

5-7-2003

Congress and the Making of the Second Rehnquist Court

Neal Devins

College of William and Mary, Marshall Wythe School of Law

Follow this and additional works at: <https://scholarship.law.slu.edu/lj>



Part of the [Law Commons](#)

Recommended Citation

Neal Devins, *Congress and the Making of the Second Rehnquist Court*, 47 St. Louis U. L.J. (2003).

Available at: <https://scholarship.law.slu.edu/lj/vol47/iss3/9>

This Respondent is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Law Journal by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

CONGRESS AND THE MAKING OF THE SECOND REHNQUIST COURT

NEAL DEVINS*

Why is it that the first Rehnquist Court (1986-1994) did not embrace significant doctrinal innovations on abortion, school prayer, and other social issues? Why is it that the second Rehnquist Court has both shifted its focus to constitutional federalism and generated several important doctrinal innovations? In answering these questions, Tom Merrill serves up a nuanced, Rube Goldberg explanation—borrowing bits and pieces from the writings of leading political scientists (and, for good measure, adding an innovation of his own design).

This Comment will focus on one of the political science models that Tom makes use of—the “external strategic actor” model. According to this model, Supreme Court Justices take social and political forces into account when crafting their decisions (including their decision to hear a case).¹ In my view, there is no need to look beyond this model. Differences between the first and second Rehnquist Courts can be explained by reference to this model and nothing else. Consequently, although I agree with much of Tom’s analysis, I think that he has turned a fairly straightforward story into an overly complex one. In the pages that follow, I will call attention to how it is that the Justices have acted in response to signals sent to them from Congress and the American people. In so doing, I will make extensive use of examples discussed by Tom—both because his discussion of the external strategic actor model is

* Goodrich Professor of Law and Professor of Government, College of William and Mary. This essay is an elaboration of comments made at the October 4, 2002 Childress Lecture. Thanks to Tom Merrill both for asking me to participate in the Lecture and for writing such a good paper. Thanks also to John McGinnis for comments on an earlier draft and to Bill Hof for his hard work in making the Lecture a success.

1. Like the so-called “attitudinal model,” the external strategic actor model assumes that Justices seek to put into place their personal policy preferences. See Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 620 (2003). Unlike the attitudinal model, the external strategic actor model also assumes that Justices take social and political forces into account when casting their votes. *Id.* at 620-21. For reasons detailed both in Tom Merrill’s paper, see, e.g., *id.* at 601, and in this brief Comment (about the significant role that social and political forces play in Rehnquist Court decision making), I think that the attitudinal model is clearly incorrect.

excellent and because I see my project, in critical respects, as a tweaking of his lecture.

* * *

Before its turn to constitutional federalism, the Rehnquist Court was a Court in search of an agenda. Although investing much energy in social issues (for example, race, religion, and abortion), the first Rehnquist Court did little in the way of changing the law.² Social and political forces, especially Congress's support of civil and abortion rights, figure prominently in this story. In particular, the refusal of Justices O'Connor and Kennedy to sign onto the conservative social agenda may well be tied to the signals sent to the Court from Capitol Hill. Unlike Chief Justice Rehnquist, and Justices Scalia and Thomas (all of whom have fairly inelastic preferences on social issues), Justices O'Connor and Kennedy have never been strong supporters of the conservative social agenda.³ Consequently, with Congress battling the Reagan-Bush administrations over their efforts to reshape constitutional law through judicial appointments and Justice Department filings, it is little wonder that neither O'Connor nor Kennedy wanted to be labeled a political lackey of the president who appointed them.

Consider, for example, *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁴—which may be the defining case of the first Rehnquist Court. Justices O'Connor and Kennedy's decision to reaffirm *Roe v. Wade*⁵ seems inextricably linked to Senate Judiciary Committee efforts to "make clear to nominees that a willingness to profess belief in some threshold constitutional values is a prerequisite for the job."⁶ Specifically, the Senate Judiciary Committee limited its sights on abortion and other social issues. It rejected Robert Bork's nomination because Bork, if confirmed, almost certainly would have supplied the fifth vote needed to overturn *Roe*. Also, the Committee's "severe hazing of [Clarence] Thomas . . . served as a warning to the sitting Justices that if they persisted down the path of seeking to overturn *Roe* and

2. On abortion and school prayer, the Court reaffirmed decisions that had long been the bane of social conservatives. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (abortion); *Lee v. Weisman*, 505 U.S. 577 (1992) (school prayer). On affirmative action, the Court muddled that which was already murky; through a string of fractured rulings, the Justices did little more than reject Reagan administration efforts to undo all preferences. See Neal Devins, *Adarand Constructors, Inc. v. Pena and the Continuing Irrelevance of Supreme Court Affirmative Action Decisions*, 37 WM. & MARY L. REV. 673 (1996); Neal Devins, *Affirmative Action After Reagan*, 68 TEX. L. REV. 353 (1989).

3. For the most part, Justice Byron White supported the conservative social agenda. See Merrill, *supra* note 1, at 594-95. Consequently, the 1993 appointment of Ruth Bader Ginsburg to fill White's seat cemented the social conservatives' defeat.

4. 505 U.S. 833 (1992).

5. 410 U.S. 113 (1973).

6. Stephen J. Wermiel, *Confirming the Constitution: The Role of the Senate Judiciary Committee*, LAW & CONTEMP. PROBS., Autumn 1993, at 121, 121-22.

securing other conservative objectives, they could expect equivalent retaliation of an unspecified nature.”⁷ Against this backdrop, it seems certain that the Senate played an instrumental role in the defeat of the conservative social agenda. Not only did it keep Bork off the Court, it also sent a message to Justices O’Connor and Kennedy that the repudiation of Court decision making on abortion, school prayer, and the like would be seen as an act of political defiance.⁸ Perhaps for this reason, the *Casey* plurality (O’Connor, Kennedy, and Souter) emphasized both the costs of “overrul[ing] under [political] fire” and explicitly linked the Court’s “legitimacy” to people’s “confidence in the Judiciary.”⁹

Beyond the appointments process, Congress pressured the first Rehnquist Court in other important ways. On civil rights, Congress rejected Reagan and Bush-era initiatives to limit proofs of discrimination grounded in disparate racial impact. Most tellingly, through the Civil Rights Act of 1991, Congress overturned twelve Supreme Court decisions limiting the scope of civil rights laws. This statute, as Tom points out, “was designed to be, and was, a massive rebuke to the Court.”¹⁰ Moreover, in 1989, Congress helped shape the face of the Supreme Court’s decision in *Metro Broadcasting, Inc. v. FCC*,¹¹ a decision upholding the FCC’s use of race-based diversity preferences. By filing an amicus brief in the litigation and, more importantly, prohibiting the FCC from reexamining diversity preferences, Congress signaled its support of these programs (support that the Court pointed to in its *Metro Broadcasting* decision).¹² Finally, during its first three years, the Rehnquist Court was constrained by lawmaker rebukes to Reagan Justice Department efforts to

7. Merrill, *supra* note 1, at 630-31.

8. It is also noteworthy that the appointment of stealth nominee David Souter was made, in part, to avoid the controversy surrounding nominees—such as Bork—with a paper trail.

9. *Casey*, 505 U.S. at 867. Along these lines, even if Justices O’Connor and Kennedy were not worried about what Congress would do to *them* if they signed onto an opinion overruling *Roe*, it is possible that O’Connor and Kennedy either (1) saw Congress as a barometer of public and elite opinion—so that a decision overturning *Roe* would isolate them from communities that they did care about—or (2) thought that a decision overturning *Roe* would negatively impact on future judicial appointments or encourage Congress to overturn Court statutory interpretation decisions.

10. Merrill, *supra* note 1, at 631.

11. 497 U.S. 547 (1989).

12. *Id.* at 561, 653-66 (1989). The amicus brief was filed by the Senate. In its 1995 decision, *Adarand Constructors, Inc. v. Peña* decision, 515 U.S. 200 (1995), the Supreme Court repudiated *Metro Broadcasting*’s embrace of intermediate scrutiny review in lawsuits challenging federal affirmative action programs. *Adarand*, however, did not speak to whether FCC preferences would pass muster under strict scrutiny review. Following *Adarand*, the Clinton administration concluded that FCC preferences satisfied strict review. For additional discussion, see Alan J. Meese, *Bakke Betrayed*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 479, 487-93.

grant tax breaks to racist schools, to disallow impact-based proofs of vote dilution, to put an end to forced busing, and to repudiate affirmative action.¹³

The failure of the first Rehnquist Court to innovate doctrine and/or reach consensus on social issues is consistent with the external strategic actor model. In particular, because they are not truly committed to the conservative social agenda, Justices O'Connor and Kennedy are likely to be swayed by social and political forces.¹⁴ It, therefore, is to be expected that these Justices would be affected by the actions of Congress, especially the Senate Judiciary Committee. Furthermore, these Justices have good reason to steer away from cases implicating social issues. Without strong preferences on these issues, these Justices have little reason to place themselves in the middle of a political firestorm—especially one where their votes will almost certainly prove decisive.¹⁵

* * *

The second Rehnquist Court's pursuit of doctrinal innovations on federalism-related issues is also consistent with the external strategic actor model. In particular, social and political forces have played a significant role in shaping the federalism revival of the second Rehnquist Court.¹⁶ *First*, unlike social issues, lawmakers barely mentioned federalism in the confirmation hearings, committee reports, or floor debates concerning any member of the Rehnquist Court. For example, the Senate Judiciary Committee never pressed Sandra Day O'Connor about states' rights—even though O'Connor called attention to the fact that her "experience[s] . . . as a State legislator[,] . . . as a [State] trial court judge[, and] . . . as a judge in the Arizona Court of Appeals" gave her "a greater appreciation . . . [of the] important role for the States in [our federal system]."¹⁷ Correspondingly, there are virtually

13. See Neal Devins, *The Civil Rights Hydra*, 89 MICH. L. REV. 1723 (1991). For this reason, I disagree with Tom's claim that the external strategic actor model does not explain first Rehnquist Court decisions supporting civil rights claims. Merrill, *supra* note 1, at 627. Unlike Tom, I would look beyond party control of the White House and Senate; instead, I would pay attention to the social and political forces surrounding the Court's civil rights decision making.

14. I offer no explanation as to why Justices O'Connor and Kennedy are not true blue social conservatives. It may be, as Tom suggests, that Justice O'Connor honestly disapproves of some social conservative objectives, see Merrill, *supra* note 1, at 634-35, whereas Justice Kennedy's focus is on exogenous variables, such as the impact of the Court's abortion decision on then-President Bush's 1992 reelection campaign. See *id.* at 635.

15. See *id.* at 637 (demonstrating that the Court's shrinking docket, especially on social issues, is likely tied to Justices O'Connor and Kennedy's penchant to deny certiorari).

16. In addition to these social and political forces, it is also noteworthy that Justices O'Connor and Kennedy came to the Court with strong ties to states rights interests. Justice O'Connor was a state legislator; Justice Kennedy was the son of a state lobbyist and a state lobbyist himself. See *id.* at 608.

17. *The Nomination of Judge Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States: Hearings before the Senate Comm. on the*

no mentions of federalism in interest group testimony and written submissions.¹⁸

Second, on federalism-related issues, Congress has signaled to the Court that it has little institutional stake in these matters and, accordingly, that there is little, if any, institutional price that the Court will pay when invalidating legislation on federalism-related grounds.¹⁹ In the wake of recent rulings limiting congressional power, there has been no talk of stripping the Court of jurisdiction, of amending the Constitution, or of enacting legislation at odds with these decisions. Indeed, there has been virtually no talk at all; the precedential effects of Court decisions limiting federal power are hardly ever mentioned in the Congressional Record.²⁰ Moreover, with the exception of Court rulings invalidating the Violence Against Women Act and the Religious Freedom Restoration Act, no more than four comments exist about the wisdom of any of the Court's federalism-related decisions.²¹ Furthermore, these decisions played no role in the 2000 elections. Finally, Congress has shown relatively little interest in rewriting these statutes, and when Congress has revisited its handiwork, lawmakers have paid close attention to the Supreme Court's rulings, limiting their efforts to revisions the Court is likely to approve.²²

Third, Congress is held in disrepute by both the public and members of Congress. Consider the following: As compared to 1964 (when 76% of those polled thought that the federal government could be trusted "just about always" or "most of the time"), 27% of those polled in 2001 thought the government

Judiciary, 97th Cong. 59 (1981). O'Connor was asked four questions about federalism-related issues. There were no federalism-related references in the Judiciary Committee report supporting her nomination. In calling attention to the Senate's lack of interest in federalism in past Supreme Court confirmation hearings, I do not mean to suggest that federalism will not be a salient issue the next time the Senate deliberates over a Supreme Court nominee. With that said, for reasons I detail both in this Comment and other writings, I do not think that the Senate will vote a nominee down because of her views on federalism-related issues. See *infra* notes 19-22, 29-33 and accompanying text; see also Neal Devins, *The Federalism-Rights Nexus: Explaining Why Senate Democrats Can Tolerate Rehnquist Court Decision Making But Not The Rehnquist Court*, 73 U. COLO. L. REV. 1307 (2002) (suggesting that complaints of "conservative judicial activism" by Senate Democrats are a rhetorical tool used to pay Republicans back for their handling of Clinton-era nominees and, correspondingly, to limit the power of the Bush White House).

18. See Devins, *supra* note 17, at 1319 (discussing the nominations of O'Connor, Thomas, Souter, and Breyer).

19. For a general treatment, see Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435 (2001).

20. *Id.* at 451-52 (detailing the results of LEXIS database searches).

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

22. Devins, *supra* note 19, at 447 n.58 (detailing the ways in which Congress responded to the Court's federalism-related decision making).

trustworthy.²³ Furthermore, by a 74% to 17% margin, a 1997 poll revealed that Americans thought that members of Congress cared more about making themselves look better than making the country better.²⁴ Moreover, in 1992, 82% of those polled thought that people elected to Congress “lose touch with the people pretty quickly.”²⁵ Making matters worse, Congress itself sends signals that it is not to be trusted—especially when it comes to interpreting the Constitution. For example, rather than sorting 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 six years, Congress has included expedited review provisions on several high-profile enactments, including the Communications Decency Act, the Line Item Veto Act, McCain-Feingold campaign finance legislation, census reform legislation, and library internet filtering legislation.²⁶ When enacting such measures, lawmakers effectively delegate their power to interpret the Constitution to the Supreme Court.²⁷

More significantly, when Republicans took over both houses of Congress in 1994 (the first year of the second Rehnquist Court), House Republicans ran on the so-called “Contract with America.” Seeking to capitalize on widespread voter dissatisfaction with Washington, the Contract pledged a smaller federal government and a larger role for the states. Among other reforms, the Contract promised 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 quickly lost touch with their constituents).²⁸

Riding the crest of this renewed commitment to federalism, Reagan and Bush appointees to the Rehnquist Court had good reason to turn their attention to states’ rights claims. Moreover, federalism was the only agenda that the Rehnquist Court could pursue; by that time, efforts to advance conservative

23. See Christopher H. Schroeder, *Causes of the Recent Turn in Constitutional Interpretation*, 51 DUKE L.J. 307, 348 (2001).

24. See *id.* at 336.

25. See *id.* at 337.

26. See Devins, *supra* note 19, at 442-43 (listing the Communications Decency Act, the Line Item Veto Act, and census reform legislation).

27. For example, when enacting item veto legislation, William Clinger—chair of the House committee with jurisdiction over the bill—declared that “[i]t is not really our job to determine what is constitutional or what is not unconstitutional.” 142 CONG. REC. 6912 (1996) (statement of Rep. Clinger).

28. While most voters did not know about the Contract, it is certainly the case that voter disenchantment with Congress propelled the 1994 Republican takeover of both houses of Congress. See, e.g., Ronald G. Shafer, *Washington Wire: A Special Weekly Report from The Wall Street Journal’s Capital Bureau*, WALL ST. J., Oct. 21, 1994, at A1.

social causes “lay in shambles.”²⁹ Finally, by replicating state criminal statutes on carjacking, domestic violence, guns near schools, and much more, Congress provided the Court with the fodder necessary to pursue its federalism campaign.³⁰

It is also noteworthy that, consistent with the external strategic actor model, second Rehnquist Court federalism decision making has been incremental. Initially, the Court moved gingerly—striking down relatively few laws and doing so on somewhat ambiguous grounds. Today, however, the Court seems more aggressive, and with good reason. State governments and conservative interest groups have rallied behind the Court, filing briefs in support of federalism-based claims. For its part, Congress has not cast doubt on these decisions. Moreover, there is little reason to fear a populist backlash. The Court remains politically popular and somewhat middle-of-the-road on divisive social policy issues. Also, when the Court strikes down a law, it typically leaves Congress room to revisit the issue.³¹ Finally, most of the measures struck down were “position taking” statutes—that is, laws in which legislators derive whatever political mileage they are going to get by casting a roll call vote in support of the law.³² For example, with state laws prohibiting both gun possession near schools and domestic violence, it was more important to members of Congress to make “a judgmental statement” than to see to it that the law, in fact, took effect.

* * *

In explaining differences between the first and second Rehnquist Courts, why look beyond the external political actor model? Tom Merrill offers some explanations, but I do not think that any of them are compelling. For example, there is simply no need to argue that Justice Scalia joined the federalism revival in order to pursue his substantive agenda (on issues such as abortion, affirmative action, separation of powers, and property rights). As Tom readily acknowledges, Justice Scalia has always cast his vote with the anti-Congress Justices on states’ rights issues (even before the emergence of the second Rehnquist Court).³³ More tellingly, Justice Scalia’s disdain of Congress seems

29. Merrill, *supra* note 1, at 605.

30. For quite similar reasons, Congress spurred on the Court’s anti-Congress campaign by enacting expedited review provisions (rather than debating the constitutionality of their handiwork). Devins, *supra* note 19, at 442-43.

31. See Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139 (2002).

32. See Keith E. Whittington, *Taking What They Give Us: Explaining the Court’s Federalism Offensive*, 51 DUKE L.J. 477, 512-14 (2001).

33. See Merrill, *supra* note 1, at 617-18. For other treatments of Justice Scalia’s federalism decisions (all arguing that Scalia’s commitment to federalism is sincere), see generally Bradford R. Clark, *The Constitutional Structure of the Jurisprudence of Justice Scalia*, 47 ST. LOUIS U. L.J. 753 (2003); John O. McGinnis, *Continuity and Coherence in the Rehnquist Court*, 47 ST. LOUIS U. L.J. 875, 883-85 (2003).

quite sincere. At the end of the Court's 2000 Term, for example, Scalia made clear that the pace of Court rulings invalidating federal statutes was likely to quicken. Complaining that "Congress is increasingly abdicating its independent responsibility to be sure that it is being faithful to the Constitution," Scalia warned that the "presumption [of Congress acting constitutionally] is unwarranted."³⁴ Finally, there is little reason to think that Justice Scalia links his votes on federalism cases with the successful pursuit of his substantive agenda. As Tom skillfully demonstrates, Justices O'Connor and Kennedy have resisted this agenda through cert. denials and merits votes on abortion and several other issues.³⁵

None of this is to say that the Court's turn to federalism was not a strategic choice—a desire to move towards issues on which the Court could achieve a consensus. There is little reason to think, however, that Justice Scalia was the leader of this charge or, alternatively, that his pro-federalism votes were "insincere strategic behavior."³⁶ For these reasons, the internal strategic actor model does not help explain the emergence of the second Rehnquist Court.

What, then, of Tom's claim that "membership stasis" helps explain some of the defining characteristics of the second Rehnquist Court (for example, a smaller case load and majority opinions containing doctrinal innovation), whereas "membership flux" explains the first Rehnquist Court's habit of deciding more cases and issuing fractured opinions? Again, there is no need to travel this road. Most significantly, the second Rehnquist Court's turn to federalism—especially its ability to issue majority opinions containing doctrinal innovations—is best explained by the confluence of three factors: (a) five members of the Court support the Court's anti-Congress federalism initiatives; (b) social and political forces have pushed the Court away from social issues and towards federalism; and (c) Congress's acceptance of the Court's federalism decisions has encouraged the Court to pursue states' rights claims aggressively. Correspondingly, there is no reason to think that the Rehnquist Court would have approached the federalism issue differently if there was significant turnover among the Justices who dissented in these cases

34. Stuart Taylor, Jr., *The Tipping Point*, 32 NAT'L J. 1810, 1811 (2000). For my money, this speech (delivered in the heat of battle) is more probative of Scalia's state of mind (when striking down legislation on federalism grounds) than the 1982 article that Tom cites in his lecture. See Merrill, *supra* note 1, at 610.

35. Merrill, *supra* note 1, at 633-38. Correspondingly, if Justice Scalia was simply acting strategically, it is hard to fathom why he would supply the fifth vote in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), a decision at odds with his substantive property rights agenda. See Merrill, *supra* note 1, at 612-13. In light of Justices O'Connor and Kennedy's failure to champion his substantive agenda, the best explanation for this vote is that Scalia agreed with the decision.

36. Merrill, *supra* note 1, at 603. To his credit, Tom explains that there is evidence on both sides of the question of whether Justice Scalia's behavior is strategic or sincere. See *id.* at 609-19.

(Souter, Stevens, Breyer, and Ginsburg). Likewise, there is no reason to think that the Court would have approached these issues differently if any member of the Rehnquist Court majority had been replaced by a Justice with identical views on federalism-related issues.

Tom ultimately offers no hard evidence to suggest that voting patterns are tied to “stasis,” not the convergence of personal preferences with social and political forces. Moreover, at the start of the second Rehnquist Court, the Court was not a Court in “stasis.” From 1990 to 1993, four Justices joined the Court. Of equal significance, from 1987 to 1993, a group of five “conservative” Justices served together on the Court (Rehnquist, White, O’Connor, Scalia, and Kennedy), but that group of Justices—as Tom readily admits—was never able to reap the rewards of “stasis.” The reason: the combination of personal predilections and social and political forces made it impossible for this group to pursue the conservative social agenda.

This is not to say that “stasis” does not have its advantages. No doubt, members of the second Rehnquist Court have a better appreciation of each other and, consequently, should have an easier time drafting opinions that all five can sign onto. Also, although social and political forces explain the Court’s shift away from social issues towards federalism, “stasis” may help explain the Court’s shrinking docket.³⁷ Finally, the personal bonds formed through coalition building may make it easier for that coalition to stand together on issues of first impression, such as *Bush v. Gore*.³⁸ Nevertheless, when explaining either the demise of the first Rehnquist Court or the advent of the second Rehnquist Court, “membership stasis” adds precious little to the “external strategic actor” model championed in this comment.

* * *

In arguing that the defining characteristics of the first and second Rehnquist Courts are a by-product of social and political forces, I do not mean to suggest that either the “internal strategic actor” model or “membership flux and stasis” are irrelevant to the task of explaining Supreme Court decision making. In particular, although I do not think that these models are especially

37. Even here, however, a cautionary note seems appropriate. Two of the factors that Tom points to in explaining the decline in Court opinions are only marginally related to “stasis.” The personal preferences of Justices to write their own opinions seem very much linked to the individual personalities of Justices, not “stasis.” *Cf. id.* at 643-44 (discussing how Justices’ opinion-writing preferences contributes to the Court’s shrinking docket). Also, the advent of the cert. pool speaks more to institutional design than to “stasis.” *Cf. id.* at 642 (discussing how the cert. pool contributes to the Court’s shrinking docket).

38. 531 U.S. 98 (2000). For Tom’s discussion, see Merrill, *supra* note 1, at 650-51. On the other hand, there are numerous counter-examples, that is, instances in which members of both the liberal and conservative blocks have switched sides to form unusual coalitions. *See, e.g.*, Alan M. Dershowitz, *Curious Fallout from Bush v. Gore*, N.Y. TIMES, July 4, 2001, at A15 (describing this phenomenon in the Court’s 2000-01 Term).

helpful in understanding the Rehnquist Court's turn to federalism, they may prove useful in understanding some of the Court's decisions. More generally, it is certainly true that no model can explain the decision making of every Justice and every Court. For this reason, Tom Merrill deserves a lot of credit both for articulating a new model that helps explain Court decision making and in trying to locate Rehnquist Court decision making in each of the dominant models used by political scientists (as well as his freshly minted model).

At the same time, it is sometimes the case that a simpler explanation is to be preferred to a more nuanced one. That, I think, is the flaw of *The Making of the Second Rehnquist Court*. There was no need to find some kernel of truth in each of the dominant political science models; instead, the external strategic actor model nicely explains the defining features of both Rehnquist Courts. On social issues, Justices O'Connor and Kennedy were unwilling to resist social and political forces (especially confirmation politics and lawmaker efforts to overturn the conservative social agenda).³⁹ On federalism issues, Congress and the American people have signaled the Justices that Court-imposed limits on congressional power are acceptable.

39. Whenever Court decision making turns on the votes of one or two swing Justices, it is likely that the external strategic actor model will explain the Court's actions. Swing Justices, by definition, have relatively weak preferences. Consequently, as was true with Justices O'Connor and Kennedy, social and political forces often play a determinative role in shaping their decisions.