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Section 2: The Court and the 2016 Election

Institute of Bill of Rights Law at The College of William & Mary School of Law

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II. The Court and the 2016 Election

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“Presidential Election Will Shape Supreme Court, and National Policies, for Years to Come”

The Wall Street Journal

Jess Bravin

July 22, 2016

Republicans and Democrats on the campaign trail say the 2016 election could reshape the Supreme Court for decades. They are right.

The next president could fill a vacancy created by Justice Antonin Scalia’s February death and two or more additional seats as elderly justices retire. The changes likely will shift the court from its current makeup of four liberals and four conservatives, shaping some of the nation’s most significant issues on social norms, individual rights, balance of government powers and business and workplace matters.

“It’s pretty rare that it’s an evenly balanced court about to go one way or another, so the stakes have never been higher,” said John Aldrich, a political-science professor at Duke University.

Senate Republicans have declined to consider the nominee President Barack Obama announced in March, U.S. Circuit Judge Merrick Garland, aiming to keep the seat open in the hope Republican nominee Donald Trump wins the White House and appoints a conservative justice.

That would restart a decades long conservative drive that ground to a halt with Justice Scalia’s death, affecting the outcome

of several cases on issues such as the power of public-employee unions, religious exemptions from the health-care law and the extent of federal authority to set national policy over objections from states or private interests.

A win by Democrat Hillary Clinton, in contrast, would set the stage for a liberal majority on the Supreme Court, something not seen since the retirement of Chief Justice Earl Warren in 1969.

What that might mean is “hard to contemplate,” said Carlton Larson, a law professor at the University of California, Davis. “For my entire life, we’ve had a conservative-moderate court,” he said, adding “in terms of an aggressive liberal agenda, there probably isn’t one today.”

The gay rights issue has been an exception, but following the 2015 decision affording marriage to same-sex couples, “the big gay-rights cases have already been dealt with,” he said. Over recent decades, the court’s liberals primarily have focused on defending from conservative challenge mid-20th century precedents that expanded civil rights and upheld social-welfare legislation, something that is likely to continue.

Elizabeth Slattery, a legal fellow at the conservative Heritage Foundation, said she expects a liberal majority would try “to restrict religious liberty to the four walls of a house of worship,” possibly by targeting the 2014 Hobby Lobby decision that allowed for-profit corporations to seek religious exceptions to legal obligations under the federal Religious Freedom Restoration Act. Liberal justices may be skeptical of laws that allow officials or businesses with religious objections to homosexuality to avoid providing services to married same-sex couples.

The landscape in the legal fight over abortion also could change with multiple appointments. A court with two or more new conservatives could throw into doubt the 1973 *Roe v. Wade* decision recognizing a woman’s right to abortion and create more leeway for state restrictions on the procedure. In contrast, additional liberals on the court could bolster abortion rights.

A single Democratic appointment to the Supreme Court could doom the 2010 *Citizens United* decision, which struck down restrictions on corporate and union political spending. That ruling and other opinions invalidating campaign finance laws came on 5-4 conservative majority votes that said restrictions on finance amounted to a restraint of free speech. A Clinton appointee almost certainly would join liberal justices who dispute that analogy and have signaled an intent to significantly narrow or overrule the *Citizens United* ruling.

Mr. Trump has said he would appoint conservative justices sure to share the former

court majority’s deep skepticism of campaign finance regulations.

Gun rights also likely depend on the next appointments. Supreme Court rulings in 2008 and 2010 held 5-4 that the Second Amendment provides individuals a right to keep a handgun in the home for self-defense. Since then, however, the court has done little to clarify whether gun rights extend further, letting stand lower court decisions that usually have upheld restrictions on semiautomatic weapons and other regulations enacted by some states and localities.

That trend likely would continue under justices appointed by Mrs. Clinton. A Trump appointee likely would join with other conservatives who have said gun rights should be strengthened.

Caroline Fredrickson, president of the liberal American Constitution Society, said the addition of Clinton appointees could spell the end of the death penalty, which already is in decline. “There already are several justices who think the time has come to end that practice,” she said.

Besides such high-profile issues, Ms. Fredrickson said she expects Clinton appointees to pare back legal rules adopted by the court’s former conservative majority that benefit business interests and government officials.

“There are a number of cases that may not be as well-known as *Bush v. Gore* or *Citizens United*, but have imposed real procedural hurdles for people” seeking redress in court, she said. For instance, she said Clinton appointees might be inclined to ease the way

for class-action lawsuits, weaken precedents that strictly enforce consumer- and employee-arbitration clauses, and lift the broad immunity from liability afforded to police officers and other public officials sued for misconduct by private citizens.

If conservatives regain the upper hand, some issues might not make it to the court as a Trump administration moves away from Obama policies on environmental, consumer, employee and immigration matters that have been challenged in the courts. On the other hand, if Mr. Trump were to aggressively assert his own executive authority, the courts could face challenges to Trump's authority similar to those brought against Mr. Obama.

Some areas of law, however, are harder to predict based on who makes the appointment. In some criminal cases, for instance, Justice Scalia was more protective of defendants' rights than the normally liberal Justice Stephen Breyer. And justices across the ideological spectrum have at times suggested that the revolution in digital technology requires a new approach to privacy rights that could lead to tighter controls on government surveillance.

As a political issue, the Supreme Court is unlikely to tilt the election. "It's never figured that prominently in terms of how you win votes of people who are undecided," Mr. Aldrich said. Yet—as Mr. Obama has seen in cases involving the Affordable Care Act, immigration policy and gay rights—the success of future presidential agendas may rest with supreme bench.

“The Supreme Court Really Matters in This Election”

Bloomberg

Albert R. Hunt

July 3, 2016

For a half century, presidential candidates have routinely claimed that there are no bigger stakes in the election than the next appointments to the Supreme Court.

This year, for the first time since 1968, the dire warnings could actually have an important effect on voting behavior.

Since the death of Justice Antonin Scalia in February, the court has deadlocked 4-4 on four cases, including a few big ones. On a number of others, a single vote determined the outcome. In addition, Merrick Garland, the nominee to replace Scalia, will still be waiting for review by the Senate on Election Day; two justices will be in their 80s, and one will be 78.

It is likely that Hillary Clinton or Donald Trump will have at least two or three appointments in a first term. And that will shape a number of important issues, ranging from immigration to racial preferences, as well as the role of unions and environmental issues.

The significance is underscored by the last two presidents. Had Vice President Al Gore won the Electoral College vote as well as the popular vote in 2000, the court seats now occupied by Chief Justice John Roberts and Samuel Alito would have been filled by

more liberal jurists, giving progressives a majority. Likewise, if Republican had won the White House in 2008, Elena Kagan and Sonia Sotomayor wouldn't be on the court and conservatives would enjoy a comfortable majority.

The stakes are even more obvious now. The last time there was an open seat during a presidential election was 1956. That October, President Dwight D. Eisenhower tapped William Brennan in a recess appointment for the slot. In 1968, Chief Justice Earl Warren declared his intention to step down, but President Lyndon Johnson's choice to succeed him, Justice Abe Fortas, was blocked by the Senate.

This year, both candidates are seizing on the issue. Trump has released a list of 10 conservative jurists he might consider for court vacancies.

Clinton hasn't gone that far, but she has vowed that any appointee would favor abortion rights and overturning the court's recent campaign finance decisions.

Activists on the right and left are ginned up and certainly will make the court part of their fundraising.

Conservatives have done a slightly better job of seizing on the issue. They may be helped

this time by court decisions on affirmative action, abortion, same-sex marriage and upholding Obamacare that the right found disappointing.

They aren't confident, however, that a President Trump, a recent convert to conservative causes, would be an ally, even though they liked his list of potential appointees.

Miguel Estrada, one of the most prominent conservative legal intellectuals, though he is a fan of Garland, acknowledged that he probably wouldn't like Clinton's appointees. He's not assuaged, however, by Trump's list: "It's like a game of Russian roulette with Trump," Estrada said.

"He's just as likely to appoint Judge Judy as anyone on that list," he added, referring to the reality-television star.

Liberals hope Trump will stir their base, especially Hispanics. One of the deadlocked Supreme Court decisions this term effectively suspended President Barack Obama's executive order aimed at preventing millions of undocumented workers from being deported. It likely will be considered again.

There are questions about Clinton's court appointments, too. She once said that she'd love to name Obama to the bench -- William Howard Taft became chief justice after he left the White House -- but that's unlikely.

As president, she probably would like to tap someone younger, more liberal and of a more diverse background than the 63-year-old Garland, who was first nominated in March. But to pass him over would be a rebuke not

only to the respected judge, but also to Obama. That's probably not the way she'd like to start a presidency.

“Clinton's court shortlist emerges”

The Hill

Lydia Wheeler

July 30, 2016

Hillary Clinton's potential shortlist for the Supreme Court is coming into view.

Clinton has refused to name names when it comes to the court, saying only that Congress should confirm President Obama's nominee, Merrick Garland.

Her general election opponent, Republican nominee Donald Trump, has taken a different tack, releasing a list of 11 possible nominees. That list, released in May, included several judges often found on conservative wish lists, reassuring groups on the right.

Still, while Clinton hasn't followed Trump's lead in releasing names, advocates say her most likely choices for a high court appointment are already apparent.

The Hill talked to three well-connected groups in Washington about Clinton's Supreme Court options should she win the White House. None would go on the record, citing the sensitivities surrounding the issue.

But there's broad agreement about who Clinton would be most likely to consider, not only for the vacancy already on the court, but also the additional ones that could open up over the next four years if liberals like Justice

Ruth Bader Ginsburg and Justice Anthony Kennedy were to retire.

Topping the list, insiders say, is Garland.

He's an obvious choice, having already completed the background checks from the FBI and the American Bar Association to be a Supreme Court nominee; that process can take up to four months.

Garland already serves on the powerful D.C. appeals court, and personally knows some of the other members of the Supreme Court, including Chief Justice John Roberts.

And while Republicans have refused to consider Garland's nomination this year, saying the court vacancy should be filled by the next president, many have spoken highly of his qualifications, giving him a good chance at being confirmed.

Other top contenders for a Clinton appointment would be Sri Srinivasan, a judge on the D.C. Circuit Court of Appeals and Jane Kelly, a judge on the Eighth Circuit Court of Appeals. The Obama White House reportedly considered both judges this year before the president nominated Garland.

Srinivasan would be the first Indian-American and Hindu to serve on the court, but his nomination could face resistance from the left due to his past work representing corporate clients.

While an attorney for O'Melveny & Myers, Srinivasan reportedly defended ExxonMobil and mining giant Rio Tinto against allegations of human rights abuses in Indonesia and Papua New Guinea.

Paul Watford, an African American judge on the 9th Circuit Court of Appeals is also being mentioned as a potential Clinton nominee, along with Jacqueline Nguyen, a Vietnamese-American judge on the same court.

In a blog post after Justice Antonin Scalia's death in February, Tom Goldstein, the publisher of SCOTUSblog, called Watford the "most likely nominee."

Not only was the Southern Californian recently vetted for his current position, Goldstein said the Senate confirmed him in 2012 by a vote of 61-34 — a filibuster-proof majority, though the balance of votes in the Senate will almost certainly change in 2017.

Insiders name Goodwin Liu, an Asian-American judge on the California Supreme Court as another possibility. Liu, whose nomination to the 9th Circuit Court of Appeals was blocked by Republicans in 2010, is a former UC Berkeley Law School professor who has a history of advocating for equal rights.

Mariano Florentino Cuéllar, of the same court is considered in the mix, along with his wife Lucy Koh, a judge on the U.S. District

Court for the Northern District of California, who was recently nominated to the 9th Circuit Court of Appeals.

Koh is the first Asian American United States district court judge in the Northern District of California, and best-known for presiding over high-profile tech cases, including a patent feud between Apple and Samsung over design ideas for the iPhone and iPad.

Patricia Ann Millet is another D.C. Circuit court judge often mentioned by insiders. The former appellate lawyer, who worked for 11 years as an assistant in the Office of the Solicitor General, has argued 32 cases before the Supreme Court.

Rounding out the list of potential nominees are two names from Congress: Sens. Amy Klobuchar (D-Minn.) and Corey Booker (D-N.J.).

Booker has a law degree from Yale Law School, while Klobuchar is a former prosecutor.

Conservatives have made the Supreme Court as a rallying cry for the election, fearing Clinton would nominate the most liberal candidate she could find.

"It's that simple, a Hillary Clinton Supreme Court means your right to own a firearm is gone," Chris Cox, the executive director of the National Rifle Association's Institute for Legislative Action, warned earlier this month.

“Trump's Supreme Court Picks Could Bring Real-World Experience”

Roll Call

David Hawkings

May 18, 2016

Donald Trump on Wednesday released a list of 11 reliably conservative judges whom he said he would consider for his first Supreme Court nomination. All of them were appointed to prestigious courts at relatively young ages, and several possess the sort of experience in partisan or electoral politics that's almost entirely absent on the high court today.

Six of the jurists that the presumptive GOP nominee mentioned were appointed by President George W. Bush to seats on the federal circuit courts of appeal. Five were confirmed by the Senate with minimal apparent controversy.

But the other, William H. Pryor Jr. , got his seat on the 11th circuit in 2005 only after one of the most bruising battles in the modern history of the partisan judicial wars. His confirmation came only after a last-minute deal, negotiated by a bipartisan group of senators known as the Gang of 14, ushered several of Bush's most politically polarizing nominees past persistent threats of Democratic filibusters. They derided Pryor at the time as a conservative extremist before he was confirmed 53 to 45.

But Pryor would bring something to the court that it has not had in more than a decade: The experience of someone who has won an

election. Pryor was twice elected as Alabama's attorney general as the successor to Jeff Sessions, who this year became the first GOP senator to endorse Trump's presidential candidacy.

The last justice whoever won an election was Sandra Day O'Connor, an Arizona state senator before joining the court in 1981. She retired in 2005.

Two other appeals judges on the list, both now on the 8th Circuit, were once United States attorneys, a job that carries enormous workaday political pressures along with being the top federal prosecutor for a region. They are 53-year-old Steven Colloton in Iowa and 52-year-old Raymond Gruender in St. Louis.

The other federal judges are the 6th Circuit's Raymond Kethledge , 49, who was once a senior attorney on the Senate Judiciary Committee staff; the 3rd Circuit's Thomas Hardiman of Pittsburgh, 50, who came to the federal trial court in Pittsburgh when he was 37; and the 7th Circuit's Diane Sykes , 58, a former justice on the Wisconsin Supreme Court.

Sykes is one of three women on Trump's list. The others are Alison Eid , 51, who is an elected justice on the Colorado Supreme

Court; and Joan Larsen of the Michigan Supreme Court, who spent time in the Justice Department's Office of Legal Counsel during its contentious period driving the Bush administration's legal rationale for combating terrorism after the Sept. 11 attacks.

Thomas Lee, a justice on the Utah Supreme Court for the past six years, is the older brother of GOP Sen. Mike Lee of Utah. The youngest person on Trump's roster is 41-year-old David Stras of the Minnesota Supreme Court.

Everyone on the list is white, and all have some affiliation with the Federalist Society, arguably the most influential conservative legal group.

But the jurists represent some potential diversity for the court in another way: While all eight current justices attended law school at either Harvard or Yale, only one of Trump's 11 did so. Colloton went to Yale.

Trump, the presumptive Republican nominee, has been promising to release such a list since March, when his chief rival for the nomination at the time, Sen. Ted Cruz of Texas, declared Trump was not a true conservative and warned voters to beware of the sort of people he would nominate to the court.

Soon thereafter, Trump said he was consulting with the Heritage Foundation to formulate his list and promised to choose from it if elected.

The court has had a vacancy since Justice Antonin Scalia's death in February, and Senate Republicans have pledged not to fill

the seat until a new president is in office. President Barack Obama has nominated Merrick Garland, chief judge of the D.C. appeals court, for the position.

Senate Judiciary Chairman Charles E. Grassley, R-Iowa, who is helping to block Garland's path, said in a statement: "Mr. Trump has laid out an impressive list of highly qualified jurists, including Judge Colloton from Iowa, who understand and respect the fundamental principle that the role of the courts is limited and subject to the Constitution and the rule of law."

Advocacy groups on the left sounded as disdainful of the roster as GOP senators were effusive.

"A woman's worst nightmare," was the summation from Ilyse Hogue, president of NARAL Pro-Choice America. "His vision appears to be turning the court into an ideological instrument instead of an arbiter of the bedrock values of our country — justice, freedom, and equality."

“SCOTUS Unites Trump and Senate GOP”

U.S. News and World Report

Sam Hananel and Mary Clare Jalonick

August 23, 2016

Differences aside, Donald Trump and Senate Republicans are strongly united on one issue — the balance of the Supreme Court.

While Democrats are pushing the GOP-led Senate to confirm Supreme Court nominee Merrick Garland by the end of President Barack Obama's term, Majority Leader Mitch McConnell, R-Ky., has been resolute in blocking him, saying the next president should fill the high court vacancy. Republicans maintain it's a winning political strategy in a year when some GOP rank and file are struggling with reasons to vote for their nominee.

"I would argue that it's one of the few ties that binds right now in the Republican Party," said Josh Holmes, McConnell's former chief of staff. "It's one of the things that's kept a Republican coalition together that seems to be fraying with Donald Trump."

Trump himself has made the same argument.

"If you really like Donald Trump, that's great, but if you don't, you have to vote for me anyway," Trump told supporters at a rally last month. "You know why? Supreme Court judges, Supreme Court judges. Have no choice ... sorry, sorry, sorry."

The billionaire businessman has made the future ideological balance of the high court a

key issue in the campaign, promising to nominate a conservative in the mold of former Justice Antonin Scalia, who died in February. He often mentions the issue in campaign speeches, as does his vice presidential nominee, Indiana Gov. Mike Pence.

Pence often spends several minutes of his standard campaign speech reminding crowds of the importance of the court and conservative values. To loud cheers, he warns that a court in Hillary Clinton's hands could push through amnesty for immigrants living in the country illegally and strip individuals' rights to own guns, a reversal of the Second Amendment that Clinton has rejected.

Democrats had hoped that McConnell's insistence on blocking the nominee would hurt vulnerable Senate incumbents, but the issue of the Supreme Court fails to resonate with voters like jobs or terrorism. At the Democratic convention last month, Clinton never uttered his name.

After Obama nominated Garland in March, Democrats were particularly hopeful that Republican resistance would sway independent voters in New Hampshire and Pennsylvania, where Republican Sens. Kelly Ayotte and Pat Toomey are running in tough

re-election races. But neither Ayotte's challenger, New Hampshire Gov. Maggie Hassan, nor Toomey's challenger, Katie McGinty, has made the Supreme Court one of their top issues.

In Iowa, a Democrat Party Judge decided to challenge longtime Iowa Sen. Charles Grassley as Democrats targeted the Senate Judiciary Committee chairman over his refusal to hold hearings on Garland. But Grassley is still the favorite to win re-election.

Most of the vulnerable Republican senators have not wavered in their support for McConnell's obstruction.

After an April meeting with Garland, Toomey said that "for something as important as the fundamental balance of the court for a generation, the American people should have the maximum say" by picking the next president.

The only exception among Republicans up for re-election is Sen. Mark Kirk, who is an underdog in his re-election bid in heavily Democratic Illinois. Kirk said he supports a vote on Garland's nomination.

Carrie Severino, head of the conservative Judicial Crisis Network, said it's "a wash" in many of the Senate races because the people who care the most about the issue are partisans, not coveted independents.

For Republicans, Garland's nomination "crystallized the importance of the Senate and reminded people that there's so much that rides on these Senate seats."

Senate Democratic Leader Harry Reid is hoping to bring the issue to the forefront in

September, when the Senate returns from a seven-week break. He has suggested he will use procedural maneuvers to try and force a vote on Garland, though those tactics are unlikely to succeed.

Reid told reporters earlier this month that Republicans who are blocking Garland's nomination are "enablers" of Trump. But he was also realistic about McConnell's determination to leave the decision to the next president, predicting that Clinton would pick Garland if she wins the presidency.

Though McConnell has remained resolute, that hasn't quelled speculation that he may do an about face after the election if Clinton wins in November and if Democrats take back the Senate. Garland is seen as more conservative than a potential liberal justice that Clinton could nominate, and at 63, Garland is older than any high court nominee since Lewis Powell in 1971.

If Clinton does win and Garland is not confirmed, some liberal groups are hoping she would try and reshape the court with a new pick.

"We should have four or five women on the court and at least one should be an African-American woman," said Terry O'Neill, president of the National Organization for Women.

Friends of Garland point out that he went through another lengthy confirmation delay when his appeals court appointment was held up for 19 months. He was later confirmed in 1997 on a 76-23 vote.

"He has given no sign of being frustrated," said Laurence Tribe, a Harvard Law

professor and longtime friend to his former student.

“Cautiously Optimistic about Trump’s SCOTUS Shortlist”

The National Review

Josh Blackman

May 19, 2016

In his dissent in last summer’s same-sex marriage case, Justice Antonin Scalia lamented that the Supreme Court is “hardly a cross-section of America.” The problem, Scalia wrote, is that the most serious questions of constitutional law are resolved by a “strikingly unrepresentative” group of attorneys from elite circles. Donald J. Trump’s list of eleven potential nominees to the Supreme Court would fix that problem. Rather than focusing on the usual shortlist of well-credentialed jurists who live along the Amtrak corridor between Boston and D.C., Trump cast a wider net to provide better representation of our constitutional culture. I have expressed my serious doubts about Mr. Trump’s vision of constitutional law, but so long as he sticks with this list, I remain cautiously optimistic.

Last June, Justice Antonin Scalia observed that for all the talk — and high praise — of diversity in the judiciary, the Supreme Court was lacking in a different type of diversity. All nine justices “studied at Harvard or Yale Law School,” he wrote. Eight of the justices “grew up in east- and west-coast States.” Only Chief Justice John Roberts (of Indiana) “hails from the vast expanse in-between.” Indeed, four out of the nine justices were “natives of New York City.” (My hometown

of Staten Island was the only unrepresented borough.)

This coastal insularity was illustrated during Sonia Sotomayor’s confirmation hearing in 2009. The lifelong New Yorker was asked how she could “understand the everyday challenges of rural and small-town Americans and how Supreme Court decisions might affect their lives?” Sotomayor’s answer was revealing.

“Yes, I live in New York City and it is a little different than other parts of the country, but I spend a lot of time in other parts of the country,” Sotomayor said. “I’ve visited a lot of states. I’ve stayed with people who do all types of work. I’ve lived on — not lived, I’ve visited and vacationed on farms. I’ve lived and vacationed in mountaintops. I’ve lived and vacationed in all sorts — not lived. I’m using the wrong word. I’ve visited all sorts of places.”

Mr. Trump’s list does not follow this template. First, his list of potential nominees did not all receive their law degrees in Cambridge, Mass., or New Haven, Conn. The University of Chicago — where Scalia was a professor — graduated Justices Allison Eid and Thomas Lee. Justice Don Willett studied at Duke; Judge Raymond Kethledge at Michigan; and Judge Thomas Hardiman at

Georgetown. Several of the candidates did not graduate from the so-called Top 14 law schools, including Judge William Pryor, from Tulane; Justice David Stras, from the University of Kansas; and Judge Raymond Gruender, from Washington University in St. Louis.

Trump's choices should be celebrated, as these jurists managed to make it to the top of their fields without having the elite "privilege" — to use a term in common usage today — of a prestigious diploma. The education these judges received was in no way deficient, and perhaps in some ways superior, to those of their Ivy League colleagues. It brings to mind William F. Buckley Jr.'s famous confession that he would "sooner live in a society governed by the first two thousand names in the Boston telephone directory than in a society governed by the two thousand faculty members of Harvard University."

Second, Trump did not limit his search to the usual inside-the-beltway favorites. The list includes Steven Colloton (Iowa), Raymond Gruender (Missouri), Thomas Hardiman (Pennsylvania), Raymond Kethledge (Michigan), William Pryor (Alabama), Diane Sykes (Wisconsin), Allison Eid (Colorado), Joan Larsen (Michigan), Thomas Lee (Utah), David Stras (Minnesota), and Don Willett (Texas). All these judges have served on the bench within what Justice Scalia called that "vast expanse in-between."

Third, for the first time in a generation, not a single judge from the D.C. Circuit Court of Appeals — often called the second-highest court in the land — made the Supreme Court shortlist. This is a positive development. The

judges on Trump's list are less likely to view the great expanses of the United States beyond the Hudson River in the same way as that famous New Yorker cover. They are also less likely to be susceptible to the so-called Greenhouse Effect, the "judicial drift" caused by Beltway Fever. These justices will have the strongest immunity to the D.C. cocktail-hour scene, which tries to nudge judicial conservatives to the left.

Fourth, this geographic diversity also instills a respect for the principles of federalism: Not all of the answers to our problems will come from the seat of the central government, many will come from the "laboratories of Democracy" in the several states. Particularly compelling is that five of the potential nominees currently serve on state supreme courts. We have not had a justice appointed from a state court since President Reagan plucked Sandra Day O'Connor from the Arizona Court of Appeals. These judges focus on interpreting their state constitutions — a task that is often separate and apart from following the rulings of the U.S. Supreme Court. These jurists are less likely to lose sight of the fact that states are free and able to provide additional constitutional protections beyond those of the federal government. They also implicitly understand the importance of the Tenth Amendment and state sovereignty. Further, judges who have had to stand for election will have a deeper appreciation for the role of the courts in our Republic.

But I must temper my optimism with a note of caution: Mr. Trump stopped short of guaranteeing that he would pick someone from this list. In March, he unequivocally

promised, “I will pick, 100 percent pick” from the list. Now, he would only say that these jurists will serve as a “as a guide to nominate our next” justice, and that the list was “representative of the kind of constitutional principles I value.” I have expressed my serious doubts about Mr. Trump’s vision of constitutional law, and this equivocal language leaves me doubting more. For now, I can only give it two cheers. If Mr. Trump wants the third cheer, he must convince us that this will not end up as a “If you like your justices, you can keep your justices” promise. This must be a promise to keep.

“How the G.O.P. Outsourced the Judicial Nomination Process”

The New York Times

Linda Greenhouse

July 21, 2016

The massacre of children and teachers in Newtown, Conn., didn't do it. Neither did the mass murder of worshipers in Charleston, S.C., nor of county employees in San Bernardino, Calif., nor of people at a gay nightclub in Orlando, Fla. Nor, most likely, will the recent coldblooded murders of police officers persuade the Republicans in Congress to enact even modest measures to make it harder for people to get their hands on weapons of destruction.

If the affirmative act of passing legislation is out of reach, it seems to me that there is one thing an aroused and disgusted public ought to focus on: reclaiming the judicial confirmation process from the National Rifle Association.

Over the past seven years, Senate Republicans have outsourced the confirmation process to the gun lobby. This is not hyperbole, but fact. The N.R.A.'s instant and evidence-free denunciation of Judge Merrick B. Garland, President Obama's nominee for the Supreme Court vacancy, may have appeared to be just piling on, since Mitch McConnell, the Senate majority leader, had already announced that no nominee would even be granted a hearing.

But in fact, it was merely the tip of the iceberg.

Some recent history: Back in 2009, President Obama's first Supreme Court nominee, Judge Sonia Sotomayor, appeared on the path to confirmation by a wide bipartisan majority, because of her obvious qualifications and compelling personal story. Alarmed, Senator McConnell, who was then the minority leader, went to his friends at the N.R.A. to ask a favor: oppose the Sotomayor nomination and “score” the vote.

A scored vote is one that an interest group uses in compiling the score that it gives a member of Congress at the end of the session. A score of less than 100 from the N.R.A. can spell trouble for an incumbent in many states and districts. The N.R.A. had never scored a vote on a judicial nomination. Judge Sotomayor had no record on gun issues. But the organization obliged Senator McConnell and announced that it would score the Sotomayor vote. Republicans melted away. Only seven voted for confirmation.

The scenario was repeated the following year with the nomination of Elena Kagan, who had no track record on gun cases because she had never been a judge. Nonetheless, the

N.R.A. declared her “a clear and present danger to the right to keep and bear arms,” adding that “this vote matters and will be part of future candidate evaluations.” Only five Republicans voted for confirmation.

The N.R.A. was also largely responsible for the defeat of Caitlin J. Halligan, a distinguished Obama administration nominee to the United States Court of Appeals for the District of Columbia Circuit. The president submitted her name three times, but she never got a vote. A former Supreme Court law clerk, she had served as solicitor general for New York State, and in that role had represented the state in a lawsuit against gun manufacturers.

The N.R.A.’s opposition was particularly convenient for Senate Republicans, who had to know that a seat on the D.C. Circuit would make her a highly plausible Supreme Court nominee for Democratic presidents far into the future; she was only 46 by the time President Obama admitted defeat and withdrew her name three years ago. She is now co-head of the appellate and constitutional law practice for the firm of Gibson Dunn.

And what about Merrick Garland, whose nomination to the Supreme Court passed the four-month mark the other day? The N.R.A. objects to his vote on the D.C. Circuit, where he is chief judge, to give a full-court rehearing to a three-judge panel’s opinion that the District of Columbia’s strict gun-control law was unconstitutional. He was joined in that unsuccessful vote by Judge A. Raymond Randolph, one of the more conservative judges ever to sit on the appeals court.

But no matter; the N.R.A. has decided, according to Chris W. Cox, the organization’s chief lobbyist, that Judge Garland “does not support the Second Amendment” and that he would provide a fifth Supreme Court vote to overturn *District of Columbia v. Heller*, the 2008 decision that interpreted the Second Amendment as protecting an individual right to keep a handgun at home for self-defense. (A Supreme Court shaped by a President Hillary Clinton’s appointments was the focus of Mr. Cox’s fear-mongering speech at the Republican convention on Tuesday night. “Your right to own a firearm is gone” under a Clinton administration, he warned the delegates.)

Heller was a 5-to-4 decision with a majority opinion by Justice Antonin Scalia, who died in February. It marked the first time the Supreme Court had recognized an individual right under the Second Amendment and, as Professor Adam Winkler of the University of California, Los Angeles, School of Law observed in a smart *Atlantic* piece earlier this summer, it thus lifted the gun issue out of the purely legislative domain and made it “unambiguously a constitutional issue, which means the justices, not elected lawmakers, have the final say.” This may well account for the N.R.A.’s increased focus on judicial nominations — although the first time the N.R.A. opposed a judicial nominee was in 1979, when it tried and failed to stop the confirmation of Abner Mikva, the former White House counsel who died this month, to the D.C. Circuit.

Would Judge Garland — or another Democratic Supreme Court nominee —

provide the fifth vote to overturn *Heller*? Both before and after Justice Scalia's death, the Supreme Court avoided taking up any new gun cases that might shed light on how broad an individual right *Heller* actually protects. The decision exists as both symbol and substance: powerful as a symbol of the pro-gun movement's victory, but considerably cloudier and more limited as a judicial precedent. Lower courts have been interpreting it narrowly.

The decision last month by the United States Court of Appeals for the Ninth Circuit, upholding California's law restricting the right to carry a concealed weapon, provides the most significant example. The court ruled that "the right of a member of the general public to carry a concealed firearm in public is not, and never has been, protected by the Second Amendment." Judge William A. Fletcher's majority opinion stressed the limits the *Heller* decision had set. "The court in *Heller* was careful to limit the scope of its holding," he noted, and he quoted Justice Scalia's own language:

"Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues."

That's not the language from *Heller* that the gun lobby likes to quote. But it's language

that a more progressive court can most likely live with. If it becomes clear over time that all *Heller* means is a handgun at home, the N.R.A. will surely be back for more.

Every weekday, get thought-provoking commentary from Op-Ed columnists, The Times editorial board and contributing writers from around the world.

That chance may come sooner rather than later. By the time the Ninth Circuit handed down its opinion in *Peruta v. County of San Diego*, the California concealed-carry case had been pending in one court or another for more than four years. The plaintiffs have vowed to appeal to the Supreme Court if they can't get a rehearing first before the entire Ninth Circuit (the latest decision was by a 7-to-4 vote of an 11-member panel). It's more than likely that when a Supreme Court nominee gets a hearing before the Senate Judiciary Committee, he or she will be asked what *Heller* means. It's certain that the nominee will refuse to say. The question is whether the public will be listening to this exchange and understand its implications.

According to the 2016 Republican platform, it is pornography, not guns in any hand that can hold one, that is a "public health crisis." Whatever might "make America safe again," to quote the slogan of the Republican convention's opening night, it evidently won't be even the mildest restriction on gun ownership. Is this what the American public, surveying the bloody ground of recent months, really thinks?

Charlton Heston, the actor who in his later years became a pathetic shill for the N.R.A., famously declared at the organization's 2000

convention that liberals — Vice President Al Gore in particular — would have to take his guns “from my cold, dead hands.” It’s time to break the N.R.A.’s deadly stranglehold on the vital process of confirming judges.

“Op-Ed: Filling Supreme Court vacancies isn't a good enough reason to vote for Trump”

The Los Angeles Times

John Yoo and Jeremy Rabkin

August 16, 2016

Many Republicans are trying to persuade themselves to support Donald Trump. They start by admitting a problem they have with him: "I'm embarrassed that Trump attacked a Gold Star family ... " or "Yes, he's confused about the nuclear triad..." And then they come to this conclusion: “But we have to support him because of the Supreme Court.”

As conservative law professors, we share the concern that a Hillary Clinton victory would halt decades of efforts to restore an originalist interpretation of the Constitution. Since Justice Antonin Scalia’s death in February, the court has been divided between four very liberal justices and four conservatives (some more than others). Central constitutional concerns, including religious freedom, voting rights, property rights, the death penalty and gun control are up for grabs, possibly turning on the views of the next new justice.

Trump himself has been gloating over the leverage the situation sets up. “They have no choice,” he said on the stump in Virginia not long ago. “Even if you can’t stand Donald Trump, you think Donald Trump is the worst, you’re going to vote for me. You know why? Justices of the Supreme Court.”

But the Supreme Court is not enough. Our nation confronts a revanchist Russia; a bellicose, expansionist China; terrorism in Europe; and civil war in the Middle East — in short, a world reeling at the edge of chaos. The president's first responsibilities are to maintain national security, advance our national interests in foreign affairs and provide direction for the military. As Alexander Hamilton observed, the framers of the Constitution vested the executive power in one person, the president, to ensure that the United States could conduct its foreign relations with “decision, activity, secrecy, and dispatch.”

Faced with mounting international instability, Trump’s answer is to promise an unpredictable and unreliable America. He has proposed breaking U.S. commitments to NAFTA and the World Trade Organization, closing our military bases in Japan and South Korea, repudiating security guarantees to NATO allies, pulling out of the Middle East, and ceding Eastern Europe to Russia and East Asia to China. A Trump presidency invites a cascade of global crises. Constitutional order will not thrive at home in a world beset by threats and disorder.

While he is shaking up the world, Trump will also nominate conservatives to the federal courts — or so he says. But no one should rely on his vague promises. He has already flip-flopped on numerous core issues, such as the minimum wage, tax rates and entitlement reform. Even when he announced his list of judges in May, Trump would not be pinned down.

“We’re going to choose from, most likely from this list,” he hedged in a Fox News interview, adding “At a minimum, we will keep people within this general realm.”

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Why should we be confident that Trump, who mistook the number of articles in the Constitution and erred in thinking that federal judges could investigate Hillary Clinton, knows the boundaries of “this general realm”? Besides, choosing justices does not belong to the president alone. Senate Democrats and their allies in the media and the academy, will launch unlimited political warfare to stop conservative Supreme Court nominees, as they did with Judge Robert Bork in 1987 and attempted to do with Clarence Thomas in 1991.

In fact, Republican presidents have filled 12 of 16 Supreme Court vacancies since 1968. Only four of the those confirmed were truly conservative jurists (William Rehnquist, Antonin Scalia, Clarence Thomas and Samuel A. Alito Jr.), with the rest either outright liberals (John Paul Stevens and David Souter) or moderates (Sandra Day

O’Connor, Anthony M. Kennedy, John G. Roberts Jr.). Trump’s outbursts won’t persuade the Senate to embrace more conservative nominees, where Reagan’s sunny optimism and George H.W. Bush’s patrician decency failed.

If, miraculously, a President Trump were to succeed in making some favorable appointments to the Supreme Court, the results cannot be guaranteed to satisfy conservatives.

For example, had Scalia lived or had another conservative quickly filled his seat, that wouldn’t have prevented the court from upholding racial preferences in college admissions, thanks to Kennedy’s vote in *Fisher vs. University of Texas* this term. Also this term, Kennedy joined the court liberals to strike down a Texas effort to regulate abortions. In 2015, with Scalia alive and well, Kennedy also provided the fifth vote in *Obergefell vs. Hodges*, striking down federal and state bans on gay marriage.

In 2012, Chief Justice Roberts joined the four liberals to uphold the Affordable Care Act, one of the most disruptive extensions of federal power in our nation’s history, and introduced the idea that Washington’s taxing authority is essentially unlimited.

Recent history shows that even conservative appointees flinch from upholding constitutional norms when they fear it will provoke a strong political response against the court. Trump will not be able to change this depressing reality.

Conservatives who are indulging delusions about a Trump presidency are fantasizing even more about the Supreme Court. The

inconstant ideological majorities of the Supreme Court cannot provide reliable protection for a conservative constitutional agenda. Conservatives must face the hard political challenge of consistently winning elections that advance the cause of limited government not just for the presidency and Congress, but also for governors, statehouses and mayoralities.

Even if Trump were to win in November, it is in the legislative and executive branches that conservatives will have to win their most important battles. Does Trump look like the man to lead them?

“Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term”

The New York Times

Adam Liptak

July 10, 2016

Unless they have a book to sell, Supreme Court justices rarely give interviews. Even then, they diligently avoid political topics. Justice Ruth Bader Ginsburg takes a different approach.

These days, she is making no secret of what she thinks of a certain presidential candidate.

“I can’t imagine what this place would be — I can’t imagine what the country would be — with Donald Trump as our president,” she said. “For the country, it could be four years. For the court, it could be — I don’t even want to contemplate that.”

It reminded her of something her husband, Martin D. Ginsburg, a prominent tax lawyer who died in 2010, would have said.

“Now it’s time for us to move to New Zealand,” Justice Ginsburg said, smiling ruefully.

In an interview in her chambers on Friday, Justice Ginsburg took stock of a tumultuous term and chastised the Senate for refusing to act on President Obama’s Supreme Court nominee.

Her colleagues have said nothing in public about the presidential campaign or about Mr. Obama’s stalled nomination of Judge

Merrick B. Garland to the Supreme Court. But Justice Ginsburg was characteristically forthright, offering an unequivocal endorsement of Judge Garland.

“I think he is about as well qualified as any nominee to this court,” she said. “Super bright and very nice, very easy to deal with. And super prepared. He would be a great colleague.”

Asked if the Senate had an obligation to assess Judge Garland’s qualifications, her answer was immediate.

“That’s their job,” she said. “There’s nothing in the Constitution that says the president stops being president in his last year.”

The court has been short-handed since Justice Antonin Scalia died in February, and Justice Ginsburg said it will probably remain that way through most or all of its next term, which starts in October. Even in “the best case,” in which Judge Garland was confirmed in the lame-duck session of Congress after the presidential election on Nov. 8, she said, he will have missed most of the term’s arguments and so could not vote in those cases.

Justice Ginsburg, 83, said she would not leave her job “as long as I can do it full steam.” But she assessed what is at stake in the presidential election with the precision of an actuary, saying that Justices Anthony M. Kennedy and Stephen G. Breyer are no longer young.

“Kennedy is about to turn 80,” she said. “Breyer is going to turn 78.”

For the time being and under the circumstances, she said, the Supreme Court is doing what it can. She praised Chief Justice John G. Roberts Jr.

“He had a hard job,” Justice Ginsburg said. “I think he did it quite well.”

It was a credit to the eight-member court that it deadlocked only four times, she said, given the ideological divide between its liberal and conservative wings, both with four members.

One of the 4-4 ties, *Friedrichs v. California Teachers Association*, averted what would have been a severe blow to public unions had Justice Scalia participated. “This court couldn’t have done better than it did,” Justice Ginsburg said of the deadlock. When the case was argued in January, the majority seemed prepared to overrule a 1977 precedent that allowed public unions to charge nonmembers fees to pay for collective bargaining.

A second deadlock, in *United States v. Texas*, left in place a nationwide injunction blocking Mr. Obama’s plan to spare more than four million unauthorized immigrants from deportation and allow them to work. That was unfortunate, Justice Ginsburg said, but it could have been worse.

“Think what would have happened had Justice Scalia remained with us,” she said. Instead of a single sentence announcing the tie, she suggested, a five-justice majority would have issued a precedent-setting decision dealing a lasting setback to Mr. Obama and the immigrants he had tried to protect.

Justice Ginsburg noted that the case was in an early stage and could return to the Supreme Court. “By the time it gets back here, there will be nine justices,” she said.

She also assessed whether the court might have considered a narrow ruling rejecting the suit, brought by Texas and 25 other states, on the ground that they had not suffered the sort of direct and concrete injury that gave them standing to sue. Some of the chief justice’s writings suggested that he might have found the argument attractive.

“That would have been hard for me,” Justice Ginsburg said, “because I’ve been less rigid than some of my colleagues on questions of standing. There was a good argument to be made, but I would not have bought that argument because of the damage it could do” in other cases.

The big cases the court did decide, on abortion and affirmative action, were triumphs, Justice Ginsburg said. Both turned on Justice Kennedy’s vote. “I think he comes out as the great hero of this term,” Justice Ginsburg said.

The affirmative action case, *Fisher v. University of Texas*, was decided by just seven justices, 4 to 3. Justice Elena Kagan had recused herself because she had worked on the case as United States solicitor general.

But Justice Ginsburg said the decision was built to last. “If Justice Kagan had been there, it would have been 5 to 3,” she said. “That’s about as solid as you can get.”

“I don’t expect that we’re going to see another affirmative action case,” Justice Ginsburg added, “at least in education.”

The abortion decision, *Whole Woman’s Health v. Hellerstedt*, in a 5-to-3 vote, struck down two parts of a restrictive Texas law, ones requiring doctors who perform abortions to have admitting privileges at nearby hospitals and abortion clinics to meet the demanding standards of ambulatory surgical centers.

Justice Kennedy had only once before voted to find an abortion restriction unconstitutional, in *Planned Parenthood v. Casey* in 1992, when he joined Justices Sandra Day O’Connor and David H. Souter to save the core of *Roe v. Wade*, the 1973 decision that established a constitutional right to abortion.

Asked if she had been pleased and surprised by Justice Kennedy’s vote in the *Texas* case, Justice Ginsburg responded: “Of course I was pleased, but not entirely surprised. I know abortion cases are very hard for him, but he was part of the troika in *Casey*.”

Justice Breyer wrote the methodical majority opinion in the *Texas* case, and Justice Ginsburg added only a brief, sharp concurrence.

“I wanted to highlight the point that it was perverse to portray this as protecting women’s health,” she said of the challenged

requirements. “Desperate women then would be driven to unsafe abortions.”

The decision itself, she said, had a message that transcended the particular restrictions before the court.

“It says: ‘No laws that are meant to deny a woman her right to choose,’” she said.

Asked if there were cases she would like to see the court overturn before she leaves it, she named one.

“It won’t happen,” she said. “It would be an impossible dream. But I’d love to see *Citizens United* overruled.”

She mulled whether the court could revisit its 2013 decision in *Shelby County v. Holder*, which effectively struck down a key part of the Voting Rights Act. She said she did not see how that could be done.

The court’s 2008 decision in *District of Columbia v. Heller*, establishing an individual right to own guns, may be another matter, she said.

“I thought *Heller* was “a very bad decision,” she said, adding that a chance to reconsider it could arise whenever the court considers a challenge to a gun control law.

Should Judge Garland or another Democratic appointee join the court, Justice Ginsburg will find herself in a new position, and the thought seemed to please her.

“It means that I’ll be among five more often than among four,” she said.

“Justice Ruth Bader Ginsburg Calls Trump a ‘Faker,’ He Says She Should Resign”

CNN

Joan Biskupic

July 13, 2016

Supreme Court Justice Ruth Bader Ginsburg's well-known candor was on display in her chambers late Monday, when she declined to retreat from her earlier criticism of Donald Trump and even elaborated on it.

"He is a faker," she said of the presumptive Republican presidential nominee, going point by point, as if presenting a legal brief. "He has no consistency about him. He says whatever comes into his head at the moment. He really has an ego. ... How has he gotten away with not turning over his tax returns? The press seems to be very gentle with him on that."

Ginsburg's comments came in a previously scheduled interview related to my research for a book on Chief Justice John Roberts. I took a detour to raise the reverberations from her criticism of Trump to The Associated Press and The New York Times in recent interviews. "I can't imagine what this place would be -- I can't imagine what the country would be -- with Donald Trump as our president," she had said in the Times interview published Monday.

Trump responded Wednesday morning by calling on Ginsburg to resign.

"Justice Ginsburg of the U.S. Supreme Court has embarrassed all by making very dumb political statements about me. Her mind is shot - resign!" Trump tweeted.

It is highly unusual for a justice to make such politically charged remarks, and some critics said she crossed the line. House Speaker Paul Ryan told CNN's Jake Tapper on Tuesday night the comments were "out of place."

"For someone on the Supreme Court who is going to be calling balls and strikes in the future based upon whatever the next president and Congress does, that strikes me as inherently biased and out of the realm."

Having met with Ginsburg on a regular basis for more than a decade and sometimes been struck by her frankness, I found her response classic. The 83-year-old justice expressed no regret on Monday for the comments or surprise that she would be criticized. Any disbelief she expressed stemmed from the fact that Trump has gotten so far in the election cycle.

"At first I thought it was funny," she said of Trump's early candidacy. "To think that there's a possibility that he could be president ... " Her voice trailed off gloomily.

"I think he has gotten so much free publicity," she added, drawing a contrast between what she believes is tougher media treatment of Democratic candidate Hillary Clinton and returning to an overriding complaint: "Every other presidential candidate has turned over tax returns."

Ginsburg was appointed to the high court by President Bill Clinton in 1993, and is now the senior member of the liberal wing and leading voice countering conservative Chief Justice Roberts. She has drawn a cult-like following among young people who have nicknamed her The Notorious R.B.G., a play on American rapper The Notorious B.I.G.

I have witnessed her off-bench bluntness many times through the years. During 2009 oral arguments in a case involving a 13-year-old Arizona girl who had been strip-searched by school administrators looking for drugs, she was troubled that some male justices played down any harm to the student. "They have never been a 13-year-old girl," Ginsburg told me. "It's a very sensitive age for a girl. I didn't think that my colleagues, some of them, quite understood."

Earlier in 2009, she was being treated for pancreatic cancer yet made sure to attend President Barack Obama's televised speech to a joint session of Congress, explaining that she wanted people to know the Supreme Court was not all men. "I also wanted them to see I was alive and well, contrary to that senator who said I'd be dead within nine months." She was referring to Sen. Jim Bunning, a Kentucky Republican, who had said she would likely die within nine months from the pancreatic cancer. Bunning later apologized.

It was evident in our interview on Monday that when Ginsburg imagines who would succeed Obama, she does not expect Trump to prevail over Clinton.

Acknowledging her own age and that Justices Anthony Kennedy and Stephen Breyer will turn 80 and 78, respectively, Ginsburg said of the possible next president: "She is bound to have a few appointments (to the Supreme Court) in her term."

“Justices Have Free Speech Rights Too”

The New York Times

Erwin Chemerinsky

July 12, 2016

Surely no one was surprised by any of the views expressed by Justice Ruth Bader Ginsburg in an interview with *The New York Times* reporter Adam Liptak, though it is surprising for a Supreme Court justice to be so candid. This, however, is part of a trend in the past several years where many of the justices have spoken publicly and I think this is a very good development. More speech, especially by thoughtful people, is almost always desirable in a democratic society.

I would always rather know what justices and judges think rather than have enforced silence and pretend they have no views.

There was nothing surprising in Justice Ginsburg expressing pleasure at the abortion and affirmative action decisions from the last few weeks; she was in the majority in both cases. Nor was anyone shocked to learn that she thought that the court was wrong in *Citizens United v. Federal Election Commission*, in holding that corporations could spend unlimited money in election campaigns, or in *District of Columbia v. Heller*, in striking down a city's ban on handguns. She dissented in both cases. Quite important, she did not comment on any case now pending before the court or say anything

that could not already be inferred from her past votes.

Nor was it surprising that she praised President Obama's nominee for the Supreme Court, Judge Merrick Garland, and expressed her view that the court's work is hindered by the Senate's failure to consider him. I wish that more of the justices would explain that the Senate's refusal to consider this nomination, as well as nominations for lower federal court judgeships, is seriously interfering with the functioning of the courts.

Perhaps most surprising was her sharp criticism of Donald Trump and her worrying about what the country would be like with him as president. But she simply voiced what countless people, liberal and conservative, think about the possibility of a Trump presidency and no one should be surprised that Ginsburg thinks this too. The judicial code of ethics says that judges are not to endorse or oppose candidates for elected office. But these provisions do not apply to Supreme Court justices.

Nor do I believe that such restrictions are constitutional or desirable. The First Amendment is based on the strong presumption that more speech is beneficial

because it means we are all better informed. I think it is valuable for people to hear what the justices have to say on important issues. As a lawyer and as a citizen, I'd always rather know what justices and judges think rather

than have enforced silence and pretend they have no views. We are in a relatively new era of public statements by justices, and I applaud it.