

July 2015

Clouds in the Crystal Ball: Presidential Expectations and the Unpredictable Behavior of Supreme Court Appointees

Christopher E. Smith

Kimberly A. Beuger

Please take a moment to share how this work helps you [through this survey](#). Your feedback will be important as we plan further development of our repository.

Follow this and additional works at: <http://ideaexchange.uakron.edu/akronlawreview>



Part of the [Courts Commons](#), [Judges Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Smith, Christopher E. and Beuger, Kimberly A. (1994) "Clouds in the Crystal Ball: Presidential Expectations and the Unpredictable Behavior of Supreme Court Appointees," *Akron Law Review*: Vol. 27 : Iss. 2 , Article 2.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol27/iss2/2>

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact mjon@uakron.edu, uapress@uakron.edu.

CLOUDS IN THE CRYSTAL BALL: PRESIDENTIAL EXPECTATIONS AND THE UNPREDICTABLE BEHAVIOR OF SUPREME COURT APPOINTEES

by

CHRISTOPHER E. SMITH* & KIMBERLY A. BEUGER**

INTRODUCTION

When Justice Byron White announced in March of 1993 that he intended to retire at the conclusion of the Supreme Court's 1992-93 term,¹ he created the opportunity for President Bill Clinton to be the first Democratic president in twenty-six years to select a nominee for the high court.² Because "[p]residents recognize that the capacity of their appointees to help shape the Court's policies is among [the presidents'] major legacies,"³ Clinton took great care in selecting a nominee. He spent nearly three months considering potential appointees. Like other presidents, Clinton gave his Supreme Court nomination "a degree of personal attention that is paralleled only by that given to Cabinet appointments."⁴

Clinton's selection of Judge Ruth Bader Ginsburg from the U.S. Court of Appeals for the District of Columbia Circuit⁵ immediately elicited predictions from observers about how Ginsburg's participation would affect the high court's decision making.⁶ While Clinton expressed the expectation that Ginsburg would "be a force for consensus-building on the Supreme Court,"⁷ "[l]iberals fear[ed] that her friendship with conserva-

* Associate Professor of Political Science, University of Akron; A.B., Harvard University, 1980; M.Sc., University of Bristol (England), 1981; J.D., University of Tennessee, 1984; Ph.D., University of Connecticut, 1988.

** Teacher, Mesvita High School, Cleveland, Ohio. B.A., University of Findlay, 1990; M.A., University of Akron, 1993.

¹ Linda Greenhouse, *White Announces He'll Step Down From High Court*, N.Y. TIMES, Mar. 20, 1993, at A1.

² The last Democratic president to nominate a new justice was Lyndon Johnson who appointed Thurgood Marshall to the Supreme Court in 1967. HENRY J. ABRAMAH, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 292-95* (3d ed. 1992). The one Democratic president to serve in the years between the Johnson and Clinton presidencies was Jimmy Carter (1977-1981) who had no opportunities to appoint new justices because there were no deaths or retirements of justices during his administration. *Id.* at 334. By contrast, all of the Republican presidents who served between Johnson's and Clinton's presidencies made appointments to the Supreme Court. Richard Nixon made four appointments (Warren Burger, Harry Blackmun, Lewis Powell, and William Rehnquist), Gerald Ford made one appointment (John Paul Stevens), Ronald Reagan made three appointments (Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy), and George Bush made two appointments (David Souter and Clarence Thomas). DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 414* (3d ed. 1993).

³ LAWRENCE BAUM, *THE SUPREME COURT 41* (4th ed. 1992).

⁴ *Id.* at 39.

⁵ Richard L. Berke, *Clinton Names Ruth Ginsburg, Advocate for Women, to Court*, N.Y. TIMES, June 15, 1993, at A1.

⁶ For example, the Supreme Court correspondent for the *New York Times* declared that "Presumably the center of gravity will shift with Justice White's retirement In [issue] areas in which the Court is often closely divided, including free speech, religion and abortion, Judge Ginsburg is likely to be substantially more liberal than Justice White." Linda Greenhouse, *The Court's Counterrevolution Comes in Fits and Starts*, N.Y. TIMES, July 4, 1993, at E1, E5.

⁷ *Transcript of President's Announcement and Judge Ginsburg's Remarks*, N.Y. TIMES, June 15, 1993, at A24.

tive Justice Antonin Scalia . . . might move her away from her natural [moderate] allies.’⁸ Others predicted that she “will nudge [the Supreme Court] to re-energize liberal Warren Court decisions that the Rehnquist regime has all but vanquished.”⁹

Although it remains to be seen which prognosticators, if any, have accurately predicted Ginsburg’s performance, historians will eventually look closely at whether or not Ginsburg’s performance fulfilled the expectations of the person responsible for her appointment, President Bill Clinton. Presidents always have specific motivations in selecting Supreme Court nominees. Because presidents cannot control the behavior of justices on the Court, however, many presidents are ultimately disappointed by the decisions which their nominees produce. This article will analyze the pitfalls that presidents face in hoping that their nominees’ judicial performance will comport with presidential expectations. As Justice Ginsburg begins her service on the Rehnquist Court, President Clinton and other observers should note that Ginsburg’s Supreme Court colleagues provide enlightening examples of the many ways in which justices can disappoint the presidents who appointed them.

MOTIVATIONS AND DISAPPOINTMENTS

A variety of factors influence the selection of new Supreme Court justices: “Merit competes with other political considerations like personal and ideological compatibility, with forces of support or opposition in Congress and the White House, and with demands for representative appointments on the basis of geography, religion, race, gender, and ethnicity.”¹⁰

Although every Supreme Court appointment involves a unique set of circumstances at the historical moment in which a vacancy arises, presidential motivations in selecting nominees can be placed into specific categories. Some categories, such as the president’s perceptions about sharing philosophical values and policy preferences with the nominee, exert influence over nearly every nomination. Other categories, such as presidential concerns about geographic representativeness on the high court,¹¹ have been influential only during specific historical moments.¹²

⁸ Margaret Carlson, *The Law According to Ruth*, TIME, June 28, 1993, at 38, 40.

⁹ David A. Kaplan & Bob Cohn, *A Frankfurter, Not a Hot Dog*, NEWSWEEK, June 28, 1993, at 29, 29.

¹⁰ O’BRIEN, *supra* note 2, at 66.

¹¹ For example, President Franklin Roosevelt wanted to appoint a Westerner to replace retiring Justice Louis Brandeis in 1939. The appointee, William O. Douglas, had been a Yale law professor in Connecticut, but senators from Western states endorsed him as one of their own because he had grown up in Yakima, Washington. ABRAHAM, *supra* note 2, at 225-26.

¹² There were apparently no concerns about developing a geographical balance on the Supreme Court in 1992 because President Clinton seriously considered replacing Justice White with Secretary of the Interior and former Arizona Governor Bruce Babbitt. Richard L. Berke, *Babbitt a Candidate for High Court*, N.Y. TIMES, June, 4, 1993, at A20; see also Bob Cohn, *Decisions, Decisions*, NEWSWEEK, June 21, 1993, at 24, 24-25. If Babbitt had been appointed instead of Ruth Bader Ginsburg, three of the high court’s nine members would have been from a single small state, Arizona, because Chief Justice Rehnquist and Justice O’Connor were from Arizona.

Presidents usually place great emphasis on their expectations for how a potential nominee will affect Supreme Court decisions. As politicians, presidents want to move public policy in directions that comport with their political values and they recognize that Supreme Court appointments will influence judicial policy making and the definition of constitutional law. As one scholar has noted, "Because justices serve for life, they furnish a President with historic opportunities to influence the direction of national policy well beyond his own term."¹³

Presidents may appoint justices with the intention of advancing specific policy preferences. For example, Richard Nixon, who won the presidency, in part, by emphasizing a "law and order" perspective during his political campaign, selected Warren Burger to be Chief Justice in 1969 primarily because of Burger's appellate court record of strident opposition to decisions favoring rights for criminal defendants.¹⁴ Other presidents, both liberals and conservatives, have made their selections based on specific expectations about how their nominees would decide cases. For example, "President Franklin Roosevelt's focus in selecting justices was on overturning the Court's rulings on economic regulation and he chose justices for opposition to or criticism of the conservative Supreme Court, their support for his Court-packing plan, and their divergence from what the 'Establishment Bar' would have chosen."¹⁵

Unless the president's political party controls the U.S. Senate, excessive emphasis on a nominee's philosophical orientation may result in the mobilization of effective political opposition during the confirmation process. A study of the unsuccessful Su-

¹³ O'BRIEN, *supra* note 2, at 65.

¹⁴ Charles M. Lamb, *Chief Justice Warren E. Burger: A Conservative Chief for Conservative Times*, in *THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES* 129, 130-32 (Charles M. Lamb & Stephen C. Halpern eds., 1991).

The politics of the late 1960s, Nixon's election in 1968, and the new president's views on criminal procedure all contributed to Burger's elevation to chief justice. . . . Given rising crime rates and several landmark Warren Court decisions expanding the rights of persons accused of crime, "law and order" grew into a widely debated political issue. The emphasis on criminal justice during the 1968 election year reflected the concerns of a large percentage of Americans and leading political figures. . . . During the 1968 campaign, Nixon openly criticized Warren Court policy, stressing that a principal way to resolve the law and order problem was to appoint Supreme Court justices who were "strict constructionists" in criminal procedure.

. . . The president viewed Burger as a so-called strict constructionist who would "apply" the law, not broadly "legislate" social policy. . . . He expected Burger to interpret constitutional rights narrowly, particularly those designed to protect persons accused of crime.

Id.

¹⁵ STEPHEN L. WASBY, *THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM* 117 (4th ed. 1993).

preme Court nominations put forward by Presidents Lyndon Johnson¹⁶ and Richard Nixon¹⁷ found that:

[t]he major factor leading the Senate to turn down the nominations of Abe Fortas, Clement F. Haynesworth, Jr., and G. Harrold Carswell was the perceived ideology of the nominees. In all three instances, senators consistently favored or opposed the nominations on the basis of whether or not they were in accord with the basic philosophy they believed the nominees would rely upon in deciding cases. . . .¹⁸

During the 1980s, President Ronald Reagan was reminded of this lesson when the Democratically-controlled Senate, by a vote of 58 to 42, rejected his nomination of Judge Robert Bork, an outspoken conservative scholar, as the replacement for retiring centrist Justice Lewis Powell.¹⁹

Although presidents emphasize nominees' philosophical compatibility in making appointments, justices frequently surprise and disappoint the presidents who nominated them. Presidents frequently make inaccurate predictions about how their nominees will decide cases on the high court. For example, Earl Warren's performance as Chief Justice disappointed President Dwight Eisenhower because Eisenhower expected Warren to be much more conservative.²⁰ Earl Warren had built his reputation as a tough prosecutor and, as Governor of California, he was an instigator of the shameful World War II era policy of incarcerating innocent Japanese-American families in concentration camps.²¹ On the Supreme Court, however, "Earl Warren was in the process of providing leadership for a libertarian-activist approach to public law and personal rights that went far beyond the Eisenhower brand of progressive Republicanism. To Eisenhower the new Warren represented all but a betrayal of older beliefs and understandings."²²

Presidents may set the stage for their own disappointment when they seek electoral or other political benefits in selecting an appointee. For example, although Eisenhower

¹⁶ President Johnson attempted to elevate Associate Justice Abe Fortas to Chief Justice after Earl Warren informed the President about his impending retirement. See Christopher E. Smith, "What If . . .": *Critical Junctures on the Road to (In)Equality*, 15 T. MARSHALL L. REV. 1, 11-12 (1989-90). As a lameduck president, Johnson miscalculated his ability to push Fortas's elevation through the Senate during an election year. *Id.*

¹⁷ President Nixon made two unsuccessful attempts to appoint Southerners to the Supreme Court in order to cultivate support from Southern voters. His first nominee, Clement Haynesworth, was hurt by "clear evidence of the nominee's patent insensitivity to some financial and conflict-of-interest improprieties." ABRAHAM, *supra* note 2, at 15. The second unsuccessful nominee, G. Harrold Carswell, was tarnished by his past support for racial segregation. *Id.* at 16.

¹⁸ JOHN MASSARO, SUPREME POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS 1 (1990) (footnotes omitted).

¹⁹ DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT 146 (1992).

²⁰ ABRAHAM, *supra* note 2, at 255.

²¹ *Id.*

²² *Id.*

predicted, inaccurately as it turned out, that Warren would have a philosophy of judicial restraint, the actual selection of Warren — as opposed to other potential candidates — was motivated by various political considerations:

[Attorney General Herbert] Brownell was well aware of [the] political debt to be paid [to Warren by Eisenhower]. For it had been Warren . . . who was primarily responsible for swinging all but eight of California's seventy-member delegation at the Nominating Convention to Eisenhower rather than to Senator Robert A. Taft at a particularly crucial stage in the jockeying [involving] the seating of certain contested Southern delegations. . . .

There may have been one other factor involved: Warren, the unprecedented three-term governor of California, although a loyal Republican, had long been a thorn in side of the partisan California Republican leadership (which included Vice President Richard M. Nixon . . .) . . . [who] would be delighted to see Warren removed from California politics. . . .²³

Similarly, Eisenhower appointed William Brennan in 1956 in order to seek electoral support from Catholic and other urban ethnic voters who traditionally voted for Democrats.²⁴ Ultimately, Eisenhower's focus on alternative political motivations contributed to his disappointment in the liberal decisions of Warren and Brennan and led him to declare that those two appointments were the greatest mistakes of his presidency.²⁵

PRESIDENTIAL EXPECTATIONS AND THE REHNQUIST COURT

The Rehnquist Court gained a reputation among scholars as a Court in which "the conservative bloc has become the most cohesive that it has been in half a century."²⁶ With

²³ *Id.* at 255-56.

²⁴ *Id.* at 265-66.

The president easily concurred . . . in the political wisdom of designating, especially in an election year, a Democrat who also happened to be a Roman Catholic. It might well avoid a "return home" to the Democratic nominee by Eisenhower Democrats of 1952, buttressing the nonpolitical or bipartisan atmosphere in which Ike felt more comfortable. Moreover, there had been no one of Brennan's religious faith on the bench since Justice Murphy's death in 1949; why not "restore" the time-honored Roman Catholic seat on the Court? The metropolitan East would be pleased indeed!

Id. at 266.

²⁵ *Id.* at 266.

[T]he President who sent [Brennan] to the Court was only slightly less irked by, and disenchanted with, Brennan's evolving record than with Earl Warren's (whose opinions Brennan joined in most instances). When Eisenhower was asked later if he had made any mistakes while he had been President, he replied: "Yes, two, and they are both sitting on the Supreme Court." "Both" referred to Warren and Brennan.

Id.

²⁶ SHELDON GOLDMAN, CONSTITUTIONAL LAW 151 (2d ed. 1991).

the retirements of Warren Court liberals William Brennan and Thurgood Marshall in 1990 and 1991 respectively, the Court was composed of eight Republican appointees²⁷ and only one Democratic appointee.²⁸ Many of the decisions by the lone Democrat, Byron White, “place[d] him on the unqualifiedly conservative side” of the Supreme Court during his career.²⁹ Thus, because Republican justices have generally been less supportive of individuals’ claims concerning civil rights and liberties,³⁰ the political composition of the Court appeared significantly skewed in favor of conservative decisions. However, in spite of the conscious efforts of Republican presidents, such as Ronald Reagan,³¹ to fill the Supreme Court with justices who would steer the high court toward conservative outcomes, the Rehnquist Court has been less uniformly conservative than many observers expected.³² Despite characterizations of the Rehnquist Court as a “transformed Court [that] no longer sees itself as the special protector of individual liberties,”³³ the 1992 term revealed that “the Court nonetheless remains sharply divided in such important areas as religion and civil rights.”³⁴ An examination of the judicial behavior of selected members of the Rehnquist Court illustrates why presidential expectations for Supreme Court decision making go unfulfilled, even on a Court that is stacked with appointees from one political party.

Justice Harry Blackmun: Unpredictable Changes in the Individual Justice

In 1970, after the Senate rejected Richard Nixon’s two Southern nominees to the Supreme Court, Clement Haynesworth and G. Harrold Carswell, Nixon turned to a life-

²⁷ Harry Blackmun and William Rehnquist were appointed by Republican President Richard Nixon. John Paul Stevens was appointed by President Gerald Ford. President Ronald Reagan appointed Sandra Day O’Connor, Antonin Scalia, and Anthony Kennedy. David Souter and Clarence Thomas were appointed by President George Bush.

²⁸ Byron White was appointed by President John F. Kennedy.

²⁹ Daniel C. Kramer, *Justice Byron R. White: Good Friend to Polity and Solon*, in *THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES* 407, 428 (Charles M. Lamb & Stephen C. Halpern eds., 1991).

³⁰ See generally C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946-1978*, 75 *AM. POL. SCI. REV.* 355 (1981) (empirical study indicating that justices’ political party affiliations are associated with decisions supporting or opposing civil liberties claims).

³¹ See HERMAN SCHWARTZ, *PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION* 175-76 (1988).

[Reagan] cannot deliver what [conservatives] want, such as constitutional amendments or legislation on abortion, school prayer, affirmative action, and busing.

... [However,] [t]he one thing a president can do for these supporters — and this will ultimately be just as effective on the social issues — is to give them the judges they want.

Id.

³² Robert H. Smith, *Justice Souter Joins the Rehnquist Court: An Empirical Study of Supreme Court Voting Patterns*, 41 *U. KAN. L. REV.* 11, 12 (1992). A detailed study of the voting patterns of justices within the Rehnquist Court found “significant divisions within the blocs of Justices. . . . [And] significant variations from subject area to subject area.” *Id.*

³³ SAVAGE, *supra* note 19, at 453.

³⁴ Greenhouse, *supra* note 6, at E1.

long friend of Chief Justice Warren Burger, Judge Harry Blackmun of the U.S. Circuit Court of Appeals for the Eighth Circuit. Blackmun was a respected, but not widely known, Midwestern Republican. In nominating Blackmun, Nixon insisted that he was fulfilling his pledge to nominate a conservative strict constructionist.³⁵ In a memorandum to his assistants, Nixon insisted that “Blackmun is to the right of both Haynsworth and Carswell on law and order and perhaps slightly to their left, but very slightly to the left only in the field of civil rights.”³⁶

During his early terms on the Court, Blackmun fulfilled Nixon’s expectations by consistently allying himself with conservative Chief Justice Burger.³⁷ As one scholar has noted, Blackmun “voted so frequently, and seemingly so predictably, with the Chief Justice that the press soon dubbed them the ‘Minnesota Twins.’”³⁸ After a few years, however, Blackmun’s decision making patterns changed and he became a relatively consistent ally of the Court’s liberals.³⁹ By the end of the 1980s, Blackmun was accusing the Court’s conservatives of both forgetting that racial discrimination had ever been a problem in American society⁴⁰ and “cast[ing] into darkness the hopes and visions of every woman in this country” by limiting the right of choice for abortions.⁴¹ Blackmun’s movement away from judicial conservatism was so substantial that during the Court’s 1991 term, Blackmun joined the Court’s most liberal justice, John Paul Stevens, in over seventy-seven percent of nonunanimous cases while agreeing with the Court’s most conservative justices, Antonin Scalia and Clarence Thomas, in less than thirty percent of such cases.⁴¹ Scholars have noted that “[i]n jurisprudential terms, there can be simply no doubt that Harry A. Blackmun’s judicial odyssey, his transformation from [a] Minnesota Twin to [a] firm Brennan-Marshall ally, save in some criminal-justice cases, is readily demonstrable.”⁴³

Laurence Tribe has argued that there is a “myth of the surprised president.”⁴⁴ According to Tribe, what appears to be a Supreme Court appointee’s failure to fulfill his or her appointing president’s expectations is actually a failure of the president to anticipate

³⁵ MASSARO, *supra* note 18, at 154.

³⁶ *Id.*

³⁷ ABRAHAM, *supra* note 2, at 307.

³⁸ *Id.*

³⁹ See GOLDMAN, *supra* note 26, at 149 (“Blackmun joined the Court as a hard-core conservative but became more moderate or middle-of-the-road and by the time of the Rehnquist Court was a member of the liberal wing.”).

⁴⁰ *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 662 (1989) (Blackmun, J., dissenting) (“One wonders whether the majority still believes that race discrimination — or, more accurately, race discrimination against non-whites — is a problem in our society, or even remembers that it ever was.”).

⁴¹ *Webster v. Reproductive Health Services*, 492 U.S. 490, 557 (1989) (Blackmun, J., dissenting).

⁴² Christopher E. Smith & Scott Patrick Johnson, *The First-Term Performance of Justice Clarence Thomas*, 76 JUDICATURE 172, 174 (1993).

⁴³ ABRAHAM, *supra* note 2, at 310.

⁴⁴ LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* 50 (1985).

all of the issues that will confront the Supreme Court during a specific justice's tenure.⁴⁵ Thus, if the fulfillment of presidential expectations was limited to an examination of those issues that specifically motivated the president's appointment decision, it is difficult to identify any surprised or disappointed presidents. In Tribe's words, "[o]n issues of known import to a President at the time he selects his nominees, a Chief Executive is much more likely to get his way with the Court."⁴⁶ With respect to Blackmun, Tribe argues that "Blackmun . . . had been picked for [his] tough stances on 'law and order'; Nixon wanted jurists who would indulge the prerogatives of prosecutors and police, rather than the rights of criminal defendants."⁴⁷ Consistent with Tribe's argument, Blackmun's reputation as a liberal was not built in the area of criminal justice, in which he remained relatively conservative, but in areas such as abortion and affirmative action which had never been considered by the Supreme Court at the time of Nixon's appointment of Blackmun.⁴⁸ However, Tribe's argument about the myth of the surprised president does not hold when Blackmun's complete tenure is considered. Despite the fact that Blackmun's liberalization was less pronounced in criminal justice cases (i.e., the issues that Nixon expected him to decide in a conservative manner), Blackmun's "judicial transformation manifested itself even on matters of criminal procedure, where his initial conservatism had lasted longest."⁴⁹ For example, Blackmun ultimately parted company with his conservative colleagues, and his own conservative past,⁵⁰ by joining the liberal justices for many death penalty cases.⁵¹ When the Rehnquist Court's conservative majority disregarded statistical evidence of racial discrimination in Georgia's capital sentencing,⁵² a "new" Justice Blackman transpired:

⁴⁵ *Id.* at 53-54.

⁴⁶ *Id.* at 54.

⁴⁷ *Id.* at 53.

⁴⁸ Stephen L. Wasby, *Justice Harry A. Blackmun: Transformation from "Minnesota Twin" to Independent Voice*, in *THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES* 66-73 (Charles M. Lamb & Stephen C. Halpern eds., 1991). Justice Blackmun was appointed in 1971. The Court's monumental abortion case, *Roe v. Wade*, was decided in 1973 and the seminal affirmative action decision, *Regents of the University of California v. Bakke*, was not issued until 1978. See *Roe v. Wade*, 410 U.S. 113 (1973); see also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

⁴⁹ Stephen L. Wasby, *Harry Andrew Blackmun*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 75, 76 (Kermit L. Hall et al. eds., 1992).

⁵⁰ As a judge on the Eight Circuit Court of Appeals, Blackmun authored an opinion in 1968 that rejected the use of statistical evidence to show the existence of improper racial discrimination in capital sentencing for rape cases. See *Maxwell v. Bishop*, 398 F.2d 138 (1968), cert. granted, 393 U.S. 997 (1968), and vacated, 398 U.S. 262 (1970). By contrast, in 1987 Justice Blackmun joined the liberal dissenters in chastising the conservative justices for disregarding such statistical evidence of discrimination in death penalty cases. See *McCleskey v. Kemp*, 481 U.S. 279, 320 (1987) (Brennan, J., dissenting).

⁵¹ For example, Blackmun joined the dissenting opinion of ardent death penalty opponent, William Brennan, when the Court majority endorsed the execution of teenage offenders. See *Stanford v. Kentucky*, 492 U.S. 361, 382 (1989) (Brennan, J., dissenting).

⁵² See *McCleskey*, 481 U.S. at 297.

[h]ere . . . emerged a new Harry Blackmun — one apparently “sensitized to the vagaries of death penalty litigation.” . . . [Blackmun] asserted in 1987, “The Court sanctions the execution of a man despite his presentation of evidence that establishes a constitutionally intolerable level of racially based discrimination leading to the imposition of his death sentence.”⁵³

Scholars have advanced several theories to explain why Blackmun’s decision making became more liberal.⁵⁴ After authoring the Supreme Court’s controversial decision that recognized a constitutional right for women to make choices about abortion,⁵⁵ Blackmun received considerable criticism from scholars and public condemnations from abortion opponents and conservative politicians.⁵⁶ Blackmun may have reacted to the criticism by moving closer to the liberal justices who supported his opinion.⁵⁷ Alternatively, Blackmun’s changed decision making behavior has been attributed to his resentment for being regarded as an automatic supporter of Chief Justice Burger and for being assigned by Burger to write relatively few important opinions on behalf of the Court.⁵⁸ Blackmun’s transformation may also have been generated by his desire to avoid seeing the Court become too conservative as new Republican appointees gradually replaced the retiring liberals from the Warren Court era: “When ideology threatened to move the Court too far to the right, [Blackmun] was stimulated to try to maintain a centrist philosophy for the Court.”⁵⁹

Whatever the motivation for the liberalization of Blackmun’s decisions, his example clearly demonstrates that presidents can be disappointed in Supreme Court appointees when those appointees alter their judicial philosophies while serving on the bench.

⁵³ LEE EPSTEIN & JOSEPH F. KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE* 127 (1992) (quoting *McCleskey v. Kemp*, 481 U.S. 279, 345 (1987) (Blackmun, J., dissenting)).

⁵⁴ See Wasby, *supra* note 49, at 71-72.

⁵⁵ See *Roe v. Wade*, 410 U.S. 113 (1973).

⁵⁶ See O’BRIEN, *supra* note 2, at 37-38

Even those who favored the ruling sharply criticized *Roe* for resting on a constitutional right of privacy. Scholars attacked the legal analysis and reliance on scientific and medical evidence in the opinion.

Other court watchers critical of *Roe* . . . attacked the Court for becoming a ‘super legislature’ . . .

For still others, the Court committed a more fundamental sin: it had written the rights of the unborn out of the Constitution.

Id.

⁵⁷ See ABRAHAM, *supra* note 2, at 308 (“As if stung by the attacks, including consistent charges of having created ‘ambiguous and uncertain’ rights out of whole cloth, Blackmun’s jurisprudence appeared to begin actively to change.”).

⁵⁸ Wasby, *supra* note 48, at 70.

⁵⁹ *Id.* at 71.

Justices Antonin Scalia and Clarence Thomas: Predictable Performance With Unpredictable Results

Justice Antonin Scalia and Clarence Thomas were appointed by Presidents Ronald Reagan and George Bush, respectively, with the intention of moving the Supreme Court's decision making in a conservative direction.⁶⁰ Presidents Reagan and Bush also sought to appeal to specific demographic segments of the electorate with the appointments of Scalia, an Italian-American,⁶¹ and Thomas, an African-American.⁶² However, these specific individuals were chosen from among all other potential candidates within their own (and other) demographic groups because their well-known conservative beliefs were consistent with the objectives of their respective appointing presidents.⁶³

Justice Scalia and Thomas have fulfilled their appointing presidents' expectations by staking out, along with Chief Justice Rehnquist,⁶⁴ the most consistently conservative positions among contemporary justices.⁶⁵ During the 1992-93 Term, Scalia and Thomas

⁶⁰ Although there has regularly been discussion among the press about presidents seeking to maintain a "Catholic seat" on the Supreme Court, "Justice[] Scalia . . . w[as] chosen because of his experience and ideology, not religion." WASBY, *supra* note 15, at 116. President Reagan's appointment of Justice Scalia was described by two commentators in the following terms: "Few in the legal world thought that President Reagan could find anyone to the right of Rehnquist, but that was an underestimation of the ability of [Reagan's] administration to implement its conservative will." TIMOTHY M. PHELPS & HELEN WINTERITZ, *CAPITOL GAMES CLARENCE THOMAS, ANITA HILL, AND THE STORY OF A SUPREME COURT NOMINATION* 157 (1992). Similarly, Clarence Thomas was selected by George Bush because of his conservative views and his strong support among political conservatives. *Id.* at 3. Although some of Bush's advisors voiced concerns about Thomas's youthfulness (age 43) and relative inexperience (one year as a federal appellate judge), "[c]onservative orthodoxy seemed to be replacing stature as the chief qualification. For presidents like Reagan and Bush who were determined to bring about a conservative counterrevolution in the federal courts, youth ensured the judicial longevity of those they chose." *Id.* at 4-5.

⁶¹ See ABRAHAM, *supra* note 2, at 353 ("Finally, the Reagan administration was assuredly not blind to ethnic realities and the potential political capital generated by naming the first Italian-American to mount the Court.").

⁶² Democratic senators were reluctant to oppose Thomas's nomination because they feared that African-American voters, especially those in the South who supported Thomas's nomination, might defect to the Republican Party. Thomas B. Edsall & E.J. Dionne, Jr., *The Vote That Split the Liberal Core*, WASH. POST NAT'L W'KLY ED., Oct. 21-27, 1991, at 12; R.W. Apple, Jr., *Senate Confirms Thomas, 52-48, Ending Week of Bitter Battle; 'Time for Healing,' Judge Says*, N.Y. TIMES, Oct. 16, 1991, at A1.

⁶³ See WASBY, *supra* note 15, at 116 ("Justice Scalia . . . [was] chosen because of judicial experience and ideology . . . although Scalia's religion and ethnic background . . . may have made some difference."); Christopher E. Smith, *Politics and Plausibility: Searching for the Truth About Anita Hill and Clarence Thomas*, 19 OHIO N.U.L.REV 697, 754 (1993) ("Bush nominate Thomas for the same reasons that nearly every other justice has been, nominated, namely political reasons.").

⁶⁴ Prior to Thomas's appointment, for example, Justice Scalia was second only to Chief Justice Rehnquist in his disinclination to support constitutional rights claims by criminal defendants. Christopher E. Smith, *Justice Antonin Scalia and Criminal Justice Cases*, 81 KY. L. J. 187, 193 (1992-93).

⁶⁵ Christopher E. Smith & Thomas R. Hensley, *Assessing the Conservatism of the Rehnquist Court*, 77 JUDICATURE 83, 86 (1993).

evinced the two lowest levels of support for the claims of individuals in civil rights and liberties cases. Scalia supported individuals in only twenty-seven percent of such cases and Thomas supported individuals in only thirty percent of such cases.⁶⁶ The two justices agreed with each other in ninety-one percent of all cases during the term, the highest agreement rate among any two justices on the Court.⁶⁷ Despite fulfilling presidential expectations in their individual decision-making behavior, these justices have not fulfilled, and indeed, have arguably hampered the attainment of Reagan's and Bush's overriding goals of conservatizing specific judicial policy issues, particularly abortion and school prayer.

When he was appointed to the Supreme Court, Scalia was viewed by "adoring conservatives . . . [as] the savior who will lead them into the judicial promised land of 'strict construction.'"⁶⁸ By replacing the retiring Warren Court liberal, Thurgood Marshall, Thomas's appointment "symbolized for many the final transformation of the Supreme Court. While Marshall had been a crusader for minorities and the poor, Thomas was expected to solidify the new Court's already powerful conservative majority."⁶⁹ Despite being members of a Supreme Court containing only two clear supporters (Blackmun and Stevens) of a right to choice in abortion⁷⁰ and the strict separation of church and state,⁷¹ Scalia and Thomas were unable to lead the Court to undo Warren and Burger Court precedents that conservative Republicans, including Reagan and Bush, found to be objectionable.⁷²

⁶⁶ *Id.*

⁶⁷ Marcia Coyle, *The High Court's Center Falls Apart*, 15 NAT'L L. J., Aug. 23, 1993, at S1, S1.

⁶⁸ David Kaplan & Bob Cohn, *The Court's Mr. Right*, NEWSWEEK, Nov. 5, 1990, at 62, 62.

⁶⁹ SAVAGE, *supra* note 19, at 457.

⁷⁰ After the retirements of Justices Brennan and Marshall in 1990 and 1991 respectively, Justice Blackmun and Stevens were the only remaining justices who dissented against the Court's approval of state regulation of abortion in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

⁷¹ Blackmun and Stevens agreed with each other in nearly eighty percent of First Amendment religion cases from 1981 through 1990, and they agreed less frequently with their more accommodationist colleagues. Christopher E. Smith & Linda Fry, *Vigilance or Accommodation: The Changing Supreme Court and Religious Freedom*, 42 SYRACUSE L. REV. 893, 917 (1991). Their rates of agreements with more conservative justice ranged from forty percent agreement with Justice Kennedy to sixty-one and fifty-eight percent agreement, respectively, with Justice O'Connor. *Id.*

⁷² See CHRISTOPHER E. SMITH, JUSTICE ANTONIN SCALIA AND THE SUPREME COURT'S CONSERVATIVE MOMENT 121-34 (1993). Reagan and Bush both publicly criticized the Supreme Court's decisions endorsing a right of choice for abortion. Reagan "had no trepidation about criticizing the Burger Court's 'activist' stances on abortion, affirmative action, and other issues. Neither did he make any bones about his strategy of judicial appointment: he would nominate jurists who shared his values." EPSTEIN & KOBYLKA, *supra* note 53, at 18. Reagan was the first president whose Solicitor General actively sought to have the Supreme Court overturn pro-choice precedents. *Id.* at 292. Bush also chose his appointees to fit his conservative agenda, *id.* at 19, and Bush's administration urged the Supreme Court to eliminate the constitutional right to make choices about abortion. See BARBARA HINKSON CRAIG & DAVID M. O'BRIEN, ABORTION AND AMERICAN POLITICS 333 (1993).

Reagan was the first president to publicly advocate the elimination of Supreme Court precedents outlawing organized prayers sponsored by public schools, e.g., *Engel v. Vitale*, 370 U.S. 421 (1962). See John A. Murley, *School Prayer: Free Exercise of Religion or Establishment of Religion?*, in SOCIAL AND REGULATORY POLICY: MORAL CONTROVERSIES IN AMERICAN POLITICS 5, 33-34 (Raymond Tatalovich & Byron W. Daynes eds., 1988). The Bush administration also supported a weakening of judicial doctrines supporting the strict separation of church and state. See Linda Greenhouse, *Justices Affirm Ban on Prayers in Public Schools*, N.Y. TIMES, June 25, 1992, at A1.

The failure of Scalia and Thomas to effectively advance the larger policy objectives of their appointing presidents stems from the failure of these justices to participate persuasively in the collegial decision-making processes of the Supreme Court. They failed to establish the kinds of relationships with their colleagues that would contribute to success in a collegial environment. It is not sufficient for a justice to espouse the viewpoints desired by an appointing president if the justice cannot participate effectively in the high court's group decision-making environment. As one scholar has observed:

No matter how great their isolation from each other, justices have incentives to interact and work together on decisions. The shared goal of seeking majority approval for an opinion and the general desire to obtain as much consensus as possible in [a] case often require interaction. On a different level, justices who feel strongly about cases often attempt to persuade colleagues to accept their viewpoints, and there may be a good deal of competition between opposing sides to win votes in . . . close case[s].⁷³

Because Scalia and Thomas refuse to participate in persuasion and compromise, they have failed to advance Reagan's and Bush's policy expectations on some issues and even contributed to the defeat of their own objectives.⁷⁴

In 1992, the Supreme Court considered the issue of abortion and the conservative justices had the opportunity to reverse the *Roe v. Wade* precedent that was so objectionable to Reagan, Bush, and other political conservatives.⁷⁵ The case arose at a time when only Justice Blackmun remained on the Court from among the seven original members of the *Roe* majority. In a surprising decision, Reagan- and Bush- appointees Kennedy, O'Connor, and Souter co-authored an opinion supported by Blackmun and Stevens that reaffirmed *Roe v. Wade* and the existence of a fundamental right of choice concerning abortion.⁷⁶ The decision was especially surprising because Justice Kennedy had been among the critics of *Roe v. Wade* in a 1989 case in which he joined an opinion by Chief Justice Rehnquist, a dissenter in the original *Roe* case, that clearly indicated that several justices, including Kennedy, believed that *Roe* should be overruled.⁷⁷ Moreover, Justice

⁷³ BAUM, *supra* note 3, at 159.

⁷⁴ SMITH, *supra* note 72, at 121-34.

⁷⁵ CRAIG & O'BRIEN, *supra* note 72, at 169, 191.

⁷⁶ *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

⁷⁷ *Webster v. Reproductive Health Services*, 492 U.S. 490, 517-21 (1989).

O'Connor, who had criticized both the reasoning⁷⁸ and judicial activism⁷⁹ underlying *Roe* as early as 1983, suddenly made it clear that she wanted to preserve the right-to-choice precedent.⁸⁰ The co-authored opinion placed great emphasis on the need to maintain *stare decisis* in order to protect the high court's image and legitimacy⁸¹ by avoiding the perception that an alteration of *Roe* by the Rehnquist Court was based merely on political changes in the Court's composition.⁸² These were arguments that Kennedy and O'Connor had not raised when they participated in the criticism of *Roe* in earlier abortion decisions.⁸³

In another 1992 case, Kennedy, O'Connor, and Souter again joined Blackmun and Stevens to create a five-member majority that preserved and expanded Warren Court decisions opposing official sponsorship of religious activities in public schools.⁸⁴ Justice Kennedy surprised observers⁸⁵ by authoring the majority opinion which barred the recitation of prayers by clergy at public school graduations. Kennedy's actions were surprising because he had previously joined opinions criticizing the Court's separationist Establishment Clause jurisprudence⁸⁶ and he had written an opinion that accused the

⁷⁸ In a case rejecting the City of Akron's abortion regulations, Justice O'Connor's dissenting opinion criticized *Roe*'s reliance on the current state of medical technology in using a trimester framework to determine the nature and timing of women's right of choice during pregnancy. See *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 454-59 (1983) (O'Connor, J., dissenting). She called the trimester framework in Blackmun's *Roe* opinion "a completely unworkable method of accommodating the conflicting personal rights and compelling state interests that are involved in the abortion context." *Id.* at 454.

⁷⁹ With respect to the Supreme Court's involvement in the abortion issue, O'Connor wrote:

Irrespective of what we may believe is wise or prudent policy in this difficult area, "the Constitution does not constitute us as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, 'wisdom,' or common sense."

Id. at 453 (quoting *Plyler v. Doe*, 457 U.S. 202, 242 (1982) (Burger, C.J., dissenting)).

⁸⁰ CRAIG & O'BRIEN, *supra* note 72, at 337-39

⁸¹ *Planned Parenthood v. Casey*, 112 S. Ct. at 2816 ("A decision [overturning *Roe*] would [be] at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law.")

⁸² According to the co-authored opinion:

The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.

Id. at 2814.

⁸³ Smith, *supra* note 72, at 88-102

⁸⁴ *Lee v. Weisman*, 112 S. Ct. 2649 (1992).

⁸⁵ See Christopher E. Smith, *Supreme Court Surprise: Justice Anthony Kennedy's Move Toward Moderation*, 45 OKLA. L. REV. 459, 468-71 (1992).

⁸⁶ See Smith & Fry, *supra* note 71, at 927-28.

Supreme Court of discriminating against Christians by not permitting the government to publicly support Christian holidays.⁸⁷

Why did Kennedy and O'Connor part company with their usual allies among the Court's conservatives and thereby provide the necessary votes to defeat their appointing president's (Reagan) preferred policies? One significant factor that appeared to drive Kennedy and O'Connor away from their erstwhile allies was the confrontational style and combative judicial behavior of Justices Scalia and Thomas.

Justice Scalia developed a reputation as a justice who would regularly employ sarcastic, strident language to condemn any justice, friend or foe, who disagreed with him,⁸⁸ and Justice Thomas appears to emulate Scalia's style.⁸⁹ As one observer noted, "Thomas can write in language that brings to mind Scalia's occasional let's-you-and-me-scrap tone."⁹⁰ In the 1989 abortion case in which the conservatives were poised to overturn *Roe* if they could gain O'Connor's support, Chief Justice Rehnquist, joined by

⁸⁷ *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). In a case concerning the permissibility of religious holiday displays in public buildings, Kennedy wrote:

I am quite certain that ["the reasonable person"] will take away a salient message from our holding in [this] case[]: the Supreme Court of the United States has concluded that the First Amendment creates classes of religions based on the relative number of adherents. Those religions enjoying the largest following must be consigned to the status of least-favored faiths so as to avoid [the] risk of offending members of minority religions.

Id. at 677.

See also Smith & Fry, *supra* note 71, at 940 ("The implicit message in this statement, namely that 'we are the majority, therefore we must have our way,' epitomizes an orientation toward religious freedom that lacks sensitivity to the concerns and rights of members of religious minorities.").

⁸⁸ See Christopher E. Smith, *Justice Antonin Scalia and the Institutions of American Government*, 25 WAKE FOREST L. REV. 783 (1990).

⁸⁹ As one study noted:

Thomas appeared to be most like Scalia in his willingness to criticize other justices while employing less diplomacy than most justices usually use in their opinions. . . . Scalia is well-known for his strident opinions that roundly condemn his colleagues. . . . For example, in one case in which Thomas and Scalia were lone dissenters against the majority's finding of a constitutional violation when corrections officials beat a prisoner, Thomas wrote, with a touch of sarcasm, that "the Eighth Amendment is not . . . a National Code of Prison Regulation" as he criticized the majority for behaving as if the Constitution can cure all social ills. [*Hudson v. McMillian*, 112 S. Ct. 995, 1010 (1992) (Thomas, J., dissenting)]. In another dissent, Thomas criticized the majority's construction of a statute defining the crime of extortion:

As serious as the Court's disregard for history is its disregard for well-established principles of statutory construction. . . . If the Court makes up this version of the crime [of extortion] today, who is to say what version it will make up tomorrow when confronted with the next perceived rascal? [*Evans v. United States*, 112 S. Ct. 1881, 1899, 1904 (1992) (Thomas, J., dissenting)].

Smith & Johnson, *supra* note 42, at 177 (footnotes omitted).

⁹⁰ Thomas Sancton, *Judging Thomas*, TIME, July 13, 1992, at 30.

Justices White and Kennedy, attempted to patiently cultivate O'Connor's support.⁹¹ Meanwhile Scalia undercut their efforts by condemning O'Connor for not immediately joining the conservative initiative.⁹² Scalia's concurring opinion was a quintessential example of his failure to adhere to the Court's usual traditions of diplomatic opinions and strategic interactions in order to cultivate the support of colleagues. While Rehnquist and the other conservatives were building a bridge between themselves and O'Connor by laying the groundwork for O'Connor to join their open opposition to *Roe* in a future case, Scalia was bulldozing their structure by attacking O'Connor. Could O'Connor be

⁹¹ *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). Because Justice O'Connor was not yet willing to provide the fifth vote necessary for reversal of *Roe*, Chief Justice Rehnquist, joined by Justices White and Kennedy, claimed to agree that "[t]his case therefore affords us no occasion to revisit the holding of *Roe*," which, unlike this case concerning a Missouri regulatory statute, concerned a Texas statute that criminalized abortions. *Id.* at 521. Thus Rehnquist, White, and Kennedy admitted that they were "modify[ing] and narrow[ing] *Roe*," but leaving the landmark precedent in place. *Id.* Rehnquist, White, and Kennedy would not take the risk of advocating outright reversal of *Roe* until they were sure of O'Connor's support for fear that asserting too strong a position against abortion might push O'Connor to join the liberals in setting yet another precedent endorsing *Roe*. Rehnquist and his allies claimed to agree with O'Connor's assertion that *Roe* did not need to be reexamined in this case, yet they also sought to persuade O'Connor of *Roe*'s fatal flaws by detailing their reasons why the *Roe* opinion was inconsistent with the Constitution:

[T]he rigid *Roe* framework is hardly consistent with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as ours does. The key elements of the *Roe* framework — trimesters and viability — are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle. Since the bounds of the inquiry are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code or regulations rather than a body of constitutional doctrine.

Id. at 518.

In their strategic action of seeking to persuade O'Connor while indicating a willingness to wait for her to make a decision, Rehnquist, White, and Scalia sought to cultivate her support for any subsequent case that would challenge *Roe* more directly.

⁹² *Id.* at 532 (Scalia, J., concurring in part in concurring in judgment). While Rehnquist, with the support of White and Kennedy, strategically crafted his opinion to express opposition to *Roe* while endeavoring to gain O'Connor's support in the future, Scalia employed his characteristic stridency to attack his conservative allies, especially O'Connor, for being unwilling to wipe away the *Roe* precedent once and for all. In his concurring opinion, Scalia used all of his strongest techniques, including sarcasm, personal attacks, and dire warnings of impending catastrophe, to condemn his colleagues. Scalia sarcastically derided Rehnquist's majority opinion:

The outcome of today's case will doubtless be heralded as a triumph of judicial statesmanship. It is not that, unless it is statesmanlike needlessly to prolong this Court's self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not juridical.

Id.

Scalia directed a special attack at O'Connor for failing to come out against *Roe*. In a strong statement, Scalia declared that "Justice O'Connor's assertion that a 'fundamental rule of judicial restraint' requires us to avoid reconsidering *Roe*, cannot be taken seriously" *Id.* (emphasis added). Supreme Court justices are accustomed to disagreeing strongly with each other's reasoning. However, words that imply such a complete and belittling rejection of a colleague's opinion are out of step with the usual strategic diplomacy employed by justices to cultivate support from each other. Scalia proceeded to devote fully half of his opinion to attacking O'Connor for authoring and joining opinions in other comparable situations that reexamined precedents despite not facing direct challenges to those precedents. *Id.* The opinion made it very clear that one of Scalia's primary purposes was to implicitly label O'Connor as a "hypocrite" for refusing to tackle the abortion issue in circumstances in which she had previously addressed directly a variety of other controversial issues. *See id.*

expected to provide the crucial fifth vote against *Roe* in a subsequent case when she had endured a strident and personal attack from Scalia? O'Connor might have felt that she risked the appearance of being pounded into submission if she were to agree with Scalia in a later case. Moreover, O'Connor had reason to be annoyed with other aspects of Scalia's behavior,⁹³ most notably because Scalia, as well as Thomas, were widely reported in the news media as deriding O'Connor within the Court for making decisions as if she were a "politician" rather than a "judge."⁹⁴ Because O'Connor, in turn, has responded to her conservative antagonists by accusing them of rushing too quickly in an effort to undo established precedents,⁹⁵ it is not surprising that she reacted against Scalia's and Thomas's combative behavior by acting to preserve the *Roe* precedent.⁹⁶

It is less clear that Justice Kennedy was alienated by Scalia's judicial style. Although there were press reports indicating that Kennedy was offended by Scalia's attacks,⁹⁷

⁹³ In a candid interview, Justice Blackmun described Scalia's behavior and the way in which he antagonized O'Connor: [Justice Scalia] is and always will be the professor at work. . . . He asks far too many questions, and he takes over the whole argument of the counsel, he will argue with counsel. . . . Even [Justice O'Connor], who asks a lot of questions, a couple of times gets exasperated when [Scalia] interrupts her line of inquiry and goes off on his own. She throws her pencil down and [says,] "umh, umh."

Stuart Taylor, Jr., *Blackmun Provides a Peek at the People Under Those Robes*, N.Y. TIMES, July 25, 1988, at B6. The Supreme Court correspondent for the *Los Angeles Times* also reported that O'Connor was irritated by Scalia's behavior at oral argument:

On a bench lined with solemn gray figures who often sat as silently as pigeons on a railing, Scalia stood out like a talking parrot. . . .

. . . Scalia's show did not always play well with the other justices. Several said they wished he would be quiet for a change. On occasion, Byron White would glare down the bench with a look that suggested he would like to put the newest justice into a headlock if it would shut him up. Sandra O'Connor would harrumph slightly when [Scalia] interrupted one of her questions.

SAVAGE, *supra* note 19, at 119.

⁹⁴ Paul M. Barrett, *On the Right: Thomas Is Emerging As Strong Conservative Out to Prove Himself*, WALL ST. J., Apr. 27, 1993, at A1, A6. According to a report in the *Wall Street Journal*:

[T]here is an undercurrent of tension between [Thomas] and . . . O'Connor, people familiar with the workings of the [C]ourt say, although it has surfaced publicly only in the justices' opinions.

Justice Thomas has come to agree with Justice Scalia's view, shared with conservative clerks and others, that jurists who seek compromise, rather than the single "right" answer in a case, are "politicians" masquerading in black robes.

Justice O'Connor, a proponent of splitting differences and moving cautiously, gets tagged with this pejorative most often in private conversation at the high court.

Id.

⁹⁵ See *id.* at A6 ("[O'Connor] has accused Justice Thomas in her opinions of misconstruing high court precedent in his hurry to remake constitutional law.").

⁹⁶ O'Connor had never stated a clear position on *Roe* prior to 1992, so some might argue that she did not react to Scalia in finally stating her views. However, she avoided stating a view until directly confronted with the issue after Scalia had attacked her.

⁹⁷ See Paul M. Barrett, *Independent Justice: David Souter Emerges As Reflective Moderate on the Supreme Court*, WALL ST. J., Feb. 2, 1993, at A1, A1-A6 ("There is no question that [Souter] doesn't take [criticism from Justice Scalia] as personally as Kennedy and O'Connor," says a lawyer who clerked last term for another justice.").

Kennedy had consistently joined Scalia in deciding many cases during previous terms.⁹⁸ During the 1990-91 Term, for example, Kennedy and Scalia agreed with each other in 78 percent of all nonunanimous cases, a high agreement level that was exceeded only by Kennedy's 83 percent agreement rate with Justice Souter and Souter's 89 percent agreement rate with O'Connor.⁹⁹ What, then, was the difference for Justice Kennedy between the 1990 Term, when he manifested his usual consistent conservatism, and the 1991 Term, in which he provided decisive fifth votes to thwart conservatives' expectations about altering abortion and prayer in school?¹⁰⁰ The most obvious difference between the two terms was the presence on the Supreme Court of Justice Thomas. There is reason to believe that Thomas alienated some of his colleagues during his controversial confirmation process.¹⁰¹ According to journalists, Thomas "infuriated some, if not all, of the justices" by staging a large celebration and insisting that he be sworn in as a Justice on the day after the funeral for Chief Justice Rehnquist's wife.¹⁰² Thomas's appearance on the cover of a *People* magazine issue in which his wife described the confirmation hearings as "spiritual warfare" and "[g]ood versus evil"¹⁰³ was "according to Court insiders, . . . greeted with abject horror in the chambers of many of the justices."¹⁰⁴ Moreover, according to a national news magazine, "two conservative justices who watched the [Thomas confirmation] hearings told their clerks that they thought [Justice] Thomas lied to the Judiciary Committee."¹⁰⁵ Thus, Kennedy, as well as O'Connor and Souter, may have sought to disassociate themselves from a justice who, despite being a fellow Republican appointee of a conservative president, had not handled effectively and gracefully the plausible sexual harassment charges that turned his nomination into a controversial political battle.¹⁰⁶

As indicated by the consequences of the judicial behavior of Justices Scalia and Thomas, presidential expectations may remain unfulfilled even if their appointees decide cases in the manner that the president desires. If the appointees are not respected

⁹⁸ Scott P. Johnson & Christopher E. Smith, *David Souter's First Term on the Supreme Court: The Impact of a New Justice*, 75 JUDICATURE 238, 239 (1992).

⁹⁹ *Id.*

¹⁰⁰ Smith, *supra* note 85, at 465-71.

¹⁰¹ *Id.* at 473-76.

¹⁰² PHELPS & WINTERNITZ, *supra* note 60, at xv.

¹⁰³ Virginia Lamp Thomas, *Breaking Silence*, PEOPLE, Nov. 11, 1991, at 108, 111.

¹⁰⁴ Karen O'Connor, *The Effects of the Thomas Appointment to the Supreme Court*, 25 PS: POL. SCI. & POL. 492, 495 (1992).

¹⁰⁵ David A. Kaplan et al. *An Uncomfortable Seat*, NEWSWEEK, Oct. 28, 1991, at 31, 31.

¹⁰⁶ The charges against Thomas appear to be quite plausible because none of Thomas's supporters could substantiate any evil motives on the part of his accuser, Professor Anita Hill. See Smith, *supra* note 63 at 714-46. Moreover, Hill's four unconnected corroborating witnesses presented uncontradicted testimony that she had told them about Thomas's harassment years before anyone could have predicted that Thomas would be nominated to the nation's highest court. *Id.* at 722. Thus there is no evidence that Hill manufactured her charges against Thomas. *Id.* at 727.

by their colleagues or if they fail to work effectively within the collegial, group decision-making processes of the Supreme Court, presidents and their political allies may be disappointed to see that outspoken justices harm the attainment of their own preferred outcomes by alienating other justices.

Justice David Souter: Judicial Conservatism That Differs From Political Conservatism

President Bush appointed Judge David Souter to replace Warren Court liberal William Brennan because he wanted a conservative jurist on the Supreme Court whose nomination would not produce a bruising confirmation battle in the Senate.¹⁰⁷ As one scholar observed about Souter:

It was abundantly clear, however, that based on his five years of service on the New Hampshire Superior Court and seven on [the state's] Supreme Court, that here was a jurist firmly committed to Bush's desire for a strict constructionist, a judicial restraintist, dedicated to legal and constitutional precedent and history.¹⁰⁸

During Souter's first term on the high court, Bush's desire for an additional, dependable conservative vote appeared to be fulfilled.¹⁰⁹ Souter became a member of a consistent conservative voting bloc by voting together with Chief Justice Rehnquist and Justices Scalia, Kennedy, O'Connor, and White in more than seventy percent of nonunanimous cases.¹¹⁰ He also cast the decisive fifth vote in eleven conservative five-to-four decisions that would have been decided the other way if his predecessor, Justice Brennan, had remained on the Court.¹¹¹ These cases included seven criminal justice issues¹¹² and two First

¹⁰⁷ See ABRAHAM, *supra* note 2, at 366.

The president's decision to select Judge Souter — a judge he had never met or spoken with until then — was based predominantly on the chief executive's desire to finger a conservative judge with no controversial written opinions (especially on the emotional abortion issue) that would trigger sustained ideological conflict on the eve of the 1990 midterm elections.

Id.

¹⁰⁸ *Id.* at 367.

¹⁰⁹ Johnson & Smith, *supra* note 98 at 239-42.

¹¹⁰ *Id.* at 239.

¹¹¹ Christopher E. Smith & Scott P. Johnson, *Newcomer on the High Court: Justice Souter and the Supreme Court's 1990 Term*, 37 S.D. L. REV. 21, 39-41 (1992).

¹¹² Harmelin v. Michigan, 111 S. Ct. 2680 (1991) (no Eighth Amendment proportionality problem with a mandatory life sentence without parole for possession of a specified amount of cocaine); Peretz v. United States, 111 S. Ct. 2661 (1991) (U.S. magistrate judges permitted to conduct *voir dire* for felony juries despite lack of explicit statutory authority); Schad v. Arizona, 111 S. Ct. 2491 (1991) (no constitutional violation in judge's failure to instruct jury on lesser included offenses in capital case); Wilson v. Seiter, 111 S. Ct. 2321 (1991) (subjective standard for determining unconstitutional conditions of confinement in prisons); Mu'min v. Virginia, 111 S. Ct. 1899 (1991) (no right to fair trial violation when judge refused to question jurors about the contents of news reports to which they had been exposed); County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991) (arrestees may be held for forty-eight hours before charges or evidence are presented against them); Arizona v. Fulminante, 111 S. Ct. 1246 (1991) (coerced confessions may be regarded as "harmless error").

Amendment issues¹¹³ that the divided Court decided in favor of the government rather than in favor of the individual claimants who asserted violations of their constitutional rights.

In his second term, however, Souter disappointed Bush and other conservatives by joining Kennedy, O'Connor, Blackmun, and Stevens to thwart the President's desire for the removal of judicial precedents that established abortion rights¹¹⁴ and barred public schools from sponsoring religious activities.¹¹⁵ Unlike Justices Kennedy and O'Connor, Souter appears unaffected by the confrontational styles of Justices Scalia and Thomas,¹¹⁶ and the news media have noted "Justice Souter's ability to confront Justice Scalia without rancor."¹¹⁷ Thus Souter's failure to fulfill his appointing president's expectations stems from some source other than alienation from the stridency of his more conservative colleagues.

A primary source of difficulty for presidents seeking to appoint like-minded justices is that political terminology, especially the words "conservative" and "liberal", are not necessarily applicable in a uniform manner when applied to judges. For example, Justice Scalia and Souter are both "conservative" in the sense that, unlike Justices William Brennan, Thurgood Marshall, William O. Douglas, and other Warren Court liberal stalwarts, they are generally disinclined to favor individuals' claims of asserted constitutional rights over the policy determinations of officials in the legislative and executive branches of government. This disinclination is reflected in the fact during the 1990 and 1991 terms, Scalia's and Souter's average support level for the claims of individuals in civil rights and liberties was twenty eight percent and forty-two percent, respectively, while the Court's more liberal justices had much higher percentages (i.e., Blackmun, sixty-eight percent; Stevens, seventy-seven percent).¹¹⁸ However, Scalia and Souter frequently diverge in the application of their respective brands of conservatism to Supreme Court cases because Scalia often seeks to advance conservative outcomes while

¹¹³ *Barnes v. Glen Theatre*, 111 S. Ct. 2456 (1991) (state can ban nude dancing in bars despite the fact that such dancing is acknowledged to be a form of artistic expression); *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (president can alter interpretation of government regulations in order to bar doctors in federal funded clinics from providing patients with information about abortion).

¹¹⁴ See *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

¹¹⁵ See *Lee v. Weisman*, 112 S. Ct. 2649 (1992).

¹¹⁶ See Jeffrey Rosen, *Poetic Justice*, THE NEW REPUBLIC, March 8, 1993, at 25, 26.

Unlike Sandra Day O'Connor, who can get rattled by Scalia's bullying, Souter is amused by what he calls "Nino blowing off steam." Last June, for example, when Scalia ranted at Souter for following two inconsistent decisions by John Marshall, Souter replied, deadpan: "The dissent accuses us of repeating what it announces as Chief Justice Marshall's misunderstanding . . . of his own previous opinion. We are honored."

Id.

¹¹⁷ Barrett, *supra* note 97, at A1.

¹¹⁸ Smith & Hensley, *supra* note 65, at 86.

Souter seeks to restrain his judicial role by respecting case precedents, including liberal precedents. Scalia has stated clearly that he will not abide by liberal precedents with which he disagrees,¹¹⁹ but Souter's conservatism leads him to preserve the Court's image and legitimacy as a judicial institution, even if he may not personally wish to endorse a particular outcome. Scalia attacks liberal precedents if he finds them to be objectionable. By contrast, Souter may uphold such precedents if he believes the Court's image will be tarnished by changing precedents too rapidly. On the abortion issue, for example, Souter was the chief architect of the co-authored opinion emphasizing the importance of *stare decisis* because he reportedly believed that "[f]or the [C]ourt to reverse itself on such a contentious issue would encourage the impression of it as moved by raw politics, not reason."¹²⁰

The differing approaches of conservative Justices Scalia and Souter reflect emphases on alternative aspects of the concept of judicial restraint. One scholar has identified six dimensions of the concepts of judicial activism and restraint.¹²¹ Justice Scalia is "one of the most vocal advocates of judicial restraint among the justices in the emerging conservative majority,"¹²² yet Scalia places much less emphasis than does Souter on the "Interpretive Stability" dimension of judicial restraint. They are both conservatives, but they emphasize different priorities within their conservative judicial philosophies. President Bush may have hoped that he was appointing another Scalia when he saw the conservative trends in Souter's state court judicial decision making. However, Souter has felt it necessary on the U.S. Supreme Court to emphasize "Interpretive Stability," a component missing from Scalia's brand of conservatism. Thus Souter has disappointed

¹¹⁹ See, e.g., *South Carolina v. Gathers*, 409 U.S. 805, 825 (1989) (Scalia, J., dissenting) ("I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face.").

¹²⁰ Barrett, *supra* note 97, at A6.

¹²¹ See Bradley C. Canon, *Defining the Dimensions of Judicial Activism*, 66 JUDICATURE 236, 239 (1983).

(1) Majoritarianism — the degree to which policies adopted through democratic processes are judicially negated.

(2) Interpretive Stability — the degree to which earlier court decisions, doctrines, or interpretations are altered.

(3) Interpretive Fidelity — the degree to which constitutional provisions are interpreted contrary to the clear intentions of their drafters or the clear implications of the language used.

(4) Substance/Democratic Process Distinction — the degree to which judicial decisions make substantive policy rather than affect the preservation of democratic political processes.

(5) Specificity of Policy — the degree to which a judicial decision establishes policy itself as opposed to leaving discretion to other agencies or individuals.

(6) Availability of an Alternate Policymaker — the degree to which a judicial decision supersedes serious consideration of the same problem by governmental agencies.

Id.

¹²² Christopher E. Smith, *The Supreme Court's Emerging Majority: Restraining the High Court Or Transforming Its Role?*, 24 AKRON L. REV. 393, 399 (1990).

political conservatives,¹²³ including President Bush, because his judicial conservatism differs from that of Scalia, Thomas and Rehnquist, the Court's most active proponents of achieving conservative outcomes in nearly every case.

Souter's example illustrates the risk that presidents may misperceive value differences that exist between themselves and their generally like-minded nominees. Because justices may constrain their personal values by seeking to fulfill their vision of the appropriate role for a judicial officer,¹²⁴ their apparent liberalism or conservatism may differ from that of the appointing president and thereby ultimately lead the president's expectations on specific issues to remain unfulfilled.

CONCLUSION

Justice Ginsburg and President Clinton's Expectations

Like other presidents, Clinton had multiple purposes when he appointed Judge Ruth Bader Ginsburg to the Supreme Court in 1993. One dominant consideration was "his need for a nominee who was risk-free, one who would not only sail smoothly through the Senate but also might eclipse some of his most recent embarrassments, reconfirm his move to the political center and give new momentum to his Administration."¹²⁵ In addition, Clinton had to be concerned about maintaining support from his liberal constituents in the Democratic Party by appointing someone who would support the right of choice for abortion and who would generally provide much greater support for the protection of individuals' constitutional rights than that provided by the predominantly Republican members of the Rehnquist Court.¹²⁶ In Ginsburg, Clinton found a nominee with established liberal credentials from her years as the nation's foremost legal advocate of equal rights for women when she argued six seminal gender discrimination cases

¹²³ See Barrett, *supra* note 97, at A1.

The White House assured the GOP hard right that David Souter would be "a home run."

The Bush Administration was "miserably inaccurate," complains Thomas Jipping, vice president of the Free Congress Foundation, which coordinated support for the nomination among conservative groups. He says that Justice Souter has been "horrible in some of the real fundamental areas." Exhibit A was last June's abortion ruling. . . .

Id.

¹²⁴ See CHRISTOPHER E. SMITH, *COURTS, POLITICS, AND THE JUDICIAL PROCESS* 144 (1993) ("[J]udges' role conceptions limit the expression of what judges want to do (i.e., their policy preferences) because judges also seek to do what they think they ought to do according to their beliefs about the proper role and behavior for judicial officers.").

¹²⁵ Thomas L. Friedman, *The 11th Hour Scramble*, N.Y. TIMES, June 15, 1993, at A1, A23.

¹²⁶ Other than Ginsburg, all of the other eight justices on the Rehnquist Court are Republicans appointed by Republican presidents.

before the Supreme Court in the early 1970s.¹²⁷ However, Ginsburg's record as a liberal attorney posed little risk of concerted opposition by Republican senators and conservative interest groups because as a judge, Ginsburg "has occasionally disappointed some of her former liberal allies in the liberal advocacy groups. In her 13 years on the appeals court, she has . . . often gone out of her way to mediate between the court's warring liberal and conservative factions."¹²⁸

Did Clinton find the perfect appointee who would avoid controversy while fulfilling his expectations in decision making? With respect to avoiding controversy, by winning easy confirmation, Ginsburg proved that her image as a thoughtful, moderate judge defused any potential conservative opposition.¹²⁹ Moreover, as the lone Democrat joining a Supreme Court loaded with Republican appointees from conservative presidents, her presence will do little to make significant immediate changes in the balance of power and the trends in decision making. Thus she was confirmed by the Senate in an impressive 96-to-3 vote.¹³⁰

With respect to Ginsburg's decision making as a justice, obviously it remains to be seen whether her decisions will comport with Clinton's expectations. In comparing her to other Rehnquist Court justices who have disappointed their appointing presidents, there is little reason to predict that she will change her views, like Justice Blackmun, or that she will alienate fellow justices, like Justices Scalia and Thomas. During her confirmation hearings, although she deftly avoided answering many questions concerning ongoing controversies, such as homosexuals' rights and the death penalty,¹³¹ her statements condemning discrimination¹³² and supporting a right of choice for abortion¹³³ seemed consistent with her long-standing viewpoints from her years as a lawyer, law professor, and appellate judge. Moreover, because she spent many years as a constitutional law professor, she seemed less likely than some other justices to face issues on the Supreme Court which either she had never encountered before or which were beyond the scope of the judicial philosophy she developed through years of advocacy, teaching, writing, and judging. Thus there is no special basis for anticipating that she will adopt a new judicial outlook as Justice Blackmun did.

¹²⁷ See Neil A. Lewis, *Rejected as Clerk, Chosen as a Justice*, N.Y. TIMES, June 15, 1993, at A1, A23.

¹²⁸ *Id.*

¹²⁹ See Walter Goodman, *A Judicious TV Image with a Flair for Detail*, N.Y. TIMES, July 22, 1993, at B1, B4.

¹³⁰ Linda Greenhouse, *Senate, 96-3, Easily Affirms Judge Ginsburg as Justice*, N.Y. TIMES, Aug. 4, 1993, at B8.

¹³¹ Neil A. Lewis, *Ginsburg Deflects Pressure to Talk on Death Penalty*, N.Y. TIMES, July 23, 1993, at A1.

¹³² See *Excerpts From Senate Hearings on Ginsburg Supreme Court Nomination*, N.Y. TIMES, July 23, 1993, at A8 ("I think rank discrimination for any reason — hair color, eye color, you name it — rank discrimination is un-American for whatever reason. If you have a classification, there has to be a reason. . . .").

¹³³ Neil A. Lewis, *Ginsburg Embraces Right of a Woman to Have Abortion*, N.Y. TIMES, July 22, 1993, at A1.

Similarly, there is little basis for expecting her judicial style to subvert her effectiveness in the manner of Justices Scalia and Thomas. President Clinton appointed Ginsburg, in part, because her appellate court performance demonstrated that she could work very effectively within collegial, group decision-making process. Clinton nominated her with the explicitly-stated expectation that “she will be . . . a force for consensus-building on the Supreme Court, just as she has been on the Court of Appeals, so that our judges can become an instrument of our common unity in the expression of their fidelity to the Constitution.”¹³⁴ Ginsburg’s testimony seemed to confirm that she placed a high value on collegiality and may, in fact, regard collegiality within the Court as sometimes more important than the substantive outcome of a case.¹³⁵ Thus she seems likely to be the antithesis of Justices Scalia and Thomas, and therefore she should work actively to develop opinions that will appeal to a majority of justices.

The one way in which Ginsburg’s Supreme Court performance may differ from Clinton’s expectations is in her belief in a restrained judicial role; a belief that may lead her to endorse conservative outcomes that are unpopular with liberal Democrats who supported her nomination. Just as Justice Souter’s performance has been more liberal than many Republicans had hoped, Justice Ginsburg’s performance may deviate from the expectations of her appointing president. During her confirmation hearings, Ginsburg disclaimed any judicial monopoly over guardianship of the Constitution¹³⁶ and she

¹³⁴ *Transcript of President’s Announcement and Judge Ginsburg’s Remarks*, *supra* note 7, at A24.

¹³⁵ See Lewis, *supra* note 133, at A11.

In her slow cadence, Judge Ginsburg also offered a glimpse into her emphasis on the importance of judges’ going along with their colleagues’ views. She suggested that unanimity on a court can sometimes be nearly as important as the merits of a case.

... Judge Ginsburg said, “This is an area where style and substance meet.” She said she believed that judges should avoid taking zealous positions and should avoid writing overwrought opinions criticizing their colleagues. “You should say to yourself ‘Is this conflict really needed?’” she said. She also suggested that when confronted with disagreement from a fellow judge, one should “pause and rethink your own views.”

Judge Ginsburg’s interest in collegiality was a factor that made her an attractive Supreme Court candidate. But her tendency to elevate collegiality to a substantive issue has also earned her some criticism from lawyers who have said that courtesy may be a fine value but that a judge should not abandon or tailor her beliefs to please colleagues. One comment that Judge Ginsburg made today is likely to bolster those critics. She said that a judge who is inclined to disagree might stop and think: “Is this a case where it really doesn’t matter which way the law goes as long as it’s clear?”

Id.

¹³⁶ See *Excerpts From Senate Hearings on Ginsburg Nomination to Supreme Court*, N.Y. TIMES, July 21, 1993, at C26, C27.

Supreme Court justices are guardians of the great charter that has served as our nation’s fundamental instrument of government for over 200 years. . . . But the justices do not guard constitutional rights alone; courts share that profound responsibility with Congress, the President, the states, and the people. The constant realization of a more perfect union, the Constitution’s aspiration, requires the widest, broadest, deepest participation on matters of government and government policy.

Id.

explicitly acknowledged that courts' have a limited capacity to effectively make and enforce public policy.¹³⁷ Ginsburg expressed fears that legal victories may be fleeting if courts move too fast and too far ahead of the other institutions in society.¹³⁸ Because commentators who analyzed her confirmation hearing testimony concluded that "Ginsburg's approach [to judging] should enable her to fit comfortably on the current Court, near the center now inhabited by Justices Sandra Day O'Connor, David Souter, and less consistently, Anthony M. Kennedy,"¹³⁹ it appears likely that Ginsburg may be more conservative on some issues than President Clinton realizes.

It is impossible to predict with any degree of accuracy whether and to what extent a Supreme Court justice will fulfill the expectations of his or her appointing president. As illustrated by the examples of justices serving on the Rehnquist Court, unfulfilled presidential expectations can be generated by a variety of causes. Although presidents cannot control the performance of their appointees to the Supreme Court, they can learn from the experiences of their predecessors when they consider potential nominees. For example, while any justice may embark on a Blackmun-esque voyage of self-discovery and transformation, presidents may diminish the risk of unexpected changes in judicial decision making by appointing new justices who possess broad experience in facing the complex issues of a heterogeneous society rather than individuals from narrow professional backgrounds and limited personal experiences. Judicial officers who lack concrete exposure to and understanding of societal problems may either change unexpectedly or produce opinions that are disconnected from the human society that is affected by judicial decisions.¹⁴⁰ Similarly, the lesson offered by the judicial performances of Justices Scalia and Thomas is that a president must recognize not only the human society from which a justice is drawn and which will be affected by judicial decisions, but also the human environment within the high court in which nine individuals interact with each other (or fail to do so) in shaping opinions. Because Scalia's "no-compromise approach... often isolates him from his colleagues and prevents him from leading the court's slowly maturing conservative majority,"¹⁴¹ presidents should consider whether subsequent nominees should be selected, as Ginsburg was, with an eye toward effective participation in a collegial decision-making environment.

¹³⁷ Linda Greenhouse, *A Sense of Judicial Limits*, N.Y. TIMES, July 22, 1993 AT A1, A11.

¹³⁸ *See id.* ("In [Ginsburg's] view, equality — or any other goal — is best achieved if all branches of government have a stake in achieving it. If courts move too fast, a legal victory may be fleeting and the political support necessary to sustain it may not develop.").

¹³⁹ *Id.*

¹⁴⁰ Christopher E. Smith, *Federal Judicial Salaries: A Critical Appraisal*, 62 TEMP. L. REV. 849, 865-66 (1989). If judicial officers are not insulated from and out of touch with the lives of their fellow citizens, they may "better . . . comprehend and address the human problems which the judiciary confront." *Id.* at 866.

¹⁴¹ Kaplan & Cohn, *supra* note 68, at 62.

Justice Ginsburg's performance on the Supreme Court will write the next chapter in the evolving lesson book for presidents who must select new appointees to the high court. Hopefully, as presidents study the pitfalls of predicting the future decisions of their nominees, they will remember that history will ultimately judge each justice — and each appointing president — according to the impact of Supreme Court decisions on American society, not according to the justice's fulfillment of an appointing president's expectations. If this larger lesson is learned and remembered, then presidents may diminish their concerns for short-term political gains and focus greater attention on potential nominees' judicial role conceptions and ability to work within a collegial decision-making environment.

