honestly be said to have given the President . . . a mandate [to remake the Supreme Court in his own image], because that was the one campaign in which Supreme Court appointments surfaced as a major issue and in which the victor won by a mandate-sized margin." L. TRIBE, *supra* note 12, at 134.

52. For example, voters who split their tickets by voting for one party's presidential candidate and another party's House of Representatives candidate. *See, e.g.*, Cutler, *Party Government Under the American Constitution*, 134 U. PA. L. REV. 25, 26 (1985) (exponential increase in ticket splitting since 1945).

53. L. TRIBE, *supra* note 12, at 132–36. (Senate more diverse, representative, and accountable than the President).

54. *See* Friedman, *supra* note 8; L. TRIBE, *supra* note 12.

55. A variety of appointments under U.S. CONST. art. II, § 2, cl. 2 are considered in J. HARRIS, THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE (1953); Kutner, *supra* note 30.

56. *See* L. FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT (1985); L. FISHER, THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE (1981); J. SUNDQUIST, THE DECLINE AND RESURGENCE OF CONGRESS (1981); Thomson, *supra* note 27, at 562–64.

57. *See* L. TRIBE, *supra* note 12, at 50–56 (discussion and rebuttal of "myth"). *See also infra* note 92 (Senate misjudging nominees' future judicial performance).

58. After Holmes' dissent in Northern Sec. Co. v. United States, 193 U.S. 197 (1904), Roosevelt apparently exclaimed: "I could carve out of a banana a judge with more backbone than that!" L. TRIBE, *supra* note 12, at 51; Friedman, *supra* note 8, at 54 n.340. Professor Tribe points out that "Holmes's opinion . . . did not alter the outcome" of Northern Securities and considers

and Eisenhower's lament over Earl Warren[59]—not only achieves that result but also reinforces an opposing hypothesis.[60] Justices remain enamored of and continue to implement the ideals, values, and philosophical inclinations of their nominating President.[61] Within those parameters deviations constitute an exception not a general rule.[62] Overt "court-packing"[63] occurs at this juncture.[64] Combining Justices' conformity to their previously espoused views and executive awareness of the Justices' personal inclinations enhances, and, perhaps, assures, a President's ability, via the nomination power, to direct future developments in federal constitutional law.[65] Compliant Senate confirmations would foreclose the remaining avenue[66] by which this occurrence could be obviated.

III. SENATE ADVICE

Advice to the President is the Senate's first constitutional function

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that "on the other issues dear to President Roosevelt's heart . . . Holmes . . . gave [Roosevelt] every reason to be pleased." L. TRIBE, *supra* note 12, at 52. Friedman takes the opposite view and cites evidence that Roosevelt subsequently expressed "bitter disappointment" about Holmes. Friedman, *supra* note 8, at 54 n.340. For Roosevelt's pre-nomination concern about Holmes see *id.* at 66–67. Holmes continues to be a fascinating study. *See, e.g.*, Rogat & O'Fallon, *supra* note 7 (changing perceptions of Holmes' first amendment opinions); Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CALIF. L. REV. 343 (1984) (assessment of shifting scholarly views of Holmes). Critical appraisal of Holmes' opinion in Buck v. Bell, 274 U.S. 200 (1927) emerges in Dudziak, *Oliver Wendell Holmes as Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833 (1986); Lombardo, *Three Generations, No Imbeciles: New Light on* Buck v. Bell, 60 N.Y.U. L. REV. 30 (1985).

59. After the expiration of his presidency, Eisenhower characterized his appointment of Chief Justice Warren as "the biggest damn fool thing I ever did." E. WARREN, THE MEMOIRS OF EARL WARREN 5 (1977); *see also* L. TRIBE, *supra* note 12, at 51 (Eisenhower stated that his two mistakes as President were nominating Warren and Brennan). Professor Tribe endeavours to extricate this example from the "surprised myth." *Id.* at 52. For a wider discussion of whether Warren's pre-appointment and post-appointment views were consistent see G. WHITE, EARL WARREN: A PUBLIC LIFE (1982); Kurland, Book Review, 96 HARV. L. REV. 331, 335–37 (1982) (reviewing G. WHITE, EARL WARREN: A PUBLIC LIFE (1982)).

60. *See* other examples in L. TRIBE, *supra* note 12, at 51–54, 56; Friedman, *supra* note 8, at 91 nn.568–70.

61. L. TRIBE, *supra* note 12, at 54–74 (examples of various Presidents and their Supreme Court appointments); *see also id.* at 74–7 (conclusions that the few surprises are attributable to the President and that Presidents can reshape the Supreme Court).

62. L. TRIBE, *supra* note 12, at 50, 53, 74–77.

63. *See supra* note 8 (examples of packing and unpacking the Supreme Court by changing the number of Justices).

64. *See, e.g.*, L. TRIBE, *supra* note 12, at 67. (After the Roosevelt "Court-packing plan died in the Senate," Tribe notes that "the *real* Court-packing" began) (emphasis in original). Tribe also states that "a President . . . can build the Court of his dreams." *Id.* at 76.

65. Interaction of federal and state constitutional law enables the President, through Supreme Court nominations, to also affect the latter. *See, e.g.*, Thomson, *supra* note 23, at 1264 (relationship between federal and state bills of rights).

66. Removal of Supreme Court Justices after impeachment and conviction is a post-appointment sanction. *See supra* note 5.

in the appointment process.[67] Senatorial advice can be sought by Presidents or thrust upon them. Advancement or retardation of prospective nominees will be the objective. As a matter of constitutional law, not politics, there remains inherent in this dialogue a presidential discretion to ignore, reject, or follow Senate advice. Ultimately, if the President refuses to deliver a Supreme Court commission[68] Senate confirmation will also be merely an advisory function.

A more positive implication may, however, be garnered from the Constitution's explicit requirement of Senate advice. Giving advice, if it is not to be trivialized, requires prior acquisition and evaluation of all the factors which might assist in deciding whether a nominee should become a Supreme Court Justice. An initial textual foothold can, therefore, be secured which rebuts any rubber-stamp theory of Senate functions, mandates serious Senate involvement in the appointment process, and, less articulately, invites the formulation of principles, standards, and criteria.

IV. SENATE CONSENT

Prerequisite to a Supreme Court appointment is Senate consent.[69] Adumbration of history and policy in *God Save This Honorable Court* is an attempt to motivate active, intelligent, and orderly Senate participation in Supreme Court appointments.[70] Textual justification, emanating from the need to obtain and assess information if deliverance to the

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67. U.S. CONST. art. II, § 2, cl. 2. *See also supra* note 2. Some discussion of "advice" as a requirement independent of Senate "consent" is in L. TRIBE, *supra* note 12, at 80–81; Black, *supra* note 30, at 658–59. The Senate's "formal power of veto increases presidential susceptibility to advice." L. TRIBE, *supra* note 23, at 50 n.6.

68. *See infra* notes 97–99.

69. U.S. CONST. art. II, § 2, cl. 2. *See supra* note 2. A sample of the literature discussing Senate confirmation includes *Advice and Consent on Supreme Court Nominations: Hearings Before the Senate Subcommittee on Separation of Powers of the Committee on the Judiciary*, 94th Cong., 2d Sess (1975); J. HARRIS, *supra* note 55; Black, *supra* note 30; Friedman, *supra* note 8; Grossman & Wasby, *supra* note 30; Kutner, *supra* note 30; Percy, *Advice and Consent: A Reevaluation*, 3 S. ILL. U.L.J. 31 (1978); Rees, *supra* note 30; Segal & Spaeth, *If a Supreme Court Vacancy Occurs, Will the Senate Confirm a Reagan Nominee?*, 69 JUDICATURE 186 (1986); Slotnick, *Reforms in Judicial Selection: Will They Affect the Senate's Role?*, 64 JUDICATURE 60 (1980). Senate confirmation hearings are reproduced in 1–12 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916–72 (R. Mersky & J. Jacobstein ed. 1975) (reviewed by Powe, Book Review, 54 TEX. L. REV. 891 (1976)) [hereinafter HEARINGS AND REPORTS]. Senate confirmation proceedings on Supreme Court nominations occurred shortly after the publication of L. TRIBE, *supra* note 12. *See* SENATE COMM. ON THE JUDICIARY, NOMINATION OF WILLIAM H. REHNQUIST TO BE CHIEF JUSTICE OF THE UNITED STATES, 99th Cong., 2d Sess. (1986); SENATE COMM. ON THE JUDICIARY, NOMINATION OF ANTONIN SCALIA TO BE ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, 99th Cong., 2d Sess. (1986).

70. L. TRIBE, *supra* note 12, at 77–137.

President of the Senate's consent is to be informed rather than perfunctory, could also have been mustered. Whether this perspective of "advice and consent" can vanquish separation of powers dilemmas and provide a requisite constitutional warrant to sustain compulsive measures for enforcing Senate subpoenas directed to executive officers, Supreme Court Justices, and federal judges requesting assistance with inquiries related to the appointment process, remains unresolved.[71]

Searing politics with principles may be idealistic. That, however, is the vision which animates *God Save This Honorable Court*. Its milieu, the simultaneous intersection of Senate power, presidential prerogative, and future composition of the Supreme Court, offers an exquisite opportunity to strive for something more than the prevalence of power. A blend of reality and constitutional grandeur is required. How can that mixture be achieved during Senate deliberations which may, by a simple majority of Senators present and voting, determine the fate of Supreme Court nominees? Demolishing "the myth of the spineless Senate"[72] and creating enduring principles[73] will, Professor Tribe hopes, assist.

Initially, *God Save This Honorable Court* extols the past to challenge the future. Conveniently, for an advocate of vigorous and vigilant Senate consideration of Supreme Court nominations, a general historical survey[74] extrapolates, not infrequently, examples conforming to that postulated standard of senatorial performance. Despite numerous instances of Senate acquiescence without opposition and prompt compliance with presidential requests for Senate confirmation also obtruding,[75] arguments advocating Senate activism can requisition factual support. The danger, however, is overvaluation of the beguilingly simple conclusion that even the most pessimistic rendition of confirmation hearings cannot, other than as a matter of fiction, compile a record of unblemished Senate docility.

Quantification of Senate rejections and confrontations should not suffice. Reasons, *God Save This Honorable Court* proclaims, are more important. Even from this perspective, some encouragement can be

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71. This question, in relation to Supreme Court and federal judges, is alluded to in *Recess Appointments*, *supra* note 2, at 140 n.77. Executive privilege claims in the context of Senate confirmation proceedings are discussed in L. TRIBE, *supra* note 23, at 214.

72. L. TRIBE, *supra* note 12, at 77–92.

73. *Id.* at 93–124.

74. *Id.* at 79–92. See Friedman, *supra* note 8. *See also* sources cited *supra* notes 4, 10 & 69 (providing detailed assessments).

75. L. TRIBE, *supra* note 12, at 92 ("periods of [Senate] acquiescence"). *See* Friedman, *supra* note 8, at 1 (from 1894 to 1967 only one presidential nomination to the Supreme Court did not receive Senate confirmation). *But see* L. TRIBE, *supra* note 12, at 83 (depth of controversy in 1949 not revealed by merely looking at the 78 to 3 vote confirming Tom Clark).

gleaned from previous Senate performances. Supreme Court nominations have been contested and rejected because of a nominee's patent dearth of intellectual and legal credentials, philosophical inclinations, and likely affect on the overall balance of views prevailing on the Supreme Court.[76] Inevitably each criterion and its application to individual nominees is tinged with subjectivity. That need not devalue and may, occasionally, enhance the intellectual respectability of a principled approach to formulating judgments[77] about the Supreme Court and those who are offered the chance to become a Justice.

Professor Tribe is not deterred. Unhesitatingly, principles are advanced to provide a framework for decision-making in a conspicuously political forum. "A concerted, collective effort by the [Senate] to articulate a vision of the Constitution's future, and to scrutinize potential Justice's in that vision's light, is [for *God Save This Honorable Court*] the ideal."[78] If other reference sources can guide Senators to an understanding of the Constitution,[79] how are the nominees to be scrutinized? Individually and within the context of the current Supreme Court membership is Professor Tribe's suggestion.[80] Other possibilities, which have nothing to do with the nominee, the Supreme Court, or the Constitution, presumably should be eschewed.

Individual testing entails measurement of a nominee's predilections against standards postulated as acceptable for Supreme Court Justices. The meaning of the Constitution constitutes an initial ground of calibration. Definitive standards, transgression of which, according to *God Save This Honorable Court*, requires rejection of the nomination, include the continuing application of the Bill of Rights to the states, adherence to legislative apportionment decisions, disagreement with the view that equal protection of the laws requires complete extinction of private property and contract,[81] and compliance with constitutional amendments.[82] Monosyllabic answers, even if correct, do not suffice. Professor Tribe requires nominees to be able, on a principled

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76. *See, e.g.*, L. TRIBE, *supra* note 12, at 81–91.

77. A principled approach is also espoused in other realms of constitutional law. *See, e.g.*, A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 23–28 (1962) (justification for judicial review); Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978) (Supreme Court opinions).

78. L. TRIBE, *supra* note 12, at 131.

79. *See, e.g.*, L. TRIBE, *supra* note 15; L. TRIBE, *supra* note 23.

80. L. TRIBE, *supra* note 12, at 92–124.

81. *Id.* at 96. Would Professor Tushnet disagree? *See* Tushnet, *supra* note 26, at 696–705 (hypothetical socialist judge interpreting the Constitution to do justice). Professor Tushnet considers that "Professor Tribe . . . would surely be a better Justice than many." *Id.* at 710. Do the principles enunciated in GOD SAVE THIS HONORABLE COURT preclude Professor Tribe from returning the compliment?

82. L. TRIBE, *supra* note 12, at 94–97.

basis, to enunciate rational and coherent justifications, not ad hoc responses, for their views concerning constitutional issues.[83] A second batch of principles is used to evaluate judicial philosophy. Does the nominee's view of the process of rendering judgments, for example, concerning precedent in constitutional law, substantially deviate from how a Supreme Court Justice is expected to perform? Seeking promises or predictions about future decisions in specific cases is, however, neither appropriate nor desirable.[84] The third category of principles requires Senators and nominees to address problems touching upon the role of the Supreme Court in the American system of government.[85] On every occasion "probing questions" and "responsive answers" are required.[86] Detail and depth, not superficiality, are demanded by *God Save This Honorable Court*.[87]

Survivors of that litany should not, in Professor Tribe's opinion, necessarily receive the Senate's consent. Contextual considerations may render asunder individual acceptability. Institutional importance must rank above an individual nominee's well-being. Accordingly, the Senate's task is more difficult and complex. Will confirmation of the nomination disturb a delicate judicial equilibrium, push the Supreme Court's predominant predispositions into extremities, or jeopardize judicial commitment to basic constitutional principles?[88] Senators anticipating these occurrences are strenuously urged by *God Save This Honorable Court* to reject the nomination.

Numerous issues evade the designated purview of *God Save This Honorable Court*. The list includes nominees' covert efforts to obtain Senate confirmation,[89] presidential intervention in the Senate's deliber-

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83. *Id.* at 97–100.

84. *Id.* at 100–03.

85. *Id.* at 103–05.

86. *Id.* at 100.

87. *Id.* at 100–01. *"[W]hat matters most* is that . . . Senators . . . individually take a good, hard look at both the nominee and at the Supreme Court the nominee will join . . . ." *Id.* at 131 (emphasis added). Detailed analysis of the questioning and responses of Supreme Court nominees is provided in Rees, *supra* note 30. Other individuals and groups are also questioned. *See, e.g.*, HEARINGS AND REPORTS, *supra* note 69.

88. L. TRIBE, *supra* note 12, at 106–24. A different perspective on these contextual conundrums is offered in Maguire, *supra* note 12, at 304–07. Professor Tribe candidly acknowledges that "[w]hat constitutes a desirable path for the Supreme Court is, of course, open to debate–and should be debated." L. TRIBE, *supra* note 12, at 110. For Tribe's contribution to that debate see *id.* 111–24; L. TRIBE, *supra* note 15; L. TRIBE, *supra* note 23. *See generally* Elfenbein, *The Myth of Conservatism as a Constitutional Philosophy*, 71 IOWA L. REV. 401 (1986) (conservative/liberal antimony in constitutional law, philosophy, and Supreme Court adjudication).

89. For example, Brandeis' activities are characterized as a central feature of the campaign for his confirmation by L. PAPER, BRANDEIS, 215, 218, 220, 226, 235 (1983); P. STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 293, 295–99 (1984).

ations,[90] the role of individuals, interest groups, and organizations in the confirmation process,[91] the accuracy of Senators' predictions concerning nominees' judicial performance,[92] and the effect of confirmation confrontations on Justices' post-appointment behavior.[93] Provision of a more informative bibliography would have encouraged those stimulated by *God Save This Honorable Court* to stray, under Professor Tribe's tutelage, into these and other domains.[94]

V. PRESIDENTIAL APPOINTMENT

Conferral of a commission of office upon a nominee by the President, except for recess appointments,[95] can occur only after the Senate has given its advice and consent.[96] Whether or not an appointment ensues is a presidential decision. Appointment is a voluntary, not mandatory, act and the President may resile from the nomination at any time prior to that action.[97] A President's signature on a commis-

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90. *See, e.g.*, Grossman & Wasby, *supra* note 30, at 577–80 (presidential strategy and support).

91. *See, e.g., id.* at 583–85 (NAACP and labor opposition to confirmation of Parker, Haynsworth, Carswell, and Rehnquist).

92. *See, e.g.*, Friedman, *supra* note 8, at 90–92 (reasons for and examples of a surprised Senate or individual Senators). *Compare* sources cited *supra* notes 57–60 (discussing presidential predictions regarding nominations to the Supreme Court). Will use of the principles and standards advocated in GOD SAVE THIS HONORABLE COURT eliminate errors in predictions?

93. *See, e.g.*, Friedman, *supra* note 8, at 85–87 (the Supreme Court and individual Justices are affected by confirmation battles).

94. L. TRIBE, *supra* note 12, at 152–53 ("A Mini-Guide to the Background Literature"). Unfortunately, Professor Tribe believes "that a selected bibliography would not be especially useful . . . ." *Id.* at 152. Tribe mentions only one reference which is directly on the appointment process. H. ABRAHAM, *supra* note 8. At the very least Tribe should have included Friedman, *supra* note 8.

95. See sources cited, *supra* note 2 (regarding an application of recess appointment clause to Supreme Court Justices and federal judges).

96. *See* U.S. CONST. art. II, § 2, cl. 2. See also *supra* note 2. The President "shall Commission all the Officers of the United States." U.S. CONST. art. II, §3.

97. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162 (1803) ("The *discretion* of the executive is to be exercised until the appointment has been made.") (emphasis added). Supreme Court nominees confirmed by the Senate have always been offered an appointment. G. SCHUBERT, *supra* note 4, at 21 n.1. Justice Hugo Black may have been lucky to have been appointed.

> Two days [after his Senate confirmation], Black was back at the White House. . . . Once again the President had a piece of paper to exhibit–this time the commission of an Associate Justice of the Supreme Court, duly *signed* by [the President and] countersigned by [the] Secretary of State. . . . Black left with the precious document encased in a cardboard cylinder . . . .

G. DUNNE, *supra* note 1, at 60 (emphasis added).

> [H]ad [Black's Ku Klux Klan association come to light] *before* he left the White House on [that day], *it is improbable* that he would have carried his precious cardboard cylinder away with him. Indeed, *the truly interesting question is whether the President would have ever delivered the document*, had the facts surfaced. Hence, with the clock ticking away, there was every incentive to complete the formalities and put on the constitutional armor of his new position.

sion constitutes the appointment of a Supreme Court Justice.[98] Presidential power then ceases and the commission must be delivered to the nominee.[99] Regrettably, *God Save This Honorable Court* does not allude to the intriguing possibilities inherent in this penultimate stage of selecting a member of the Supreme Court.

VI. OATH OF OFFICE

Taking an oath or affirmation to support the Constitution is the final constitutional requirement which must be fulfilled by each Supreme Court Justice.[100] Having done so, a new Justice can descend into one of the nine large chairs which always command the focus of attention in the chamber where the United States Supreme Court conducts its public business.

VII. CONCLUSION

Constitutional law, especially emanating from the Supreme Court, is not hermetically insulated against contamination from perennially prevailing winds of politics, philosophy, history, and economics.[101] Inevitably this endangers the enterprise which *God Save This Honorable Court* seeks to accomplish. Overt recognition of the nature of constitutional adjudication engenders the quandary— why, when two political institutions select members of the third political institution, should not politics always prevail over principles? Professor Tribe provides compelling, not compulsive, answers.[102]

Id. at 63 (emphasis added). *See also* G. DUNNE, *supra* note 1, at 62 (indicating that Black took the requisite oaths in haste); V. HAMILTON, *supra* note 1, at 283 (presentation of Black's commission).

98. *Marbury*, 5 U.S. (1 Cranch) at 157, 162. "The last act to be done by the President, is the signature of the commission. . . . [W]hen a commission has been signed by the President, the appointment is made . . . ." *Id.*

99. *Marbury*, 5 U.S. (1 Cranch) at 162. "But having once made the appointment, [the President's] power over the office is terminated in all cases, where, by law, the officer is not removeable by him. The right to the office is *then* in the person appointed, and he has the absolute, unconditional, power of accepting or rejecting it.

. . . .

To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right." *Id.* (emphasis in original). If President Roosevelt had signed Black's commission he would have been under a legal obligation to deliver it to Black. *But cf.* G. DUNNE, *supra* note 1, at 63 (Dunne's interesting question).

100. U.S. CONST. art. VI, cl. 3 ("[a]ll . . . judicial Officers, . . . of the United States . . . shall be bound by Oath or Affirmation, to support this Constitution. . . ."). *See also* 28 U.S.C. § 453 (1982) (the judicial oath); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 401–02 (1937) (individual, not composite, nature of oath).

101. *See generally*, Elfenbein, *supra* note 88, at 401–02 (constitutional law a multi-disciplinary enterprise).

102. L. TRIBE, *supra* note 12. *See also* L. TRIBE, *supra* note 15; Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592 (1985). *But see* Easter-

Ultimately, however, Presidents and Senators will disregard principles for politics. From George Washington's first Justices to the present[103] that has not destabilized the Supreme Court or the Constitution. Pressing too hard or far in any direction—doctrinaire principles or rampant politics, an overly active or meekly passive Senate—could, as with any other facet of constitutional law, be calamitous. No panacea or sagacious advice need be proffered. Reading *God Save This Honorable Court* will suffice.

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brook, *Method, Result, and Authority: A Reply*, 98 HARV. L. REV. 622 (1985).

103. Differing perspectives have already emerged concerning the likely effect on the Supreme Court of President Reagan's nominations on June 17, 1986, of Justice Rehnquist as Chief Justice and Judge Scalia to fill the Rehnquist vacancy. *See, e.g.*, Kamen, *On Matters of Opinions, Brennan Stands to Gain*, Wash. Post, June 25, 1986, at A23 (Justice Brennan may more often be the senior Justice in the majority and, therefore, be able to select the Justice who will write the Court's opinion with the result that "[t]he shift [in the Court's ideological balance] so hailed by conservatives and so lamented by liberals may turn out, at least in the short run, to surprise them all."); Schmidt, *The Rehnquist Court: A Watershed*, N.Y. Times, June 22, 1986, § 4, at E27, col. 2 (Rehnquist and Scalia nominations "represent a major challenge" to civil rights and civil liberties jurisprudence); Broder, *Finally the Reagan Stamp*, Wash. Post., June 22, 1986, at C8 (likely that conservative jurisprudence will prevail for at least two decades); Rowan, *Not to Worry—Yet*, Wash. Post, June 22, 1986, at C8 (need for "a couple more" Reagan appointments to achieve conservative predominance). Professor Tribe "would be extremely surprised if over the next several years the effect [of the Rehnquist/Scalia duo] is not to push the court to the right considerably." Thomas, *supra* note 32, at 25. Has Professor Tribe conceded that in accordance with his principles Rehnquist and Scalia can or should be confirmed or that confirmation will occur in any event? *See also* Note, *The Rehnquist Court Still Seems an Appointment Away*, N.Y. Times, Sept. 21, 1986, § 4, at E8. Chief Justice Rehnquist and Justice Scalia took their oaths of office on Sept. 26, 1986. 107 S.Ct. XL–XLIV (1986) (Commissions and Oaths). For suggestions for changing the appointment process see Comment, *Court Packing Revisited: A Proposal for Rationalizing the Timing of Appointments to the Supreme Court*, 134 U. PA. L. REV. 967 (1986).