

3-2005

## The Judicial Nominations Wars

William P. Marshall

*University of North Carolina School of Law*

Follow this and additional works at: <https://scholarship.richmond.edu/lawreview>

Part of the [Constitutional Law Commons](#), [Courts Commons](#), [Election Law Commons](#), [Judges Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

William P. Marshall, *The Judicial Nominations Wars*, 39 U. Rich. L. Rev. 819 (2005).

Available at: <https://scholarship.richmond.edu/lawreview/vol39/iss3/5>

This Symposium Articles is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact [scholarshiprepository@richmond.edu](mailto:scholarshiprepository@richmond.edu).

## THE JUDICIAL NOMINATIONS WARS

*William P. Marshall* \*

Although there is much that divides the speakers here today, there is one point upon which there is general agreement—the judicial nominations process has become increasingly divisive and is exacting a considerable toll on both the candidates and on the process itself. Indeed, it may very well be, as Judge Jones suggests, that the delays, partisanship, and acrimony currently dominating the process are deterring some able and talented lawyers from seeking positions in the federal judiciary.<sup>1</sup>

In part, I suspect that the current judicial nominations battles are simply symptomatic of the broader political and cultural wars that so deeply divide this country. The nation is split literally down the middle between conservatives and liberals, Democrats and Republicans, red states and blue states, and there is little reason to expect that in this current climate the judicial nominations process should be the issue that flies below the partisan radar. Indeed, given the stakes involved, the fact that the judicial nominations process has generated as much vitriol as it has is anything but surprising. After all, the matters that routinely come before the federal courts are the very issues that deeply divide us. In the last few years alone, the Supreme Court has issued critical rulings on such hot-button issues as gay rights,<sup>2</sup> school vouchers,<sup>3</sup> the environment,<sup>4</sup> affirmative action,<sup>5</sup> the Pledge of Allegiance,<sup>6</sup> the war on terror,<sup>7</sup> and abortion<sup>8</sup>—just to

---

\* William R. Kenan Distinguished Professor of Law, University of North Carolina School of Law. B.A., 1972, University of Pennsylvania; J.D., 1977, University of Chicago. I am grateful to Lydia Jones for her excellent research assistance.

1. See Edith H. Jones, *Observations on the Status and Impact of the Judicial Confirmation Process*, 39 U. RICH. L. REV. 833, 845 (2005).

2. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

3. See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

4. See *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461 (2004).

5. See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

6. See *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004).

name a few. Judicial decisions, in short, are at the heart of our political and cultural divisions.

The current nominations wars, however, also have their own particular genesis apart from the broader political fray, and it is worthwhile investigating how we got into the current morass. Certainly, political battles about judicial selection are nothing new. Even George Washington saw one of his nominees to the Supreme Court, John Rutledge, go down in defeat because of the latter's political beliefs.<sup>9</sup> During Jefferson's presidency, Congress escalated the political battle to even greater heights (depths) by going so far as to impeach a sitting Supreme Court Justice, Samuel Chase, for partisan reasons.<sup>10</sup> Chase, apparently, was thought to be too much a Federalist for the Democratic Congress.<sup>11</sup>

The source of our current troubles, however, likely stems from the series of controversial decisions of the Warren Court<sup>12</sup> that broadly expanded constitutional rights in the areas of church and state,<sup>13</sup> criminal defense,<sup>14</sup> voting rights,<sup>15</sup> and reproductive rights<sup>16</sup> and *Roe v. Wade*,<sup>17</sup> the most galvanizing decision of all, decided during the early years of the Burger Court.<sup>18</sup> To the conservatives, these opinions were an anathema—nothing more than

7. See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

8. See *Stenberg v. Carhart*, 530 U.S. 914 (2000).

9. Rutledge engendered opposition because of his stated objections to the Jay Treaty of 1794. See HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON* 29–30 (rev. ed. 1999).

10. See, e.g., *id.* at 57–58.

11. See *id.* Although impeached by the House, Chase was acquitted by the Senate. *Id.* at 58. The reason for the Senate's action, however, apparently had less to do with the high principle of preserving judicial independence than the fact that Jefferson had apparently alienated members of his own party over another unrelated matter and some senators voted in favor of Chase as political retaliation. See generally WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* 106–13 (1992) (discussing the impeachment of Justice Chase and possible explanations for his acquittal).

12. The Warren Court spanned from 1953 to 1969. See, e.g., ABRAHAM, *supra* note 9, at 189.

13. See *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

14. See *Miranda v. Arizona*, 384 U.S. 436 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961).

15. See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

16. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

17. 410 U.S. 113 (1973).

18. The Burger Court spanned from 1969 to 1986. See, e.g., ABRAHAM, *supra* note 9, at 251.

the policy preferences of “unrepresentative, unelected, politically unaccountable judges.”<sup>19</sup> To the liberals, these were decisions that protected the values and principles at the core of the Constitution.<sup>20</sup> The two sides have been talking past each other ever since.

Although the Warren Court, and to an even greater extent the Burger Court, were led by Republican appointees, it was the Republicans that began the process of attempting to undo the Warren Court legacy. Their method was direct—appoint conservatives to the bench who would reverse the Warren and Burger Court decisions that they believed to be illegitimate.<sup>21</sup> At the same time, the Democrats began to mobilize their defenses believing that the Warren and Burger Court decisions were constitutionally correct and the conservative attack upon them misguided.<sup>22</sup> The Democrats also believed that Republican efforts to use judicial appointments to achieve certain results were themselves problematic.<sup>23</sup> After all, whatever one says about the Warren Court, its Justices were not appointed by presidents intent upon reaching specific results. The Warren Court decisions were products of the independent legal reasoning of its Justices (many of them Republican) and not the implementation of a particular president’s political agenda.<sup>24</sup> Thus, the Democrats reasoned, if the effectuation of ideological change was the purpose behind a president’s judicial nominees, then resistance to that ideology could properly be used in support of opposition to that nominee.<sup>25</sup> The culmination of all this, of course, was the fight over the nomination of Robert Bork; a battle whose scars, as some of the other panelists in this Symposium attest, have yet to heal.<sup>26</sup>

---

19. Jones, *supra* note 1, at 835.

20. See, e.g., ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 179 (1987); see also LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* 3–40 (1985).

21. See, e.g., HERMAN SCHWARTZ, *PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION* 3–9 (1988). See generally ABRAHAM, *supra* note 9, at 291–315 (describing the efforts of Presidents Ronald Reagan and George H.W. Bush to fill the Supreme Court of the United States with conservatives).

22. See, e.g., ABRAHAM, *supra* note 9, at 298; SCHWARTZ, *supra* note 21, at 74–102.

23. See, e.g., ABRAHAM, *supra* note 9, at 297–98.

24. See, e.g., SCHWARTZ, *supra* note 21, at 3–4, 8–9.

25. See, e.g., ABRAHAM, *supra* note 9, at 297–98, 306, 309; SCHWARTZ, *supra* note 21, at 76–77.

26. See generally Gary L. McDowell, *Bork Was the Beginning: Constitutional Moralism and the Politics of Federal Judicial Selection*, 39 U. RICH. L. REV. 809, 809–14 (2005); Charles Cooper, Remarks at the Allen Chair Symposium: Federal Judicial Selection, The

The Democrats, as it turned out, were quite correct in thinking that the Republicans were appointing persons like Robert Bork to achieve political results. Indeed, the Republicans were explicit about this intent. As Professor Dawn Johnsen has documented, in the late 1980s the Reagan-Meese Justice Department prepared a series of memoranda calling for judicial results to be effectuated by the appointment of conservative judges.<sup>27</sup> The memoranda identified specific areas of constitutional law as needing a substantial overhaul, and deemed appointing judges with specific ideology as the way to get there.<sup>28</sup> In the words of the Justice Department memorandum, “[t]here are few factors that are more critical to determining the course of the nation, and yet more often overlooked, than the values and philosophies of the men and women who populate the third co-equal branch of the national government—the federal judiciary.”<sup>29</sup>

The Clinton years saw their own form of ideological strife. In an effort to minimize opposition, President Clinton consulted with key Republicans before formally sending his nominations to Congress.<sup>30</sup> As a result, and much to the chagrin of his supporters, Clinton tended to pick judicial moderates rather than candidates with controversial records.<sup>31</sup> In fact, President Clinton’s judicial nominations priorities rested with increasing the ethnic and gender diversity of the courts as much as anything else.<sup>32</sup> Neverthe-

---

First Two Centuries (Apr. 16, 2004), at <http://law.richmond.edu/news/media.htm> (last visited Jan. 21, 2005) (the relevant portion of Mr. Cooper’s presentation begins at 00:41:47 of the online video).

27. Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 397–98 (2003). As a factual matter, it should be noted that the Reagan-Meese documents were not completed at the time of the Bork nomination. Compare ABRAHAM, *supra* note 9, at 297 (noting that Bork’s nomination was announced in July 1987), with Johnsen, *supra*, at 397 (noting that the Reagan-Meese documents were issued in 1988).

28. Johnsen, *supra* note 27, at 397.

29. *Id.* (quoting OFFICE OF LEGAL POLICY, U.S. DEPT OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION, at v (1988)).

30. See MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 122 (2000).

31. See *id.*

32. *Id.* at 131; see also ABRAHAM, *supra* note 9, at 316–17 (quoting President Clinton as saying “I would appoint to the federal bench only men and women of unquestioned intellect, judicial temperament, broad experience. . . . I believe that public confidence in our federal judiciary is furthered by the presence of more women lawyers and more minority lawyers on the bench, and the judicial system and the country benefit from having judges who are excellent lawyers with diverse experience”).

less, although Clinton's nominees had the highest percentage of "well-qualified" ratings by the American Bar Association ("ABA") in history,<sup>33</sup> the Republicans nevertheless prevented many qualified Clinton nominees from reaching the bench.<sup>34</sup>

The tactics used to frustrate President Clinton's nominations were less overt, but certainly more effective, than the filibuster techniques the Democrats have used to fight some of President Bush's nominees.<sup>35</sup> Rather than debating the merits of the Clinton judges, the Republican Congress simply refused to give hearings to many of Clinton's appointees.<sup>36</sup> The result was that some of Clinton's nominations were defeated simply by the passage of time, without public debate or attendant publicity. Many of those

---

33. GERHARDT, *supra* note 30, at 120. Some observers contend that the ABA ratings reflect an ideological bias. See Jones, *supra* note 1, at 839–40; see also James Lindgren, *Examining the American Bar Association's Ratings of Nominees to the U.S. Courts of Appeals for Political Bias, 1989–2000*, 17 J.L. & POL. 1, 28–30 (2001). Other studies suggest, however, that the data shows no statistically significant difference in the ratings of Clinton versus Bush judges. See Michael J. Saks & Neil Vidmar, *A Flawed Search for Bias in the American Bar Association's Ratings of Prospective Judicial Nominees: A Critique of the Lindgren Study*, 17 J.L. & POL. 219, 252 (2001).

34. *Bush Vows to Stick with Judicial Picks*, SAN DIEGO UNION-TRIB., Nov. 14, 2003, at A16 (noting that Senate Republicans blocked sixty-three of President Clinton's judicial nominees).

35. See, e.g., Jones, *supra* note 1, at 840. See generally Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 898 (2005) (discussing how "Republican obstructionism kept open vacancies that the Clinton Administration, by right, should have filled"); Sheldon Goldman, *Unpicking Pickering in 2002: Some Thoughts on the Politics of Lower Federal Court Selection and Confirmation*, 36 U.C. DAVIS L. REV. 695, 716 (2003) (discussing Republican obstruction of President Clinton's judicial nominees).

36. Jones, *supra* note 1, at 840. Judge Jones argues that the Republicans during the Clinton years did not engage in tactics that "besmirched the candidates' reputations nor waged open warfare on their judicial philosophy." *Id.* In fact they did. For example, when Justice Ronnie White of the Supreme Court of Missouri was up for Senate confirmation for a federal district judgeship, he faced a vicious and unsubstantiated attack of his views on criminal law issues by then Senator John Ashcroft. See GERHARDT, *supra* note 30, at 141, 363 n.16 (discussing White's rejection and attributing it to his alleged "procriminal" attitude); Tracey E. George, *Judicial Independence and the Ambiguity of Article III Protections*, 64 OHIO ST. L.J. 221, 235–36 n.63 (2003) (discussing White's rejection and quoting Ashcroft's accusation that Judge White "has a tremendous bent toward criminal activity"); Ronald J. Tabak, *Why an Independent Appointing Authority is Necessary to Choose Counsel for Indigent People in Capital Punishment Cases*, 31 HOFSTRA L. REV. 1105, 1110 (2003) (discussing Ashcroft's role in White's rejection); Editorial, *A Sad Judicial Mugging*, N.Y. TIMES, Oct. 8, 1999, at A26 (discussing White's rejection and how Ashcroft incorrectly depicted Judge White as "pro-criminal and activist," largely for political reasons). Of course, the Republicans did avoid publicly attacking the reputations of some of the nominees they opposed, but it was not because of chivalry. Because they never provided hearings, committee votes, or floor votes to the appointees, the Republicans never had to officially articulate their basis of opposition.

whose nominations were never completed are among the most qualified and distinguished lawyers in the country. Elena Kagan, currently the Dean of the Harvard Law School, was never given a hearing for her nomination to the United States Court of Appeals for the District of Columbia Circuit.<sup>37</sup> Helen White waited four years and still never received a hearing on her nomination to the Sixth Circuit.<sup>38</sup> Kathleen McCree Lewis<sup>39</sup> and Kent Markus<sup>40</sup> were also never given hearings for their nominations to the Sixth Circuit. Enrique Moreno was denied a hearing for a Fifth Circuit seat.<sup>41</sup> Allen Snyder's nomination to the District of Columbia Circuit never made it out of committee,<sup>42</sup> and the list goes on.

Numbers, moreover, do not tell the whole story. Because of their leverage in denying hearings or floor votes, Republicans were able to insert some of their own candidates into the appointments process. Conservative jurist Ted Stewart of Utah, for example, was appointed by President Clinton in order to secure cooperation in the nominations process from Senator Orrin Hatch.<sup>43</sup> The selection of Judge Silverman to the Ninth Circuit was heavily influenced by the intervention of conservative Republican Senator John Kyl.<sup>44</sup> Given this history, it is a wonder that the Democratic senators have been as pliant as they are with respect to the Bush nominees.<sup>45</sup> After all, to the Democrats, many of

---

37. See Michael J. Gerhardt, *Here's What Less Experience Gets You*, WASH. POST, Mar. 2, 2003, at B1.

38. See *id.*

39. Norman Sinclair, *Partisan Spat Leaves 6th Circuit Court Short; Dems Levin, Stabenow Oppose Nomination of Republican Picks to Fill 4 Judge Vacancies*, DETROIT NEWS, June 27, 2004, at 1B.

40. Jack Torry, *Sutton, Cook Being Judged in a Dysfunctional Process*, COLUMBUS DISPATCH, Feb. 5, 2003, at 11A.

41. See Editorial, *Your Turn; Focus: Politics*, SAN ANTONIO EXPRESS-NEWS, Sept. 14, 2003, at 4H.

42. See Mike O'Callaghan, *So Where is the Crisis?*, LAS VEGAS SUN, Nov. 14, 2003, at A27.

43. Michael J. Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667, 683 (2003) (describing how President Clinton and Senator Hatch "choreographed an exchange" where "President Clinton agreed to begin the vetting process for nominating Stewart, while Hatch agreed that as long as Stewart continued to progress through the appointments process, he would initiate hearings on some pending nominations").

44. Carl Tobias, *Filling the Federal Appellate Openings on the 9th Circuit*, 19 REV. LITIG. 233, 256 (2000).

45. As of October 2004, "[t]he Senate has confirmed 201 of President Bush's judicial nominations, including 35 to the circuit courts"—more confirmed nominations "than the per-term average for Presidents Clinton, Bush I or Reagan." *Alliance for Justice Status Report on Judicial Nominations*, U.S. NEWSWIRE, Oct. 14, 2004. To date, the Democrats have blocked only ten of President Bush's nominees. *Id.* For a detailed list of the filibustered

the vacancies to which President Bush has made nominations should have been filled with Clinton appointees.<sup>46</sup> Meanwhile, for the most part, President Bush has failed to consult across the aisle regarding any part of the nominations process. It has not worked as an effective strategy to foster cooperation.

*Bush v. Gore*,<sup>47</sup> of course, also worked to fan the fire. Whatever one feels about the merits of that case, there is no question that the decision sent a powerful message to the nation's political actors: Federal courts do more than decide abstract legal issues—

tered nominees, see <http://www.independentjudiciary.com/nominees/index.cfm?CategoryID=8> (last visited Nov. 29, 2004).

46. In his remarks during this Symposium, Charles Cooper suggested that the Democrats have been hypocritical in delaying some Bush nominations after criticizing the Republicans for delaying Clinton's appointments. See Charles Cooper, Remarks at the Allen Chair Symposium: Federal Judicial Selection, The First Two Centuries (Apr. 16, 2004), at <http://law.richmond.edu/news/media.htm> (last visited Jan. 21, 2005) (the relevant portion of Mr. Cooper's presentation begins at 00:45:52 of the online video) (comparing statements of Senators Leahy, Kennedy, and Daschle regarding their prior refusal to allow filibusters of judicial nominees with their current support of such filibusters). In this respect, it is equally significant to note how leading Republicans have also changed their views on judicial selection dependent upon who held the presidency. In addressing the Senate's delays during President Clinton's tenure, Senator Orrin Hatch took the position that "delay on confirmation hearings is routine, not an indication of obstruction." Brian Blomquist, *Lott Won't Use Rulings to Topple Federal Judges*, WASH. TIMES (D.C.), Mar. 18, 1997, at A4. After President Bush took office, however, Senator Hatch told a different tale: "I think what's happening here is, is that there's a tremendous desire to delay and delay and delay and delay. . . . That's just not right and, frankly, we've got to do something about it." *News Conference with Republican Senators*, FED. NEWS SERV., Apr. 12, 2002. Senator Hatch was also quoted during Clinton's tenure as saying that "[t]here is no vacancy crisis, and a little perspective clearly belies the assertion that 103 vacancies represent a systematic crisis." Greg Pierce, *Inside Politics: No Crisis*, WASH. TIMES (D.C.), Sept. 8, 1997, at A10. When the appointment power was in Bush's hands, however, Senator Hatch told a different story: "We're reaching a crisis in our federal courts. We still have 88 vacancies." James W. Brosnan, *Judicial View from Other End of Telescope*, COM. APPEAL (Memphis, Tenn.), May 13, 2002, at B5.

Of similar interest are the statements of then Senate Majority Leader Trent Lott. When the judicial nominees were Clinton appointees, Senator Lott took the position that: "There are not a lot of people saying: Give us more federal judges . . . getting more federal judges is not what I came here to do." Editorial, *A Vote for All the Judges*, WASH. POST, Sept. 23, 1999, at A28. When the nominees were those of President Bush, however, he presented a different position: "Holding hearings and votes on judicial nominees is arguably the most important responsibility' of the panel." Susan Milligan, *Pickering Rejection Sets Off Nominee War*, BOSTON GLOBE, Mar. 16, 2002, at A1. Similarly when asked in 1997 about whether the slow movement of Clinton judges by the Republicans was deliberate, Senator Lott replied: "[S]ounds like a good idea to me." Editorial, *Delayed and Denied*, N.J. LAW: WKLY NEWSPAPER, May 14, 2001, at 6. Yet only nine months after President George W. Bush took office, Senator Lott was already claiming that the Senate was "at its lowest confirmation rate of federal judges in recent history, and we need to pick up the pace immediately." Donald Lambro, *Moment of Decision for Law Enforcement*, WASH. TIMES (D.C.), Oct. 22, 2001, at A18.

47. 531 U.S. 98 (2000).



they have the power to declare who will be the President of the United States. No other example of the Court's power—except perhaps a decision on who controls Congress—could be expected to resound so deeply. The stakes in judicial selection, in short, were raised once again. That the relevant political actors have approached judicial selection matters with increased intensity since *Bush v. Gore* should therefore not be surprising.

To some, this history is irrelevant. To some, the issue is not about the questionable tactics employed by either, or both sides, in the judicial nominations battles; rather, the issue is the proper role of the judiciary in constitutional decision-making. As Judge Jones states, “The problems of judicial selection . . . are not so much a cause as a symptom of the deeper division in views as to what constitutes the rule of law.”<sup>48</sup> The appropriate role of judges, she argues, is to interpret the law and not to seek to effectuate social change.<sup>49</sup> Professor Gary McDowell echoes this point in his description of conservatives, such as Robert Bork, as being committed to true constitutional interpretation rather than the political expediency of the moment.<sup>50</sup> Such comments reflect two themes often claimed by judicial conservatives. First, they argue that conservative jurisprudence stands for the proposition that effectuating social change is properly in the province of the elected branches and not the judiciary, and that judicial power, therefore, must be exercised with considerable restraint.<sup>51</sup> Second they contend that conservative jurisprudence is marked by a commitment to enduring principle and judicial restraint, while liberal “activist” jurisprudence, in contrast, does little more than manipulate text, precedent, history, and doctrine to achieve desired results.<sup>52</sup>

There is a major problem, however, in the conservative account: it is not accurate. To demonstrate this point one need only look to the opinions of Justices Scalia and Thomas, the Justices whom the Bush Administration cites as the models of the type of

---

48. Jones, *supra* note 1, at 846 (quoting Judge Edith H. Jones, *Foreword to Symposium: The Ethics of Judicial Selection*, 43 S. TEX. L. REV. 1, 6 (2001)).

49. *Id.*

50. McDowell, *supra* note 26, at 810.

51. See generally RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 211 (1985); J. Harvie Wilkinson III, *Why Conservative Jurisprudence Is Compassionate*, 89 VA. L. REV. 753, 762 (2003).

52. See Wilkinson, *supra* note 51, at 762.

“strict constructionists” that they intend to nominate to the federal bench.<sup>53</sup> Whatever else they may be, Justices Scalia and Thomas are not exemplars of judicial restraint. Rather, they have been among the most active Justices in history in striking down—or voting to strike down—federal legislation.<sup>54</sup> Even more revealing is their record in cases where the elected branches have acted precisely as the conservative model would have it—i.e., when politically accountable officials have acted to promote social change.<sup>55</sup> Their record in this area is clearly not one of deference.<sup>56</sup> For example, Justices Scalia and Thomas have voted to strike down federal affirmative action provisions,<sup>57</sup> state affirmative action plans,<sup>58</sup> measures designed to promote minority ownership of media,<sup>59</sup> campaign finance legislation that attempts to redress wealth inequities in the political process,<sup>60</sup> portions of the Americans with Disabilities Act,<sup>61</sup> part of the Family and Medical Leave Act,<sup>62</sup> legislative attempts to promote minority representation,<sup>63</sup> laws protecting women from violence,<sup>64</sup> and laws protecting gays,<sup>65</sup> the aged,<sup>66</sup> and the disabled from discrimination.<sup>67</sup> They have found constitutional violations in the actions of local communities seeking to protect their citizens from flooding,<sup>68</sup> conges-

53. See Elisabeth Bumiller, *Bush Vows to Seek Conservative Judges*, N.Y. TIMES, Mar. 29, 2002, at A24.

54. See *infra* notes 57–72 and accompanying text.

55. See *infra* notes 57–72 and accompanying text.

56. See *infra* notes 57–72 and accompanying text.

57. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring); *id.* at 240–41 (Thomas, J., concurring).

58. See *Grutter v. Bollinger*, 539 U.S. 306, 346–49 (2003) (Scalia, J., concurring in part and dissenting in part); *id.* at 349–78 (Thomas, J., concurring in part and dissenting in part).

59. See *Adarand Constructors*, 515 U.S. at 239 (Scalia, J., concurring); *id.* at 240–41 (Thomas, J., concurring).

60. See *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 247–64 (2003) (Scalia, J., concurring in part and dissenting in part); *id.* at 264–86 (Thomas, J., concurring in part and dissenting in part).

61. See *Tennessee v. Lane*, 124 S. Ct. 1978, 2007–13 (2004) (Scalia, J., dissenting); *id.* at 2013 (Thomas, J., dissenting); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

62. See *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 741–44 (2003) (Scalia, J., dissenting); *id.* at 744–59 (Kennedy, J., joined by Scalia & Thomas, JJ., dissenting).

63. See *Shaw v. Reno*, 509 U.S. 630 (1993).

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

65. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

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

67. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

68. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

tion,<sup>69</sup> and environmental damage.<sup>70</sup> They have even argued that the efforts of all fifty states to fund legal services for the poor by using the interest from a pooled account of lawyers' trust funds which could not earn interest for their owners,<sup>71</sup> was nevertheless an unconstitutional taking even though the owners suffered no economic loss.<sup>72</sup>

This is not the track record of a jurisprudence that believes that judges should not effectuate political results. As such, it is only natural that Democrats would oppose conservative judicial nominees avowedly appointed in the model of Justices Scalia and Thomas. After all, the conservative Justices have already made clear that they are fully willing to invalidate any number of Democratic-supported measures and the Democrats, one would suspect, would be motivated to have their legislative and policy gains upheld.

The conservative judges response to all this, presumably, is that their strict adherence to the rule of law demands these results. The fact that their decisions can be characterized as politically conservative is simply a fortuitous or unfortunate by-product, depending upon one's political beliefs, of dispassionate legal reasoning. Again, however, the record belies the claim. The opinions of the so-called strict constructionist judges make clear that judicial conservatives are more than willing to engage in "activist" decision-making, including foregoing so-called originalist analysis,<sup>73</sup> when the results so require.

Let me briefly offer some examples.<sup>74</sup> When Justice Scalia could not find any constitutional provision that would limit the ability of local communities to protect citizens from environmental harms, he based his decision on something he called "constitu-

---

69. *See id.*

70. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

71. Such funds would include those of insubstantial amounts, those held for short periods of time, and/or other such funds in which the costs of administering the account would exceed any interest earned to the client. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 223–24 (2003).

72. *See id.* at 241–52 (Scalia, J., joined by Rehnquist, C.J., Kennedy, & Thomas, JJ., dissenting).

73. *See* Lino A. Graglia, *How the Constitution Disappeared*, in *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* 35, 42 (Jack N. Rakove ed., 1990); *see also* Jones, *supra* note 1, at 837.

74. For a more detailed presentation of this argument, see William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217 (2002).

tional culture.”<sup>75</sup> Although Justice Thomas could find no textual basis protecting the states from being sued in front of federal administrative agencies, he found the states immune from suit anyway.<sup>76</sup> In the sovereign immunity cases, the conservatives relied on history when they could find no constitutional text supporting their positions.<sup>77</sup> In state affirmative action cases, they relied on text when they could find no history.<sup>78</sup> In federal affirmative action cases they relied on neither text nor history on account that neither could support their position.<sup>79</sup> The conservative position on so-called originalism,<sup>80</sup> in short, is that it is a judicial tool of convenience and not one of restraint.<sup>81</sup>

In fact, the evidence against the conservative’s claim that theirs is the true “rule of law” jurisprudence is overwhelming. Time and time again they have been willing to manipulate not only their applications of originalism but also their views on deference to elected officials, judicial restraint, and judicial power in order to accomplish specific results. In cases where the state has

---

75. See *Lucas*, 505 U.S. at 1028.

76. See *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 751–67 (2002).

77. See, e.g., *Alden v. Maine*, 527 U.S. 706, 760 (1999) (noting that “history” provides sufficient rationale for affirming the State’s immunity from suit in federal court).

78. See, e.g., Jed Rubenfeld, *Affirmative Action*, 107 *YALE L.J.* 427, 429–32 (1997) (discussing the constitutionality of affirmative action and how Justices Scalia and Thomas apply a literal reading of the Constitution to reject affirmative action); Stephen A. Siegel, *The Federal Government’s Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 *NW. U. L. REV.* 477 (1998) (analyzing the constitutionality of affirmative action programs).

79. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (overruling in part *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990)).

80. The use of originalism in constitutional interpretation can be subject to serious criticism, not the least of which is that it is not clear that a group of individuals as visionary as the Framers would have wanted their specific views to be the canons that decide questions in a world with issues and problems that they could not even begin to anticipate. Indeed it is just as likely that in their use of such general terms as “due process” and “privileges and immunities,” that they wanted the Constitution to be subject to ongoing interpretation. For a particularly excellent discussion of the originalism debate, see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 *HARV. L. REV.* 885 (1985). See also RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 89–117 (2004) (analyzing originalism as a form of constitutional interpretation); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L. REV.* 1 (1971) (arguing that the Constitution should be interpreted according to the original intentions of its framers); Paul Brest, *The Misconceived Quest for Original Understanding*, 60 *B. U. L. REV.* 204 (1980) (arguing throughout that originalism is not a tenable approach to constitutional decision-making).

81. Occasionally the conservatives employ a seemingly originalist method in reaching a decision that is not easily characterized as politically conservative. See, e.g., *Kyllo v. United States*, 533 U.S. 27 (2001) (holding that the use of a heat measuring device in a drug investigation constituted a search under the Fourth Amendment).

disfavored gays, for example, they call for deference to the decisions of the political majority,<sup>82</sup> but in cases where the state has acted to protect gays they refuse to defer.<sup>83</sup> They restrict judicial standing when the plaintiffs are low-income, minority, or otherwise disenfranchised<sup>84</sup> or when the plaintiffs sue to remedy environmental harms,<sup>85</sup> but they find broad standing available when the plaintiffs are white persons challenging affirmative action,<sup>86</sup> majority-minority redistricting plans,<sup>87</sup> or when the plaintiffs represent commercial interests contesting government efforts to preserve the environment.<sup>88</sup> The conservatives criticize the “readiness” of Supreme Court moderates to ignore *stare decisis* in overturning the seventeen-year-old precedent of *Bowers v. Hardwick*<sup>89</sup> in *Lawrence v. Texas*;<sup>90</sup> but in *Payne v. Tennessee*,<sup>91</sup> Justice Scalia<sup>92</sup> voted to overturn two decisions of only two<sup>93</sup> and four<sup>94</sup> years and to allow the prosecution to introduce victim impact statements in capital cases. Again, the list goes on.<sup>95</sup>

---

82. See *Lawrence v. Texas*, 539 U.S. 558, 589 (2003) (Scalia, J., joined by Rehnquist, C.J., & Thomas, J., dissenting) (arguing that states should be permitted to ban private consensual conduct based on the “ancient proposition that a governing majority’s belief that certain sexual behavior is ‘immoral and unacceptable’ constitutes a rational basis for regulation”); *Romer v. Evans*, 517 U.S. 620, 648 (1996) (Scalia, J., joined by Rehnquist, C.J., & Thomas, J., dissenting) (arguing that deference should be given to the political majority in permitting states to regulate their “sexual morality statewide”).

83. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

84. See *Lewis v. Casey*, 518 U.S. 343, 355 (1996); *Allen v. Wright*, 468 U.S. 737 (1984); *Warth v. Seldin*, 422 U.S. 490 (1975).

85. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 198–215 (2000) (Scalia, J., joined by Thomas, J., dissenting).

86. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995).

87. See *Shaw v. Reno*, 509 U.S. 630, 630 (1993).

88. See *Bennett v. Spear*, 520 U.S. 154 (1997). For a thorough account of how the Court’s standing doctrine has tended to favor privileged over marginalized interests, see Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301 (2002).

89. 478 U.S. 186 (1986).

90. 539 U.S. 558 (2003) (affirming the rights of adults to engage in private consensual conduct).

91. 501 U.S. 808 (1991).

92. Justice Thomas was not yet on the Supreme Court when *Payne v. Tennessee* was decided on June 27, 1991. See ABRAHAM, *supra* note 9, at 313 (noting that Justice Thomas was confirmed by the Senate on November 15, 1991 and was sworn in three days later on November 18, 1991).

93. *South Carolina v. Gathers*, 490 U.S. 805 (1989), *overruled by Payne v. Tennessee*, 501 U.S. 808, 828–30 (1991).

94. *Booth v. Maryland*, 482 U.S. 496 (1987), *overruled by Payne v. Tennessee*, 501 U.S. 808, 828–30 (1991).

95. For example, although conservatives, including Robert Bork, have widely ridiculed

The point of this should be clear. The conservative attempt to proclaim their jurisprudence of a higher constitutional order is simply untenable.<sup>96</sup> The so-called strict constructionists have more than demonstrated that they will deviate from high princi-

Justice Douglas's use of the term "penumbral rights" in *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965)—the case that provides the primary doctrinal foundation for *Roe v. Wade*, 410 U.S. 113 (1973)—it was Justice Scalia who, in *Employment Division v. Smith*, 494 U.S. 872 (1990), coined the term "hybrid rights." *Smith*, 494 U.S. at 882. See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 95–100 (1990) (discussing *Griswold v. Connecticut* and the origins of the right to privacy).

96. The greater claim to jurisprudential legitimacy may in fact belong to the liberals. Over sixty years ago, the Supreme Court noted, in *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4. (1938), that judicial power was to be used sparingly and that courts should generally defer to the decision of politically accountable actors. At the same time, the Court made clear that courts should be vigilant in reviewing state actions that adversely affect minority groups (who do not have the political power to protect themselves from disfavored treatment) or state actions that affect the integrity of the political process itself. *Id.*

The *Carolene Products* formulation is a good one. In a democracy, the role of an unelected judiciary should be limited in order to respect majority will; however, it is also sensible that courts should step in when the political processes themselves cannot be expected to be fair. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75–77 (1980) (analyzing the famous *Carolene Products* footnote four). According to John Hart Ely:

[footnote four of *Carolene Products*] suggests that it is an appropriate function of the Court to keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open. . . . the Court should also concern itself with what majorities do to minorities, particularly . . . laws "directed at" religious, national, and racial minorities and those infected by prejudice against them.

ELY, *supra*, at 76.

Since *Carolene Products*, liberal jurisprudence, by and large, has stayed true to this general theme. See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985) (discussing how *Roe v. Wade* fits within the *Carolene Products* formulation). But see John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920, 933–37 (1973) (arguing that *Roe* does not fit within the *Carolene Products* model).

Conservative jurisprudence, on the other hand, has turned *Carolene Products* on its head. In case after case, conservative decisions have reinforced the rights of the already established, against the interests of the disaffected. They have protected white majorities against laws that would assist minorities. See *Grutter v. Bollinger*, 539 U.S. 306, 346–49 (2003) (Scalia, J., joined by Thomas, J., concurring in part and dissenting in part); *id.* at 349–78 (Thomas, J., joined by Scalia, J., as to Parts I–VII, concurring in part and dissenting in part); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Shaw v. Reno*, 509 U.S. 630 (1990). They have protected heterosexuals from laws that would help homosexuals. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). They have voted to strike down state efforts that would provide the poor with the legal assistance necessary to challenge more entrenched economic interests. See *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 241–52 (Scalia, J., joined by Rehnquist, C.J., Kennedy, & Thomas, JJ., dissenting). Yet, while it makes sense to protect political minorities from political majorities, protecting political majorities from themselves makes little sense at all.

ple when necessary to further their own political vision.<sup>97</sup> President Bush's call to place strict constructionists on the bench, thus, can only be understood as a call for the implementation of that political vision (with its attendant set of specific constitutional results) and not for the furtherance of a principled constitutional order.

None of this, of course, is conducive to de-escalating the battles over judicial nominations. The President's opponents, after all, cannot be fairly criticized if they respond politically to the President's political agenda—even if he advances that agenda under a judicial nominations rubric. The end of the nominations battles, I suggest, will only occur when both sides work to achieve some measure of bipartisanship. Certainly, any president's judicial nominations are entitled to deference from Congress. At the same time, any president should expect opposition when his judicial nominations are a part of political strategy designed to achieve partisan goals.

---

97. As I have said elsewhere:

[T]he conservative Justices show little hesitance in doing exactly what they condemn when it serves their agenda. They seek favored constitutional status for their own chosen constituencies even though they assert that exercising judicial power to effectuate social policy is illegitimate. They strike down, rather than defer to, legislative attempts to alleviate societal disparities in wealth and power even though they claim that redressing social inequities is in the province of the legislature.

William P. Marshall, *The Empty Promise of Compassionate Conservatism: A Reply to Judge Wilkinson*, 90 VA. L. REV. 355, 375 (2004).