

**CRITICAL JUDICIAL NOMINATIONS AND POLITICAL CHANGE: THE IMPACT OF CLARENCE THOMAS.** By Christopher E. Smith.<sup>1</sup> Westport, Conn: Praeger. 1993. Pp. xii, 172. \$47.95.

**JUSTICE ANTONIN SCALIA AND THE SUPREME COURT'S CONSERVATIVE MOMENT.** By Christopher E. Smith. Westport, Conn: Praeger. 1993. Pp. xi, 148. \$47.95.

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There is little doubt that changes in the membership of the U.S. Supreme Court have considerable legal and political consequences. The political effects are obvious enough: When vacancies occur on the high court, presidents seek ideologically compatible nominees who are both palatable to the Senate and capable of withstanding the buffets of televised hearings, ratings in public opinion polls, and the competing voices of any number of organized interests that might mobilize in response. Such high levels of public attentiveness to the selection process naturally reflect the importance of the Court as a policymaker, but in some instances the nature of judicial selection may have broader significance; indeed, it may alter how citizens view and respond to substantive issues of public policy raised during the course of choosing a new Justice. Moreover, the legal effects of membership change are equally plain: Interest in this process is, not surprisingly, all the more magnified when an appointment has the potential to modify the direction of the Court's outcomes. Of course, the ability of any single Justice to shape the contours of federal law is mediated by membership in what is, despite only infrequent direct interaction among its members, a collegial body. It is these two issues—the political ramifications of choosing a new Justice and the doctrinal impact of a member once elevated to the bench—upon which Christopher E. Smith focuses in two separate books.

Using Justices Clarence Thomas and Antonin Scalia as case studies, Smith assesses the effect of the individual Justice in both

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the political and legal contexts. The political implications are addressed in *Critical Judicial Nominations and Political Change*. In this book, Smith examines the larger systemic repercussions of the controversy surrounding the confirmation hearings of Justice Thomas. Here he argues that Anita Hill's allegations of sexual harassment made against Thomas, as well as the manner in which the issue was handled by the Senate Judiciary Committee, radically altered the nature of electoral politics; according to Smith, the confirmation hearings of Thomas ushered in a new era in which women within the electorate generally, and female candidates for public office specifically, now play a dominant and forceful role. In *Justice Antonin Scalia and the Supreme Court's Conservative Moment*, Smith provides the legal perspective, arguing that Scalia's judicial temperament frustrated the crystallization of a solid conservative coalition on the Court, one that might otherwise have departed significantly from established liberal precedents.

Drawing from the literature on electoral behavior, Smith suggests that certain nominations (as distinguished from actual confirmations) for the Supreme Court should also be regarded as "critical." These are the nominations "that serve as catalytic events for important changes in politics and public policy that were not anticipated by the political actors who initiated the nominations." Using this definition, Smith highlights several nominations, each to fill the chief justiceship, as exemplifying this notion. Thus, for example, the nominations of John Marshall and Earl Warren were critical because they had more general and lasting implications: Marshall elevated the institutional status of the Court, and Warren steered the Court into dramatically different constitutional waters. What made the nomination of Clarence Thomas critical, he contends, was that it served as a catalyst for mobilizing substantial numbers of women to run for Congress while sparking greater exercise of the franchise by women within the electorate.

By exploring a series of illustrative congressional races, Smith ably demonstrates how many women candidates, such as Carol Moseley Braun and Lynn Yeakel, capitalized upon the antagonisms of many voters aroused by the Judiciary Committee's handling of the allegations against Thomas. Here, Smith does an effective job of showing the larger implications that the politics of judicial selection may have for alternative arenas of the governing process. The drama played out during the hearings was an impetus for drawing many, mostly Democratic, women into forging new election campaigns.

To help establish the appropriate nexus between events, Smith endeavors to provide the backdrop, unraveling events in an analytical narrative of the hearings themselves. This might be a useful way of trying to illuminate the specific circumstances that effected so many women office-seekers, but Smith's account is a tad too partisan for my taste. A good deal of effort is devoted to making a strong case for Hill's side of the story, and ultimately, I think, the polemic becomes more distracting than elucidating. After all, it is not necessary to defend either Anita Hill or Clarence Thomas to justify what is empirically the case: a significant number of women, reacting to the issues debated at Thomas' confirmation hearings, decided to run for public office; many, it turns out, did so successfully.

The related claim advanced by Smith—that “the catalytic Thomas hearings mobilized women voters to support female candidates for a variety of political offices on the premise that women officeholders would make new kinds of decisions . . .”—is not well defended. By my reading, at no point in the book does Smith provide any direct evidence that women voted with any greater frequency or solidarity in the fall of 1992. Nor does he demonstrate that women voters determined the outcomes of any of the contests in which women candidates were competing. Apart from these quibbles, though, I think Smith's basic concern about the need to recognize the rippling effects of the manner in which members of the Court are chosen is quite correct.

Overall, Smith has written an informative and provocative book, one that should generate increased scholarly interest in the subject of judicial nominations. Still, I am not convinced that the Thomas nomination represented the beginning of a new electoral era; rather, it strikes me as more of an aberration from a generally predictable pattern of election outcomes. This deviation might be more appropriately explained, at least at the national level, by the confluence of a variety of unique forces—including, for example, redistricting and the House banking controversy, as well as the Thomas hearings—that conspired to produce, not only more women in Congress, but more blacks and Hispanics as well, all in the context of high levels of turnover.<sup>3</sup>

The virtue of this book, as Smith himself appropriately recognizes, is at the conceptual level. Specifically, Smith emphasizes the need for scholars of judicial selection to cast their nets more widely, arguing that “[a]lthough judicial decisions and their im-

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3. See, e.g., Gary C. Jacobson, *Congress: Unusual Year, Unusual Election* in Michael Nelson, ed., *The Elections of 1992* (CQ Press, 1993).

fact . . . are the most well-recognized and thoroughly studied aspects of the Supreme Court's role, the judicial nomination process represents another useful focal point for discerning the importance of judicial institutions . . . ." To his credit, Smith is grappling with an important issue, one about which we know far too little: What are the political effects of the process by which we elevate individuals to the Supreme Court?

In contrast, we know a good deal about how members of the Supreme Court make their decisions. Among the more frequently tested hypotheses is that collegiality on the bench figures significantly in this process. Of course, the data with which many political scientists would prefer to work in examining this question are hard to come by; they must depend upon the intermittent information supplied by sitting members of the Court and the release of the Justice's private papers. The latter of these two—the Justices' docket books especially—have provided tremendous assistance in studying the role of interaction between the Justices, but the evidence is, at best, mixed. Several scholars who have examined Justice Marshall's papers at some length, though, have reported to me that there is far more collegiality of consequence on the bench than many have presumed.

In his study of the impact of Justice Scalia on his brethren, Smith takes a more contextual approach. He examines Scalia's jurisprudence, as well as his demeanor on the bench, and concludes that, at a time when the Rehnquist Court could have reversed a number of precedents of the Warren and Burger Courts, the sometimes vituperative expression of Scalia's views inhibited the conservatives from achieving that goal.

After tracing the background of Scalia, his early career, and his approach to constitutional interpretation, Smith provides an overview of Scalia's tenure on the Court. His basic assertion is that "Justice Scalia appears to be . . . incapable of participating in the collegial decision-making process in a manner that will maximize his effectiveness." Scalia's often blunt written opinions and his persistent questions during oral argument, by now well known to observers of the Court, have, in Smith's judgment, made it difficult for the more conservative Justices to build the coalitions necessary to reverse liberal decisions. He profiles selected areas of the Court's agenda—the exclusionary rule, abortion, and church-state cases—and argues that Scalia failed to take advantage of the opportunity to lead a majority on the Court. In each instance, the book provides ample illustration of Scalia's propensity for stinging discourse. It is this approach to

judging, says Smith, that has proven costly to conservatives. “[W]ords that imply such a complete and belittling rejection of a colleague’s opinion,” he maintains, “are out of step with the usual strategic diplomacy employed by justices to cultivate support from each other.”

It is difficult to know, however, the extent to which the straightforward language of one Justice affects the behavior of the others. Smith argues that it is, in fact, significant; a more accommodating jurist, with a willingness to suppress disagreement or mollify colleagues, would be better positioned to exercise leadership on the Court. At the same time, given his methodology, he is right to be cautious about his interpretations.

In some instances, I think perhaps Smith gives the Court too much credit for having established norms of propriety. Frequently, the book makes reference to such standards as “the traditions of diplomatic opinions.” To be sure, the Supreme Court is an institution rich with tradition, but many of the mores to which Smith apparently refers have dissipated dramatically since the middle of the century, so the issue of professional civility becomes more relative. Scalia is, of course, an extreme example, but his tendency to write separately, for example, is by no means unusual. Furthermore, on the issue of the harsh tenor of many opinions, the book brands Scalia as a maverick. Yet terse verbiage—especially in concurring and dissenting opinions—has become quite common on the Court. Here again, Scalia may be among the more accomplished practitioners, but one need not look very far within the *U.S. Reports* to find abundant examples of Justices speaking their minds in no uncertain terms.

Despite these qualifications, I think this book represents an interesting and significant effort to tease out some of the critical questions surrounding collegial decisionmaking on the bench. It is particularly important in that it emphasizes the need to broaden our understanding of leadership on the Court. More generally, the value of this book and its companion volume is that each should serve to stimulate interest in the impact, both legal and political, that an individual Justice can have on the Court as well as society.