

RELIGIOUS AFFILIATION, PERSONAL BELIEFS, AND THE PRESIDENT'S FRAMING OF JUDICIAL NOMINEES

*Lisa M. Holmes**

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I. INTRODUCTION

The proper role that religious beliefs and personal convictions play in the judicial selection and confirmation process became the subject of great debate in 2005, when President George W. Bush nominated John Roberts and Samuel Alito to positions on the U.S. Supreme Court.¹ Upon confirmation by the Senate, Roberts and Alito became the fourth and fifth Catholics currently serving on the Court, representing the first time in history that a majority of seats on the Court were held by Catholics.² This controversy over the role of personal beliefs in the judicial appointment process echoed a similar situation in 2003 when members of the Senate Judiciary Committee questioned whether it was appropriate to ask William Pryor³ to discuss his personal convictions and religious beliefs during

* Assistant Professor of Political Science, University of Vermont; B.A., University of Vermont; Ph.D., University of Georgia.

1. Sheldon Goldman et al., *Picking Judges in a Time of Turmoil: W. Bush's Judiciary During the 109th Congress*, 90 JUDICATURE 252, 253-54 (2007).

2. Sheldon Goldman, *The Politics of Appointing Catholics to the Federal Courts*, 4 U. ST. THOMAS L.J. 193, 193 (2006).

3. William H. Pryor, Jr., was first nominated by President George W. Bush to a seat on the United States Court of Appeals for the Eleventh Circuit on April 9, 2003. The White House, *Nominations Sent to the Senate* (Apr. 9, 2003), <http://www.whitehouse.gov/news/releases/2003/04/20030409-1.html>. His hearing before

confirmation hearings. Although Pryor's road to obtaining a seat on the court of appeals proved to be more difficult than that faced by either Roberts or Alito when they were nominated to the Supreme Court, each eventually achieved confirmation to lifetime tenured seats on their respective courts.⁴

These appointments highlight a number of questions concerning the interaction between religious beliefs and personal convictions and the judicial nomination and confirmation process. To what extent, if any, do an individual's religious convictions influence whether that person is nominated to a seat on the federal judiciary? Is it appropriate for members of the Senate to consider personal beliefs in the confirmation process? Should a nominee be asked specific questions about his religious convictions and whether they may influence that judge's behavior on the bench? These questions are undoubtedly important in assessing the modern judicial appointment process. However, less attention has been given to the question of whether Presidents choose to use the religious and moral convictions of their nominees when they are selling their nominees to the public.⁵ This Article will examine how recent Presidents have chosen to discuss their nominees for the U.S. Courts of Appeals to the public. Given the regularity of appointments to these seats—compared to the relatively few seats that have turned over on the Supreme Court in recent years—and the controversy that arose over the questioning of

the Senate Judiciary Committee was held on June 11, 2003. *Confirmation Hearing on the Nominations of William H. Pryor, Jr. to Be Circuit Judge for the Eleventh Circuit and Diane M. Stuart to Be Director, Violence Against Women Office, Department of Justice Before the S. Comm. on the Judiciary*, 108th Cong. 1 (2003) [hereinafter *Pryor Confirmation Hearing*].

4. William Pryor received a recess appointment by President Bush on February 20, 2004. The White House, Judicial Nominations: Judge William H. Pryor Jr., <http://www.whitehouse.gov/infocus/judicialnominees/pryor.html> (last visited Apr. 9, 2008). His nomination to the seat to which he was recess appointed was returned to the President on December 8, 2004. 150 CONG. REC. S12087 (daily ed. Dec. 8, 2004). Upon renomination by the President on February 14, 2005, Pryor was confirmed by the Senate by a vote of fifty-three to forty-five on June 9, 2005. 151 CONG. REC. S6284 (daily ed. June 9, 2005) (roll call vote); The White House, Nominations Sent to the Senate (Feb. 14, 2005), <http://www.whitehouse.gov/news/releases/2005/02/20050214-7.html>.

5. The concept of "selling" judicial nominees was developed in JOHN ANTHONY MALTESE, *THE SELLING OF SUPREME COURT NOMINEES* 11 (1995). Maltese argues that recent presidents "have an unprecedented ability to communicate directly with the American people, to mobilize interest groups, and to lobby the Senate." *Id.* at 11.

William Pryor's personal beliefs when he was nominated to the court of appeals,⁶ attention to whether and in what way Presidents discuss their nominees' personal beliefs are important issues to consider.

Part II of this Article focuses on changes in the modern lower court appointment process and provides background to the controversy over the confirmation hearing for Judge Pryor. Part III examines President George W. Bush's public response to the questioning of Pryor and his evolving reaction to the controversy concerning the role of religious beliefs in the confirmation process. In Part IV, previous research on why and how Presidents discuss their nominees to the courts of appeals is addressed, with an examination of how Democratic and Republican Presidents differ with respect to how they choose to discuss their nominees in public. Part V is devoted to the question of whether recent Presidents discuss the religious beliefs of their nominees to the courts of appeals. As well, the Presidents' framing of their public comments about judicial nominees is considered. Lastly, Part VI provides some thoughts on how future Presidents may choose to discuss their nominees to these seats and discusses some of the potential implications of the current state of political discourse over lower court nominees.

II. THE MODERN APPOINTMENT PROCESS AND THE PRYOR NOMINATION

The process by which judges are appointed to the lower federal courts has changed a great deal in recent decades. These changes have influenced Presidents' choices of nominees, the nominees' treatment by the Senate, and the role of organized interests in both aspects of the appointment process. With respect to a President's approach to the selection of nominees, Sheldon Goldman has distinguished "between a president's policy agenda, partisan agenda, and personal agenda" in approaching judicial selection decisions.⁷ Presidents who focus on the policy agenda attempt to achieve substantive policy goals through their appointments.⁸ Those who prioritize the partisan agenda work to shore up support for themselves or their parties through judicial appointments, while those who follow a personal agenda are looking to help a friend or associate.⁹

6. See William H. Pryor, Jr., *The Religious Faith and Judicial Duty of an American Catholic Judge*, 24 *YALE L. & POL'Y REV.* 347, 377 (2006) (recounting the Senate Judiciary Committee's questioning of Pryor's religious beliefs).

7. SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* 3 (1997).

8. *Id.*

9. *Id.*

In recent decades, efforts by Presidents Carter and Clinton to diversify the federal bench demonstrate the intent of Democratic Presidents to pursue the partisan agenda as a means of appealing to groups important to their party's electoral circumstances.¹⁰ Although recent Republican Presidents have expressed an interest in diversifying the federal bench,¹¹ Republicans have generally followed the policy agenda by appointing strong conservatives to the lower courts.¹² This move away from a historical emphasis on the personal agenda through patronage appointments to Presidents hoping to achieve diversity or policy goals have made judicial appointments a broader and greater part of a President's agenda and legacy.

This shift in presidential attention to appointments to the lower courts has been matched by alterations in the Senate confirmation process. Historically, the Senate's "advise and consent" role was largely routine, particularly with respect to lower federal court appointments.¹³ However, as the nominee selection process became influenced by Presidents' increased desire to pursue policy and partisan goals through judicial appointments, lower court nominees became the subject of greater scrutiny by the Senate.¹⁴

Since 1995, when the "Republican Revolution" returned control of the Senate to Republicans early in the Clinton Administration, the confirmation process has been subjected to unprecedented delay and defeat of lower court nominees, especially for those nominated to the

10. See Goldman, *supra* note 2, at 211, 214 (discussing President Carter's and Clinton's appointments of women and minorities to federal courts).

11. See *id.* at 212-13 (outlining the Reagan Administration's courting of Hispanic voters in the 1984 election). Among Republican Presidents, President George W. Bush has been particularly active in appointing diverse judges. See Goldman et al., *supra* note 1, at 275-76, 281. In his public speeches, President Bush has tended to draw some public attention to his efforts to diversify the bench. See Lisa M. Holmes, *Why 'Go Public'? Presidential Use of Nominees to the U.S. Courts of Appeals*, 38 PRESIDENTIAL STUD. Q. 110, 119 (2008).

12. See Goldman, *supra* note 2, at 217-18 (discussing the lure for Republicans of appointing conservative Catholics to the lower courts).

13. DAVID M. O'BRIEN, JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION 66-69 (1988).

14. Elliot E. Slotnick & Sheldon Goldman, *Congress and the Courts: A Case of Casting*, in GREAT THEATRE: THE AMERICAN CONGRESS IN THE 1990s 197, 197-98 (Herbert F. Weisberg & Samuel C. Patterson eds., 1998); Roger E. Hartley & Lisa M. Holmes, *Increasing Senate Scrutiny of Lower Court Nominees*, 80 JUDICATURE 274, 274-75 (1997).

courts of appeals.¹⁵ During the current Bush Administration, although many nominees to the courts of appeals have been confirmed, the President and some in the Senate have engaged in long-term battles over particular individuals nominated repeatedly by the President.¹⁶ In his year-end report on the federal judiciary in both 1997 and 2001, Chief Justice Rehnquist touched on the conflict in the lower court appointment process, connecting it to his concerns over workload and judicial recruitment.¹⁷

A third important shift in the appointment process for lower court judges in recent decades has been the increased participation of organized groups in the appointment process, at both the nomination and confirmation stages.¹⁸ Beginning in the mid-1980s, the number of lower court nominees subjected to interest group opposition increased

15. Wendy L. Martinek et al., *To Advise and Consent: The Senate and Lower Federal Court Nominations, 1977–1998*, 64 J. POL. 337, 339–40 (2002) (“[T]he mean number of days from nomination to confirmation during the first six years of the Clinton administration [was] more than double that of the Reagan administration”); see also Sarah A. Binder & Forrest Maltzman, *Senatorial Delay in Confirming Federal Judges, 1947–1998*, 46 AM. J. POL. SCI. 190, 197–98 (2002) (“Particularly during periods of divided government, the majority party exploits its scheduling powers to restrain presidents from shifting the ideological tenor of the federal bench against the views of the majority party.”).

16. Some of the nominees who would become the subjects of such long-term contention, including Charles Pickering and Priscilla Owen to the Court of Appeals for the Fifth Circuit and Miguel Estrada to the Court of Appeals for the District of Columbia, were among President Bush’s earliest referrals to the Senate. Lisa Holmes & Elisha Savchak, *Judicial Appointment Politics in the 107th Congress*, 86 JUDICATURE 232, 238 (2003). This ongoing discord eventually led to the controversial proposal, referred to by Democrats as the “nuclear option,” to change the filibuster rule with respect to appointments to a simple majority vote. See Goldman et al., *supra* note 1, at 264. The nuclear option was staved off by the bipartisan “Gang of 14” senators who negotiated a compromise that filibustering judicial nominees would only occur in “extraordinary circumstances.” *Id.* at 264–65.

17. William H. Rehnquist, *The 1997 Year-End Report on the Federal Judiciary*, THIRD BRANCH (Admin. Office of the U.S. Courts, Washington, D.C.), Jan. 1998, at 2–3, available at <http://www.uscourts.gov/ttb/jan98ttb/january.htm>; William H. Rehnquist, *The 2001 Year-End Report on the Federal Judiciary*, THIRD BRANCH (Admin. Office of the U.S. Courts, Washington, D.C.), Jan. 2002, at 2–3, available at <http://www.uscourts.gov/ttb/jan02ttb/jan02.html>.

18. For a general assessment of the role of interest groups in the modern lower court appointment process, see LAUREN COHEN BELL, *WARRING FACTIONS: INTEREST GROUPS, MONEY, AND THE NEW POLITICS OF SENATE CONFIRMATION* 67–87 (2002); NANCY SCHERER, *SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS* 108–132 (2005).

dramatically.¹⁹ With the increased importance of the courts of appeals to the development of legal policy and the relative rarity with which appointments to the Supreme Court occur, interest groups with both liberal and conservative agendas have turned their attention to appointments to the courts of appeals.²⁰

With all of the increased interest in appointments to the lower courts, it is unsurprising that the relevance of a nominee's religious convictions would be of interest to those responsible for confirming judges. Although this debate has been discussed most recently with respect to the appointments of Chief Justice Roberts and Justice Alito, it was arguably more intense and controversial with respect to Judge Pryor's nomination to the Court of Appeals for the Eleventh Circuit.²¹ During the hearings on his nomination, Pryor was asked by Senator Charles Schumer (D-NY) about his "deeply" and "passionately" held views.²² In addition, concern was expressed by Senator Richard Durbin (D-IL) that Pryor demonstrated "an ambivalence when it comes to the whole question of asserting the rights of those who don't happen to be Christian to practice their religion in this diverse Nation."²³ Both Senator Durbin and Senator Dianne Feinstein (D-CA) questioned Pryor on statements he had made concerning his views of the Christian influence on the Constitution and Declaration of Independence.²⁴

These questions drew a sharp rebuke from Judiciary Committee Chairman Orrin Hatch (R-UT). Hatch first asked Pryor to state his

19. SCHERER, *supra* note 18, at 3–4.

20. *Id.* at 19–20.

21. Judge Pryor provided a brief synopsis of his questioning by senators on the Judiciary Committee in a recent article on faith and judging. *See* Pryor, *supra* note 6, at 347–48. Judge Pryor was not the first Bush nominee to the lower courts whose religious beliefs were the subject of interest. For example, after President Bush nominated J. Leon Holmes to the District Court for the Eastern District of Arkansas in early 2003, some of Holmes' writings concerning a woman's place in marriage were criticized. *See, e.g.,* Charles Hurt, *Senate Showdown Set for Judge Pick: Catholic Track Disturbs Democrats*, WASH. TIMES, July 6, 2004, at A1. Holmes' hearing before the Senate Judiciary Committee was held on March 27, 2003. *Confirmation Hearings on Federal Appointments Before the S. Comm. on the Judiciary*, 108th Cong. 747 (2003). Subsequently, at an April 1 Committee hearing, Senator Charles Schumer (D-NY) criticized Holmes' views on abortion—"Mr. Holmes has said that rape leads to pregnancy about as often as it snows in Miami."—and noted that Holmes also said "that women are obligated to subjugate themselves to their husbands." *Id.* at 1069.

22. *Pryor Confirmation Hearing, supra* note 3, at 12.

23. *Id.* at 89.

24. *Id.* at 76, 90.

religious affiliation and to confirm his active participation in the church as a practicing Catholic, before leading Pryor to discuss his belief in following the law.²⁵ Hatch then rebuked other committee members who “make such a fuss against people just because you disagree with them.”²⁶ Ranking Democrat Patrick Leahy (VT) responded by harshly criticizing Hatch’s specific questioning of Pryor’s religion.²⁷ Senator Hatch defended his questioning:

[S]ome of the questions that come up clearly go to that issue. And I just wanted to make it very clear that he is a very strong Catholic who believes in what he is doing, but yet has abided by the law, and that is a very important point because some of the criticisms have been hitting below the belt, frankly.²⁸

Subsequently, Democratic senators who opposed Pryor’s nomination were accused of being biased against his Catholic beliefs.²⁹ This criticism extended to advertisements sponsored by groups alleging that “Catholics need not apply” to judicial positions.³⁰ Democrats responded by arguing that they opposed Pryor’s record on issues like abortion—they did not oppose his faith.³¹ Senator Leahy released a statement condemning these ads as “unfounded” and “despicable,” and challenging Republican members of the Judiciary Committee “to condemn this ad campaign and the injection of religion into these matters.”³² Clearly, the question of the role that William Pryor’s religious beliefs played in the judicial appointment process was raised, and accusations of bias and inappropriate behavior among senators and organized groups in the confirmation process were being leveled by both sides. Given the state of affairs over this nomination, this Article now turns to an assessment of the President’s response to the treatment of his nominee.

25. *Id.* at 104–05.

26. *Id.* at 105–06.

27. *Id.* at 107.

28. *Id.*

29. Robin Toner, *Accusation of Bias Angers Democrats*, N.Y. TIMES, July 27, 2003, at 18.

30. Pryor, *supra* note 6, at 347–48 (citing Charles Hurt, *Democrats Target Religious Belief of Bush Judicial Nominee*, WASH. TIMES (Nat’l Wkly. Ed.), July 28, 2003, at 5).

31. Toner, *supra* note 29, at 18.

32. Patrick Leahy, Statement on the Nomination of William Pryor—Cloture Vote (July 30, 2003), <http://leahy.senate.gov/press/200307/073103a.html>.

III. PRESIDENT BUSH'S PUBLIC RESPONSE TO DEBATE ABOUT PRYOR'S BELIEFS

When public debate surfaced concerning Pryor's religious beliefs and his confirmation hearing in the summer of 2003, there was no immediate statement made by the President in the wake of the hearing or in response to the controversy that arose. Five months after the confirmation hearing that caused so much discord, President Bush made his first public remarks in support of William Pryor's nomination.³³ In these remarks, the President made no comment concerning Pryor's faith, the questioning of him before the committee, or the political fallout from the hearing.³⁴ Rather, President Bush stated:

I have nominated really good, honest people like Bill Pryor. Bill Pryor will make a fantastic judge on the court of appeals. Because of a small group of Senators who are willfully obstructing the process, some of my nominees, like Bill, have had to wait months, in some cases, even years, for an up-or-down vote.³⁵

The President made no further public reference to Pryor's nomination until February 2004, when the President used his power to make recess appointments to place Pryor on the bench.³⁶ The President issued a brief statement announcing Pryor's appointment and criticizing the "unprecedented obstructionist tactics" utilized by "a minority of Democratic Senators" in an attempt to prevent Pryor's confirmation.³⁷ Again, no specific comment was made concerning Pryor's beliefs.³⁸

Before Pryor's eventual confirmation by the Senate on June 9, 2005, the President made one more public comment about this nominee, at a news conference on May 31, 2005.³⁹ In his remarks, the President mentioned his pleasure at Priscilla Owen's confirmation to a seat on the U.S. Court of Appeals for the Fifth Circuit, and simply stated that "Pryor

33. Remarks at a Bush-Cheney Luncheon in Birmingham, Alabama, 39 WEEKLY COMP. PRES. DOC. 1531, 1534 (Nov. 3, 2003).

34. *See id.* at 1534.

35. *Id.*

36. Statement on the Appointment of William H. Pryor, Jr., to Serve on the United States Court of Appeals for the Eleventh Circuit, 40 WEEKLY COMP. PRES. DOC. 259 (Feb. 20, 2004).

37. *Id.*

38. *See id.*

39. The President's News Conference, 41 WEEKLY COMP. PRES. DOC. 903 (May 31, 2005).

and Judge Brown will be coming up pretty soon, I hope, and I would hope they would get confirmed as well. They're good judges."⁴⁰ Similarly, on June 14, 2005, days after both Pryor and Brown were confirmed by the full Senate, the President noted the recent confirmations of Pryor, Brown, and Owen and stated his intent to "continue to urge the Senate to fulfill its constitutional responsibility by giving every judicial nominee an up-or-down vote on the Senate floor" in his remarks at the 2005 President's Dinner.⁴¹

At first glance, the President's remarks at the 2005 President's Dinner appeared to be no different than his previous comments concerning Pryor's nomination and eventual confirmation by the Senate. However, what is notable about the remarks made by the President at this event was the broader context in which he was discussing these nominees. In his President's Dinner speech, the President made a connection between his desire to appoint "judges who faithfully interpret the law, not legislate from the bench"⁴² and his support of a handful of high-profile, conservative issues:

Our party will continue to support the faith-based and community groups that bring hope to harsh places. We'll continue to promote a culture of life in which every person is valued and every life has meaning. And we will defend the institution of marriage from being redefined forever by activist judges.

And speaking about judges, the American people made it clear they want judges who faithfully interpret the law, not legislate from the bench. I applaud Senator Frist and Senator Specter and Senator Hatch and other Members of the United States Senate in confirming some outstanding nominees who have waited a long time for a vote, Priscilla Owen and Janice Rogers Brown and Bill Pryor. I'll continue to urge the Senate to fulfill its constitutional responsibility by giving every judicial nominee an up-or-down vote on the Senate floor.⁴³

In these remarks, the President made no specific mention of the

40. *Id.* at 911–12. Here, the President was referring to Janice Rogers Brown, whom he nominated to a seat on the U.S. Court of Appeals for the District of Columbia on July 25, 2003. The White House, Nominations Sent to the Senate (July 25, 2003), <http://www.whitehouse.gov/news/releases/2003/07/20030725-14.html>.

41. Remarks at the 2005 President's Dinner, 41 WEEKLY COMP. PRES. DOC. 995, 997–98 (June 14, 2005).

42. *Id.* at 997.

43. *Id.* at 997–98.

religious affiliations or moral beliefs of Pryor or the other two recently confirmed judges.⁴⁴ However, he linked his judicial appointment strategy to his promotion of “a culture of life” and other stands on social issues that would resonate with religiously conservative listeners.⁴⁵

By the end of 2007, President Bush would mention William Pryor’s appointment to the court of appeals in one more speech. On November 15, 2007, the President spoke before the Federalist Society’s 25th Annual Gala Dinner.⁴⁶ In his remarks, the President spoke at length about the judicial appointment process, touching on judicial philosophy, problems in the confirmation process for his nominees, and the importance of appointing judges to the federal appellate courts.⁴⁷ In making his comments, the President mentioned not only William Pryor, but also Priscilla Owen, Janice Rogers Brown, Brett Kavanaugh, Leslie Southwick, and Peter Keisler.⁴⁸

In criticizing the treatment of some of his nominees by members of the Senate, the President stated:

[T]he Senate is no longer asking the right question: whether a nominee is someone who will uphold our Constitution and laws. Instead, nominees are asked to guarantee specific outcomes of cases that might come before the court. If they refuse—as they should—they often find their nomination ends up in limbo instead of on the Senate floor. This is a terrible way to treat people who have agreed to

44. *See id.*

45. *See id.*

46. Remarks at the Federalist Society’s 25th Annual Gala Dinner, 43 WEEKLY COMP. PRES. DOC. 1507 (Nov. 15, 2007).

47. *Id.* at 1508–10.

48. *Id.* at 1509. Judge Kavanaugh was confirmed to a seat on the Court of Appeals for the District of Columbia on May 26, 2006. The White House, Judicial Nominations: Judge Brett M. Kavanaugh, <http://www.whitehouse.gov/infocus/judicialnominees/kavanaugh.html> (last visited Apr. 9, 2008). Judge Southwick was confirmed to a seat on the Court of Appeals for the Fifth Circuit on October 24, 2007. The White House, Judicial Nominations: Judge Leslie H. Southwick, <http://www.whitehouse.gov/infocus/judicialnominees/southwick.html> (last visited Apr. 9, 2008). Keisler has been thrice nominated by the President to a seat on the Court of Appeals for the District of Columbia, most recently on January 9, 2007. The White House, Nominations Sent to the Senate (Jan. 9, 2007) <http://www.whitehouse.gov/news/releases/2007/01/20070109-6.html>; *see also* The White House, Nominations Sent to the Senate (Nov. 15, 2006), <http://www.whitehouse.gov/news/releases/2006/11/20061115-3.html>; The White House, Nomination Sent to the Senate (Jun. 29, 2006), <http://www.whitehouse.gov/news/releases/2006/06/20060629-12.html>.

serve their nation. It's a sad commentary on the United States Senate, and every time it happens, we lose something as a constitutional democracy.

Our Constitution prohibits a religious test for any Federal office, yet when people imply that a nominee is unfit for the bench because of the church where he worships, we lose something.⁴⁹

These comments made in 2007, criticizing how the beliefs of some of his nominees were being regarded in the Senate, were particularly interesting given the President's response to specific questions posed to him at a news conference on April 28, 2005. At the news conference, the President was asked to respond to criticisms raised by Tony Perkins, the president of the Family Research Council, concerning filibusters of some nominees.⁵⁰ In his questioning, NBC's David Gregory asked the President:

Mr. President, recently the head of the Family Research Council said that judicial filibusters are an attack against people of faith. And I wonder whether you believe that, in fact, that is what is motivating Democrats who oppose your judicial choices? And I wonder what you think generally about the role that faith is playing, how it's being used in our political debates right now?⁵¹

President Bush answered by stating, "Yes. I think people are opposing my nominees because they don't like the judicial philosophy of the people I've nominated. Some would like to see judges legislate from the bench. That's not my view of the proper role of a judge."⁵² In response to follow-up questions by Gregory, the President refuted Perkins's statement and confirmed his view that his nominees were being opposed because of judicial philosophy, rather than religious beliefs.⁵³

Thus, at a general news conference in 2005, the President refused to discuss an issue that he would subsequently incorporate into a speech before the Federalist Society in late 2007. Of course, the controversy over the appointments of John Roberts and Samuel Alito to the Supreme Court had not yet occurred when the President refused to enter this debate in

49. Remarks at the Federalist Society's 25th Annual Gala Dinner, *supra* note 46, at 1509.

50. The President's News Conference, 41 WEEKLY COMP. PRES. DOC. 683, 686 (Apr. 28, 2005).

51. *Id.*

52. *Id.*

53. *Id.*

April 2005. But the debate associated with certain nominees to the lower courts, including Pryor, had arisen by the time the President was asked these questions in 2005. The President's willingness to engage in this debate in 2007, and his sharp criticism that some in the Senate were implying that nominees may be unfit due to their religious beliefs, represented an important shift in the President's public behavior concerning the treatment of his nominees.

Even though President Bush had generally refused to entertain a discussion of Pryor's treatment by the Senate prior to the remarks he made before the Federalist Society in 2007, he had previously made many general comments concerning a nominee's personal beliefs and convictions, and the relevance of those beliefs to the appointment process. These previous comments, however, were generally directed at his own behavior in the nominee selection process, about which the President regularly stated that he had no litmus test concerning a potential nominee's beliefs on particular issues.⁵⁴ President Bush's assertion that he employed no litmus test in the nominee selection process is understandable given that Presidents routinely avoid any implication that they are employing religious consideration in their deliberations. Sheldon Goldman contends that it would be "unthinkable," for example, for a President "to announce at a news conference that he had directed his Attorney General to find 'some fine, prominent Catholic to nominate.'"⁵⁵ Indeed, President Bush's predecessor used similar language during his presidency in defending his refusal to use any sort of litmus test in the nominee selection process.⁵⁶

54. For example, during a presidential debate against Senator John Kerry (D-MA) in Tempe, Arizona, in 2004, President Bush responded to a question about overturning *Roe v. Wade* by stating that "What he's asking me is will I have a litmus test for my judges, and the answer is no, I will not have a litmus test. I will pick judges who will interpret the Constitution, but I'll have no litmus test." Presidential Debate in Tempe, Arizona, 40 WEEKLY COMP. PRES. DOC. 2364, 2377-78 (Oct. 13, 2004). This echoed a statement that President Bush made at an earlier debate in St. Louis, in which he stated that, with respect to judges, he would have "no litmus test except for how they interpret the Constitution." Presidential Debate in St. Louis, Missouri, 40 WEEKLY COMP. PRES. DOC. 2289, 2307 (Oct. 8, 2004). Furthermore, during the 2004 presidential campaign, President Bush accused Senator Kerry of using a "liberal litmus test" if Kerry were to become President. *E.g.*, The President's Radio Address, 40 WEEKLY COMP. PRES. DOC. 2707, 2708 (Oct. 30, 2004); Remarks in Tampa, Florida, 40 WEEKLY COMP. PRES. DOC. 2732, 2735 (Oct. 31, 2004).

55. Goldman, *supra* note 2, at 195.

56. For example, President Clinton stated that he did not subject Ruth Bader Ginsburg to "any kind of litmus test" when considering her for appointment. Interview with Larry King, 29 WEEKLY COMP. PRES. DOC. 1397, 1401 (July 20, 1993). Similarly,

Modern Presidents, then, are inclined to deny any use of a litmus test in the selection of their nominees based on particular religious or social issues. Research indicates that modern Presidents are in fact not motivated to select nominees to either the Supreme Court or the lower courts based solely on an individual's belonging to a particular religious group.⁵⁷ Rather, the appointment of judges affiliated with particular religious faiths is an indirect consequence of a President's primary agenda concerning judicial appointments.⁵⁸ For recent Democratic Presidents, the appointment of Catholics is the indirect consequence of efforts to diversify the bench by appointing more minorities and women.⁵⁹ For Republican Presidents, on the other hand, the appointment of Catholics furthers an interest in appointing social conservatives, with particular emphasis on the abortion issue.⁶⁰

In analyzing the religious background of a President's judicial nominees, it is also important to remember that the eventual nominee reflects the President's consideration of the political and institutional constraints under which the nomination is made, and that the eventual nominee may not be the President's first choice for selection.⁶¹ Although Presidents work to achieve their particular agenda through appointments to the federal bench, considerations of the public's approval of the nominee and the partisan composition of the Senate, for example, may influence the President's assessment of the potential nominees under consideration.⁶² Additionally, the choice of a nominee is constrained by the preferences of those the President may like to nominate. For example, in filling the seat vacated by Sandra Day O'Connor on the U.S. Supreme Court, the eventual appointment of Samuel Alito, who would become the

at a town meeting in Sacramento in 1993, when asked whether he had changed his position about abortion, President Clinton stated that he had not, but that "I don't think I should have the same standard, if you will, or have just sort of a litmus test for every judge on every last detailed issue that might come before the court under the abortion area." Remarks in a Town Meeting in Sacramento, 29 WEEKLY COMP. PRES. DOC. 1965, 1977 (Oct. 3, 1993).

57. See generally Goldman, *supra* note 2.

58. See *id.* at 218.

59. *Id.* at 214 n.91.

60. See *id.* at 217 (claiming Republican Presidents put "Catholic lawyers and jurists . . . in the pool of potential judicial appointees" because of the Catholic Church's "opposition to abortion").

61. See generally CHRISTINE L. NEMACHECK, STRATEGIC SELECTION: PRESIDENTIAL NOMINATION OF SUPREME COURT JUSTICES FROM HERBERT HOOVER THROUGH GEORGE W. BUSH (2007).

62. *Id.* at 133-40.

fifth Catholic currently serving on the Court, resulted from the reported refusal of two candidates to be considered for nomination, as well as the failed nomination of Harriet Miers.⁶³

Therefore, it is evident that recent nominees to the federal bench are not chosen based on their membership in particular religious groups. They are selected based on a consideration of a variety of factors, including the political climate under which the nomination is being made, the willingness of individuals to be considered for appointment, and whether they help the President achieve the particular partisan or policy agenda he is hoping to further. That being said, once a nomination is made to the lower courts by the President, less is known concerning how the President chooses to sell his nominees to the public. In particular, given the ongoing controversy over the relevance of nominee beliefs in the confirmation process, as well as the rejection by recent Presidents of the use of litmus tests in nominee selection, it is worth considering if recent Presidents ever rely on the personal convictions or religious beliefs of their nominees when discussing them in public.

IV. PUBLIC SUPPORT OF COURTS OF APPEALS NOMINEES BY PRESIDENTS

Until recent years, Presidents rarely discussed their individual nominees to the U.S. Courts of Appeals in public.⁶⁴ With increased interest and contention in the lower court appointment process, Presidents have begun to make more use of public comments in support of their nominees to the courts of appeals in recent years.⁶⁵ A President's public show of support for an individual nominee, however, does not serve to improve that individual's chances of being confirmed, and some evidence exists that this public support actually decreases the likelihood of confirmation success.⁶⁶

63. *Id.* at 144.

64. For a more complete analyses of how recent Presidents discuss their nominees to the courts of appeals in public, see Lisa M. Holmes, *Presidential Strategy in the Judicial Appointment Process: "Going Public" in Support of Nominees to the U.S. Courts of Appeals*, 35 AM. POL. RES. 567 (2007); Holmes, *supra* note 11. This section draws from both of these sources.

65. Presidents began to discuss their nominees to the courts of appeals in public more regularly beginning in 1999. Holmes, *supra* note 64, at 573-74. Regular public attention to such nominees continued throughout the remainder of Clinton's presidency and throughout the current Bush presidency. *Id.* at 574.

66. *Id.* at 583-87.

When Presidents discuss their nominees to the courts of appeals in public, they appear to have goals in mind beyond influencing the confirmation prospects of the nominees. Recent Presidents have also used their nominees to gain favor with their core constituents and like-minded groups.⁶⁷ The general public remains largely uninformed and uninterested in nominations to the lower courts.⁶⁸ Core constituents and interest groups, however, are highly interested and engaged in the selection of judges to the lower courts.⁶⁹ Thus, Presidents tend to mention their lower court nominees when speaking to core election supporters at campaign events, to organized groups, or to audiences that would be particularly receptive to discussion of a nominee's race or gender.⁷⁰

As discussed previously, however, recent Democratic Presidents have tended to have different agendas in mind than have recent Republican Presidents when approaching the judicial appointment process.⁷¹ Given that Democratic Presidents have been interested in selecting nominees with an eye toward currying favor with members of demographic groups important to their party's electoral success, it is understandable that Democratic Presidents regularly tout the diversity of their nominees when speaking of them publicly.⁷² Republican Presidents, on the other hand, make occasional reference to a nominee's gender or race, but more regularly use the treatment of their nominees to criticize those in the Senate or to mobilize listeners to vote for Republican candidates.⁷³

In the era of increased conflict and contention in the lower court appointment process, Presidents have begun to make more regular use of their nominations to the courts of appeals. Public statements, however, have not been made solely in the hopes of achieving confirmation for troubled nominees. Rather, Presidents discuss their nominees before narrow audiences of interested supporters or groups, and the message that a President intends to convey in discussing nominees to the courts of appeals is largely party-specific. Democratic Presidents further their agenda of courting favor with members of important demographic groups

67. Holmes, *supra* note 11, at 120.

68. See SCHERER, *supra* note 18, at 21 ("Why, then, would elected officials invest so much political capital in the lower court appointment process if their constituents are not paying attention?").

69. *Id.* at 21–23.

70. Holmes, *supra* note 11, at 116–17.

71. See *supra* notes 10–12 and accompanying text.

72. Holmes, *supra* note 11, at 119.

73. *Id.*

by promoting the diversity of their nominees. Republican Presidents, on the other hand, discuss their nominees to motivate core electoral supporters and to criticize the treatment of their qualified nominees by those in the Senate. Given these findings, it may be more appropriate to discuss a President's manner of "framing" his discussion of nominees to the courts of appeals in the modern, contentious appointment process rather than discuss how Presidents "sell" their nominees to these seats. When Presidents discuss nominees in order to achieve goals other than Senate confirmation, and the goals to be achieved are party-specific, it is proper to think about how Presidents frame their comments about lower court nominees. In particular, with the ongoing controversy over the role of the personal and religious beliefs of nominees in the confirmation process, it is important to determine whether considerations of a nominee's religious or personal convictions are used in framing a President's public discussion of his nominees.

V. DO PRESIDENTS DISCUSS NOMINEES' BELIEFS IN PUBLIC?

In order to examine whether Presidents discussed their nominees' religious beliefs or personal convictions, presidential speeches referring to all individuals nominated to the U.S. Courts of Appeals from 1977 to 2007 were collected from *The Weekly Compilation of Presidential Speeches* and *The Public Papers of the Presidents*.⁷⁴ All presidential speeches, press conferences, and remarks with reporters were searched to identify instances in which Presidents made reference to one or more individual nominees in the context of the appointment process. Given that Presidents at times discuss nominees prior to their referral to the Senate, or subsequent to final action—confirmation or withdrawal, for example—all presidential remarks were considered, regardless of when in the appointment process the President discussed the nominee.⁷⁵ However, speeches discussing a nominee in any context outside of that nominee's appointment to the U.S. Court of Appeals were excluded.⁷⁶

74. Nominees to the U.S. Court of Appeals for the Federal Circuit were excluded from the analysis due to the Federal Circuit's status as a specialized jurisdictional court. See ROBERT A. CARP ET AL., *JUDICIAL PROCESS IN AMERICA* 35 (7th ed. 2007) (summarizing the limited jurisdictional bounds of the Federal Circuit).

75. See Holmes, *supra* note 11, at 114–16.

76. For example, only speeches in which President Bush discussed his appointment of John Roberts to the Court of Appeals for the District of Columbia were included in this analysis. Speeches related to Roberts's subsequent appointment to the U.S. Supreme Court were excluded.

From 1977 through 2007, Presidents discussed thirty-six different nominees to the courts of appeals during a total of ninety-five speeches, with most of these speeches being made by Presidents Clinton and George W. Bush, during whose presidencies the appointment process has been most contentious. Examination of these speeches provides support for Sheldon Goldman's contention that it would be "unthinkable" for a President to tout publicly that he was motivated by religious considerations when selecting nominees.⁷⁷ In fact, only one instance was found in which a President even made mention of the specific religious affiliation or beliefs of a nominee. On March 9, 2000, in remarks made at the One America Meeting with Religious Leaders, President Bill Clinton made reference to three of his nominees to the courts of appeals.⁷⁸ The three nominees selected to be discussed—Richard Paez, Marsha Berzon, and Julio Fuentes⁷⁹—fit the tendency of Democratic Presidents to highlight their female and minority nominees. However, President Clinton also highlighted the religion of one of the nominees when he referred to Richard Paez as "a Hispanic judge from California, of the Mormon faith."⁸⁰ The President provided no further elaboration on Paez or his religion. However, this short, possibly off-the-cuff mention of Paez's religious affiliation was clearly an anomaly, given that no mention was made of any other nominee's specific affiliation or religious beliefs across any of the ninety-five speeches considered.

In arguing that any public discussion of a President's interest in promoting religious considerations in the judicial selection process was "unthinkable," Goldman stated that "the role of religious considerations in judicial appointments must be found in materials containing behind-the-scenes revelations."⁸¹ With this statement in mind, it is useful to look "between the lines" to determine whether Presidents ever frame public comments about their nominees in ways that draw their listeners' attention to a nominee's convictions without making overt reference to religious affiliations or beliefs. Thus, I reexamined the ninety-five speeches to determine whether Presidents ever framed their comments about nominees to the courts of appeals in a way that incorporated discussion of moral

77. Goldman, *supra* note 2, at 195.

78. Remarks to the One America Meeting with Religious Leaders, 36 WEEKLY COMP. PRES. DOC. 506, 510 (Mar. 9, 2000).

79. *Id.*

80. *Id.*

81. Goldman, *supra* note 2, at 195.

issues or beliefs.⁸² In doing so, I examined the content of the speeches by determining what other issues, if any, were discussed immediately before or after the discussion of the nominee, and whether any link was made between the appointment of that judge to specific moral issues or concerns. By reexamining the speeches in this way, I was able to determine if Presidents ever discussed specific nominees to the courts of appeals in a broader context that incorporated religious or moral themes.

Throughout much of the period of this analysis, Presidents refrained from discussing their individual nominees in any context that may reasonably be viewed as linking or juxtaposing judicial appointments to moral or religious themes or issues. Until 2003, aside from the one comment that President Clinton made in 2000 concerning the religious affiliation of Richard Paez, there were no speeches in which a President made reference to a specific nominee in the context of a broader discussion that implicated particular moral issues or beliefs. In two speeches made in 2003, however, President Bush juxtaposed discussion of specific nominees to support his faith-based initiative program, to “empower those who have heard the universal call to love a neighbor just like we’d like to be loved ourselves”⁸³ and to work toward his “compassion agenda.”⁸⁴ The connection between specific judicial nominees and the President’s agenda on the faith-based initiative was, admittedly, indirect. President Bush made no specific connection between his faith-based program and the specific nominees. On August 16, 2004, however, when campaigning in Traverse City, Michigan, the President made a more explicit connection between his support “for a culture of life” and his choice of a specific nominee:

We stand for institutions like family and marriage, which are the foundations of our society. We stand for a culture of life in which every person matters and every person counts. We stand for judges who faithfully interpret the law, instead of legislating from the bench. That’s why I named Judge Rick Griffin to the Federal courts. He’s right from here. He’s a good, honest fellow. The problem is, people

82. A President was coded as having discussed a moral issue or belief when he focused attention on issues such as abortion, the sanctity of marriage, or prayer in school, or when he discussed any issue using moral or religious language or themes.

83. Remarks in Southaven, Mississippi, 39 WEEKLY COMP. PRES. DOC. 1514, 1515 (Nov. 1, 2003).

84. Remarks at the “Congress of Tomorrow” Republican Retreat Reception in White Sulphur Springs, West Virginia, 39 WEEKLY COMP. PRES. DOC. 176, 177 (Feb. 9, 2003).

like my opponent are playing politics with the judicial system on the Floor of the United States Senate.⁸⁵

In this statement, the President did not explicitly state that he nominated Richard Griffin due to Griffin's beliefs on issues related to the "culture of life."⁸⁶ The President did, however, choose to frame Griffin's nomination in a context that also included the President's—and, presumably, his listeners'—positions on issues related to the family, marriage, and the culture of life.⁸⁷

In addition to the remarks made at the 2005 President's Dinner on June 14, in which the President related his appointment of Priscilla Owen, Janice Rogers Brown, and William Pryor to the "culture of life" and defending "the institution of marriage,"⁸⁸ the President made one additional speech in 2005 in which he connected a specific nominee to religious or moral issues.⁸⁹ In remarks made on June 2 at a dinner for Senator James Talent in St. Louis, Missouri, the President thanked the Senator for helping to

promot[e] a culture of life in America [and] for helping defend the institution of marriage from being redefined by activist judges. And speaking about judges—[laughter]—I want to thank both Senators from Missouri for understanding that every nominee a President sends up must have a fair hearing in the Judiciary Committee, an expeditious hearing in the Judiciary Committee and then an up-or-down vote on the floor of the United States Senate.⁹⁰

The President then went on to thank Missouri Senators Talent and Bond for supporting his nomination of Priscilla Owen to the Court of Appeals for the Fifth Circuit.⁹¹ In this speech, the President connected his

85. Remarks in Traverse City, Michigan, 40 WEEKLY COMP. PRES. DOC. 1617, 1622 (Aug. 16, 2004).

86. See *id.* President Bush first nominated Richard A. Griffin to a position on the U.S. Court of Appeals for the Sixth Circuit on June 26, 2002. Rita F. Wallace, Court Historian, U.S. Court of Appeals for the Sixth Circuit, Richard Allen Griffin, http://www.ca6.uscourts.gov/lib_hist/Courts/circuit/judges/judges/griffin.html (last visited Apr. 9, 2008). Griffin would eventually be confirmed on June 9, 2005. *Id.*

87. Remarks in Traverse City, Michigan, *supra* note 85, at 1622.

88. See Remarks at the 2005 President's Dinner, *supra* note 41, at 997; see also *supra* notes 41–45 and accompanying text.

89. Remarks at a Dinner for Senator James M. Talent in St. Louis, Missouri, 41 WEEKLY COMP. PRES. DOC. 935, 939 (June 2, 2005).

90. *Id.*

91. *Id.*

appointment of judges—and Owen in particular—to his defense of the institution of marriage in order to stump for a senator who shared the President's agenda.⁹² The last time that the President made such a connection between moral issues and specific nominees to the courts of appeals was at the previously discussed 2007 Federalist Society dinner.⁹³

By examining the framing of Presidents' public comments of their specific nominees to the U.S. Courts of Appeals, four conclusions can be drawn. First, although it is indeed nearly unthinkable for a President to blatantly discuss a nominee's religious affiliation,⁹⁴ it is not quite as unthinkable for a President to frame the discussion of a nominee by referring to issues that would likely resonate with listeners who share particular religious or moral beliefs. Second, framing the discussion of a nominee by making reference to issues like faith-based programs, marriage, and the culture of life is a tactic that appears to be specific to the current Bush Administration. Third, even President Bush has used this tactic sparingly. The research conducted for this Article identified only six speeches in which the President framed the discussion of specific nominees in this way. Lastly, even though it is used sparingly by President Bush, this tactic takes various forms. The President at times simply placed his discussion of a specific nominee alongside a discussion of his faith-based initiative or the culture of life without making a specific connection between them. In other instances, the connection was made more directly by the President linking a nominee to the President's support of a moral issue.

Although President Bush has framed the discussion of his judicial nominees in a way that related judicial appointments to particular moral issues only a handful of times, I was interested in determining whether the President used public speeches to frame judicial appointments in terms of moral issues, even when not referring to a specific nominee. In order to examine this, I searched all presidential speeches and remarks in 2006 for any discussion of judicial appointments generally.⁹⁵ I only searched

92. *See id.*

93. *See supra* notes 46–48 and accompanying text.

94. Recall that President Clinton's reference to Judge Paez's religious affiliation on March 9, 2000 is the only example of such a comment across the ninety-five speeches analyzed. *See supra* notes 78–80 and accompanying text.

95. To accomplish this, I searched for any speech containing the words "judge" or "judges" using the online version of the *Weekly Compilation of Presidential Documents*. *See* U.S. Gov't Printing Office, *Weekly Compilation of Presidential Documents: Main Page*, <http://www.gpoaccess.gov/wcomp/> (last visited Apr. 9, 2008).

speeches given in 2006 because I was interested in whether President Bush made such connections in his public remarks after the appointments of Roberts and Alito to the Supreme Court revitalized the public debate regarding this issue.⁹⁶

Throughout 2006, I identified twenty-seven speeches in which President Bush discussed his approach to selecting nominees to the federal bench. In twelve of those speeches (44.4%), he framed such remarks in a context that also incorporated discussion of moral issues or themes. As with speeches that connected these issues to specific nominees, in speeches about the President's general approach to judicial appointment strategy, the connection at times was weak, such as simply juxtaposing comments about judicial appointments alongside issues such as marriage. At other times, the linkage was made more overtly. In the remaining fifteen speeches (55.6%), President Bush framed his discussion of judicial appointments with no reference to any moral theme or issue.

President Bush, therefore, has demonstrated a willingness to frame his discussion of specific nominees and his approach to judicial appointments in a broader context that at times incorporates moral issues into the discussion. In doing so, he has not made specific reference to a nominee's faith or religious affiliation. In framing the discussion of judicial appointments by linking them to certain moral issues, however, the President has at the very least reminded his listeners of the importance of judges to the social and moral issues about which many of those listeners care deeply. In doing so, moral issues have been injected into the broader debate about judicial appointments, even in the absence of references to the specific beliefs of individual nominees.

VI. IMPLICATIONS OF FRAMING NOMINEES THROUGH MORAL ISSUES

Some scholars of U.S. presidential politics argue that Presidents exert public support of policy issues in order to solidify or modify the opinions of core supporters or political elites.⁹⁷ Given the general public's lack of

I then identified the speeches in which the President was discussing the American judicial appointment process, regardless of whether he was referring to any particular nominee.

96. Given Roberts's confirmation to the Supreme Court in 2005 and Alito's confirmation on January 31, 2006, some of these speeches in 2006 made specific references to Roberts and Alito. As long as speeches mentioning Roberts and Alito contained some discussion of judicial appointments generally, or the President's approach to making appointments to the judiciary, they were included in the analysis.

97. For a thorough analysis of the argument that Presidents speak in public in

interest in the lower federal courts, Presidents use these positions to gain favor with particular groups or constituents.⁹⁸ When Presidents discuss their nominees publicly, they do so, in part, to gain favor with interest groups or core constituents.⁹⁹ President Bush's recent tactic of insinuating a discussion of moral issues in his public support of his judicial selection approach or of specific nominees is understandable in this context. Recent Republican Presidents have been interested in using their appointments to the lower courts to pursue a policy agenda.¹⁰⁰ That conservative social agenda, furthermore, is shared by like-minded interest groups and many of the Republican Party's core supporters.¹⁰¹ Discussing judicial nominees publicly, and reminding listeners of the relevance of these appointments to the social issues they care about, is likely a good way to motivate and mobilize core Republican Party supporters.

Presidents have publicly discussed their nominees to the courts of appeals with increased regularity in recent years.¹⁰² Given the importance of these appointments to core supporters of each political party, one should expect Presidents to continue discussing their nominees publicly. Whether future Presidents continue the tactic established by President Bush of occasionally framing judicial appointment politics within a context that links these appointments to moral issues remains to be seen. The interest of recent Democratic Presidents to pursue a partisan agenda—rather than a policy agenda—through diversifying the bench¹⁰³ would indicate that future Democratic Presidents would continue to tout the diversity of their nominees, rather than frame them with moral issues and themes.¹⁰⁴ One may expect future Republican Presidents, on the other hand, to continue the approach established by President George W. Bush of occasionally

order to influence certain key supporters, rather than the general public, see GEORGE C. EDWARDS III, *ON DEAF EARS: THE LIMITS OF THE BULLY PULPIT* (2003); see also GEORGE C. EDWARDS III, *AT THE MARGINS: PRESIDENTIAL LEADERSHIP OF CONGRESS* (1989).

98. SCHERER, *supra* note 18, at 21–23; see also Goldman, *supra* note 2, at 202–15 (discussing historical judicial appointments of Catholics to lower courts to promote partisan agendas).

99. Holmes, *supra* note 11, at 120.

100. Goldman, *supra* note 2, at 211–15.

101. SCHERER, *supra* note 18, at 17–20.

102. Holmes, *supra* note 64, at 573–74.

103. See Goldman, *supra* note 2, at 198–200, 211–14 (explaining that the judicial nominations of Presidents Carter and Clinton reflected their desires to please segments of the party through diverse judicial appointments).

104. See Holmes, *supra* note 11, at 119.

framing judicial appointments—even to the lower courts—to moral issues that would resonate with their core supporters.

One potential early hint of this may be seen in the way in which Senator John McCain (R-AZ) explained his stands on certain social issues in his campaign to be the Republican nominee for President in the 2008 election. On his website, the Senator stated that he “believes *Roe v. Wade* is a flawed decision that must be overturned, and as President he will nominate judges who understand that courts should not be in the business of legislating from the bench.”¹⁰⁵ As President, Senator McCain also promised that he would protect marriage by nominating judges

who understand that the role of the Court is not to subvert the rights of the people by legislating from the bench. Critical to Constitutional balance is ensuring that, where state and local governments do act to preserve the traditional family, the Courts must not overstep their authority and thwart the Constitutional right of the people to decide this question.¹⁰⁶

In becoming the Republican Party's presumptive nominee for President, Senator McCain has already connected his judicial appointment approach to particular moral issues. Arguably, Senator McCain's framing of judicial appointment politics to moral issues is even more direct and substantial than that seen in speeches made to date by President Bush. As discussed previously, President Bush was careful to state that he did not use a litmus test in selecting nominees.¹⁰⁷ Senator McCain, on the other hand, chose to seek the Republican Party's nomination by signaling his intent to appoint judges who will overturn *Roe v. Wade* and “protect marriage.”¹⁰⁸

Aside from predicting how subsequent presidents may choose to frame their discussion of judicial nominees, another implication of the findings discussed in this Article relates to the Republican critics who accused Democratic senators of considering religious beliefs of nominees in the confirmation process. As discussed previously, President Bush himself reversed course between 2005, when he refused to engage in this debate, and 2007, when he voiced a similar criticism in his speech to the Federalist

105. John McCain for President, *On the Issues: Human Dignity & the Sanctity of Life*, <http://www.johnmccain.com/Informing/Issues/> (follow “Human Dignity & the Sanctity of Life” hyperlink) (last visited Apr. 9, 2008).

106. *Id.*

107. *See supra* note 54.

108. John McCain for President, *supra* note 105.

Society.¹⁰⁹ These criticisms, coupled with the President's repeated assurance that he used no litmus test in selecting his nominees, are used to claim that religious or moral beliefs have no legitimate role in deciding who should sit on the federal bench. The President, however, chose at various times to frame his comments about certain nominees and his general judicial selection approach by reminding his listeners of the importance of judicial appointments to policy decisions over moral issues. Senator Hatch's argument that some of the questions and criticisms leveled at certain nominees by Democratic senators were "hitting below the belt"¹¹⁰ rings hollow when the President personally relied on making such connections when discussing nominees publicly.

Finally, the state of the modern lower court appointment process, coupled with the increased inclination of recent Presidents to discuss nominees, in part to gain favor with interested listeners, may eventually have an influence on how the public perceives the lower courts.¹¹¹ Research on the public's attitude toward the U.S. Supreme Court indicates that the Supreme Court enjoys a "reservoir of good will" that is generally resistant to depletion by unpopular or controversial decisions.¹¹² However, others have argued that the public's faith in the legitimacy of the Court as an institution may diminish depending on how questions about Supreme Court cases are framed.¹¹³ Additionally, when the public is exposed to debate concerning an appointment to the Supreme Court, the "confirmation processes 'wake up' dormant attitudes toward law and courts."¹¹⁴ In particular, members of the public who see the "Supreme Court as being 'above' politics" may take offense at the political and partisan haggling over an appointment.¹¹⁵

These studies on the public's perception of the Supreme Court are

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109. See *supra* notes 46–49 and accompanying text.
110. *Pryor Confirmation Hearing*, *supra* note 3, at 107.
111. See *Holmes*, *supra* note 11, at 120.
112. James L. Gibson et al., *The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 541 (2003) (discussing the legitimacy of the U.S. Supreme Court and the implications of the *Bush v. Gore* decision).
113. E.g., Stephen P. Nicholson & Robert M. Howard, *Framing Support for the Supreme Court in the Aftermath of Bush v. Gore*, 65 J. POL. 676 (2003).
114. James L. Gibson & Gregory A. Caldeira, *Supreme Court Nominations, Legitimacy Theory, and the American Public: A Dynamic Test of the Theory of Positivity Bias 3* (July 4, 2007) (unpublished manuscript), available at <http://ssrn.com/abstract=998283>.
115. *Id.* at 30.

illustrative in that they provide some warning that negative framing of judicial behavior may influence the public to be less favorable towards that institution. However, given that most presidential remarks concerning nominees to the courts of appeals are directed at elite constituents and core supporters rather than at the general public,¹¹⁶ the audience for the messages being forwarded by recent Presidents may be less likely "to become disoriented by a moderately politicized confirmation process in which the ideology of the nominee is widely discussed."¹¹⁷

It is important to note that these studies have focused exclusively on the public's perception of the U.S. Supreme Court, which has a "reservoir of good will" that is fairly deep.¹¹⁸ Recent Presidents, however, have engaged in public discussion of their nominees to the U.S. courts of appeals, and have focused on their nominees' qualifications, diversity, and treatment by the Senate.¹¹⁹ President Bush has added to this discussion by occasionally mentioning the importance of his appointments to controversial social issues. It cannot be assumed that the lower courts enjoy a "reservoir of good will" that is as deep or as resilient as that of the U.S. Supreme Court. Rather, there is good reason to think that support for lower courts may be based on factors different from those used for the Supreme Court.¹²⁰ For one thing, confirmation battles to the Supreme Court have been relatively rare in recent years.¹²¹ Battles over appointments to the courts of appeals, on the other hand, have become relatively regular affairs. Regular exposure to the framing of lower court appointment politics, particularly when this framing includes reference to moral issues, may diminish public support for the courts of appeals, especially if the audience for this debate is unhappy with ideological outcome of the appointment process.

The modern lower court appointment process has seen a number of important changes in recent years, not the least of which is the increased interest in nominees and conflict over the treatment of nominees with particular religious and moral beliefs. Generally lost in the debate,

116. Holmes, *supra* note 11, at 120.

117. Gibson & Caldeira, *supra* note 114, at 30.

118. Gibson et al., *supra* note 112, at 541.

119. Holmes, *supra* note 11, at 114–21.

120. Sara C. Benesh, *Understanding Public Confidence in American Courts*, 68 J. POL. 697, 698 (2006). Although Benesh focuses on public confidence in state courts, her arguments have some implications for the public's confidence in lower federal courts as well.

121. See Gibson & Caldeira, *supra* note 114, at 3.

however, is attention to the question of whether Presidents participate by using religious or moral issues to frame their discussions of nominees and the judicial appointment process more generally. There is no evidence that Presidents select nominees based on specific religious affiliations,¹²² and recent Presidents have routinely stated that they do not use a litmus test in the nomination process. With that said, Presidents do discuss their nominees by framing the discussion in ways that will appeal to core supporters. For President George W. Bush, such framing has at times included linking nominees to particular moral issues. Given the political rancor over how nominees' religious beliefs are handled by those in the Senate in recent years, the willingness on the part of the current President to frame judicial appointments with reference to moral issues is a shift in public behavior that is concerning and certainly worthy of future attention.

122. See generally Goldman, *supra* note 2.