A "REPRESENTATIVE" SUPREME COURT?: THE IMPACT OF RACE, RELIGION, AND GENDER ON APPOINTMENTS. By Barbara A. Perry[1] New York: Greenwood Press. 1991. Pp. XIV, 160. Cloth, $39.95.

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This slim, rather dull but thoroughly researched volume deals, as its subtitle says, with "The Impact of Race, Religion, and Gender on Appointments." Readers only interested in a general way in the subject need read only the eight page Conclusion. Those preceding it deal with the question whether there has been and should be a Catholic, Jewish, black and woman's "seat" on the Court. The author concludes that religion certainly has played a part in appointments of most of the Catholics and Jews to the Court, but that only in a few of those cases has it been the dominant consideration.[3] The precise opposite seems to be true of the one black and the one woman appointed to the Court at the time the book was written; here race and sex, respectively, were the dominant factors. The author notes, correctly in my view, that as the nation has matured, religion has played less of a role than in earlier times.

To conclude, as the author does, that religion was rarely if ever the primary consideration is not to say that religion was not the single most important consideration in the case of the appointment of some Justices. In the case of Catholic Pierce Butler's appointment, the author states that "religion . . . had now become one of the primary considerations" in choosing a Supreme Court Justice. The author notes that Murphy " 'was the first Roman Catholic Justice to have been appointed from *explicitly* religious criteria.' "

Throughout the book the author is at pains to distinguish the role of religion as the "primary" factor from its representative "role." Too often this distinction seems unhelpful. Frequently all the distinction means is that, for example, the facts that Brandeis was a superb lawyer and had helped Wilson fashion important parts of his "New Freedom" were just as important as the fact that he

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2. A.B. Harvard College 1935; L.L.B. Yale Law School 1938; Professor Emeritus of Law, University of Minnesota.

3. The author examines the appointments of sixteen Justices and concludes that religion, race, or sex "was *a factor* in all but four instances" (Taney, Cardozo, Kennedy, and Edward White's appointment to be an associate justice) (133). (White is considered twice; first as an Associate Justice and later as Chief Justice.)

was Jewish.[4] Still, it must be noted, particularly in the case of the Jews selected for the Court (with the exception of Cardozo, who was virtually appointed by public demand), all had worked closely with the President prior to their appointments and could safely be called good friends or at least well known to the Presidents who appointed them.[5]

The most interesting—and the boldest—position taken in the book is near its end and reads as follows:

> In an effort to inject some objectivity into the evaluation of judicial merit, I would propose the following professional and personal criteria for potential Supreme Court nominees: strong educational background, intelligence, clarity of expression, professional ability, judicial temperament, impeccable moral character, and diligence and conscientiousness. Although the individual components of such models may be difficult to define, they are meant to take us beyond futile exercises in which conservatives and liberals declare those of a similar ideological stripe "meritorious."
> . . . [I]deological and political compatibility is simply a cardinal fact of political life and Supreme Court appointments. It does not *necessarily* have to detract from a candidate's objective merit. (136)

In my view, however, the quality which the author denigrates—"ideological . . . compatibility"—should be the most important qualification of all for appointments to the highest Court.

The most important work of the Supreme Court is to utter the final words binding on all branches of the Government and on the people of the meaning of such vague constitutional phrases as "liberty," "due process of law," "equal protection," and so on. The impact of Supreme Court decisions interpreting these words and phrases is enormous; the Court's decisions can contribute to civil disorder throughout the land,[6] they can determine who will be elected to Congress[7] and they can even bring about changes in human reproductive processes.[8] To no other court in any country have such powers been entrusted.

Another way of thinking about that which the author terms "ideological . . . compatibility" is an ability to sense the direction in

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4. See Alpehus Thomas Mason, *Brandeis: A Free Man's Life* 397-404 (Viking, 1956) ("*Brandeis*").

5. See pp. 68-69 (Cardozo); p. 72 (Frankfurter); pp. 74-75 (Goldberg); Laura Kalman, *Abe Fortas: A Biography* 199-212 (Yale U. Press, 1990).

6. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

7. *Baker v. Carr*, 369 U.S. 186 (1962).

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

which the Nation should move within the limits of rational constitutional interpretation. The Court at the time FDR sought to pack it had a totally different vision of the steps the country should take to surmount the Depression than did the overwhelming majority of citizens. Yet, arguably most or all of the Justices comprising the majority against FDR on the Court possessed the qualities our author lists.[9]

The quality frequently emphasized as desirable if not essential for Supreme Court Justices is that he or she be well versed in the law.[10] I believe that quality is very much overrated. Certainly Justice Scalia has been well trained in the law; he had served for at least thirteen years as a law professor and four years on the D.C. Circuit.[11] His opinions are masterfully argued, but I daresay a substantial proportion of the public disagrees with them. Justice Black had no prior judicial experience to speak of and certainly had not enjoyed a distinguished law practice before entering the Senate.[12] Like Justice Scalia, his opinions were masterfully reasoned and I daresay commanded the adherence of persons whose outlook is quite opposite from that of Justice Scalia. To choose sides between these two exceptionally bright and incisive Justices depends almost entirely on one's ideology.

The notion that "ideological" compatibility should not be the primary or at least a very important consideration in Supreme Court appointments is based on an unrealistic view of the role of the Court in American government. The Court has increasingly been confronted with issues that are essentially political—that involve a choice based on one's vision of the kind of country that one wants the United States to be and to become—and therefore ideological considerations should be the first, not the last criterion on which a president should base his selection. Surely Presidents Reagan and Bush agree with this position. What other explanation is there for most of their Supreme Court appointments?[13]

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9. These Justices were: Van Devanter, McReynolds, Sutherland, Butler and Roberts. It could be argued that McReynolds lacked judicial temperament. See Mason, *Brandeis* at 537 (cited in note 4).

10. See Sheldon Goldman, *Judicial Selection and the Qualities that Make a 'Good' Judge*, 462 *Annals of The American Academy of Political and Social Science* 112, 114 (July 1982) ("*Annals*"), cited for a different judicial quality in the book reviewed at note 60 on page 17.

11. *Who's Who in America* 2885-6 (Marquis, 1990).

12. Virginia Van Der Veer Hamilton, *Hugo Black: The Alabama Years* (Louisiana State U. Press, 1972).

13. It can not be gainsaid that a nominee to the Court should have other qualifications than ideological compatibility with the appointing President. The nominee should be able to make up his or her mind, to carry a fair share of the workload, to be capable of rational thought beyond that of the ordinary citizen, to be in good health, and, of course, the nominee

Elsewhere I have pointed out that in 1940 the Justices of the Supreme Court did not come from the inferior courts; they were former attorneys general, a former solicitor general, a secretary of state, law professors, a United States senator, and a private practitioner.[14] None had had significant experience as a judge. Today, five of the Justices came from the United States Courts of Appeals, two from state appellate courts, and two from the "number two" position in the Department of Justice.[15] The earlier article argued that this shift away from persons of broad experience in government did not bode well for the country. Presidents would do well to include on the Court—in addition to experienced appellate judges from lower courts—a lawyer who has been in the cabinet or at an administrative agency, a person with extensive legislative experience, and a lawyer with no prior experience in government. We are putting on the Court too many people without that kind of breadth of experience that is most likely to result in a broad vision—or sense, if you will—of the direction in which the Court should go in rendering those vital opinions interpreting the Constitution.

On the last page of the text of the book, the author discusses friendship with the President as a criterion for Court appointments and concludes that "where one stands on this issue may depend on the theory of constitutional analysis to which one subscribes." The author is referring to the fact that a president is more apt to know where a friend stands on the policy issues that are apt to come before the Court. She concludes the book with a thought with which it is difficult, if not impossible, to disagree:

> But presidents must carefully survey the political and judicial landscape to find ideologically compatible *and* professionally respected justices, for they may well participate in shaping the legacy of the Court and the nation.[16]

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must be morally honest and at least intellectually honest most of the time. To say in addition that a nominee should have good judgment begs the question. Compare Goldman, *Annals* at 113-114 (cited in note 10).

14. See Victor H. Kramer, *Let's Send a Politician to the High Court*, Legal Times 29 (May 7, 1990). The former attorneys general were McReynolds, Stone and Murphy; the former solicitor general was Reed; the former law professors were Douglas and Frankfurter; the former Senator was Black; and Roberts was the former private practitioner.

15. The five from the Courts of Appeals are Blackmun, Stevens, Scalia, Kennedy and Thomas. The two from the state appellate courts are O'Connor and Souter. The two from the Department of Justice are White and Rehnquist.

16. I found several errors in the book.

First, on page 68, Newton Baker is said to have come from Cincinnati; he came from Cleveland. See *Webster's Biographical Dictionary* 91 (G.C. Merriam Co., 1962).

Second, two religious affiliations are mistaken. On page 87, in footnote 132, Senator Cohen of Maine is said to be Jewish. He describes himself as a Unitarian-Universalist in the *Congressional Directory* 87 (1989). Deceased Senator Gruening of Alaska is also in the author's list of Jewish senators. He did not furnish any religious affiliation for his biography in 6 *Who Was Who in America* 170 (1976), nor did he give any religious affiliation in the *Congressional Directory* 7 (1968). In his autobiography (p. 16) the following appears: