

# THE MAJORITARIAN REHNQUIST COURT?

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## I

### INTRODUCTION

Recent (1995–2002) Rehnquist Court decisions striking down federal laws can be tied to “majoritarian” social and political forces.<sup>1</sup> In explaining why I think this is so, I will not defend these decisions. It may be, for example, that these decisions were wrongly decided, or inconsistent with what the Justices have said in other decisions, or both. Moreover, these decisions may well reflect the personal preferences of the Justices voting to invalidate these laws. Instead, my point is that majoritarian forces help explain why the Rehnquist Court seemed so willing to strike down federal laws.

Before turning to the Rehnquist Court and to the social and political forces that impact its decisionmaking, it is useful to provide some background to my project. Having spent much of the past sixteen years examining how constitutional law is shaped by both judicial and nonjudicial actors, I am quite convinced—as Robert Dahl put it in 1957—that the Court’s constitutional decisions “are never for long out of line with the policy views dominant among the law-making majorities of the United States.”<sup>2</sup> This does not mean that the Court never falls out of step with lawmakers or U.S. citizens. Court-curbing proposals, for example, are often a byproduct of shifting alignments within Congress—

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A preliminary version of this essay was presented at a December 2002 conference at the Duke Law School, “The Constitution and Other Legal Systems: Are there Progressive and Conservative Versions?” From December 2002 to June 2004, Supreme Court decisionmaking has largely confirmed my December 2002 remarks. In this essay, I make brief mention of some of these decisions. The focus of this essay, however, is understanding why it is that Rehnquist Court decisions invalidating federal statutes from 1995–2002 could be labeled “majoritarian.”

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1. Academic and newspaper commentary about Rehnquist Court “activism” has focused on these decisions, especially the Rehnquist Court’s revival of federalism. Because much of this commentary has depicted the Court as arrogant by imposing its views on Congress and U.S. citizens, I thought it would be useful to focus my analysis on these decisions. At the same time, I think it would be wrong to infer from my analysis that Rehnquist Court decisions striking down state laws and/or overturning state court decisions are somehow “majoritarian.” The dynamics of Congress-Court relations, as this article makes clear, are quite different from the dynamics of state-Court relations.

2. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957).

so that a majority with constitutional views that differ from the Court's views replaces a majority that generally accepts the Court's decisionmaking.<sup>3</sup> While these proposals are often prompted by Court rulings that strike down federal or state laws, it would nevertheless be wrong to measure whether the Court is countermajoritarian by looking at the frequency with which it strikes down legislation.<sup>4</sup> It may be, for example, that lawmakers delegate power to the courts either because the issue (abortion, slavery) threatens to disrupt existing political coalitions or because they want to cast a vote for something that is politically popular (flag burning, internet decency).<sup>5</sup> Also, what if the laws the Court invalidates are unpopular either with lawmakers or with the American people? If the law is truly outdated, its invalidation may well seem majoritarian.<sup>6</sup> On the other hand, a law may be unpopular with the people but not with lawmakers. This was true with *Lochner* Court invalidations of first New Deal legislation.<sup>7</sup>

What then of the Rehnquist Court? By invalidating all or parts of thirty-one laws between 1995 and 2002,<sup>8</sup> the Court has been characterized as "arrogant, self-aggrandizing, and unduly activist" by "giving insufficient deference—or even a modicum of respect—to Congress."<sup>9</sup> Whatever one thinks of this characterization, there is little reason to think that Congress and U.S. citizens will

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3. See generally Stuart S. Nagel, *Court-Curbing Periods in American History*, 18 VAND. L. REV. 925 (1965) (discussing seven periods of intense Court-curbing and the factors that provoke conflict between the legislative and judicial branches). See also Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POLI. SCI. REV. 795, 796 (1975) (noting that the Court performs a countermajoritarian role during "transitional periods, in which the Court is a holdover from the old coalition").

4. For similar reasons, it would be wrong to depict the Court as countermajoritarian or activist because it overturns precedent. It may be that that precedent cuts against the grain of prevailing social norms. This, of course, is what happened in the ten terms from 1937-46. During those years, the FDR Court validated the power of government to pursue social objectives through economic regulation and, in so doing, reversed thirty-two of its earlier decisions. WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN* 233 (1995).

5. See *infra*, Part III. See also Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. IN AMER. POL. DEV. at 35, 37-38 (1993).

6. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U.L. REV. 333, 349-50 (1998).

7. For a provocative argument, based on extensive surveying of public opinion polls, that the *Lochner* Court decisionmaking reflected public opinion, see Barry Cushman, *Mr. Dooley and Ms. Gallup: Public Opinion and Constitutional Change in the 1930s*, 50 BUFF. L. REV. 7 (2002). At the same time, by resisting reforms pushed by New Deal Democrats, these decisions placed the Court "squarely against the interests of the dominant political party of the period." Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L. J. 477, 514 (2001).

8. In its 2002-2003 term, the Court—for the first time since 1994—did not strike down any federal statutes. Instead, it limited its federalism revival by upholding Congress's power to limit states' rights on gender-related issues. See *infra* note 95. In its 2003-04 term, the Court also handed Congress important victories. It upheld soft money limits in campaign finance reform legislation. See *infra* note 108. It also approved the Americans with Disabilities Act demand that state buildings be accessible to the handicapped. See *infra* note 95. The Court also turned down efforts to limit Congress's Spending Clause power. See *infra* note 112.

9. This is how Suzanna Sherry depicts Rehnquist Court critics in *Irresponsibility Breeds Contempt*, 6 GREEN BAG 2d 47, 47 (2002) (explaining why the Court has reason to be contemptuous of irresponsible lawmaking by Congress). See also Barry Friedman, *The Cycles of Constitutional Theory*, LAW & CONTEMP. PROBS. 149, 162 (Summer 2004) (noting that "the talk among progressives is of complaints about judicial supremacy and the hegemony of the Supreme Court" and collecting quotes to prove his point).

soon countermand Rehnquist Court overreaching. Instead, the Rehnquist Court seems to be paying close attention to signals that Congress and U.S. citizens have sent it. In this way, Rehnquist Court decisions striking down federal laws do not frustrate majoritarian preferences and, as such, follow the historical pattern.<sup>10</sup>

In advancing this claim, I do not argue that the federal statutes invalidated by the Court were unpopular. Instead, I call attention to why neither lawmakers nor the people cared passionately about the fate of these statutes. Moreover, I suggest that citizens and lawmakers look especially to the Court to check Congress. Because the people turn to the Court to check Congress, rather than trust Congress to responsibly utilize its enumerated powers, Court decisions striking down federal statutes look more like exercises of delegated authority than like countermajoritarian judicial review. What follows is a laundry list of factors supporting this conclusion. These factors are broken down into sections on public opinion, Congress, and the Rehnquist Court's sensitivity to signals sent by Congress and the American people.

## II

### THE AMERICAN PEOPLE SUPPORT BOTH THE COURT'S STRIKING DOWN FEDERAL LAWS AND ITS TURN TO FEDERALISM.

Societal forces are inevitably part of the mix of constitutional law. So long as judges "are relatively normal human beings," observed Chief Justice William Rehnquist, they cannot "escape being influenced by public opinion . . . ."<sup>11</sup> By reading the newspaper, talking with family members, and the like, Supreme Court Justices cannot escape "[t]he great tides and currents which engulf the rest of men."<sup>12</sup> The Rehnquist Court is no exception. Its anti-Congress decisionmaking is in sync with public opinion.

#### A. Public Distrust in the Federal Government

Public opinion polls reveal that U.S. citizens today distrust "the government in Washington," especially compared to the mid-sixties when LBJ's Great Society was in full bloom.<sup>13</sup> In 1964, the American National Election Study asked "How much of the time do you think you can trust the government in Washington to do what is about right?" At that time, seventy-six percent of respondents answered "just about always" or "most of the time."<sup>14</sup> By 1995, the percentage

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10. See sources and related text, *supra* notes 2-7.

11. William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 768 (1986).

12. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 168 (1921).

13. The polling data cited here (and much else in this point) is drawn from Chris Schroeder's excellent article *Causes of the Recent Turn in Constitutional Interpretation*, 51 DUKE L.J. 307 (2001).

14. *Id.* at 348.

dropped to twenty-three percent; in 2001, it stood at twenty-seven percent.<sup>15</sup> Correspondingly, people in the U.S. think that members of Congress care more about making themselves look better than making the country better (seventy-four percent to seventeen percent).<sup>16</sup> They also think that “those we elect to Congress in Washington lose touch with the people pretty quickly” (eighty-two percent to sixteen percent),<sup>17</sup> and think that Congress is captured by “big companies,” “political parties,” and the “news media” (ranging from seventy-nine percent to eighty-eight percent).

## B. Public Distrust in State and Local Government

States and localities have not seen a sharp decline in trust during the same period. When asked how they would feel “[i]f the federal government transferred responsibility for more government programs to your state government,” seventy seven percent of those polled in 1995 were “very” or “somewhat confident” that their state could do a better job managing those programs than the federal government.<sup>18</sup> Likewise, when it comes to fighting crime, the public, by a 2 to 1 margin, has more trust and confidence in state and localities than in the federal government.<sup>19</sup> In other words, “[d]isenchantment with the national government did not produce commensurate disenchantment at lower levels.”<sup>20</sup>

## C. Lack of Public Support for Statutes Invalidated by the Rehnquist Court

Even though some of the statutes the Court invalidated were politically popular, there is little reason to think there was significant public support for any of these measures. Consider, for example, the Communications Decency Act (CDA),<sup>21</sup> the Line Item Veto Act,<sup>22</sup> the Brady Bill,<sup>23</sup> the Gun Free School Zone Act (GFSZA),<sup>24</sup> and the Violence Against Women Act (VAWA).<sup>25</sup> Al-

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15. *Id.* When it comes to “foreign relations,” especially after the September 11, 2001 terrorist attack, U.S. citizens *do* trust the federal government. In a September 18, 2002 Gallup Poll, seventy-one percent of the respondents said they trusted the federal government’s handling of international problems “a great deal” or “a fair amount.” Gallup Poll (question ID, USGALLUP.02Sept5 R37A), conducted on Sept. 5, 2002, Gallup News Service, released on Sept. 18, 2003, *available at* <http://www.gallup.com>. It is possible that this turn in public opinion has slowed the pace of the Court’s federalism revolution and, more generally, the Court’s willingness to invalidate federal statutes. *See supra* note 8 (contrasting the 2002-03 and 2003-04 Supreme Court terms to the 1995-2002 period).

16. *Id.* at 336.

17. *Id.* at 337.

18. Gallup Poll (question ID, USHART.95CEG R21), conducted on Mar. 16, 1995, Gallup News Service, released on Mar. 30, 2003, *available at* [www.gallup.com](http://www.gallup.com).

19. Pew Research Center Poll of January 9, 1997, Roper Center, *available at* <http://www.lexis-nexis.com>; *see also* NPR Poll of June 25, 2000, Roper Center at University of Connecticut (showing continuing public confidence in states and localities).

20. Schroeder, *supra* note 13, at 350.

21. 47 U.S.C. § 223 (2000).

22. 2 U.S.C. § 922 (2000).

23. 18 U.S.C. § 922 (2000).

24. 18 U.S.C. § 921 (2000).

25. 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.) (106 H.R. 1248).

though polls measuring public support were taken of only two of the five statutes—the background check provision of the Brady Bill and the Line Item Veto Act—polling data suggest that each of these statutes matched public opinion on the issue. Also, polling data show that several of the statutes addressed a problem that the public deemed important (school violence, domestic violence, pork barrel spending, handgun violence). At the same time, Court decisions invalidating all or parts of these statutes hardly registered with the public. Opinion polls were not taken about any of these rulings and there is no evidence suggesting meaningful interest group or other pressure on Congress to countermand these Court rulings.<sup>26</sup>

In understanding why this is so, it is useful to consider both the consequences of these decisions and shifting attitudes about government. To start, populist distrust of Congress is linked to the changing balance of power between the federal and state governments. Unlike the New Deal and Great Society, in which support for centralized planning and the national administrative state were essential, the 1980s and 1990s saw the emergence of the devolution movement. For example,

[t]hroughout the 1990s, the call for devolving more authority from the federal government to the states had enormous political appeal. . . . In almost all policy areas, states are portrayed as venues for creative and innovative solutions, and the federal government is the home of “one-size-fits-all” solutions that are inflexible and inappropriate by comparison.<sup>27</sup>

Correspondingly, with voters expecting less of the national government, lawmakers turn more and more to so-called “position taking” legislation. “The electoral requirement [of such measures] is not that [a lawmaker] make pleasing things happen but that he make pleasing judgmental statements.”<sup>28</sup> More to the point, judicial invalidation of such statutes is unlikely to prompt a populist backlash because those statutes are about delivering a symbol, not a good.

The CDA and Line Item Veto Act are classic “position taking” measures. Lawmakers, for example, had little interest in allowing the President to punish their favored constituents by item-vetoing “pork barrel” appropriations.<sup>29</sup> Likewise, the legislative history of the CDA speaks to lawmakers’ desire to take

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26. Congress did modify some of these statutes in response to the Court’s rulings. But, as explained in Part II, there is no reason to think that Congress was especially disappointed by any of these rulings. See *infra*, Part III.

27. Schroeder, *supra* note 13, at 325-26.

28. DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 62 (Yale University Press 1974). For additional discussion in the context of Rehnquist Court federalism decisions, see Whittington, *supra* note 7, at 512-14.

29. See Lisa Hoffman Scripps, *Clinton Wields Line-Item Veto Lightly: Congress Piles Up 750 Pet Projects on Military Spending Bill; President Kills Just 13 of Them*, ROCKY MTN. NEWS, Oct. 15, 1997, at 32A. Before the Court invalidated the Line Item Veto Act, some lawmakers who supported the statute were angered by President Clinton’s (quite modest) use of his line item veto authority. *Id.*

a stand against smut, not to enact legislative restrictions that would withstand a constitutional challenge.<sup>30</sup> An argument can also be made that the VAWA, GFSZA, and the Brady Bill are also “position taking” measures.<sup>31</sup> Regardless of whether that argument is true, there are other reasons to think that these statutes were little noticed by, and of little interest to, most people in the U.S.

The apparent uninterest (or at least the uninterest of pollsters to find out what the public thought) of the VAWA and GFSZA may be tied to the fact that most states criminalized domestic violence and gun possession in school zones. Indeed, since opinion polls on violence against women and school violence made no mention of VAWA and GFSZA, the public may have seen these issues as principally issues of state criminal law. In contrast, the Brady Bill was seen as necessary federal legislation because of the failure of some states to police gun ownership and the need to establish a national data bank. The Court’s decision, however, did not have a substantial effect on government policy. Beginning on November 30, 1998, roughly one year after the decision, gun dealers were required to check the names of prospective buyers against a computerized list of offenders prepared by the FBI. Consequently, with most U.S. citizens having little investment in these federal statutes, the immediate losers in these cases were politically isolated.<sup>32</sup>

#### D. The Public Pays Little Attention to Rehnquist Era Federalism Decisions.

Opinion polls and other data suggest that the public is either unaware of or does not care about Rehnquist era federalism decisions. In general, the public pays little attention to the Supreme Court.<sup>33</sup> When people in the U.S. do pay attention to the Court, they pay attention to decisions implicating civil and individual rights. Over the past six years, for example, opinion polls were taken of Supreme Court decisions on affirmative action, school prayer, late-term abortions, physician assisted suicide, and gays in the Boy Scouts. *No polls were taken of any of the Court’s federalism-related decisions.* Considering that these decisions have limited the political victories of women’s interests, the disabled, senior citizens, and religious minorities, the pollsters’ disinterest in these cases seems surprising. Perhaps it is because the public, for reasons just detailed, had little invested in these federal statutes. Moreover, as Part IV details, none of the Court’s federalism rulings foreclosed democracy. State and federal officials could respond to the Court through normal legislation, not Court-curbing

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30. Indeed, as I will explain in Part III, lawmakers signalled the Court that they thought the CDA and Item Veto Act were vulnerable to constitutional attack. *See infra*, Part III.

31. *See* Whittington, *supra* note 7, at 513.

32. Whittington, *supra* note 7, at 515.

33. *See* David Adamany & Joel B. Grossman, *Support for the Supreme Court as National Policymaker*, 5 LAW & POLICY Q. 405, 407 (1983) (detailing opinion poll data). Correspondingly, it may be that media outlets, although reporting the Court’s decisions, do not see the Court as an agenda setter; that is, coverage of an issue (school desegregation, for example) is not tied to landmark Supreme Court decisions. *See* GERALD N. ROSENBERG, *THE HOLLOW HOPE* 111-16 (1991). For these and other reasons, judicial appointments is a low salience issue for most voters. *See* Jeffrey Toobin, *Advice and Dissent: The Fight Over the President’s Judicial Nominations*, *THE NEW YORKER*, May 26, 2003, at 48.

measures.<sup>34</sup> Whatever the explanation, interest groups and lawmakers have not raised a stir about these decisions, thereby insulating the Court from populist attack.<sup>35</sup>

It is also noteworthy that, as Barry Friedman put it, “public support for judicial independence has repeatedly derailed attempts to interfere with that independence.”<sup>36</sup> In other words, it may be that judicial review is, in some measure, “majoritarian.”<sup>37</sup> And while I do not mean to suggest that the Court cannot help but be “majoritarian,” I do think that a Court that focuses its energies on federalism, separation of powers, and symbolic legislation is operating within boundaries that most U.S. citizens find acceptable.

### III

#### CONGRESS HAS SIGNALLED TO THE COURT THAT THE COURT’S STRIKING DOWN OF FEDERAL LAWS AND, MORE GENERALLY, ITS TURN TO FEDERALISM ARE POLITICALLY ACCEPTABLE.

Congress, too, seems accepting of Rehnquist Court decisions limiting its powers. Like the general population, lawmakers increasingly speak of the need to devolve power away from the federal government and otherwise limit Congress. Congress also seems accepting of activist judicial review of its handiwork.

#### A. Members of Congress Support Independent, Scrutinizing Judicial Review of Federal Statutes.

Today, as revealed by a recent opinion poll of members of the 106<sup>th</sup> Congress (1999–2001), lawmakers adhere to a “joint constitutionalist” perspective whereby “courts should give only ‘limited’ weight to prior congressional assessments of constitutional issues, or ‘no weight at all’ to congressional interpretation.”<sup>38</sup> In contrast, a substantial number of lawmakers in the 86<sup>th</sup> Congress (1959–61) expressed their disapproval of Warren Court decisions on race and communism by embracing an “independent constitutionalist” perspective. These members “emphasized the distinctive constitutional responsibilities of

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34. See *infra*, Part IV (D).

35. When it comes to the confirmation of George W. Bush’s judicial appointees, however, lawmakers and interest groups sometimes refer to the Rehnquist Court’s “activism.” For reasons I have detailed elsewhere (and will summarize in Part III), I think these charges of “activism” have relatively little to do with individual Rehnquist Court decisions. For a more detailed treatment of this question, see Neal Devins, *The Federalism-Rights Nexus: Explaining Why Senate Democrats Can Tolerate Rehnquist Court Decisionmaking But Not the Rehnquist Court*, 73 U. COLO. L. REV. 1307 (2002).

36. Friedman, *supra* note 6, at note 15.

37. I develop this claim in both Part IV and the concluding paragraphs of this essay. See *infra*, Parts IV, V.

38. See Bruce G. Peabody, Congressional Attitudes Toward Constitutional Interpretation (unpublished manuscript, on file with author) (Peabody’s data is suggestive, not conclusive, since less than twenty percent of lawmakers completed his surveys).

the legislature and pointed to drawbacks associated with leaving interpretation strictly to judges.”<sup>39</sup>

More striking, today’s Congress sometimes treats the Constitution as the exclusive province of the Supreme Court. One manifestation of this phenomenon is the growing use of “expedited Supreme Court review” provisions in cases for which Congress finds its handiwork constitutionally suspect.<sup>40</sup> Specifically, rather than sort out the constitutionality of the legislation it is considering, Congress sometimes enacts a fast-track provision enabling litigants both to bypass the federal courts of appeal and to secure automatic Supreme Court review. Over the past several years, Congress has included expedited review provisions on several high-profile enactments, including the Communications Decency Act,<sup>41</sup> the Line Item Veto Act,<sup>42</sup> census reform legislation,<sup>43</sup> McCain-Feingold campaign finance legislation,<sup>44</sup> and indecency restrictions on libraries and cable operators.<sup>45</sup>

Congress signals the Court that constitutional questions are the Court’s domain in other ways, as well. Today’s Congress, for example, rarely casts doubt on either the correctness of the Court’s ruling or, more fundamentally, the Court’s power to authoritatively interpret the Constitution. Consider, for example, Congress’s nonresponse to *Adarand Constructors, Inc. v. Peña*,<sup>46</sup> a 1995 Supreme Court decision declaring that federal affirmative action programs must satisfy strict scrutiny review. In the immediate wake of the decision, Senator Phil Gramm proposed eliminating set-asides as the best way to “[conform] with *Adarand*.”<sup>47</sup> Senator Patty Murray countered by proposing that federal funds can openly be used for programs “completely consistent with” *Adarand*.<sup>48</sup> What is striking here is that neither Murray nor Gramm said a word about the rightness or wrongness of *Adarand*. Instead, their debate was premised on the belief that *Adarand* was the law of the land. Moreover, by overwhelmingly approving the open-ended Murray amendment (84-13), the Senate signalled that litigants seeking a definitive answer of what *Adarand* means should go to a higher authority than Congress, namely, the federal courts. Congress’s handling of *Adarand* is hardly aberrational; as detailed below, much the same can be said of Congress’s response to recent Court rulings that strike down federal statutes.<sup>49</sup>

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39. *Id.* at 8; see generally DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY (1966).

40. This paragraph and the next are drawn from Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court’s Anti-Congress Crusade*, 51 DUKE L.J. 435, 442-43 (2001).

41. 47 U.S.C. § 223 (2000).

42. 2 U.S.C. § 922 (2000).

43. Help America Vote Act, 2 U.S.C. § 438 (2000).

44. 18 U.S.C. § 607 (2000).

45. Child Online Protection Act, 15 U.S.C. § 6501 (2000).

46. 515 U.S. 200 (1995).

47. 141 CONG. REC. 19,670 (1995).

48. *Id.* at 19,667.

49. Devins, *supra* note 40, at 445-6.

B. Today's Congress is Accepting of States' Rights and Other Limits on Federal Power.

Throughout the 1990s, Congress approved various initiatives shifting power away from Washington and to the states. Examples include the Unfunded Mandates Act of 1995, 1996 welfare reform legislation, and a 1998 appropriations bill prohibiting the Clinton administration from limiting states rights' protections in an existing Executive Order.<sup>50</sup> This trend reflects the growing recognition that, "[i]n contrast to the major social issues of thirty years ago, today's important issues do not so obviously demand a federal solution."<sup>51</sup> Perhaps for this reason, presidential and congressional elections are filled with anti-big government rhetoric.<sup>52</sup>

Most notably, when Republicans took over both houses of Congress in 1994 (the very time when the Rehnquist Court began its federalism revival), House Republicans ran on the so-called "Contract with America." Seeking to capitalize on widespread dissatisfaction with Washington, the Contract pledged a smaller federal government and a larger role for the states. Among other reforms, the Contract promised line item veto legislation (because Congress could not be trusted to enact responsible spending bills), unfunded mandates reform (because Congress could not be trusted to respect state prerogatives), and a vote on a constitutional amendment to establish term limits (because members of Congress lose touch with their constituents). Furthermore, while most voters did not know about the "Contract," voter disenchantment with Congress helped propel the 1994 Republican takeover.<sup>53</sup>

Today's Congress therefore is apt to be somewhat sympathetic to Court efforts to protect state prerogatives. Unlike Court-curbing periods, in which the Court frustrated lawmaker desires to pursue critical legislative initiatives, Congress does not see judicial invalidations of federal statutes as inconsistent with Congress's broader legislative agenda. For this very reason, after observing that lawmakers seemed "detached from the actual work of the federal judiciary, particularly as it relates to the exercise of congressional power," Representative Lee Hamilton speculated that Congress "has become more conservative, and many members are comfortable with most of the Court's rulings."<sup>54</sup> Moreover,

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50. LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* 92 (3d ed. 2001). For additional discussion, see Schroeder, *supra* note 13, at 325-26.

51. Schroeder, *supra* note 13, at 344. There are exceptions, the most notable being the War on Terror.

52. This is not just about Republicans. Bill Clinton and other "New Democrats" have echoed this theme. See, e.g., Kevin Merida, *Last Rights for Liberalism? Democrats' Legacy Now Symbolizes Their Woes?*, WASH. POST, Dec. 28, 1994, at A1.

53. Ronald G. Shafer, *Democrats Fight a Problem: Voters Prefer GOP Views on Many Issues*, WALL ST. J., Oct. 21, 1994, at A1.

54. 144 CONG. REC. E48 (daily ed. Jan. 28, 1998) (statement of Rep. Hamilton (D-In.)); See also Barry Friedman & Anna Harvey, *Electing the Supreme Court*, 78 IND. L.J. 123, 125 (2003) (noting that "a Supreme Court that faces an ideologically congenial Congress has more freedom to strike statutes enacted by past Congresses.").

up until now, Court decisions have not prevented Congress from responding to constituent demands.<sup>55</sup>

C. Rehnquist Court decisions striking down federal statutes have not been of particular concern to Congress.

Congress has largely ignored Rehnquist Court invalidations of federal laws. For example, the *Congressional Record* contains virtually no commentary about the Court's action in these cases. With three notable exceptions, *U.S. v. Morrison*<sup>56</sup> (invalidating VAWA), *City of Boerne v. Flores*<sup>57</sup> (invalidating the Religious Freedom Restoration Act<sup>58</sup> (RFRA)), and *Clinton v. City of New York*<sup>59</sup> (invalidating the Line Item Veto Act), few comments exist about the wisdom of any of the Court's decisions.<sup>60</sup> 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 *Boerne*,<sup>61</sup> which invalidated the RFRA, on only ten occasions<sup>62</sup>—a startling fact when one considers that *Boerne* embraced a standard of review that significantly curtailed Congress's Section Five enforcement powers under the Fourteenth Amendment. *United States v. Lopez*,<sup>63</sup> which invalidated the Gun-Free School Zones Act, also has received limited attention in congressional debates. Notwithstanding 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 seldom mentioned *Lopez*'s precedential impact.<sup>64</sup> Finally, the Court's anti-commandeering cases, *Printz v. United States*<sup>65</sup> and *New York v. United States*,<sup>66</sup> have not figured into congressional deliberations.

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55. See *infra* Part III.

56. 529 U.S. 598 (2000).

57. 521 U.S. 507 (1997).

58. 14 U.S.C. § 2000 (2000).

59. 524 U.S. 417 (1998).

60. With the exception of *Boerne*, *Clinton*, and *Morrison*, a LEXIS database search of 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 returned no more than four results.

61. 521 U.S. 507 (1997).

62. A LEXIS database search of the Congressional Record, All Congress Combined, from June 25, 1997 (the date of the *Boerne* decision) to June 24, 2002 returned only ten results. On nine other occasions, *Boerne* was mentioned—principally in connection with efforts to revamp the RFRA.

63. 514 U.S. 549 (1995).

64. A LEXIS database search of the Congressional Record, All Congress Combined, from April 26, 1995 (the date of the *Lopez* decision) to June 24, 2002 returned only sixteen results.

65. 521 U.S. 898 (1997) (invalidating background check provision of the Brady Bill). A LEXIS database search of the Congressional Record, All Congress Combined, from June 19, 1992 (the date of the *New York* decision) until June 24, 2002 returned only six results.

66. 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" to the waste). A LEXIS database search, Congressional Record, All Congress Combined, from June 27, 1997 (the date of the *Printz* decision) to June 24, 2002 returned only two results. 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

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.<sup>67</sup> Consider, for example, lawmaker efforts to respond to Court decisions invalidating the CDA, the GFSZA, and the VAWA—three of the four statutes that Congress revised in response to Rehnquist Court decisionmaking. The legislative histories of all three statutes emphasize the need to conform with Supreme Court standards.<sup>68</sup> The Children’s Online Protection Act,<sup>69</sup> which replaced the CDA, “address[ed] the specific concerns raised by the Supreme Court,”<sup>70</sup> including the lack of legislative hearings, the failure to consider less restrictive alternatives, and the overbroad definition of what constitutes indecency.<sup>71</sup> Likewise, when a bipartisan coalition of senators introduced the Juvenile Justice and Delinquency Prevention Act of 2002 (replacing the GFSZA),<sup>72</sup> their agenda was simple: “to heed the Supreme Court’s decision regarding Federal power and yet to continue to fight against school violence.”<sup>73</sup> Finally, when responding to the decision overturning VAWA, a bipartisan coalition of lawmakers (including John Ashcroft (R-MO), Paul Wellstone (D-MN), Orrin Hatch (R-UT), and Joseph Biden (D-DE)) made no effort to revive the right to sue provision struck down by the Supreme Court.<sup>74</sup> Instead, lawmakers focused their energy on federal funding directed at the prevention of domestic violence.<sup>75</sup>

This degree of lawmaker acquiescence is striking, especially since most of these measures were overwhelmingly supported by both Democrats and Republicans.<sup>76</sup> One explanation—alluded to above—is that most statutes struck down were “position taking” measures. Specifically, when casting a vote for a

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Printz. Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, Printz, and Yeskey, 1998 SUP. CT. REV. 71, 138.

67. I do not mean to suggest that everyone in Congress bows before the Court. On occasion, members of Congress have criticized Rehnquist Court decisionmaking. 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*. But these are exceptions to an overwhelming pattern of lawmaker disinterest or acquiescence.

68. Congress also responded to the Court’s decision invalidating the RFRA. In so doing, Congress did not seek to override the Court. Instead, as Orrin Hatch put it, Congress sought to “do what it can to protect religious freedom in cooperation with the Supreme Court.” *The Religious Liberty Protection Act of 1998: Hearing Before the Senate Comm. on the Judiciary*, 105th Cong. 1 (1998).

69. 15 U.S.C. § 6501 (2000).

70. H.R. REP. NO. 105-775, at 12 (1998), reprinted in 1998 U.S.C.C.A.N. (112 Stat. 2681) 736.

71. *Id.*

72. 18 U.S.C. § 922(q)(2)(a) (2000). 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).

73. *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*).

74. On the House side, however, some lawmakers unsuccessfully sought to include a civil legal remedy in the statute. H.R. REP. NO. 106-891, at note 30.

75. 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.).

76. See Devins, *supra* note 35, at 1309-10; see also *infra* Part IV (C).

politically popular measure, legislators may not care whether the Court approves the statute. Their concern, more than likely, is the price they will pay if they oppose such a measure.<sup>77</sup> Along the same lines, the Court's invalidation of the statute provides lawmakers with an opportunity to revisit the issue and to gain political mileage by enacting a "Son of" statute designed to fix the problem identified by the Court.

#### D. Democratic Attacks on the Rehnquist Court are Motivated by Judicial Confirmation Politics.

The fact that Senate Democrats and some interest groups attack the Rehnquist Court for engaging in "conservative judicial activism" does not mean that Senate Democrats find the individual decisions of the Rehnquist Court especially troubling. These attacks, instead, may be motivated by a desire to limit Bush White House control over judicial appointments. Judicial confirmation politics operate around a different set of incentives than lawmaking, including legislation enacted in response to Court decisions overruling federal statutes.<sup>78</sup> In particular, Democrats will always have an incentive to attack the judicial appointees of a Republican president and Republicans will always have incentive to attack Democratic appointees. 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 to pay back the other party for its partisan decisionmaking. Moreover, because Court decisionmaking is consequential, lawmakers often see the confirmation process as a politically salient way to advance their ideological preferences.

Against this backdrop, it is surprising that Rehnquist Court decisions striking down federal laws received little to no mention in contentious battles over Bush judicial appointees.<sup>79</sup> Abortion and civil rights were the rallying calls in the fights over John Pickering, Priscilla Owen, Michael McConnell, and, to a lesser extent, Jeffrey Sutton and Miguel Estrada. Indeed, Senate Democrats filibustered the Pickering and Owens appointments because of civil rights and abor-

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77. William P. Marshall, *American Political Culture and the Failures of Process Federalism*, 22 HARV. J.L. & PUB. POL'Y 139, 145 (1998) (noting that a "lawmaker who voted against the national Megan's Law or the national car-jacking law, for example, would almost certainly be characterized as being soft on crime in her opponent's next thirty-second sound bite"); Sherry, *supra* note 9, at 49, 54 (discussing GFSZA, VAWA, and age discrimination legislation as examples of Congress pursuing that which is politically popular); *see* Whittington, *supra* note 7, at 513.

78. For an elaboration of this claim and substantiation of the points made in this paragraph, *see* Devins, *supra* note 35.

79. It is also noteworthy that judicial enforcement of federalism was not mentioned in either the 2000 Democratic or Republican Party Platforms. The Democratic Platform emphasized the needs for "women and minorities" to fill judicial vacancies as well as the need for courts to protect "individual rights . . . including the right to privacy." *Prosperity, Progress, and Peace* 26, available at <http://www.democrats.org/about/platform.html>. The Republican Platform spoke of "judicial supremacy" and "[a]varice among . . . plaintiffs' lawyers." *Government for the People* 4, available at <http://www.rnc.org/GOPInfo/Platform/2000platform7.htm>.

tion.<sup>80</sup> *Roe v. Wade*<sup>81</sup> also played a prominent, if not defining, role in the McConnell confirmation.<sup>82</sup> Over time, Senate Democrats may seek to limit the Bush White House by turning their attention to the Rehnquist Court's federalism revival. For example, although civil rights dominated the Sutton confirmation, Senate Democrats did question Sutton's role in making states' rights arguments before the Rehnquist Court.<sup>83</sup>

#### IV

##### THE REHNQUIST COURT APPEARS SENSITIVE TO THE SIGNALS SENT IT FROM THE CONGRESS AND THE AMERICAN PEOPLE.

The Rehnquist Court, like other Courts, has a strong incentive to take social and political forces into account. Lacking the power to appropriate funds or command the military, the Court understands that it must act in a way that garners public acceptance.<sup>84</sup> This, of course, explains why the Court's decisionmaking traditionally conforms to social norms. It also explains the methodology employed in this article. Specifically, it is necessary to examine the social and political forces surrounding Rehnquist Court invalidations of federal statutes before reaching any conclusions about whether the Court is countermajoritarian, activist, and out of touch with Congress and the general population.

##### A. The Rehnquist Court is Both Aware of and Emboldened by Public Opinion Polls.

In particular, Court decisionmaking striking down federal laws may well be tied to public support for the Court and public antipathy toward Congress. Opinion polls show that U.S. citizens' distrust of Congress does not extend to

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80. Likewise, before the Republicans 2002 takeover of the Senate, the then Democrat-controlled Senate Judiciary Committee refused to allow a vote on Pickering and Owens.

81. 410 U.S. 113 (1973).

82. Insisting that he would not be an "activist judge," McConnell said repeatedly that the abortion issue is "settled" and that "[i]t has been considered. It has been reconsidered, reconfirmed. . . . Today, it's much more reflective of the consensus of the American people." M.E. Sprengelmeyer, *Court Nominee Grilled; McConnell's Writings Still Trouble Some Senators on Panel*, ROCKY MTN. NEWS, Sept. 19, 2002, at 28A (quoting McConnell). *Roe* was also considered in the Estrada confirmation hearing. Like McConnell, Estrada argued that "[*Roe*] is there, it is settled law, and I would follow it." Jonathan Groner, *Estrada: Just One Vote Away?*, LEGAL TIMES, Sept. 30, 2002, at 1.

83. Senator Edward Kennedy, for example, said Sutton's record "fails to show that he will be able to set aside his own extreme agenda of rolling back federal power." Jack Torry & Jonathan Riskind, *Judicial Nominee's Senate Vote Today*, THE COLUMBUS DISPATCH, Apr. 29, 2003, at 1A. Outside of confirmation hearings, the Senate Judiciary Committee has paid some attention to Rehnquist Court decisionmaking. When the Democrats controlled the committee, for example, Senator Charles Schumer conducted hearings on whether the Senate could consider the Court's "ideological balance" when confirming nominees. Schumer Proposes New Confirmation Process for Judicial Nominations, U.S. Senate Press Release, at [http://www.senate.gov/~schumer/SchumerWebsite/pressroom/press\\_releases/PR01656.htm](http://www.senate.gov/~schumer/SchumerWebsite/pressroom/press_releases/PR01656.htm).

84. See *Planned Parenthood v. Casey* 505 U.S. 833, 865 (1992) (recognizing the connection between the Court's "legitimacy" and the "people's acceptance"); Tom R. Tyler & Gregory Mitchell, *Legitimacy and Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 715 (1994) (discussing the proposition that public belief in the Court's legitimacy "enhances public acceptance of controversial Court decisions").

the Court. “For the mass public,” as Gregory A. Caldeira and James L. Gibson have shown, “broad political values—commitment to social order and support for democratic norms” insulate the Court from political attack.<sup>85</sup> Moreover, although there is reason to think that public support for the Court would be inversely related to the number of statutes that the Court strikes down,<sup>86</sup> the Court can sidestep political attacks by picking its targets wisely; for example, striking down laws that are of little concern to Congress and the people. More to the point, the increasing pace of Rehnquist Court decisions striking down federal statutes has not had a negative impact on the Court’s popularity with the people. In a June 1994 Gallup Poll, eighty percent of U.S. citizens said they have “some,” “quite a lot,” or a “great deal” of confidence in the Supreme Court.<sup>87</sup> In a June 2001 poll, six months after *Bush v. Gore*, public support for the Court stood at eighty one percent.<sup>88</sup> Furthermore, there is some reason to think that the Court is paying attention to this polling data. Consider Chief Justice Rehnquist’s 1999 year-end report. The Chief Justice approvingly cited a February 1999 Gallup Poll showing that “80 percent of Americans surveyed stated that they had a ‘great deal’ or ‘fair’ amount of trust for the judicial branch of government, far exceeding figures for the other branches.”<sup>89</sup> And while this statement proves very little, there is ample reason to think that the Court is well-aware of the social and political forces surrounding its decision making.

B. The Rehnquist Court’s Turn to Federalism Reflects the Court’s Desire to Steer Away From Politically Costly, Divisive Social Issues.

Before 1995, the “first” Rehnquist Court (1986–94) decided seventeen cases involving social issues (abortion and other privacy issues, affirmative action, gay rights, and government speech on religious topics—school prayer, crèches) and thirteen federalism-related cases; from 1995–2002, the “second” Rehnquist Court decided thirteen social issue cases and twenty-five federalism-related cases.<sup>90</sup> More striking, the first Rehnquist Court did little in the way of changing the law. For example, the Court reaffirmed abortion rights and the prohibition against school prayer. The second Rehnquist Court, in contrast, has pursued

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85. *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POLI. SCI. 635, 636 (1992).

86. Gregory A. Caldeira, *Neither The Purse Nor the Sword: Dynamics of Public Confidence in the United States Supreme Court*, 80 AM. POLI. SCI. REV. 1209, 1222 (1986).

87. Gallup Poll (question ID, USGALLUP.94MAR R09C), conducted on Mar. 3, 1994, Gallup News Service, released on Mar. 31, 1994, available at [www.gallup.com](http://www.gallup.com).

88. Gallup Poll (question ID, USGALLUP.01JUN8 R12C), conducted on June. 8, 2001, Gallup News Service, released on June, 18, 2001, available at [www.gallup.com](http://www.gallup.com). Gallup Poll, Roper Center for Public Opinion.

89. William H. Rehnquist, *1999 Year-End Report on the Federal Judiciary*, at <http://www.uscourts.gov/ttb/jan00ttb/jan2000.html>.

90. For an exhaustive and illuminating overview of differences between the first and second Rehnquist Courts, see Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569 (2003).

several federalism-related doctrinal innovations.<sup>91</sup> Social and political forces figure prominently in this story. Consider, for example, Justices O'Connor's and Kennedy's refusal to both sign onto the social-conservative agenda and, in recent years, to oppose the granting of certiorari on most "social issues" cases.<sup>92</sup> My suspicion is that these Justices were influenced by the following: the Senate's rejection of Robert Bork and its hazing of Clarence Thomas; Congress's approval of the 1991 Civil Rights Act (overturning twelve Supreme Court decisions limiting the scope of civil rights laws); and interest group pressures on Congress and the Court.<sup>93</sup> In sharp contrast, social and political forces did not stand in the way of the Court's turn to federalism. The public and Congress, as noted above, both signaled the Court that it could pursue an anti-Congress agenda. Correspondingly, there is no federalism constituency; up until now, interest groups and lawmakers have shown little interest in federalism.<sup>94</sup> In critical respects, the Rehnquist Court has protected itself by limiting the reach of its federalism revolution. For example, by upholding family leave legislation and fencing out voting rights legislation from its federalism revival, the Court has handed significant victories to traditional civil rights interests.<sup>95</sup>

C. Notwithstanding *Bush v. Gore*, Rehnquist Court Decisionmaking Cannot be Neatly Characterized Along Ideological (Conservative) or Partisan (Republican) Lines.

*First*, the Rehnquist Court has targeted both Democratic and Republican interests. Consider, for example, the most controversial of the Rehnquist Court's federalism decisions—those invalidating the VAWA, the GFSZA, the Brady Bill, the RFRA, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA). With the exception of the VAWA

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91. *See id.*

92. *See id.* at 619. In making this point, I do not mean to suggest that the second Rehnquist Court has no interest in tackling divisive social issues. My point instead is that social and political forces help explain Rehnquist Court decisions about the merits of and selection of cases.

93. Neal Devins, *Congress and the Making of the Second Rehnquist Court*, 47 ST. LOUIS U. L.J. 773. For a more detailed explanation, see Merrill, *supra* note 90, at 630-32; see also Neal Devins, *Explaining Grutter v. Bollinger*, 152 U. PENN. L. REV. 347 (2003) (explaining the pivotal role that social and political forces played in the Supreme Court's 2003 approval of affirmative action in higher education).

94. *See* Devins, *supra* note 35, at 1314-24 (detailing confirmation hearing politics); Whittington, *supra* note 7, at 515-16 (contrasting the Court's federalist agenda to its agenda on abortion rights and environmental regulation).

95. *See* Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) (upholding the Family Medical Leave Act and, in so doing, recognizing that Congress has broad authority to enact legislation protecting the interests of women and minorities). In another federalism ruling that sided with civil rights plaintiffs, the Court approved portions of the Americans with Disabilities Act (ADA) in *Tennessee v. Lane*, 124 S. Ct. 1978 (2004). Holding that Congress had demonstrated "a pattern of unequal treatment in a wide range of public services," the Court refused to exempt states from portions of the ADA requiring elevators or ramps in the court houses, voting booths, or other critical public services. *Id.* at 1990-94. In so ruling, the Court limited its *Garrett* ruling and avoided a possible political backlash. The Court also avoided a political backlash by backing civil rights interests in its 2003 approval of race-conscious university admissions. *Grutter v. Bollinger*, 539 U.S. 306 (2003). *See also* Devins, *supra* note 93 at 362-81 (detailing overwhelming interest group and elected government support for affirmative action in higher education).

and the ADEA, Senate Democrats and Republicans both co-sponsored each of these bills.<sup>96</sup> With the exception of the VAWA (against which most Senate Republicans voted), each of these bills was enacted without dissent.<sup>97</sup> Furthermore, even if some of these bills are deemed “Democratic” (VAWA, ADA, ADEA, Brady), other bills invalidated by the Rehnquist Court cannot be characterized this way. Decisions invalidating the RFRA, the Line Item Veto Act, the CDA, and measures restricting the free speech rights of public employees and the legal services corporation, for example, were dubbed “extreme liberal activism” by Bill Marshall.<sup>98</sup> *Second*, as mentioned above, the Court has been somewhat middle-of-the-road on divisive social policy issues. Instead of being hard-line, the Court is “not easy to classify.”<sup>99</sup> For example, rather than overrule any landmark ruling establishing “new and controversial constitutional rights,”<sup>100</sup> the Court reaffirmed *Miranda v. Arizona*<sup>101</sup>, *Roe*, and *Engel v. Vitale*<sup>102</sup> (school prayer). The Court also approved diversity-based affirmative action and rejected a challenge to pledge of allegiance legislation on jurisdictional grounds.<sup>103</sup> More striking, the Court extended substantive due process to homosexual sodomy<sup>104</sup> and, in so doing, overturned the Burger Court’s *Bowers v. Hardwick*<sup>105</sup> decision. Also, by upholding so-called soft money limits in campaign finance legislation, the Court appeared less concerned “with the fine points of constitutional doctrine than with real-world context and conse-

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96. Devins, *supra* note 35, at 1309.

97. *See id*; *see also infra* Part III (C).

98. William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1247 (2002). Another, more recent, example of the Rehnquist Court’s willingness to frustrate the social conservative agenda is *Ashcroft v. American Civil Liberties Union*, 124 S. Ct. 2783 (2004). By a five to four vote, the Court rejected congressional efforts to protect minors from exposure to sexually explicit materials on the internet. Concluding that there may be less restrictive means to police the internet, the Court approved the granting of a preliminary injunction against enforcement of the Child Online Protection Act.

99. Kathleen M. Sullivan, *A Court Not Easy to Classify*, N.Y. TIMES, June 29, 2000, at A1; *see also* Alan M. Dershowitz, *Curious Fallout from Bush v. Gore*, N.Y. TIMES, July 4, 2001, at A15.

100. Robert F. Nagel, *The High (and Mighty) Rehnquist Court*, WALL ST. JNL., June 30, 2000, at A14.

101. 384 U.S. 436 (1966).

102. 370 U.S. 421 (1962).

103. *Grutter v. Bollinger*, 539 U.S. 306 (2003) (affirmative action); *Elk Grove Unified School Dist. v. Newdow*, 124 S. Ct. 2301 (2004) (pledge of allegiance). The *Newdow* case also suggests that the Justices did not want the pledge and, with it, the Supreme Court to be an issue in the 2004 elections. *See* Linda Greenhouse, *8 Justices Block Efforts to Excise Phrase in Pledge*, N.Y. TIMES, June 15, 2004 at A1. By concluding that a noncustodial father lacked standing to challenge the words “under God” in the pledge, the Court deftly overturned a federal court of appeals ruling that had invalidated the pledge statute. Noting that there had been “relatively little political or legal controversy” surrounding the pledge and that a substantive ruling on the constitutionality of the pledge may have been incoherent and divisive, the *Washington Post* commended the Court for its restraint. For the *Post*: “Punting may deflate the end of the term, but passivity here was a virtue, not a vice.” *Never Mind the Pledge*, WASHINGTON POST, June 15, 2004 at A22.

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

105. 478 U.S. 186 (1986).

quences,”—especially Congress’s strong interest in the decision.<sup>106</sup> Finally, when placing limits on Bush administration efforts to curtail wartime civil liberties, the Court concluded that “[a] state of war is not a blank check for the President.”<sup>107</sup>

#### D. The Rehnquist Court’s Turn to Federalism Has Not Foreclosed Democratic Outlets.

Specifically, when it comes to federalism, lawmakers and interest groups can find ways to respond to the Court’s decision without amending the Constitution or curbing the Court’s jurisdiction. For example, if a person does not like a decision, she can make use of alternative theories of power. Also, several of the decisions left much of the statutory program in effect. Finally, other governmental actors—states and municipalities—can fill the void when Congress cannot. In contrast, a ruling that limits governmental power on abortion, for example, settles the issue for all units of government. After *Roe*, no unit of government could regulate first trimester abortions. No federalism-related decision backs the government into a similar corner.<sup>108</sup>

Furthermore, in crafting its federalism counterrevolution, the Court has paid attention to signals from Congress and the people. Lawmaker and interest group opposition to the Court’s pursuit of the social-conservative agenda, popular dissatisfaction with Congress, and the 1994 elections all pointed to a federalism revival and, more generally, to decisions striking down federal laws.<sup>109</sup> Before pursuing far-reaching doctrinal innovations, however, the Court waited to see if Congress would resist the Court’s return to federalism. For this very reason, the initial rulings of the second Rehnquist Court were somewhat ambiguous—allowing the Court to look (and see Congress’s reaction) before it leaped.<sup>110</sup> Moreover, by upholding Congress’s power to limit states’ rights on gender-related issues and refusing, up until now, to meaningfully limit Con-

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106. Linda Greenhouse, *A Court Infused with Pragmatism*, N.Y. TIMES, Dec. 12, 2003, at A30 (discussing *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003)).

107. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004).

108. For this very reason, it is interesting to contrast Congress’s response to *City of Boerne v. Flores* (invalidating the RFRA) to the calm following all other Rehnquist-era federalism decisions. *Boerne* prompted numerous expressions of disappointment with the Court as well as several legislative hearings. Federalism, however, played no role in all of this. Congress’s concern, instead, were the standards employed by the Supreme Court in religious liberty cases. In particular, Congress focused its opprobrium on the very 1990 Supreme Court decision that prompted the RFRA, *Employment Division v. Smith*, 494 U.S. 872 (1990) (holding that generally applicable laws that burden religion are subject to rational basis, not heightened review).

109. Before the 1994 elections, the Rehnquist Court (most notably in its 1992 reinvigoration of the Tenth Amendment, *New York v. United States*, 505 U.S. 144 (1992)) had signalled its interest in federalism. At the same time, the Court ratcheted up the scope and pace of its federalism revival after the 1994 elections. For this reason, I think that both the anti-Congress rhetoric of the Contract with America and the fact that Republicans, for the first time since 1954, controlled both houses of Congress contributed to the Rehnquist Court’s return to federalism.

110. See Devins, *supra* note 40, at 462 (describing this practice).

gress's spending power,<sup>111</sup> the Court has deflected potential interest group and lawmaker resistance to its decisions.<sup>112</sup>

## V

### CONCLUSION

The increasing willingness of the Rehnquist Court to invalidate federal statutes is very much tied to social and political forces. *First*, these decisions match popular distrust of Congress and the corresponding demise of the New Deal/Great Society nation-state. *Second*, through expedited review provisions and other paeans to judicial supremacy, Congress has signaled the Court that it is accepting of judicial invalidations of federal statutes. Correspondingly, today's lawmakers do not think that courts should defer to Congress's constitutional judgments. *Third*, Congress has spurred on the Court in other ways. It sometimes embraces anti-Congress rhetoric and, more generally, seems accepting of devolving power away from the federal government. Moreover, with less of an investment in finding national solutions for national problems, Congress often enacts "position taking" legislation or legislation that can be invalidated without prompting an uproar from Congress, interest groups, or the general population. *Fourth*, when it comes to checking the Court, lawmakers, interest groups, and the people focus their energies on divisive social issues such as abortion, race, school prayer, and *Miranda* warnings. In contrast, there is no interest group or constituency ready to mobilize around "federalism." *Fifth*, the Rehnquist Court has paid attention to these various signals. It has focused its energy on matters as to which the people and Congress have signaled the Court that the invalidation of legislation is acceptable, and it has generally avoided polarizing rulings on social issues. Moreover, it has neither prevented Congress from meeting urgent constituent demands nor has it targeted Democratic or Republican interests. Finally, it has moved incrementally—its initial rulings were somewhat ambiguous so that it could wait to see how Congress reacted to its decision.

None of this is to say that the Justices on the Rehnquist Court (or at least the Justices in the majority) are not also advancing outcomes that match their personal public policy preferences. In other words, I am not arguing that there has been some kind of populist or legislative mandate for the Court to have invalidated the thirty-one statutes it struck down from 1995–2002. My claim, instead, is that the Rehnquist Court decisions striking down federal statutes are not particularly countermajoritarian. Instead, it often appears as if Congress

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111. *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

112. See Linda Greenhouse, *The Supreme Court: State Rights: Justices, 6-3, Rule Workers Can Sue States Over Leave*, N.Y. TIMES, May 28, 2003, at A1. Also, on May 17, 2004, a unanimous Supreme Court validated Congress's Spending Clause power in *Sabri v. United States*, 124 S. Ct. 1941 (2004). Upholding a law that makes it illegal to bribe officials at state or local agencies that receive federal funds, the Court rejected the claim that the Spending Clause demands there be some connection between the bribe and the federal grant. Concluding that Congress employed "rational means" to safeguard federal funds, the Court upheld Congress's power to fight corruption at state and local agencies.

and the people are delegating to the Court the power to strike down federal laws—so much so that a Court decision invalidating a federal statute is no longer an event of great moment. In particular, through expedited review provisions and “position taking” legislation, lawmakers often focus their energies on signing onto politically popular legislation and leave the decision of whether their handiwork is constitutional to the Court. Unless and until Rehnquist Court decisionmaking has “more foreseeable negative consequences for a wider range of interests,”<sup>113</sup> Congress and U.S. citizens are likely to see the Court as simply doing its job.

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113. Whittington, *supra* note 7, at 515.