Would McCain Change the Court?

Would McCain nominate judges who would change the present ideological mix of the court and move it in the conservative direction? Would he nominate judges who vote to overturn precedents such as the 1973 *Roe v. Wade* decision that legalized abortion nationwide? McCain says that this is exactly what he would do. "John McCain believes *Roe v. Wade* is a flawed decision that must be overturned," his campaign website says, "and as president he will nominate judges who understand that courts should not be in the business of legislating from the bench."

McCain supporters are agog about making sure that no more Stephen Breyers and Ruth Bader Ginsburgs are appointed to the court (overlooking, or not knowing, the fact that McCain voted for both nominations), and are adamant that only a vote for McCain will save us from that fate. This includes even conservative-minded Americans who disagree with McCain's positions on other issues such as immigration "reform" (he supports amnesty for illegal aliens though he does not call it that), but who believe that, as a *Republican*, he would at least nominate conservative judges.

However, contrary to the conventional wisdom, the historical record shows that most Republican-appointed Supreme Court justices over the last century have abandoned the restraints on government power set forth in the Constitution. Moreover, McCain's own positions and pronouncements do not give a lot of hope that he would break this pattern, his campaign rhetoric to the contrary notwithstanding.

Looking Back

Before considering further the kind of justices McCain might nominate as president, let's first survey the historical record of past and present GOP-nominated Supreme Court justices. For those of us who have always heard that Republicans nominate conservative justices, this record should surprise — even shock.

Republican President Herbert Hoover appointed Charles Evans Hughes as chief justice of the Supreme Court in 1930. This despite the fact that long before this appointment Justice Hughes had opined: "We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution." Such relativistic language, placing no authority in the actual words of the Constitution, but only in "what the judges say it is," is the essence of legal positivism — the legal theory that has led to the worst excesses of judicial tyranny in the last century.

Hughes' record as governor of New York prior to being appointed chief justice, demonstrated his long-held belief in government control of many of aspects of life. For example, he advocated that the government set mandated freight rates for railroads, a harbinger that he was an opponent of the free

market. As chief justice, Hughes affirmed most of Democratic President Franklin D. Roosevelt's extra-constitutional New Deal legislation.

Chief Justice Hughes was assisted in supporting the vast expansion of federal power under FDR by two fellow GOP-appointed justices — Harlan Fiske Stone (nominated by Calvin Coolidge) and Benjamin Cardozo (nominated by Hoover).

Republican President Dwight Eisenhower nominated a string of statist jurists to the High Court during the 1950s — including Earl Warren as chief justice of the United States in 1953. Eisenhower said at the time that he wanted a "conservative" justice and that Warren "represents the kind of political, economic, and social thinking that I believe we need on the Supreme Court." Warren, however, turned out to be one of the most activist chief justices in our history.

Under Earl Warren, the court decided *Brown v. Board of Education*, which used federal power to eliminate discrimination in education by unconstitutionally usurping the power of the states. *Brown* established a great government lie out of whole cloth — that education is a compelling federal government interest, rather than a family and community interest.

The Warren Court found a "right of privacy" lurking somewhere in the emanations and shadows of the Constitution, in a 1965 case called *Griswold v. Connecticut*, upon which the ghastly *Roe v. Wade* abortion case was later based. It also ruled on several cases that outlawed religion in local public life, ostensibly in order not to offend the First Amendment. This was despite the fact that the First Amendment prohibited only the U.S. Congress — not state or local governmental entities — from establishing a religion, and despite the fact that this prohibition was intended to protect the free exercise of religion, not to eradicate religion from the public square. The irony of these decisions is that the Supreme Court itself opens in a prayer ("God save the United States and this honorable Court").

Another Eisenhower appointee, William Brennan, was also a tremendously influential Supreme Court justice, writing nearly 1,400 opinions during his 35 years on the court. He joined the majority in most of the cases that expanded federal power, and that dictated what was permitted or not permitted in civil life. He consistently imposed his own radical political views upon families, communities, and states, rather than being restrained by the limits of the Constitution.

Republican President Richard Nixon appointed Harry Blackmun to the Supreme Court in 1970, who voted conservatively in his first years there. Then, in 1973, he wrote the infamous *Roe v. Wade* decision, which nullified all state anti-abortion laws in a single stroke and led to the unrestrained murder of tens of millions of babies.

Republican President Gerald Ford appointed Justice John Paul Stevens to the court in 1975. Stevens, the judge who is always seen with a bow tie, has now been on the bench for 33 years, and during that time he has become one of the most liberal justices ever to sit on that institution.

Republican super-hero Ronald Reagan appointed Sandra Day O'Connor and Anthony Kennedy to the Supreme Court in 1981 and 1988 respectively. Both voted to strike down state restrictions on abortion (*Planned Parenthood v. Casey*) and state anti-sodomy laws (*Lawrence v. Texas*), and to uphold the McCain-Feingold campaign finance (anti-free-speech) law. Also, both have gone on record favoring the use of international law to interpret our Constitution. Recently, Kennedy wrote the opinion that ruled that the death penalty was unconstitutional for a man who raped an eight-year-old child, citing "evolving standards of decency" in the United States (*Kennedy v. Louisiana*).

Republican President George H.W. Bush nominated David Souter to the U.S. Supreme Court in 1990.

Souter was touted as a "home run for conservatism" by his home-state Republican senator, John Sununu of New Hampshire. Once approved, Souter did side with conservatives for a couple of years, but then flipped like a light switch, voting against abortion restrictions, against state laws prohibiting sodomy, against private property, and for gun regulation. Illustrating the fleeting nature of political alignments, the then-National Organization for Women president, Molly Yard, testified at Souter's confirmation hearing that he would "end … freedom for women in this country." Souter has since become a darling of the radical feminists.

Republican presidents have appointed justices to the Supreme Court who generally do not reflect the official positions of the Republican Party, namely limited government, personal responsibility, lower taxes, respect for life, etc. The Republican-appointed justices mentioned above are just the beginning of a long list of such appointees who have rejected the basic philosophy of the GOP. This writer's review of the records of all Supreme Court justices appointed by Republican presidents in the last 100 years shows that, by a large margin, they have been liberals and statists, rather than conservatives or conservative libertarians.

By 1992, at the beginning of the Clinton presidency, eight of the nine Supreme Court justices were Republican appointees. Yet, the court continued its destructive pattern of trampling on property rights, disrespecting the right to life, expanding state power, disregarding family and local autonomy, and (in general) imposing unconstitutional rulings. There was little attempt to restrain the unconstitutional excesses of the president or Congress.

While "liberal" jurists, once appointed, tend to stay liberal jurists, freedom-minded conservatives often seem to "grow" in office. They learn to reflexively default to the power of the state in cases involving property rights, while becoming excessively libertine in cases involving individual rights. They rarely look to the actual language of the Constitution to inform their decisions, and they increasingly rely on international law as their foundation. Moreover, they almost never restrain their intervention to only those issues and powers granted to the Supreme Court under the Constitution.

What Would McCain Do?

If John McCain is elected president, what kind of Supreme Court justices would he likely nominate? Would he break the pattern of past Republican presidents and nominate judges who respect the Constitution?

McCain's campaign website says that "Chief Justice John Roberts and Justice Samuel Alito will serve as the model for John McCain's judicial nominees." But what kind of model do they provide? Would justices fitting this mode operate within the restraints of the Constitution? Would they vote to overturn *Roe v. Wade* if given the opportunity?

Roberts and Alito are President George W. Bush's last two Supreme Court appointments, and not enough time has passed to tell whether they will impress or disappoint their conservative patrons. However, their testimonies during their respective confirmation hearings were revealing. Roberts said during his confirmation hearings that *Roe v. Wade* is "settled as a precedent of the court, entitled to respect under principles of *stare decisis* [Latin for 'stand by a decision']." Alito said he would approach the issue of *Roe* the way he would "every legal issue I approach as a judge, and that is to approach it with an open mind." An open mind is not an admirable quality when life is at stake.

Nor has McCain himself been consistent on the issue of *Roe*. In 1999, he told the *San Francisco Chronicle* that "certainly in the short term, or even the long term, I would not support repeal of *Roe vs.*

Wade, which would then force women in America to [undergo] illegal and dangerous operations." That statement, of course, contradicts what he has said on other occasions, as well as what he has done by voting to approve two virulently pro-*Roe* justices, Ginsburg and Breyer.

McCain's campaign website says that his judicial nominees "will be faithful in all things to the Constitution and understand that there are clear limits to judicial and federal power." However, McCain's voting record in the Senate often demonstrates the opposite.

McCain was one of the main sponsors of the McCain-Feingold legislation that restricts political free speech during elections under the banner of campaign finance reform. In the name of fighting terrorism, he has also supported the Patriot Act, the Military Commissions Act, and President Bush's warrantless electronic searches, all of which ignore the Constitution's limitations on police and surveillance powers. During the current Congress (to date), Senator McCain has scored an anemic 40 percent in THE NEW AMERICAN'S "Freedom Index," which rates all members of the House and Senate on key votes based on the Constitution.

In light of this record, how realistic is it to expect that John McCain would appoint conservatives to the bench?

Do We Want "Conservative" Justices?

Do constitutionalists really want "conservatives" on the bench? Maybe not. That depends on the definition of "conservative." That definition has become badly muddied, and the current meaning may denote a person who favors fossilization of the present status of overarching federal power, as against family, church, and community self-government. In today's parlance, a conservative judge often supports the *status quo*, even when the *status quo* is immoral, unconstitutional, or even blatantly tyrannical.

By contrast, the recently reposed Russian writer Alexander Solzhenitsyn stated in his 1978 Harvard University commencement address, "A society with no other scale but the legal one is not quite worthy of man either. A society which is based on the letter of the law and never reaches any higher is taking very scarce advantage of the high level of human possibilities. The letter of the law is too cold and formal to have a beneficial influence on society. Whenever the tissue of life is woven of legalistic relations, there is an atmosphere of moral mediocrity, paralyzing man's noblest impulses." Simply stated, the law must reflect true moral righteousness, rather than just embrace precedent for the sake of settled law.

Strange incongruities arise when attempting to define "conservative" jurisprudence. Do conservatives believe in security to the detriment of individual liberty? What about economic liberty, family liberty, and educational liberty? These issues have divided coalitions in ways which defy neatly organized categories.

Those members of the court referred to as "liberals" have little respect for property and gun rights, yet sometimes protect individual rights more fully than the so-called conservatives. However, liberal justices often impose "rights" not found in the Constitution — such as a "right" to abortion or sodomy — that conflict with community and family standards. Then again, so-called conservative justices have done the same. Nixon Supreme Court appointee Harry Blackmun, recall, wrote the *Roe v. Wade* decision.

The Republican-dominated court will not defend the First Amendment-protected free-speech rights of pro-life demonstrators in front of abortion clinics, or the free-speech rights of citizens who wish to

speak out against candidates near election time. “Law and order conservatives” don’t much like the Fourth Amendment, which requires a warrant before entering to find drugs or to take allegedly abused children. Liberals hate prayer in schools, falsely claiming that it violates the First Amendment establishment of religion clause.

These examples show the difficulty in categorizing the actions of the court as liberal or conservative. Few of today’s justices base their decisions on the clear language of the Constitution. Each side has its favored portions and interpretations of the document, and each side tends to ignore the parts which do not fit into its world view.

The Supreme Court has now become a super-legislature, in some ways more powerful than Congress or the president. The court can and does legislate from the bench with impunity, and can also invalidate the laws that Congress passes. Under the theory of legal positivism, the court views the Constitution as an evolving document that can and must be reinterpreted to fit the changing needs of society and our more “enlightened” understanding, and the court manipulates the law accordingly.

Would John McCain nominate justices who reject legal positivism and international relativism, and support a strict construction of the Constitution based on the intent of the Founders? Not likely. Would McCain’s judicial nominees at least be better than those Barack Obama would choose? The evidence examined above suggests that that’s far from certain.

Those persons who acknowledge McCain’s lack of fealty to the Constitution, yet urge us to vote for him for the sake of getting better Supreme Court nominees, should hearken to history.

Update: *At the Saddleback Church forum on August 16, shortly after this article was written, Senator John McCain was asked which existing Supreme Court justices he would not have nominated. He named four: Ginsburg, Breyer, Souter, and Stevens. He did not mention, however, that he had voted to confirm the Supreme Court nominations of Ginsburg, Breyer, and Souter. A good question for Senator McCain is: if he would not have nominated them, why did he vote to approve their nominations? (Justice John Paul Stevens became a Supreme Court justice in 1975, more than a decade before McCain became a U.S. senator.)*