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THE FEDERALISM-RIGHTS NEXUS: EXPLAINING WHY SENATE DEMOCRATS CAN TOLERATE REHNQUIST COURT DECISION MAKING BUT NOT THE REHNQUIST COURT

NEAL DEVINS*

INTRODUCTION

This essay attempts to explain the apparent disjunction between Congress's disinterest in Rehnquist Court decisions limiting federal power and recent calls by Senate Democrats to use the judicial confirmation process as a way of checking the Court for its "conservative judicial activism."¹ Specifically, in light of recent attacks on the Rehnquist Court, why is it that Congress does not seem at all upset that the Rehnquist Court has struck down twenty-nine statutes, including several high-profile measures, over the past seven years?² Lawmakers from

* Goodrich Professor of Law and Professor of Government, College of William and Mary. This essay builds upon remarks made at *Conservative Judicial Activism*, a conference sponsored by the Byron R. White Center for the Study of American Constitutional Law and The University of Colorado Law Review, October 19–20, 2001. Thanks to Bob Nagel both for inviting me to the Conference and for helping me think about the Supreme Court's role in shaping constitutional discourse. Thanks also to conference participants for useful feedback. Thanks, finally, to Mike Gerhardt, Lee Rawls and Keith Whittington for useful conversations about this paper; to reference librarian extraordinaire, Fred Dingley; to my research assistants Erin O'Callaghan and Robin Mittler; and to my William and Mary colleagues for comments at a works-in-progress colloquium.

1. This essay will not provide a detailed examination of whether Senate Democrats are correct in accusing the Rehnquist Court of being "conservative" and "activist." My concern, instead, is the political saliency of Senate Democrats using the "conservative judicial activism" label to limit President Bush's power to make judicial appointments.

2. From April 1995 to June 2000, the Court declared unconstitutional twenty-three federal statutes. Stuart Taylor, Jr., *The Tipping Point*, 32 NAT'L J. 1810, 1811 (2000). In its 2001 and 2002 terms, the Court invalidated all or part of six federal statutes—four in 2001 and two in 2002. Linda Greenhouse, *In Year of Florida Vote, Supreme Court Also Did Much Other Work*, N.Y. TIMES, July 2, 2001, at A12; Linda Greenhouse, *Court Had Rehnquist Initials Intricately Carved*

both parties have largely ignored these decisions. And when lawmakers have responded to the Court, they treat the Court's decisions as final and dispositive—focusing, instead, on ways to enact corrective legislation consistent with the Court's ruling. At no point was there any suggestion of limiting the Court's jurisdiction or engaging in other activities associated with Court-curbing. Considering this backdrop, why are Democrats on the Senate Judiciary Committee now leading the charge against "conservative judicial activism"?³

In sorting out this puzzle, I will consider two competing hypotheses—one fairly simple and straightforward; the other more nuanced. The simple explanation is the change in parties by John Jeffords, the one time Vermont Republican whose decision to leave the Republican Party shifted control of the Senate from Republican to Democratic hands. Before the Jeffords switch, Democrats did not resist Rehnquist Court decision making because they were the minority party. Under this view, recent Rehnquist Court decision making did pit Democrats (who dislike these decisions) against Republicans, but Democrats were powerless to do anything about it. Today, however, Senate Democrats can use the confirmation process as a vehicle to express their disapproval of the Court.

I find this simple explanation unsatisfactory. While the Jeffords switch is important, I do not think that Democratic complaints about the Rehnquist Court are tied either to party control of the Senate or Democratic disappointment with Rehnquist Court decision making. Instead, I will argue that lawmaker objections to the Rehnquist Court are, more than anything, tied to Democratic disapproval of the Republican Senate's treatment of Clinton-era nominees, the increasing (at least before September 11) polarization of Democratic and Republican leadership, a corresponding desire among Senate Democrats to exercise power, and bitterness over the Court's decision in *Bush v. Gore*.⁴ I will divide my comments into three parts. In Part I, I will explain that Rehnquist Court decisions hardly ever pit Democrats against Republicans and, as a result, that Congress is not particularly concerned with the individual

on Docket, N.Y. TIMES, July 2, 2002, at A1.

3. Hearings, for example, have been held on the appropriateness of rejecting Bush nominees because they do not provide ideological balance to this "far right" Court.

4. 531 U.S. 98 (2000).

decisions of the Rehnquist Court. In Part II, I will demonstrate that lawmakers typically lack the incentives to attack Court decisions limiting Congress's power on federalism grounds. In Part III, I will explain why Senate Democrats nonetheless have good reason to use the Senate's confirmation power as a way to attack the Rehnquist Court.

I. CONGRESSIONAL ACQUIESCENCE TO REHNQUIST COURT
DECISION MAKING: THE IRRELEVANCE OF PARTY
ALIGNMENTS

The willingness of lawmakers to take aim at the Supreme Court is very much tied to partisan alignments within Congress. For example, Court-curbing proposals are often a byproduct of shifting alignments within Congress—so that a majority with differing constitutional views than the Court's replaces a majority that generally accepts the Court's decision making.⁵ For this reason, treating the Jeffords switch as the proximate cause of the Democrats new-found opprobrium of Rehnquist Court decision making has intuitive appeal. Upon closer examination, however, this explanation fails. The laws the Court struck down cannot be characterized in such partisan terms. And when Congress has enacted legislation in response to Rehnquist Court rulings, it has done so in a bipartisan way.

Consider, for example, the most controversial of the Rehnquist Court's federalism decisions—those invalidating all or part of the Violence Against Women Act (VAWA),⁶ the Americans with Disabilities Act (ADA),⁷ the Age Discrimination in Employment Act (ADEA),⁸ the Religious Freedom Restoration Act (RFRA),⁹ the Brady Act,¹⁰ and the Gun-Free School Zones Act of 1990.¹¹ With the exception of the VAWA and the ADEA, both Senate Democrats and Republicans

5. See generally Stuart S. Nagel, *Court-Curbing Periods in American History*, 18 VAND. L. REV. 925 (1965) (detailing role of party alignments in Court-curbing periods); Keith E. Whittington, *Legislative Sanctions and the Strategic Environment of Judicial Review*, 1 I-CON: INT'L J. CONST. L. (forthcoming July 2003), available at http://www.princeton.edu/~kewhitt/strategic_context.pdf.

6. *United States v. Morrison*, 529 U.S. 598 (2000).

7. *Bd. of Trustees v. Garrett*, 531 U.S. 356 (2001).

8. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

9. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

10. *Printz v. United States*, 521 U.S. 898 (1997).

11. *United States v. Lopez*, 514 U.S. 549 (1995).

co-sponsored each of these bills.¹² And with the exception of the VAWA (where most Republicans voted against the measure), each of these bills was enacted without dissent.¹³ Of course, it may be that Republicans were not strong supporters of these measures.¹⁴ Nonetheless, Republican co-sponsorship and Republican votes cannot be dismissed.

12. The following table details the bipartisan nature of Congress's support for these measures:

Law:	ADEA (PL 90-202)*	Brady Bill (PL 103-159)	Gun-Free School Zone Act of 1990 (part of Crime Control Act of 1990) (PL 101-647)	RFRA (PL 103-141)	ADA (PL 101-336)	VAWA of 1994 (PL 103-322)
Co-Sponsor(s):	6 D	138 D 17 R	1 D 1 R	124 D 47 R	45 D 18 R**	3 D
Vote (House):	344-13 (D 192-11) (R 152-2)	238-187 (D 182-71) (R 56-116)	313-1 (D 178-0) (R 135-1)	(voice vote)	377-28 (D 232-5) (R 145-23)	235-195 (D 189-64) (R 46-131)
Vote (Senate):	(voice vote)	(voice vote)	(voice vote)	97-3 (D 54-2) (R 43-1)	91-6 (D 54-0) (R 37-6)	61-38 (D 52-2) (R 7-36)
House Members:	D 248 R 187	D 258 R 178	D 260 R 175	D 258 R 176	D 260 R 175	D 258 R 176
Senate Members:	D 64 R 36	D 57 R 43	D 55 R 45	D 57 R 43	D 55 R 45	D 57 R 43

Information garnered from *Thomas* and *CIS Congressional Universe*, except for

* Vote info from *Congressional Record* and *Age Discrimination*, XXIII CONG. Q. ALMANAC 658, 659 (1967).

** *Thomas* indicates one more co-sponsor than *Congressional Universe* for this Act.

13. See *id.*

14. Consider, for example, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), a 1995 decision restricting Congress's power to grant race-based preferences (without explicitly overruling any federal statute). Although Republicans typically vote in favor of affirmative action legislation, there is little reason to think that this support is heartfelt. For example, in explaining why many Senate Republicans joined Congress's 1998 reaffirmation of federal transportation set-asides, John McCain (R-Ariz.) argued that the costs of repudiating affirmative action were simply too high: "The danger exists that our [party's] aspirations and intentions will be misperceived, dividing our country and

More significantly, even if some of the statutes struck down were readily identifiable with Democratic interests, including the VAWA, the ADA, the ADEA, and the Brady Act, that characterization does not apply to several of the laws struck down, including the RFRA, the Line Item Veto Act,¹⁵ the Communications Decency Act (CDA),¹⁶ *Miranda* override legislation,¹⁷ and measures restricting the speech rights of public employees and the legal services corporation.¹⁸ Indeed, as William Marshall points out in his contribution to this symposium, decisions striking down these laws could be characterized as "extreme liberal activism."¹⁹ Consequently, even if the Rehnquist Court is activist, its activism has not exclusively targeted Democratic interests.²⁰

Not only do Rehnquist Court decisions fail to pit Republicans against Democrats, there is little reason to think that these decisions are of particular concern to Congress. For the most part, Congress has simply ignored these decisions. For example, the *Congressional Record* contains virtually no commentary about the Court's action in these cases. With three notable exceptions (the VAWA, the RFRA, and the Line Item Veto Act), no more than four comments exist about the wisdom of any of the Court's decisions.²¹ Likewise, a search of the *Congressional Record* suggests that Congress is not concerned about the precedential value of these decisions. Lawmakers have mentioned the precedential impact of *City of Boerne v. Flores*,²² which invalidated the RFRA, on only ten

harming our party." 144 CONG. REC. S1490 (daily ed. Mar. 6, 1998).

15. *Clinton v. City of New York*, 524 U.S. 417 (1998).

16. *Reno v. ACLU*, 521 U.S. 844 (1997).

17. *Dickerson v. United States*, 530 U.S. 428 (2000).

18. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001); *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995) (public employees).

19. William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1247 (2002).

20. I do not mean to suggest here that the Rehnquist Court, in fact, is activist. As Ernest Young details in his contribution to this symposium, judicial activism is not easy to define—so much so that attacks on Rehnquist Court activism may operate more as a political broadside than a principled critique. Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1141 (2002).

21. LEXIS database search, *Congressional Record*, All Congress Combined, for "Court" and either the name of the case or relevant law for the period of one month following the date of the decision.

22. 521 U.S. 507 (1997).

occasions,²³ a startling fact when one considers that *Boerne* embraced a standard of review that significantly curtailed Congress's Section Five enforcement powers under the 14th Amendment. *United States v. Lopez*,²⁴ the case that invalidated the Gun-Free School Zones Act, also has received limited attention in congressional debates. Notwithstanding the fact that *Lopez* was the first case in more than sixty years to declare a federal statute outside Congress's Commerce Clause power (and that it has since proven an instrumental precedent in invalidating the VAWA), lawmakers have mentioned *Lopez*'s precedential impact only sixteen times.²⁵ Finally, the Court's anticommandeering cases, *Printz v. United States*²⁶ and *New York v. United States*²⁷ have not figured into congressional deliberations. Members of Congress have mentioned the precedential value of *New York* six times;²⁸ members have mentioned the precedential value of *Printz* only twice.²⁹

While these measures are somewhat artificial, they are nonetheless telling. At a minimum, they suggest that lawmakers are not especially troubled about Rehnquist Court decisions limiting Congress's power. For example, there is no talk of curbing the Court's jurisdiction, of amending the Constitution to nullify these decisions, of enacting legislation in

23. LEXIS database search, Congressional Record, All Congress Combined, from June 25, 1997 (the date of the *Boerne* decision) to June 24, 2002. On nine other occasions, *Boerne* was mentioned—principally in connection with efforts to revamp the RFRA. See *infra* notes 77–81 and accompanying text (discussing Congress's response to *Boerne*).

24. 514 U.S. 549 (1995).

25. LEXIS database search, Congressional Record, All Congress Combined, from April 26, 1995 (the date of the *Lopez* decision) to June 24, 2002. On fourteen other occasions, *Lopez* was mentioned (nine times in connection with letters and memoranda entered into the Congressional Record; five times in connection with efforts to revamp the guns-in-schools law).

26. 521 U.S. 898 (1997) (invalidating background check provision of the Brady Bill).

27. 505 U.S. 144 (1992) (invalidating legislation requiring states to either find a way to dispose of low-level radioactive waste or to "take title" of the waste).

28. LEXIS database search, Congressional Record, All Congress Combined, from June 19, 1992 (the date of the *New York* decision) until June 24, 2002.

29. LEXIS database search, Congressional Record, All Congress Combined, from June 27, 1997 (the date of the *Printz* decision) to June 24, 2002. On several other occasions, members of Congress have introduced letters, memoranda, and resolutions that mention these cases—thirteen times for *New York* and three times for *Printz*. Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, Printz, and Yeskey, 1998 SUP. CT. REV. 71, 138.

open defiance of the Court's ruling, or of refusing to comply with these decisions.³⁰ Instead, as suggested above, there is virtually no talk at all. Correspondingly, when Congress does respond to the Court, it has been compliant. It has treated Court rulings as final and authoritative—a precedent to deal with, not to overrule.³¹ Consider, for example, lawmaker efforts to respond to Court decisions invalidating the CDA, the Gun-Free School Zones Act, and the VAWA—three of the four statutes that Congress revised in response to Rehnquist Court decision making.³² The legislative histories of all three statutes emphasize the need to conform with Supreme Court standards. The Children's On-line Protection Act,³³ which replaced the CDA, "address[ed] the specific concerns raised by the Supreme Court,"³⁴ including the lack of legislative hearings, the failure to consider less restrictive alternatives, and the overbroad definition of what constitutes indecency.³⁵ Likewise, when a bipartisan coalition of senators introduced the Juvenile Justice and Delinquency Protection Act of 1996 (replacing the Gun Free School Zone Act),³⁶ their agenda was simple: "to heed the

30. These techniques are all examples of Court-curbing. See generally, LOUIS FISHER, CONSTITUTIONAL DIALOGUES, 200–230 (1988). For a more detailed treatment of proposals stripping the Court of jurisdiction, see EDWARD KEYNES WITH RANDALL K. MILLER, THE COURT V. CONGRESS: PRAYER, BUSING & ABORTION (1989).

31. I do not mean to suggest that everyone in Congress bows before the Court. On occasion, members of Congress have criticized Rehnquist Court decision making. And in one instance (Congress's post-*Boerne* efforts to revamp the RFRA), lawmakers considered enacting legislation casting doubt on the Court's ruling. See *infra* notes 77–81 and accompanying text. But these are exceptions to quite an overwhelming pattern of lawmaker disinterest or acquiescence.

32. Congress also responded to the Court's decision invalidating the RFRA. See *infra* notes 77–81 and accompanying text. Legislation responding to the Court's age discrimination decision, *Kimel*, was introduced by a bipartisan coalition of lawmakers in May 2001. See 147 CONG. REC. S5458 (daily ed. May 22, 2001) (statement of Sen. Jeffords). Legislation has also been introduced to overturn some of the Court's sovereign immunity decisions. In June 1999 and November 2001, Senator Patrick Leahy introduced legislation that would make states liable for violations of federal intellectual property laws. 147 CONG. REC. S11,364 (daily ed. Nov. 1, 2001) (statement of Sen. Leahy). The 1999 bill died in committee; the 2001 bill is now being considered by the Senate Judiciary Committee.

33. 15 U.S.C. § 6501 (2002).

34. H.R. REP. NO. 105-775, at 12 (1998).

35. *Id.*

36. 18 U.S.C. § 922(q)(2)(a) (2002). When the Act was introduced, it was called the Gun Free School Zone Act of 1995. 141 CONG. REC. S7919 (daily ed. June 7, 1995).

Supreme Court's decision regarding Federal power and yet to continue to fight against school violence."³⁷ Finally, when responding to the decision overturning VAWA, a bipartisan coalition of lawmakers (including John Ashcroft (R-Mo.), Paul Wellstone (D-Minn.), Orrin Hatch (R-Utah), and Joseph Biden (D-Del.)) made no effort to revive the right to sue provision struck down by the Supreme Court.³⁸ Instead, lawmakers focused their energies on federal funding directed at the prevention of domestic violence.³⁹

To summarize: There is little reason to think that Senate Democrat complaints about the Rehnquist Court are tied to party control of the Senate. Rehnquist Court decision making has targeted both liberal and conservative causes. Moreover, most of the federal laws the Rehnquist Court struck down were bipartisan measures. Finally, members of Congress have had precious little to say about Court decisions striking down their handiwork—suggesting that lawmakers are not particularly concerned with the individual decisions of the Rehnquist Court. Indeed, when responding to Court decisions, lawmakers devote their attention to complying with Court edicts, not criticizing the Court.

II. WHY LAWMAKERS HAVE LITTLE INCENTIVE TO ATTACK REHNQUIST COURT FEDERALISM DECISIONS

The question remains: If the Rehnquist Court, by striking down Republican, Democratic, and bipartisan initiatives, is an equal-opportunity activist, what explains Congress's apparent disinterest (at least before Bush-era confirmation battles) in these decisions? I think there are two explanations. The first is quite narrow and contextual, and focuses both on the specifics of the decisions and the social and political forces surrounding these decisions. In particular, Rehnquist Court

37. *Id.* at S7920 (statement of Sen. Kohl); see also *Guns in Schools: A Federal Role?: Hearing Before the Subcomm. on Youth Violence of the Senate Comm. on the Judiciary*, 104th Cong. 9 (1995) (statement of Walter Dellinger, Assistant Attorney General, Office of Legal Counsel) (explaining how the statute conforms to *Lopez*).

38. On the House side, however, some Democratic lawmakers sought (unsuccessfully) to include a civil legal remedy in the statute. H.R. REP. NO. 106-891, at n.31 (2000).

39. The Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1491 (codified as enacted, amended and repealed sections of 8, 18, 20, 28, 42 U.S.C.).

decision making is narrow enough to allow Congress to address the same issue through an alternative source of federal power, especially Congress's spending power.⁴⁰ Moreover, these decisions are in sync with increasing populist distrust of Congress.⁴¹ In contrast to this narrow explanation, the second explanation is quite broad. Specifically, Congress typically lacks incentives to respond to Supreme Court federalism decisions. In part, lawmakers and interest group lobbies pay little attention to federalism qua federalism. Their interest, instead, lies in the substantive issues that the Court examines, such as the environment, labor, and civil rights. Furthermore, when it comes to federalism, Court rulings rarely foreclose democratic solutions. Lawmakers at both the federal and state level can return to the substantive issues implicated by the Court's federalism decision making.

A. *The Narrow Explanation*

In large measure, Rehnquist Court federalism decisions have not destabilized either Congress or the interest groups that lobby Congress.⁴² As such, it is little wonder that Congress, a reactive institution,⁴³ sees these decisions as no more than a blip on its radar screen. Specifically, Rehnquist Court federalism decisions have not prevented Congress from responding to constituent demands. The Court, while invalidating scores of federal laws, has only had to overturn three of its precedents.⁴⁴ More significantly, most of these

40. For additional discussion, see *infra* note 45.

41. For additional discussion, see *infra* notes 48–50 and accompanying text.

42. For a more detailed discussion of my thinking on this subject, see Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435 (2001).

43. For the classic treatment of how lawmakers respond to "fire alarms" triggered by constituents, see Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

44. See *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999) (rejecting the constructive waiver doctrine of *Parden v. Terminal Railway*, 377 U.S. 184 (1964)); *Seminole Tribe v. Florida*, 517 U.S. 44, 66 (1996) (rejecting Congress's power to abrogate the Eleventh Amendment via a statute enacted under the Commerce Clause, overturning *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that federal affirmative action programs are subject to strict scrutiny review, not intermediate review, overturning *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990)). For a competing view (focusing on how political

decisions have been narrow in scope, striking down only parts of the statute and/or allowing Congress an opportunity to revisit the issue by making use of another source of federal power.⁴⁵ Also, because much of what is struck down is duplicative of state enactments,⁴⁶ Congress has felt relatively little constituent pressure to respond to the Court. And finally, many of the statutes struck down relate to issues, especially crime, where politicians may care more about taking a position (by voting for the legislation) than they care about the successful implementation of the law.⁴⁷

Popular attitudes towards lawmaking and, correspondingly, Congress's increasing emphasis on message politics also explains Congress's failure to target Rehnquist Court decision making. Before the September 11 terrorist attacks, voters looked less and less to Congress to solve the nation's problems. Distrust of the federal government and, with it, low expectations of congressional performance hit record levels.⁴⁸ With voters expecting less and less from Congress, the lawmaking culture has been radically transformed. For example, rather than blame the Supreme Court for standing in the way of lawmaker initiatives, Congress is more apt to blame itself for the failings of

conservatives have little regard for precedent), see Marshall, *supra* note 19, at 1232-36. See also Michael Stokes Paulsen, *Activist Judicial Restraint* (2002) (unpublished manuscript prepared for this symposium) (arguing that *stare decisis* is a type of judicial activism and, as such, adherence to precedent is itself activist).

45. In this symposium, see Young, *supra* note 20, at 1167-68 (characterizing Rehnquist Court decision making as "minimalist" in character). See generally Adrian Vermeule, *Does Commerce Clause Review Have Perverse Effects?*, 46 VILL. L. REV. 1325 (2001) (arguing that Congress can enact more comprehensive regulatory schemes than those struck down by the Court); T.R. Goldman, *Lawmakers Take Steps to Respond After Legislation is Found Unconstitutional*, LEGAL TIMES, July 14, 1997, at 8 (same).

46. States, for example, regularly criminalize gun possession at schools and domestic violence. More generally, Congress often enacts criminal statutes which do little more than duplicate state laws, including drug crimes, carjacking, failure to pay child support, embezzlement from an insurance company, and drive-by shootings. Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1, 3 (1997); Seth P. Waxman, *Does the Solicitor General Matter?*, 53 STAN. L. REV. 1115, 1123 (2001) (casting doubt on the necessity of the VAWA).

47. See Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477, 511-13 (2001).

48. For a detailing of opinion polls and a thoughtful examination of how voter distrust has contributed to Rehnquist Court decision making, see Christopher H. Schroeder, *Causes of the Recent Turn in Constitutional Interpretation*, 51 DUKE L.J. 307 (2001).

government by pushing such measures as term limit proposals and the line item veto.⁴⁹ Correspondingly, by placing more emphasis on their parties' message, and less emphasis on legislative outputs,⁵⁰ Republicans and Democrats alike discount what happens to legislation after it is enacted—including a court decision striking down legislation.⁵¹

Finally, Congress is not particularly disappointed with Court decision making. Unlike Court-curbing periods, many members of Congress are sympathetic to the Court's efforts to protect state prerogatives.⁵² For this very reason, Representative Lee Hamilton (D-Ind.), after observing that lawmakers seemed "detached from the actual work of the federal judiciary," speculated that Congress "has become more conservative, and many members are comfortable with most of the Court's rulings."⁵³ Moreover, Congress was on notice that its handiwork was vulnerable to judicial challenges. For example, when enacting the RFRA and the VAWA, academic experts, Chief Justice Rehnquist, and the Judicial Conference signaled that these laws were constitutionally suspect.⁵⁴ More

49. On the line item veto, for example, Sen. Dan Coats (R-Ind.) and others argued: Congress "cannot discipline itself . . . [It] is selfish and greedy and . . . cannot put the national interest ahead of parochial interests or special interests." *Line-Item Veto: Joint Hearing Before the House Comm. on Government Reform and Oversight and the Senate Comm. on Governmental Affairs*, 104th Cong. 22 (1995).

50. See generally C. Lawrence Evans, *Committees, Leaders and Message Politics*, in CONGRESS RECONSIDERED 217 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 7th ed. 2000). For additional discussion of message politics, see *infra* notes 92–99 and accompanying text.

51. Along the same lines, lawmakers, rather than negotiate with the White House over the terms of legislation, often enact legislation "deliberately designed to provoke a presidential veto." John B. Gilmour, *Institutional and Individual Influences on the President's Veto*, 64 J. POL. 198 (2002).

52. Whittington, *supra* note 47, at 512–15 (noting that lawmakers are not upset by Rehnquist Court federalism decision making because lawmakers still reap political benefits for voting on laws criminalizing gun possession, gender-related violence, etc.).

53. 144 CONG. REC. E48-01 (daily ed. Jan. 28, 1998) (statement of Rep. Hamilton). See also *supra* notes 21–39 and accompanying text (suggesting that Congress is not especially interested in whether the judiciary upholds its handiwork—so long as lawmakers are able to reward constituents through the bills they approve); Devins, *supra* note 42, at 461 (same).

54. For example, in 1992 (in a piece that took aim at the proposed VAWA), Chief Justice Rehnquist wrote that Congress ought to "avoid adding new federal causes of action unless critical to meeting important national interests that cannot otherwise be satisfied through nonjudicial forums, alternative dispute resolution techniques, or the state courts." William H. Rehnquist, *Congress Is Crippling Federal Courts, Ever-Expanding Number of 'Federal' Crimes Belong in*

telling, concerns over the possible success of a court challenge prompted Congress to provide for expedited Supreme Court review of the CDA, the Line Item Veto Act, and census reform legislation.⁵⁵

The Rehnquist Court's willingness to strike down federal statutes coincides with Congress's increasing willingness to see Supreme Court decisions as final and authoritative and, correspondingly, its practice of placing less emphasis on what happens to legislation after it is enacted.⁵⁶ With the public expecting less from Congress, moreover, these decisions reflect populist norms. It is little wonder therefore that Congress is loathe to attack the Court for its decision making. And since lawmakers can revisit the issue by making use of an alternative source of federal power, Rehnquist Court federalism decisions do not prevent Congress from responding to constituent pressures.

B. *The Broad Explanation*

Congress's disinterest in recent Supreme Court federalism decisions can also be attributed to the fact that Congress does not care about federalism qua federalism.⁵⁷ Federalism's saliency corresponds to the substantive issues that the Court examines (domestic violence, religious liberty, disability rights,

State Courts Instead, ST. LOUIS POST-DISPATCH, Feb. 16, 1992, at 3B. By extending Rehnquist's complaint to the Gun Free School Zone Act (invalidated in *Lopez*), Congress should have been aware of the judiciary's growing skepticism of the federalization of crime. Also, with respect to the RFRA, law professor witnesses warned Congress that the statute was constitutionally suspect (especially if Congress failed to make extensive findings of fact, something that Congress failed to do). See, e.g., *Religious Freedom Restoration Act of 1991: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong. 331 (1992) (testimony of Professor Douglas Laycock); *id.* at 390-91 (testimony of Professor Ira C. Lupu).

55. Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133, 142-43; Line Item Veto Act of 1996, Pub. L. No. 104-130, 110 Stat. 1200, 1211; Department of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2482 (1997).

56. And this, of course, is both a byproduct and a cause of voters' lower expectations for congressional performance (at least before September 11). See *supra* note 48 and accompanying text.

57. In sharp contrast, New Deal lawmakers cared a great deal about *Lochner* Court decision making because "it rendered impossible the central political goals of the newly empowered Democratic Party." Whittington, *supra* note 47, at 509.

etc.), not the question of the appropriate division of power between the federal and state government. Thus, when responding to federalism decisions that implicate civil and individual rights, Congress has little incentive to strip the Court of jurisdiction, amend the Constitution, or engage in other Court-curbing activities. Instead, its incentives cut in favor of enacting alternative legislation consistent with the Court's decision.

In concluding that today's Congress is uninterested in federalism qua federalism, I looked at the following sources: judicial confirmation hearings, party platforms, interest group web pages, opinion polls, and lawmaker commentary on Supreme Court federalism decisions. None of these sources suggest that federalism, by itself, significantly interests Congress and its constituents.⁵⁸ Lawmakers barely mentioned federalism, for example, in the confirmation hearings, committee reports, or floor debates concerning Supreme Court nominees Sandra Day O'Connor, Clarence Thomas, David Souter, and Stephen Breyer.⁵⁹ In the cases of O'Connor and Souter, this disinterest is especially telling. O'Connor called attention to the fact that her "experience[s] as a State court judge and as a state legislator" gave her "a greater appreciation of the important role that States play in our federal system."⁶⁰ Souter, the so-called "stealth nominee," had no known views on federalism—suggesting that the Senate had real incentives to question him on matters that critically concerned Judiciary Committee members.⁶¹ Similarly, interest groups steered clear

58. Admittedly, my research was selective. For example, I did not look at every judicial confirmation hearing; instead, I focused on hearings where I thought federalism issues might come up. At the same time, the paucity of references to federalism-qua-federalism suggests that my conclusion is defensible. For a related argument, see generally ROBERT F. NAGEL, *THE IMPLOSION OF AMERICAN FEDERALISM* (2001) (observing that national players do not value state contributions and, as such, are apt to degenerate federalism).

59. With respect to Justices Thomas and Breyer, federalism issues were largely ignored in Senate questioning of the nominees. According to my survey of these confirmation hearings, Thomas was only asked twice and Breyer was only asked once about federalism.

60. *The Nomination of Judge Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong. 59 (1981). O'Connor was asked four questions about federalism-related issues. There were no federalism-related references in the Judiciary Committee report supporting her nomination.

61. Souter was asked four questions about federalism during his three days of testimony. There were no federalism-related references in the Judiciary

of federalism-related issues when testifying about these nominees. For example, with the exception of the Coalition for America, no interest group testified (or, for that matter, wrote Congress) about federalism-related issues at either the Thomas or Breyer confirmation hearings.⁶²

Just as federalism issues are not a predominant concern for Congress, federalism issues likewise are not a concern of interest group lobbies. Federalism and other structural matters are not at the heart of the "mission statements" of these groups, especially left-leaning interests.⁶³ Likewise, opinion polls suggest that federalism decisions, even those implicating individual rights, are of little interest to the public.⁶⁴ Indeed, although the Gallup Organization conducted opinion polls on Rehnquist Court rulings on partial birth abortion, physician assisted suicide, the Boy Scouts' exclusion of gays, and student-led prayer, it did not bother to conduct polls on any of the Rehnquist Court's federalism decisions.⁶⁵ Against this backdrop, it is little wonder that party platforms gloss over federalism.⁶⁶ Along the same lines, the handful of

Committee report supporting his nomination. News coverage of Souter's confirmation likewise ignored federalism. A survey of stories and editorials run in *The New York Times*, *The Washington Post*, *The L.A. Times*, and *The Wall Street Journal* reveals that federalism received one or two passing references and nothing else.

62. A quick scan of interest group testimony at the O'Connor and Souter confirmation hearings likewise suggests interest group lack of interest in federalism.

63. I looked at web sites for the following groups: the National Organization for Women, the National Women's Law Center, the National Abortion Rights Action League, the ACLU, the NAACP Legal Defense Fund, and the AFL-CIO. While some web pages condemn recent federalism decisions, they do so against the backdrop of the group's substantive agenda, e.g., women's rights, anti-discrimination protections in the workplace. As to why I looked at these groups as well as the relevance of interest groups in shaping lawmaker consideration of constitutional questions, see Gregory A. Caldeira & John R. Wright, *Lobbying for Justice: Organized Interests, Supreme Court Nominations, and the United States Senate*, 42 AM. J. POL. SCI. 499 (1998).

64. And while the public does not tell the Gallup organization what issues are of interest to it, I do think it reasonable to look to opinion polls as one measure of what is and is not salient. Moreover, when it comes to Supreme Court decision making, the sad fact is that the public is hardly ever aware of Court decisions. See David Adamany & Joel B. Grossman, *Support for the Supreme Court as a National Policymaker*, 5 LAW & POL'Y Q. 405, 407 (1983) (citing studies).

65. Likewise, presidential candidates George W. Bush and Al Gore were not asked about the Court's federalism decisions in any of their presidential debates.

66. Judicial enforcement of federalism was not mentioned in either the 2000 Democratic or Republican Party Platforms. The Democratic platform emphasized the need for "women and minorities" to fill judicial vacancies as well as the need

lawmakers who have criticized Rehnquist Court federalism decisions typically focus their energies on civil and individual rights concerns, not the balance of power implications of these decisions.⁶⁷

No doubt, Congress and its constituents see Supreme Court federalism decision making as a second-order issue. Its salience is linked to the civil and individual rights issues that, for lawmakers and their constituents, define the Court.⁶⁸ Rehnquist-era federalism decision making, however, implicates civil and individual rights. By limiting Congress's power to regulate noneconomic activity (VAWA) and to extend civil rights protections against the states (RFRA, ADA, ADEA), Rehnquist Court federalism decision making has limited the political victories of women's interests, the disabled, senior citizens, and religious minorities.⁶⁹

Why then hasn't Congress launched any meaningful attack against Rehnquist Court decision making? More to the point, are the explanations suggested above enough to explain

for courts to protect "individual rights . . . including the right to privacy." *Prosperity, Progress, and Peace* 26, available at Democratic National Committee, About the DNC, Democratic Party Platform <http://www.democrats.org/about/platform.html> (last visited May 29, 2002). The Republican Platform spoke of "judicial supremacy" and "[a]varice among . . . plaintiffs' lawyers." *Government for the People* 4, available at Republican National Committee, About our Party, Platform <http://www.rnc.org/GOPInfo/Platform/2000platform7> (last visited May 20, 2002). The Republican Platform also expressed concern over court's invalidating citizen referenda. Those laws, however, have not been invalidated on federalism grounds. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating Colorado initiative implicating gay rights on equal protection grounds).

67. I do not mean to suggest that balance of powers concerns are never raised by Congress. In particular, Senator Patrick Leahy (D-Vt.) and Senator Joseph Biden (D-Del.) have both criticized the Court for improperly second guessing congressional factfinding. See 146 CONG. REC. S7758 (daily ed. July 27, 2000) (statement of Sen. Leahy); *id.* at S7590 (statement of Sen. Biden). For further discussion, see *infra* notes 77–80.

68. For an insightful explanation on why it is that courts—in bargaining with Congress and the White House over the scope of their powers—see individual rights as the source of their power, see John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 LAW & CONTEMP. PROBS. 293, 306–07 (1993).

69. African-American interests also have reason to fear the Rehnquist Court. In particular, the logic of the Court's Section Five decision making is in tension with voting rights legislation. See Ellen Katz, *The End of Reconstruction: Congress, Race, and Political Participation in the Rehnquist and Waite Courts* (2002) (unpublished manuscript prepared for this symposium); see also Marshall, *supra* note 19, at 1246 (calling attention to ways that the Rehnquist Court has facilitated non-minority challenges to race preferences).

Congress's acquiescence? The answer is a qualified "no." Even if it strongly disapproves of federalism-based decision making, Congress has little incentive to attack the Court when, and if, it responds to these decisions. Specifically, lawmakers and interest groups can find ways to respond to the Court's federalism decisions without seeking to curb the Court's jurisdiction or otherwise attack it. For example, if Congress does not like a decision, it can make use of alternative theories of power.⁷⁰ Also, several of the decisions left much of the relevant statutory program in effect,⁷¹ allowed for injunctive relief,⁷² and/or spoke of ways in which Congress could respond to the decision.⁷³ Finally, other governmental actors—states and municipalities—can fill the void when Congress cannot.⁷⁴ In other words, because Rehnquist-era federalism decisions allow elected officials and interest groups other avenues to pursue the same objectives as the laws that the Court struck down, Congress has little reason to pursue politically costly Court-curbing proposals.⁷⁵

In contrast, a ruling limiting governmental power over civil and individual rights, such as abortion, school prayer, flag burning, or busing, settles the issue for all parts of government. Consider, for example, abortion. After *Roe*, no unit of government could regulate first trimester abortions. And while

70. See *supra* note 45.

71. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Morrison*, 529 U.S. 598 (2000).

72. See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999).

73. See, e.g., *Bd. of Trustees v. Garrett*, 531 U.S. 356 (2001).

74. Following *Garrett* (ADA) and *Boerne* (RFRA), for example, several states enacted legislation providing for the very protections that the Supreme Court ruled that Congress was without the authority to mandate. See Helen Irvin, *Several States Respond to Garrett Decision, Consider Waiving Immunity to ADA Lawsuits*, 70 U.S.L.W. 2003 (2001) (discussing bills introduced in the immediate aftermath of *Garrett*, including legislation introduced in Minnesota, Rhode Island, California, and New York); Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 U.C.L.A. L. Rev. 1465 (1999) (discussing state RFRA). Also, several states criminalize domestic violence (the subject of the VAWA) and gun possession near schools (the subject of the Gun-Free School Zones Act). See *supra* note 46.

75. For a recent treatment of the political costs of Court-curbing, see generally John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353 (1999). For additional discussion, see *infra* notes 84–85 and accompanying text. And if that is not enough, Congress is limited in the ways it can curb the Court in response to its federalism decisions; for example, it makes little sense to strip the federal courts of jurisdiction on issues in which the courts are needed to enforce congressional mandates.

government could express its disapproval of this decision through appropriations riders and other indirect techniques, it could only attack the heart of the decision by attacking the decision itself. For this reason, *Roe* prompted proposals to strip the courts of jurisdiction, to amend the Constitution, and to enact human life legislation.⁷⁶

No federalism-related decision backs government into a similar corner. This, of course, is not to say that these decisions are inconsequential, but rather that, when responding to these decisions, elected officials need not resort to Court-curbing techniques. When thinking about these decisions, Congress has more incentive to rewrite the law to correct the defect that the Court identified than it has to get the Court to rethink its federalism jurisprudence.

One possible exception to this rule is Congress's response to *Boerne* (the decision invalidating the RFRA), but this is the exception that proves the soundness of the rule. Unlike the calm that has followed other Rehnquist-era federalism decisions, *Boerne* prompted numerous expressions of disappointment with the Court, several legislative hearings, and, on one occasion, talk of Court-curbing.⁷⁷ At the same time, federalism played no role in all of this. Instead, Congress focused on its disapproval of the Supreme Court's restrictive approach to religious liberty.⁷⁸ Specifically, when Congress enacted the RFRA, Congress was responding to *Employment Division v. Smith*, a 1990 Supreme Court decision allowing government to burden religious exercise without satisfying either prong of strict scrutiny review.⁷⁹ As such, like the

76. For a detailing of government responses to *Roe*, see BARBARA CRAIG HINKSON & DAVID M. O'BRIEN, *ABORTION AND AMERICAN POLITICS* (1993).

77. For hearings focusing on possible legislative responses to *Boerne*, see *Protecting Religious Freedom After Boerne v. Flores: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1997); *Congress' Constitutional Role in Protecting Religious Liberty: Hearing Before the Senate Comm. on the Judiciary*, 105th Cong. (1997). For hearings (prompted by *Boerne*) discussing Court-curbing and other legislative checks on the judiciary, see *Congress, the Court, and the Constitution: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998).

78. See Neal Devins, *How Not to Challenge the Court*, 39 WM. & MARY L. REV. 645 (1998) (portraying the RFRA as special interest legislation, with lawmakers validating religious interest group criticisms of Supreme Court religious liberty decision making).

79. 494 U.S. 872 (1990). Rather than require the government to satisfy either the compelling interest prong or least restrictive prong of strict scrutiny

human life legislation designed statutorily to overturn *Roe*, the RFRA was Congress's attempt statutorily to overturn Supreme Court standards governing religious liberty.⁸⁰ Lawmakers never lost sight of this rights-oriented objective and the wrongness of *Smith* remained the focus of hearings and legislation responding to *Boerne*.⁸¹

The lesson here is simple: Congress is a reactive institution and, consequently, Supreme Court rulings invalidating federal or state legislation operate as fire alarms demanding a response. On rights issues, the only effective response may involve one or another Court-curbing technique. Regarding federalism, lawmakers and their constituents may avail themselves of less draconian techniques. Of course, were the Rehnquist Court to step up its anti-Congress campaign and issue decisions that further narrow Congress's power, retooling federalism decision making may become the only way for Congress and its constituents to advance their agenda. Until that time, however, there is little incentive for either Democrats or Republicans in Congress to respond to individual federalism decisions by seeking a broader reexamination of the Court's jurisprudence.

review, *Smith* embraced deferential rational basis review.

80. The legislative history of the RFRA is filled with statements to this effect. *Smith*, for example, was condemned as "disastrous," "dastardly and unprovoked," "devastating," and "degrad[ing]." 139 CONG. REC. H2359 (1993) (statement of Rep. Nadler); 137 CONG. REC. E2422 (1991) (statement of Rep. Solarz); 139 CONG. REC. H2361 (statement of Rep. Schumer); *id.* (statement of Rep. Orton). For his part, President Clinton, when signing the bill, spoke of his conviction that the RFRA "is far more consistent with the intent of the Founders of this Nation than the [*Smith*] decision." Remarks on Signing the Religious Freedom Restoration Act of 1993, 2 PUB. PAPERS 2000 (Nov. 16, 1993).

81. Witness, for example, Senator Orrin Hatch's (R-Utah) opening comments at 1998 hearings on the Religious Liberty Protection Act. After observing that this "legislation seeks to protect the right of religious freedom in cooperation with the Supreme Court," Hatch remarked: "Clearly, it would have been preferable if the Court returned to its previous [pre-*Smith*] solicitude for religious liberty claims. But, until it does, this Congress will do what it can to protect religious freedom in cooperation with the Court." *The Religious Liberty and Charitable Donation Protection Act of 1998: Hearing Before the Senate Comm. on the Judiciary*, 105th Cong. 1 (1998).

III. WHY SENATE DEMOCRATS HAVE STRONG INCENTIVES TO ATTACK REHNQUIST COURT DECISION MAKING WHEN CONFIRMING BUSH JUDICIAL APPOINTEES

The confirmation process operates around a different set of incentives than federalism decision making. While Senate Democrats have little incentive to attack Rehnquist-era federalism decision making as “activist,” they have quite strong incentives to speak of “conservative judicial activism” when battling President Bush’s judicial nominees.⁸² In so doing, Senate Democrats may well make Rehnquist-era federalism decisions the focal point of confirmation battles with both the Bush White House and their Republican colleagues. And while the Jeffords switch (for reasons I will soon explain) helps fuel this campaign against “conservative judicial activism,” the incentives for Senate Democrats to resist Bush judicial appointees, ultimately, has relatively little to do with which party controls the Senate.

Democrats will always have incentive to attack the judicial appointees of a Republican president and Republicans will always have incentive to attack Democratic appointees.⁸³ Specifically, the forward-looking nature of the confirmation process exacerbates increasing polarization within Congress, including each party’s desire to send a distinctive message and pay the other party back for its partisan decision making. Correspondingly, because Court decision making is consequential (especially on civil and individual rights), lawmakers often see the confirmation process as a politically salient way to advance their ideological preferences. In the

82. When politicians speak of “judicial activism,” I think that they are making use of an empty label to achieve a political result. For more detailed elaborations of this point, see Mark V. Tushnet, *The Role of the Supreme Court: Judicial Activism or Self-Restraint?*, 47 MD. L. REV. 147 (1987); William Wayne Justice, *The Two Faces of Judicial Activism*, 61 GEO. WASH. L. REV. 1 (1992). See also Taylor, *supra* note 2, at 1816.

83. For this very reason, Senate Democrats—before the Jeffords switch—signaled Republicans that they were willing to go to war over federal judicial nominations; in particular, by fighting hard against confirming Ted Olson (Solicitor General) and John Ashcroft (Attorney General), Senate Democrats made clear that they were willing to do what it takes to derail unacceptable Bush nominees. See Alison Mitchell, *Senate Confirms Ashcroft as Attorney General*, 58-42, *Closing a Five-Week Battle*, N.Y. TIMES, Feb. 2, 2001, at A1 (the Senate was “sending Mr. Bush ‘as clear a message as we can’ about future nominations, particularly for the Supreme Court.”); Neil A. Lewis, *Panel Still Split on Solicitor General Nominee*, N.Y. TIMES, May 23, 2001, at A21.

pages that follow, I will flesh out the above explanation by way of a laundry list of (somewhat overlapping) themes explaining why Senate Democrats likely will treat recent federalism decisions as a focal point of controversial confirmation hearings:

Federalism as Proxy. Because Rehnquist Court federalism decision making is very much linked to civil and individual rights, a nominee's views on these Rehnquist Court decisions arguably act as a proxy to gauge how that nominee will approach *all* issues implicating civil and individual rights.

After all, common sense suggests that a judge who embraces states' rights arguments is more skeptical of top-down national solutions—whether their source is Congress or the courts—than a judge who is skeptical of states' rights. Put another way, for a judge who embraces state and local control, why should it matter if the national solution emanates from Congress (the ADA, the VAWA, the RFRA, etc.), or from the courts through expansive interpretations of statutes and constitutional provisions implicating civil and individual rights? Consequently, even for Senators and interest groups that do not care all that much about federalism, these cases may nevertheless serve as a good measuring stick of a nominee.

The Forward-Looking Nature of Confirmation Hearings. The widely held belief that the Court is trustworthy, especially as compared to Congress, limits Congress's power to attack individual Supreme Court decisions.⁸⁴ In contrast, judicial nominees cannot claim that they have a vested right to Senate confirmation. Consequently, while Congress will pay an institutional price when it responds to Court decision making through Court-curbing proposals,⁸⁵ almost no consequences stem from resisting White House efforts to fill the federal

84. Eighty-one percent of Americans, in a June 2001 Gallup poll, said that they have "some," "quite a lot," or a "great deal" of confidence in the Supreme Court. Gallup Poll, Roper Center for Public Opinion (June 8–10, 2001) (on file with author). For data showing widespread distrust of Congress, see Schroeder, *supra* note 48, at 346–349. See also Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971 (2000) (highlighting public support for Supreme Court's legitimacy at the very time that FDR challenged that legitimacy through his Court-packing proposal).

85. See Ferejohn, *supra* note 75, at 357; Whittington, *supra* note 5, at 17–18. It is also noteworthy that FDR suffered huge costs for his Court-packing proposal. In particular, "[t]he conservative opposition to Roosevelt crystallized around the Court issue." David M. Kennedy, *How FDR Derailed the New Deal*, ATLANTIC MONTHLY, July 1995, at 87.

bench with judges sympathetic to the president's agenda. For example, Senators can talk about how future appointees may undermine *Roe*, the separation of church and state, and so on.⁸⁶ By speaking in such forward-looking generalities, Senate Democrats can target nominees for things they have not done, but may do. These types of forward-looking attacks, moreover, are difficult to defend against, because it is impossible for a nominee to prove that she will not behave a certain way in the future.

The Packaging of Federalism Decisions. For Senate Democrats (many of whom are interested in derailing Bush judicial appointees),⁸⁷ Rehnquist Court federalism decisions are far easier to package than Court decisions on abortion, religion, speech, gay rights, and *stare decisis*.⁸⁸ In particular, the Court has not acted monolithically in its substantive civil and individual rights decisions—issuing several important rulings that have either expanded or preserved civil rights and individual liberties.⁸⁹ In contrast, no important federalism cases exist which reaffirm Congress's power to protect civil and individual rights⁹⁰ and, as such, the federalism cases can be

86. The classic example of such a parade of future horrors is the Bork confirmation hearing. For an insider's account of how the anti-Bork forces sought to attack Bork this way, see MARK GITENSTEIN, *MATTERS OF PRINCIPLE*, 95–98 (1992).

87. As to why Democrats are interested in limiting Bush this way, see *infra* notes 100–108 and accompanying text.

88. On race issues, it is easier to cast the Rehnquist Court as “anti-civil rights.” For example, as Bill Marshall points out in his contribution to this symposium, several Court rulings can be seen as setbacks to minority interests. See Marshall, *supra* note 19, at 1227–29. At the same time, the Court has yet to invalidate a federal affirmative action program. Also, it has ruled that race can be used as a factor in districting. *Hunt v. Cromartie*, 526 U.S. 541 (1999). Finally, it has reaffirmed Congress's authority to enact voting rights legislation. *Boerne v. Flores*, 521 U.S. 507, 518 (1997).

89. See, e.g., *Legal Servs. Corp. v. Velazquez*, 530 U.S. 533 (2001) (invalidating restrictions on the use of federal funds by legal services); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (invalidating Nebraska's partial birth abortion statute); *Dickerson v. United States*, 530 U.S. 428 (2000) (reaffirming and extending *Miranda* on *stare decisis* grounds); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (extending school prayer decision to student-led prayer at a football game); *Reno v. ACLU*, 521 U.S. 844 (1997) (invalidating Communications Decency Act); *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating Colorado legislation prohibiting the granting of “protected status” to gays and lesbians); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (invoking *stare decisis* to uphold *Roe*).

90. There is one arguable exception here, namely, *City of Boerne v. Flores* (RFRA). 521 U.S. 507 (1997). Specifically, the *Boerne* Court made clear that its

packaged together in a way that civil and individual rights cases cannot. Moreover, the federalism cases act as a better focal point because they cut across a broad range of interests, including those of women's groups, the disabled, the aged, and religious minorities.⁹¹

Symbolic and Message Politics. Judicial appointments, especially Supreme Court appointments, are high visibility events. Interest groups sometimes announce their opposition to a candidate by taking out full page ads in major newspapers. Television and other media coverage is extensive and a plethora of books discuss controversial confirmation hearings. Given the real world and symbolic importance of the appointment process, it is little wonder that Democrats would want to use confirmation hearings as a way of communicating to voters and interest group constituents that they are the party of civil and individual rights.⁹² As a result, Republicans and Democrats increasingly see the lawmaking process as expressive—a way for the members of each party to coalesce behind the party's policy agenda.⁹³ By focusing their efforts on

decision invalidating the RFRA did not put into doubt earlier Court rulings affirming 1960s voting rights legislation. 521 U.S. at 518. At the same time, as Ellen Katz points out in her contribution to this symposium, the Rehnquist Court's Section Five cases cast doubt on the 1982 amendments to the Voting Rights Act. Katz, *supra* note 69.

91. Old habits die hard, of course. And it may be that the chestnuts used to attack Bork and Thomas (privacy, *stare decisis*, etc.) may again emerge as the principal line of attack against Bush nominees. Consider, for example, the Senate Judiciary Committee's rejection of Bush appeals court nominee Priscilla Owen. See Neil A. Lewis, *Democrats Reject Bush Pick in Battle Over Court Balance*, N.Y. TIMES, Sept. 6, 2002, at A1. Specifically, Senate Democrats attacked Owen as being a "judicial activist" because, as a Texas Supreme Court Justice, she broadly interpreted state law restrictions on minor abortion rights. See Neil A. Lewis, *Hearing Starts with Judicial Nominee in Defensive Mode*, N.Y. TIMES, July 24, 2002, at A15. Furthermore, since federalism is a new tune to play and the real concern is about civil and individual rights, lawmakers may be more concerned about "conservative activists" disregarding *stare decisis* and returning both abortion and school prayer to the states. For this very reason, abortion and civil rights have been front and center in the confirmation hearings of Bush appellate court nominees Michael McConnell and Miguel Estrada. See Charles Lane, *Nominee for Court Faces Two Battles*, WASH. POST, Sept. 24, 2002, at A1. Moreover, in the wake of the September 11 tragedy, lawmakers may be especially interested in a nominee's views on laws that restrict civil liberties in the name of national security.

92. In particular, by inviting interest group representatives to testify at these hearings as well as including interest group representatives in strategy sessions, confirmation hearings are an excellent way for lawmakers to solidify the support of their base constituents.

93. See Evans, *supra* note 50; see also John E. Owens, *Gingrich's House Has*

the message it is sending, Senate Democrats have strong incentives to use the confirmation process to demonstrate that their vision of the federal judiciary (a Court that protects civil and individual rights) is at odds with the Republican vision.

Towards this end, Senators Patrick Leahy (D-Vt.) and Charles Schumer (D-N.Y.) are playing a leadership role in defining the Democrats' message on issues related to the composition of the Court. Through newspaper editorials,⁹⁴ television appearances,⁹⁵ floor statements,⁹⁶ and especially through hearings on Rehnquist Court decision making,⁹⁷ Senators Leahy and Schumer are seeking to establish a two-pronged message, namely: (1) the Rehnquist Court's federalism campaign is "conservative," "activist," and targeting civil rights and individual liberties, and (2) Democrats must work hard to ensure ideological balance on a Supreme Court run amok. In sorting out this message, forty-two of the Senate's fifty Democrats attended a retreat in which law professors briefed Senators both on the need to prevent President Bush from "pack[ing] the courts with staunch conservatives" and on ways in which they could attack Rehnquist Court decision making.⁹⁸ "What we're trying to do," said Senator Schumer, "is set the

Something in Common with British Parliament, ROLL CALL, Jan. 29, 1996 (noting that Gingrich "and other Republican leaders have long impressed on their House colleagues the need to think in terms of party . . .").

94. See Charles E. Schumer, *Judging By Ideology*, N.Y. TIMES, June 26, 2001, at A19 ("The Supreme Court's recent 5-4 decisions that constrain Congressional power are probably the best evidence that the Court is dominated by conservatives. . . . Tilting the Court further to the right would push our Court sharply away from the core values held by most of our country's citizens.").

95. See *Senator Charles Schumer and Jeff Sessions Discuss Whether Personal Ideology Should Matter When Confirming Federal Judiciary Nominees*, NBC News: Meet the Press Transcripts, July 1, 2001, available at 2001 WL 24103448; Interview by Brit Hume with Senator Patrick Leahy, Fox News: Fox News Sunday (July 29, 2001) (transcript on file with the University of Colorado Law Review).

96. See, e.g., 147 CONG. REC. S1671-02, S1672 (daily ed. Feb. 28, 2001) (statement of Sen. Leahy) ("The reality today in courts such as the U.S. Supreme Court and Fourth Circuit that are dominated by ideologically conservative Republican appointees is that the dominant flavor of judicial activism is right wing.").

97. See generally, e.g., *Should Ideology Matter? Judicial Nominations 2001: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary* (June 26, 2001), available at <http://www.senate.gov/~judiciary/oldsite/hr062601sc.htm>.

98. Neil A. Lewis, *Washington Talk: Democrats Ready for Judicial Fight*, N.Y. TIMES, May 1, 2001, at A19.

stage and make sure that both the White House and the Senate Republicans know [what] we expect."⁹⁹

Polarization. Judicial confirmation fights are inevitable byproducts of the fact that the Senate is more polarized today than at any time since the late nineteenth century. Unlike the 1960s and 1970s, when liberal (Rockefeller) Republicans and conservative (Dixiecrat) Democrats resulted in roughly similar ideological positions in both parties, ideology and party sharply divide today's Senate.¹⁰⁰ A plotting of the ideological positions of lawmakers would reveal that all Republican coordinates would fall on the right and all Democratic coordinates would fall on the left.¹⁰¹ One result of this transformation is the demise of old Senate folkways, including the norms of institutional respect and civility toward members of the other party.¹⁰² With less emphasis placed on working in a bipartisan way to get things done, attention instead has shifted to blocking what the other side wants.¹⁰³ In such an atmosphere, gridlock over the pace of the confirmation process is to be expected—so much so that ever-widening party divisions often take priority over a nominee's qualifications.¹⁰⁴ Indeed, "[q]uantitative studies suggest that ideological polarization in the Senate may be more significant than divided government itself in obstructing presidential nominations, though the effect is magnified when different parties control the Senate and the White House."¹⁰⁵ As such, the effect of the Jeffords switch is to

99. *Id.* (quoting Sen. Charles Schumer).

100. See David E. Rosenbaum, *In With the Ideologues, On With Deadlock*, N.Y. TIMES, Jan. 21, 1996, at 4-5.

101. See *id.* And with increasing polarization, of course, the parties are more homogeneous. This, of course, helps explain why Democrats and Republicans are able to pursue unifying messages that will define their party. See *supra* note 85 and accompanying text.

102. For a useful summary, see Brannon P. Denning, *Reforming the New Confirmation Process: Replacing "Despise and Resent" with "Advice and Consent,"* 53 ADMIN. L. REV. 1, 15-17 (2001) (discussing, among other works, DONALD R. MATTHEWS, *U.S. SENATORS AND THEIR WORLD* 94-117 (1960)).

103. For a related argument, see BARBARA SINCLAIR, *THE TRANSFORMATION OF THE U.S. SENATE*, 71-101 (1989) (explaining why Senators no longer embrace the "reciprocity norm").

104. See generally MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* (2000); G. Calvin MacKenzie, *Starting Over: The Presidential Appointment Process in 1997* (1998), available at The Century Foundation http://www.tcf.org/Task_Forces/Nominations/MacKenzie/ (last visited May 20, 2002).

105. Keith E. Whittington, *The Confirmation Process We Deserve*, POL'Y R., June & July 2001, at 76, 82. For one recent quantitative study, see Keith T. Poole

bolster already existing Democratic opposition to the appointment of political conservatives. It is little wonder then that Senate Democrats have seized upon the Rehnquist Court's increasing willingness to strike down civil rights laws on federalism grounds. By suggesting that the Court is now engaging in "conservative judicial activism," Senate Democrats have found a high sounding principle to back up their demand that the President's judicial nominees be less conservative than either the President or their Republican counterparts in the Senate.

Power. With Republicans controlling the House and the White House, the confirmation process is one of the few places where Democrats hold the trump card. In other words, since this is their "show," they have real incentives to exercise the limited power they have.¹⁰⁶ Furthermore, if Democrats did not use their confirmation power, especially in light of party polarization, they would appear little more than a rubber stamp for the Republican agenda.¹⁰⁷

Saliency of the Courts. Court decisions are consequential and, as such, the party who does not control the White House always has incentives to limit the power of the President. For this very reason, Republicans worked hard to limit President Clinton's power to appoint judges.¹⁰⁸ Likewise, Senate Democrats want to throw as many obstacles as they can in front of the Bush White House. That way the "bad guys" will get fewer judgeships and, perhaps more important, the

& Howard Rosenthal, *D-Nominate After 10 Years: A Comparative Update to Congress: A Political-Economic History of Roll-Call Voting*, 26 LEGIS. STUD. Q. 5 (2001), available at <http://www.voteview.uh.edu/praps99.pdf> ("We find that the trend to polarization and unidimensionality that we identified in *Congress* has continued unabated through the 105th Congress.").

106. Relatedly, Democrats may use their confirmation power to pursue a broad range of political objectives. For example, the Senate may hold up a confirmation hearing in order to secure the President's signature on a piece of legislation or a modification of executive branch policy. During the Clinton years, for example, the Senate Republicans held back the confirmation of Lois Schiffer, Clinton's choice to head the Justice Department's Environment Division, in order to secure a change in Justice Department policy on environmental crimes. See Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109, 124 (1996).

107. By analogy, Charles Black has written that the Supreme Court must, on occasion, invalidate a law in order to retain its status as an independent branch of government. CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT* 87–88 (1960).

108. See *infra* notes 112, 120–121 and accompanying text.

President may be forced to moderate his appointments so that President Bush will not appoint committed conservatives to the bench, especially to the Supreme Court and to appellate court judgeships that may later set the stage for a Supreme Court appointment.¹⁰⁹ Along these lines, Senate Democrat attacks against "conservative judicial activism" tell the Bush White House that the cost of appointing conservative judicial nominees is quite high.

Much of the above analysis, of course, calls attention to ways in which lawmakers see court decisions as politically salient. At the risk of redundancy, three recent examples illustrating the saliency of the courts to both Democrats and Republicans. First, over the objections of Senators Leahy and Schumer, the Bush White House limited the American Bar Association's role in judicial appointments by refusing to give the ABA a chance to rate nominees before their names were sent to the Senate.¹¹⁰ This action fortified a Republican-led campaign to limit the ABA, whose evaluations had been attacked by conservatives for their "liberal bias."¹¹¹ In particular, when chairing the Judiciary Committee, Orrin Hatch refused to include ABA assessments as an official part of committee deliberations.¹¹² After the Jeffords switch, Senate Democrats reversed Hatch's decision.¹¹³ Second, before the Jeffords switch, Senate Republicans limited the power of Senators to "blue slip" Bush nominees from their home state.¹¹⁴ Rather than require the support of both home state senators before taking action on a nominee, Hatch sought to limit the

109. For this very reason, Democrats have targeted, among others, Jeffrey Sutton (appointed to the Sixth Circuit) and Miguel Estrada (appointed to the D.C. Circuit). See also *infra* note 123 (discussing Senate Judiciary Committee rejection of Charles Pickering).

110. See Amy Goldstein, *Bush Curtails ABA Role in Selecting U.S. Judges*, WASH. POST, Mar. 23, 2001, at A1.

111. See Elisabeth Frater, *Revenge of the Bork Conservatives*, 33 NAT'L J. 970 (2001).

112. See Goldstein, *supra* note 110.

113. *Judicial Nominations: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2002) (statement of Sen. Leahy), available at http://judiciary.senate.gov/member_statement.cfm?id=181&wit_id=50.

114. The "blue slip" is a procedure in which the chair of the Senate Judiciary Committee asks the Senators of the nominee's home state whether they support the nominee. For a history of the "blue slip," see Brannon P. Denning, *The "Blue Slip": Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75 (2001).

"blue slip" to nominees opposed by both home state Senators.¹¹⁵ In protest, Senate Democrats delayed the confirmation of now-Solicitor General Ted Olson by walking out of a Judiciary Committee meeting.¹¹⁶ After the Jeffords switch, of course, Senate Democrats returned to the preexisting practice.¹¹⁷ Third, in an effort to pressure Senate Democrats to move quickly on Bush judicial nominees, Republicans delayed the vote on the foreign operations appropriations bill for 2002 (a highly visible bill tied to the war on terrorism).¹¹⁸

Pay Back. With comity among Senators taking a back seat to the ever-increasing polarization of Democrats and Republicans and the desire of each party to send a message distinguishing itself from the other,¹¹⁹ it is little wonder that each party can file a bill of grievances against the other. Senate Democrats have a strong desire to pay the Republicans back for their management of the confirmation process during the Clinton years. At that time, Democrats complained loudly about Republican refusals to confirm nominees, Republican delays in confirming nominees, Republican success in logrolling Republican-preferred candidates in exchange for their confirming Clinton nominees, and by Republican claims that there were too many judges (so that the seat should have been lost, not replaced by a Clinton appointee).¹²⁰ And if that were

115. See *id.* at 83–84.

116. See Glen Johnson, *Democrats' Walkout Signals Partisan Rupture Over Judges*, BOSTON GLOBE, May 4, 2001, at A6.

117. See Helen Dewar, *Senate Reorganization Finalized, Democrats Pledge to Follow Tradition on Court Nominees*, WASH. POST, June 30, 2001, at A11; Dave Boyer, *Senate Concurs on Reorganization, GOP Fails to Win Pledge on Judges*, WASH. TIMES, June 30, 2001, at A4.

118. See Neil A. Lewis, *Democrats Are Pushed on Judicial Nominees*, N.Y. TIMES, Oct. 21, 2001, at A22; Al Kamen, *Pressing the Issue of Judicial Confirmations*, WASH. POST, Nov. 5, 2001, at A21 (noting Republican effort to craft the following message: "You can't get wire taps, search warrants, etc. without judges; confirm the President's slate so that efforts to capture terrorists won't be delayed.").

119. See *supra* notes 84–91 and accompanying text (message politics); *supra* notes 92–96 and accompanying text (polarization).

120. On the refusal to confirm, see Gerhardt, *supra* note 104, at 140–143; John Podesta & Beth Nolan, *Federal Judgeships on Ice*, WASH. POST, July 11, 2001, at A19. On delays in confirming, see John H. Cushman, Jr., *Senate Imperils Judicial System, Rehnquist Says*, N.Y. TIMES, Jan. 1, 1998, at A1 (noting Rehnquist's depiction of the Senate's failure to confirm judicial nominees as threatening to "erod[e] the quality of justice"). On logrolling, see Gerhardt, *supra* note 104, at 140–41 (describing how Republicans held judgeships hostage in an effort both to force Clinton to nominate Ted Stewart, a nominee embraced by Orrin Hatch, and to pressure Betty Fletcher, a sitting Ninth Circuit judge and

not enough, Democrats were enraged by Republican efforts to capitalize on George W. Bush's White House victory, including the limiting of both the ABA's role and "blue slip" holds, enraged Democrats.¹²¹

That Democrats would respond in kind is hardly a surprise.¹²² And charges of "conservative judicial activism" facilitate these efforts.¹²³ In particular, these charges create an occasion for Democrats: (1) to delay the scheduling of confirmation hearings, so that they can first explore the Senate's role in curbing Rehnquist Court "activism"; (2) to be more scrutinizing when they do hold hearings, so as to make sure nominees do not exacerbate these activist tendencies; and (3) to refuse to act on "activist" Bush nominees. Making the invocation of conservative judicial activism even more appealing, Senate Democrats can throw a label at Republicans

mother of Clinton nominee William Fletcher, to resign on nepotism grounds). On Republican claims that there were too many judges, see Gerhardt, *supra* note 104, at 187 (discussing Jesse Helms's objection to James Beatty, a Clinton nominee to the Fourth Circuit).

121. See *supra* notes 110–115 and accompanying text.

122. For example, the Bush White House cut a deal with California's two Democratic senators, Barbara Boxer and Diane Feinstein, over judicial nominations in that state. Under the deal, a bipartisan advisory committee (composed of Republican and Democratic appointees) will forward the names of possible nominees to the White House. See Henry Weinstein, *Process of Judge Selection Set Up*, L.A. TIMES, May 30, 2001, at 2-1. More striking, only 28 of the 80 judges nominated by President Bush in 2001 were confirmed by the Senate in 2001 (with no hearings scheduled for most of Bush's picks to the federal courts of appeal). See David G. Savage, *Bush's Judicial Nominees Go 28 for 80 in the Senate*, L.A. TIMES, Dec. 31, 2001, at A12. During this same period, successful Bush nominees took (on average) 112 days from nomination to confirmation. Lloyd Cutler & Mickey Edwards, *End the Judicial Blame Game*, WASH. POST, Mar. 13, 2002, at A29. The average in the first year of Clinton's first term was fifty-two days; the average in the first year of his second term was 133 days. *Id.*

123. Consider, for example, the Senate Judiciary Committee's Mar. 14, 2002 rejection of Bush appellate court nominee Charles Pickering. Senator Charles Schumer, in explaining his opposition to Pickering, embraced the "conservative judicial activism" mantra. Speaking of the need to maintain "balance on federal courts" and of his fear that Bush wanted to "stack the courts with Scalias and Thomases," Schumer found Pickering unacceptable. Neil A. Lewis, *Panel Rejects Bush Nominee for Judgeship*, N.Y. TIMES, Mar. 15, 2002, at A1. Other Senate Democrats made clear that their Pickering vote, in part, was pay-back for Republican resistance to Clinton judicial appointees. Senators Russell Feingold (D-Wisc.) and Richard Durbin (D-Ill.) noted that Clinton's failure to get the Republican Senate Judiciary Committee to confirm nominees to the Fifth Circuit contributed to their decision to reject Bush's nomination of Pickering to the Fifth Circuit. See 148 CONG. REC. S1915, S1918 (daily ed. Mar. 14, 2002) (remarks of Sen. Durbin); David G. Savage, *Senate Panel Rejects Bush's Judge Nominee*, L.A. TIMES, March 15, 2002, at A12 (quoting Sen. Feingold).

that Republicans have long used to bolster their efforts to reshape the judiciary.

Democrats also want to pay Republicans back for *Bush v. Gore*, a decision that many (especially academics) condemned as unprincipled judicial activism.¹²⁴ *Bush v. Gore*, however, cannot be the focal point of confirmation hearings. It is too much about Democrats versus Republicans and there is too great a risk that a fight over *Bush v. Gore* will not help Democrats build public support for their campaign to limit the Bush White House. Moreover, notwithstanding its significance, it is just one case and a highly unusual, fact-specific one at that. Rehnquist Court federalism decisions, in contrast, can be pitched at a higher level of generality: It is not simply about pure politics, but about civil and individual rights versus decentralization in government.¹²⁵

CONCLUSION

Senate Democrats have good reason to target the Rehnquist Court's federalism revival. With George W. Bush in the White House, Democrats have strong incentives to limit Bush administration efforts to select judges whose ideology is in step with the Republican party. And since Rehnquist Court federalism decisions can be packaged as both activist and a threat to civil and individual rights, Senate Democrats are using the confirmation process to attack "conservative judicial activism." In contrast, Senate Democrats have little reason to attack the individual decisions of the Rehnquist Court. Unlike Court-curbing periods, these decisions do not pit Democrats against Republicans. The bills that the Court invalidated cannot be characterized as Democratic measures and, as such, Democratic complaints against the Rehnquist Court cannot be tied to changing alignments of power in the now Democratic Senate. More significantly, when responding to the Court's

124. Five hundred eighty-five law professors, for example, signed onto a January 13, 2001 *New York Times* advertisement, declaring that the justices in the *Bush v. Gore* majority were "acting as political proponents for candidate Bush, not as judges." See also Bruce Ackerman, *The Court Packs Itself*, THE AMERICAN PROSPECT, Feb. 12, 2001, at 48 (arguing that the decision casts the Court's fundamental legitimacy into question, so much so that the Senate should refuse to confirm any Bush appointee to the Supreme Court).

125. See *supra* notes 79-83 and accompanying text (discussing how federalism cases can be packaged).

federalism-based decisions, Congress has little incentive to attack the Court. At least until now, these decisions have been quite minimalist—rarely invalidating all of the federal law and never denying Congress or the states an opportunity to return to the issue. Consequently, rather than target the Court, Congress's incentives cut in favor of doing nothing or responding to the ruling through new legislation. And while the Rehnquist Court could extend its rulings in ways that limit core legislative powers, the current round of complaints against the Court has little to do with the Court's federalism decisions.

The fight over "conservative judicial activism" does not stem from Democratic disappointment with the individual decisions of the Rehnquist Court.¹²⁶ Instead, it is tied to the increasing polarization within Congress, the related desire of Senate Democrats both to exercise power and pay the Republicans back for their treatment of Clinton-era nominees, the rise of message politics, and the saliency of the courts. Having strong incentives to use the confirmation power as a way of limiting presidential power, Senate Democrats needed a label that would hold their party together and appeal to their constituent base. "Conservative judicial activism" is that label.

126. This is not to say that Democrats approve of these decisions. Instead, for reasons already specified, Democrats have little reason to attack the Court for any of these decisions.