The Book of Proverbs teaches:

Do not boast of tomorrow, for you do not know what the day will bring.

In the play ''Heracles,'' the great playwright Euripides wrote:

All is change; all yields its place and goes.

And the Greek philosopher Heraclitus said:

Change alone is unchanging.

I urge my colleagues to bear the constancy of change in mind as they consider the proposal to break the rules to change the rules of the Senate. Many in the Senate's current majority seem bent on doing that. They seem quite certain that they shall retain the Senate majority for quite some time thereafter.

But as Bertrand Russell said:

Most of the greatest evils that man has inflicted upon man have come from people feeling quite certain about something, which, in fact, was false.

My colleagues do not need to strain their memories to recall changes in the control of the Senate. Most recently, the Senate changed from Democratic to Republican control as a result of the 2002 election. Democrats did control the Senate throughout the sixties and the seventies, but since then the Senate has governed under six separate periods of one party's control. The Senate switched from Democratic to Republican control in 1980, back to Democratic control in 1986, back to Republican control in 1994, back to Democratic control in 2001, and back to Republican control again in 2002.

Similarly, some in the Senate can remember the decade after World War II. The Senate switched from Democratic to Republican control in 1946, back to Democratic control in 1948, back to Republican control in 1952, and then back to Democratic control again in 1954. Senators who served from 1945 to 1955, a mere 10 years, served under five separate periods of one party's majority control.

One cannot always see that change is coming, but change comes nonetheless. For example, in November 1994, Washington saw one of the most sweeping changes in power in Congress of recent memory. Very few saw that coming. The majority in the House and the Senate changed from Democratic to Republican.

It is by no means easy to see that change coming. In March of 1994, just several months before the election, voters told the Gallup poll that they were going to vote Democratic by a ratio of 50 percent Democratic to 41 percent Republican. That same month, March of 1994, voters told the ABC News poll that they were going to vote Democratic by a ratio of 50 percent Democratic to 34 percent Republican. As late as September of 1994, voters told the ABC News poll that they were going to vote Democratic by a ratio of 50 percent Democratic to 44 percent Republican. On the first Tuesday in November 1994, however, more than 52 percent of voters voted Republican for Congress. Democrats lost 53 seats in the House and 7 seats in the Senate.

In 1980, the Senate changed hands from Democratic to Republican control, but in August of 1980, voters in States with a Senate election told the ABC News-Louis Harris poll that they would vote for Democrats for the Senate by a margin of 47 percent for Democrats and 45 percent for Republicans. And on the first Tuesday in November 1980, Democrats lost 12 seats in the Senate.

In November 2002, the voters gave the Republican Party victory in the Senate. But my colleagues in the majority would do well to remember.

After a victorious campaign, Roman generals used to be rewarded with a triumph—a triumphant parade through the streets of Rome. Citizens acclaimed them like gods. But tradition tells us that behind the general on his chariot stood a slave who whispered: Remember that you are mortal.

In the ceremony of a Pope's elevation, they used to intone: Sic transit gloria mundi: ''So the glory of this world away.'' At that very moment, they would burn a handful of flax. The burning flax would symbolize how transitory the power in this world is.

In an address in Milwaukee in 1859, Abraham Lincoln said:

It is said an Eastern monarch once charged his wisemen to invent him a sentence, to be ever in view, and which should be true and appropriate in all times and situations. They presented him with the words: ''And this, too, shall pass away.'' How much it expresses! How chastening in the hour of pride! How consoling in the depths of affliction!

Mr. President, I urge my colleagues to remember that this Senate majority, too, shall pass away. This truth may console us in the minority, should the majority choose to break the rules to change the rules. But better still, better still would it be if the truth of constant change would chasten the current majority into abiding by the rules that protect Senators when they are in the majority and when they are in the minority alike.

We should protect the rules to protect minority rights, for no one can ''know what the day will bring.''

We should protect the rules that protect minority rights, for ''all yield [their] place and go.''

And we should protect the rules that protect minority rights, for it is true of majority control, as it is true of all things, that ''change alone is unchanging.''

Mr. President, I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BAUCUS. Mr. President, I ask unanimous consent the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BAUCUS. Mr. President, I yield the remainder of time on our side. I understand we have an order to go to recess.

The PRESIDING OFFICER. The Senator is correct.

RECESS

The PRESIDING OFFICER. Without objection, the Senate will stand in recess until 4:45 today.

Thereupon, the Senate, at 3:43 p.m., recessed until 4:45 p.m. and reassembled when called to order by the Presiding Officer (Mr. COBURN).

EXECUTIVE SESSION

NOMINATION OF PRISCILLA RICHMAN OWEN TO BE UNITED STATES CIRCUIT JUDGE FOR THE FIFTH CIRCUIT

The PRESIDING OFFICER. Under the previous agreement, the majority controls the next 60 minutes. The Senator from Georgia.

Mr. CHAMBLISS. Are we in morning business or are we prepared to proceed?

The PRESIDING OFFICER. We are on nominations.

Mr. CHAMBLISS. Let me start by asking, what is the pending business before the Senate?

The PRESIDING OFFICER. The nomination of Priscilla Owen to be U.S. Circuit Judge.

Mr. CHAMBLISS. Mr. President, I would like to take some time to discuss the nominations of two nominees, actually, to the Federal Court of Appeals. First, Justice Priscilla Owen of the Supreme Court of the State of Texas to the U.S. Circuit Court of Appeals for the Fifth Circuit, and then Justice Janice Rogers Brown of the Supreme Court of California to the U.S. Circuit Court of Appeals for the District of Columbia, along with why we need to move forward to a fair up-or-down vote on the nominations.

I would like to start with Judge Priscilla Owen.

Justice Owen's qualifications to serve on the Fifth Circuit Court are readily apparent to anyone who looks at her background and experience. Speaking to her in person—as I did 2 years ago, shortly after I came over to the Senate—only reinforces her obvious capabilities as a judge.

Justice Owen graduated cum laude from Baylor Law School and then proceeded to earn the highest score on the Texas Bar exam that year.

She practiced law for 17 years and became a partner with Andrews & Kurth, a highly respected law firm in Texas, before being elected to the Supreme Court of Texas in 1994.

Before I talk any more about Justice Owen's qualifications as a judge, I want to speak briefly about Priscilla Owen and the kind of person she is. Priscilla Owen has spent much of her life devoting time and energy in service of her community. She serves on the board of Texas Hearing & Service Dogs, and is a

member of St. Barnabas Episcopal Mission in Austin, TX, where she teaches Sunday school and serves as the head of the altar guild.

Having been a Sunday school teacher myself, and having grown up in the Episcopal Church—and my mother was the head of the altar guild for several decades—I know how much work that involved from a civic and religious standpoint.

She has worked to ensure that all citizens are provided access to justice as the court's representative on the Texas Supreme Court Mediation Task Force and to various statewide committees regarding legal services to the poor and pro bono legal services.

She was part of a committee that successfully encouraged the Texas legislature to provide millions of additional dollars per year for legal services for the poor.

Justice Owen is a member of the Gender Bias Reform Implementation Committee and the Judicial Efficiency Committee Task Force on Staff Diversity.

She was instrumental in organizing Family Law 2000 to educate parents about the effect of divorce and to lessen the negative impacts on children.

Justice Priscilla Owen was elected by the people of Texas, the second most populous State in this great country, to its highest court, the Supreme Court of Texas, where she serves today. In her last reelection in the year 2000, she won 84 percent of the vote and had the endorsement of every major newspaper in Texas.

Yet, there are still people who want the United States Senate to reject her nomination to the Federal bench because she is supposedly out of the mainstream in her legal reasoning. Out of the mainstream? The people of Texas obviously don't think she's out of the mainstream. In fact, I submit to you that in Texas and in the Fifth Circuit overall, she represents the mainstream of legal thought.

I would imagine my friends on the other side of the aisle would agree with me that the American Bar Association is an organization considered by many to be well within the mainstream of legal thinking in this country. The ABA rated Justice Owen as ''Well Qualified'' for the Fifth Circuit—this is its highest rating, often called the ''gold standard'' and indicating the best possible qualifications to serve on the Federal bench. By their opposition to Justice Owens confirmation, my colleagues on the other side seem to be telling the ABA: ''Don't bother with your rating; it just doesn't matter to us.''

Even though they used to refer to a well qualified rating as the ''golden standard'' for judicial nominees, now it seems this is just not about qualifications.

A judicial nominee's qualifications should matter most, and that nominee's qualifications should be the sole criterion for approving or blocking a nomination.

The focus should be on these candidates and their legal knowledge and experience. It should not be reduced to partisan battles over politics or ideology. The essential principle for picking a Federal judge should be their commitment to the law. We need judges who put the law before personal philosophy, ideology, or politics. That is what separates the judiciary from the legislative branch.

Senators should not inject politics into the process, and nominees should keep their politics out of the process as well.

The comments of some of my Democrat colleagues underscore that this debate is not about whether Priscilla Owen is well qualified as a judge. Her record reflects it, the ABA acknowledges it, and so do many of my colleagues on the other side. For example, consider these comments:

Senator DURBIN on September 5, 2002:

There is no dispute that Justice Owen is a woman of intellectual capacity and academic accomplishment.

Senator FEINSTEIN on July 23, 2002:

Justice Owen comes to us with a distinguished record and with the recommendations of many respected individuals within her State of Texas . . . [She is] personable, intelligent, and well spoken. It is clear to me that Justice Owen knows the law.

Senator KENNEDY on September 5, 2002:

Justice Owen is an intelligent jurist.

Senator KOHL on May 1, 2003:

We all recognize her legal talents.

And Senator SCHUMER on July 23, 2002:

I don't think there is any question about your legal excellence. You have had a distinguished academic and professional career . . . I think anyone who has listened even to 10 minutes of this hearing today has no doubt about the excellence in terms of the quality of your legal knowledge and your intelligence, your articulateness, et cetera.

I take my colleagues at their words. These comments are true and genuine. With that in mind and knowing that Justice Owen has the endorsement of the ABA as ''well qualified,'' since she was reelected with 84 percent of the vote in her home State, how can anyone try to say she is out of the mainstream? Why is it wrong to simply give her a fair up-or-down vote to see whether a majority of Senators believes she is qualified for this position?

Let me remind Members again that the Fifth Circuit seat to which she has been nominated has been designated as a judicial emergency by the Judicial Conference of the United States. The judges down in the Fifth Circuit need some relief. Dockets are getting backlogged. Cases are being delayed and not moving as they should. People who live in the Fifth Circuit need some relief.

Last week, on May 9, we marked the fourth anniversary of Justice Owen's nomination to the Fifth Circuit bench. Obstructing a nominee of the caliber of Priscilla Owen to a seat characterized as a judicial emergency is wrong. We cannot afford to drag this process out any further. Now is no time for obstructing the nomination of an eminently qualified jurist, one the American Bar Association has unanimously rated as ''well qualified,'' for confirmation to this Fifth Circuit seat. Let's get beyond the politics and confirm this nominee. I urge my colleagues to give Priscilla Owen a fair up-or-down vote on her nomination to the Fifth Circuit Court of Appeals.

I now will move on to discuss another nominee being considered by the Senate, Justice Janice Rogers Brown, who the President has nominated to sit on the U.S. Circuit Court of Appeals for the District of Columbia.

Since 1996, Janice Rogers Brown has been an associate justice for the Supreme Court of California, our country's most populous State. Justice Brown was initially appointed to the California high court by then-Governor Pete Wilson. She was reelected to the California Supreme Court in 1998 by the citizens of California, at which time she received 76 percent of the vote in favor of her reelection.

Prior to her service on the California Supreme Court, Justice Brown served for 2 years as a State appellate judge in California. Before that, she served as legal affairs secretary for Governor Wilson. For all but 2 of the past 24 years, Justice Brown has dedicated her career to work in public service positions.

Despite this background of public service and accomplishment, Justice Brown, unfortunately, has become the target of liberal interest groups who claim she is out of the mainstream of legal thinking. Those who oppose confirmation of these two fine State supreme court justices, Janice Rogers Brown and Priscilla Owen, apparently have no regard for the people of our two most populous States, California and Texas, the people who know these judges much better than anyone in this room or this body.

I submit again, in California, our Nation's most populous and one of our more diverse States, reelection of Justice Brown was 76 percent of the vote. That proves she is regarded as in the mainstream of legal thought.

Justice Brown rose from her early years as a child of sharecropper parents in the State of Alabama in the 1950s, one of the more difficult times in the history of our country for minorities, to sit on the highest court in the State of California. With a 76 percent reelection tally, it is obvious that a lot of people like Janice Rogers Brown. But nevertheless, Justice Brown has overcome adversity through her life and now she is facing it in her nomination to the DC Circuit Court of Appeals.

It is a core fundamental principle of the American judicial system that justice is blind. The people can get a fair hearing regardless of who they are, where they come from, or what they look like. Surely, nominees to the Federal bench deserve the same rights to a fair hearing as any of us.

Americans have a right to know where their Senators stand. Americans have a right to hold their Senators accountable. If a Senator opposes any nominees, he or she should vote against them, but they should vote. They should not hide behind Senate rules and parliamentary loopholes to block a vote. Our Nation's legal system is more important than, and should be above, petty partisan politics. There is never any reason under any circumstances that either political party should stall the courts from doing their necessary work just for political gain. As Americans, we deserve a fair, functioning legal system that is responsive to the law and not to some special interest group.

We already have too much politics in America. We already have too much politics in our legal system. While it is an unfortunate truth that partisan politics infects Washington, it has no place in our courts, it has no place in the verdicts delivered by our Federal judges, and it has no place in the confirmation process. We need the most qualified judges, not those who know how to work their way through the political system. It is and must always be a core fundamental principle of the American judicial system that people can get a fair hearing. Surely nominees to the Federal bench deserve the same rights to a fair hearing as any of us. The confirmation of judges should not be about ideology or partisanship. We need to adhere to a consistent process of investigation and decisionmaking that upholds the independent nature of our judicial system. Nominees should be judged by their qualifications, nothing less and nothing more. Once the investigation is done, nominees deserve an up-or-down vote.

Just as the Senate has been granted by the Constitution the right of advice and consent, the Constitution has also bestowed on them the responsibility to decide yes or no. If the nominee is found wanting, a ''no'' vote should be cast. But the permanent indecision and passing the buck serves no one. The essential principle in picking a Federal judge should be their understanding and commitment to the law. We need judges who put the law before personal philosophy, personal ideology, and, certainly, personal politics. That is what separates and protects an independent judiciary system from the mere politicized legislative branch.

When it comes to confirming judges, the primary criteria should be judicial and legal competence. The men and women who make up the Federal judiciary should be the best people available for the job, experienced, knowledgeable, and well versed in the law. Their job is too important to be determined by any single issue or political litmus test.

I hope at the end of this debate, whether it ends tonight, whether it ends tomorrow, whether it ends next week, that we can come together in a bipartisan way to look these two judges in the eye and say: We are going to give you an up-or-down vote. I think you are qualified and I will vote yes, or I think you are not qualified and I will vote no. That is our obligation. That is our duty. That is the direction in which we must move.

I yield the floor.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, once again, I rise to speak on behalf of the nomination of Justice Priscilla Owen to the Fifth Circuit Court of Appeals. I am very honored to do so. As we all know, the debate over this nomination will take place within the context of a historic constitutional struggle over the President's right to obtain an up-or-down vote for his judicial nominees.

In all seven of these cases—in all seven—each of them has bipartisan up-or-down majority support. All we ask is they get a vote.

Now, that will be resolved soon enough, but we should not forget that this is a fight worth having because this campaign of ongoing obstruction is depriving us of good and needed judges such as Priscilla Owen. We should not forget that in the end this debate is about the individual nominees and their qualifications for service on the Federal bench. This is a debate about Justice Priscilla Owen, and I am proud to support her.

Because Justice Owen's nomination has never come up for an up-or-down vote, I have had 4 years to consider this nomination and to get to know her personally, and to further familiarize myself with her record on and off the bench. The passage of time has only strengthened my conviction that she is wholly deserving of a seat on the Federal bench. She is a woman of real accomplishments, and the State of Texas is justifiably proud of her. I am proud of her. I am confident that if she is ever given the vote she deserves, she will do our country proud as a Federal circuit court of appeals judge.

In her years as a justice on the Texas Supreme Court, Priscilla Owen has demonstrated the cautious, impartial mind and the willingness to listen that we seek from our judges in this country. Both her private practice—where she became one of the first to break through the ''glass ceiling'' for women, became a major partner in one of the major law firms in the country, after being first in her class in law school, first on the bar examination, with the highest grade there—and her actions on the bench provide examples of the honor and dignity that an individual can bring to the practice of law.

Finally, she has comported herself with confidence and professionalism in the face of exaggerations and unfair complaints lodged against her by interest groups—the outside, leftwing interest groups—committed to her defeat. The people of Texas have recognized these attributes in Judge Owen and rewarded her twice by electing her and reelecting her to the Texas Supreme Court. In fact, she was reelected with 84 percent of the vote. Yet some try to characterize her as somehow outside of the mainstream.

How can they justify that? For 4 long years now, her nomination has languished as a result of a deliberate and systematic strategy to deny up-or-down votes to the President's majority-supported nominees. They claim nominees such as Justice Owen are extremists and conservative activists. Her record does not support these assertions, and I commend the President for renominating this eminently qualified jurist. In contrast to the false charge that she is an extremist—and I might add, how can she be an extremist and have the highest approval of the American Bar Association, certainly not a conservative group? So in contrast to the false charge that she is an extremist, the fact is Priscilla Owen is one of those relatively few nominees who received a unanimously well-qualified rating from the American Bar Association, the highest rating possible.

I am under no illusions here. The Senate is a unique, deliberative institution where the opportunity for serious debate must be vigilantly protected. Unfortunately, it seems likely that not many are going to have their minds changed by this debate. I hope the newly elected Members of the Senate will pay close attention to the facts surrounding the nomination of Priscilla Owen.

The Senate already knows Justice Owen quite well. We have spent literally hundreds of hours discussing her nomination. Many Senators have probably made up their minds. But for many people, this inside-the-beltway dispute is just now starting to draw attention. Only now, as this debate is coming to a head, is it the leading story on the network nightly news. Therefore, it is as much for the American people tuning into this debate as it is for my colleagues here that I want to address a handful of the unfair charges being made against her. And we have heard them here on the floor today.

Justice Owen graduated first in her class from Baylor Law School. She received the highest score on the State bar exam. She went on to become a partner in the prestigious firm of Andrews & Kurth.

She was admitted to practice before various State and Federal courts. She is a member of the American Law Institute, a prestigious organization; the American Judicature Society, the American Bar Association, and a fellow of the American and Houston Bar Foundations. In short, she possesses all the attributes and membership in traditional legal organizations that are recognized by all of us, and these organizations place her firmly in the mainstream of all American lawyers and of American jurisprudence.

Committed to the principle of equal justice for all, she participated on the

committee that successfully encouraged the Texas legislature to enact legislation resulting in millions of dollars per year in additional funds for providers of legal services to the poor. Does that sound like an extremist?

This is the resume of somebody fully within the mainstream of our legal community. It is not the resume of a radical or an extremist, as has been portrayed by some in this body on the other side. It is the resume of a successful attorney who went on to serve the public as a justice on the Texas Supreme Court.

She carried these mainstream professional habits, honed in private practice, with her into her career as a judge on the Texas Supreme Court. It is worth reconsidering what she had to say before the Senate Judiciary Committee during her first confirmation hearing way back on July 1, 2002. In her opening statement, she referred to the four principles that guide her decisionmaking as a judge. I am quoting her here.

Now, these are her four rules she lives by.

No. 1: Always remember that the people that come into my court are real people with real problems.

No. 2: When it is a statute that is before me, I must enforce it as you in the Congress or in the State legislature, as the case may be, have written it, unless it is unconstitutional.

No. 3: I must strictly follow United States Supreme Court precedent.

No. 4: Judges must be independent, both from public opinion and from the parties and lawyers who appear before them.

That is a statement of Justice Priscilla Owen before the Senate Judiciary Committee on July 21, 2002. This is hardly radical stuff. In fact, I would wager a vast majority of the American people agree with those principles.

Yet to listen to those committed to stonewalling this nomination—she has now been waiting 4 years for this vote—you would walk away with a very different impression, if you listened to them. I have been debating judicial nominations for a long time—all 29 years of my service in the Senate—but these most recent attacks are novel ones. The insistence on denying Justice Owen and other nominees up-or-down votes is part of a larger story dating back over 20 years now.

In those earlier debates, some committed to an activist judiciary used to wear the label ''judicial activist'' proudly on their sleeves. Over time, however, they have come to understand that the American people like their judges interpreting rather than making the laws. Judges should behave as judges, not junior auxiliaries to the legislative branch. So now they charge conservative nominees with being activists as well.

This is the principle charge against Justice Owen. The American people are going to have to make up their own minds on this, but to me it is very clear that argument does not hold any water. Look at her record. Look at those who are behind her. Look at all the Democrats who have supported her.

The abortion rights lobbyists focus their attention on a series of Justice Owen's opinions in cases involving the Texas parental notification statute. It is worth noting that contrary to the wishes of a vast majority of Americans, and the Supreme Court, groups such as the National Abortion Rights Action League oppose even these modest popular restrictions on abortion rights, that are supported by 80 percent of the American people. The reality is it is Justice Owen, not these groups, who is in the mainstream. The groups are the ones who are outside of the mainstream.

By the way, these are far-left Democratic Party groups that are far outside the mainstream in their interpretation. Anybody who disagrees with them on anything is ''outside of the mainstream'' or ''extremist.'' Unfortunately, some of our colleagues parrot what they say and what they tell them to say.

In Texas, the law requires that a minor notify her parents of her decision to have an abortion. That is what the law of Texas says. This is common in many States. Such statutes receive broad bipartisan support. I have mentioned 80 percent of the American people support these types of statutes. Yet, in their wisdom, the Texas legislature provided an opportunity for a judicial bypass of this notification of parents requirement in certain circumstances.

Judge Owen has been vilified in her dissent in the case of In re Doe I where she had to interpret the State's requirement that a minor seeking a judicial bypass of the notification of parents requirement demonstrate sufficient maturity to get the bypass. A fair reading of that opinion shows you Justice Owen made a reasonable interpretation of the Texas law.

The other day it was reported that Nancy Keenan, the president of the abortion advocacy group the National Abortion Rights Advocacy League, said she is committed to keeping what she called ''out of touch theological activists'' off the bench. I can only hope this talking point was not aimed at Justice Owen's decision, which is certainly well within the mainstream and supported by 80 percent of the American people. If so, her point misses the point entirely. Sadly, it seems that the deliberate misreading of Justice Owen's opinion may be for the sole purpose of raising ill-founded doubts against Justice Owen and other qualified nominees.

Priscilla Owen only interpreted the law to require that a minor seeking an abortion fully understand the importance of the choice she is making and be mature enough to make that choice. I thought these groups were in favor of supporting the right to make an informed choice. When it comes to Justice Owen, I guess it is easier to unfairly tar her as an anti-abortion activist.

This is a false charge, and it is contrary to the laws of many States and other laws as well. Yet some interest groups keep feeding this same misleading information to journalists around the country. Just last night, the evening news on one of the major networks reported as fact the patently false charge that Attorney General Gonzales called Justice Owen a judicial activist when he was her colleague on the Texas Supreme Court. This charge was made again this morning by the senior Senator from Massachusetts. Think about that. They know this claim is fiction, but they nonetheless continue to launch it as though people should believe it, even though it is fiction.

Attorney General Gonzales confirmed this under oath—he was not criticizing Justice Owen—in his January 6, 2005, confirmation hearing, and it is clear to anyone who bothers to read the opinions that he never referred to Owen or any other judge on the Texas Supreme Court as a judicial activist. He was basically referring to himself. He felt if he didn't rule the way he did, he would be a judicial activist. He didn't make any criticism of her. But to read the newspapers and to hear the television broadcasters and to listen to our colleagues on the other side, they completely distort what Attorney General Gonzales says. As a matter of fact, Attorney General Gonzales was one of the strongest supporters of Priscilla Owen because she is a terrific justice, as he knows because he served side by side with her on the Texas Supreme Court.

In the end, I am happy to have this debate. The American people know judicial activism when they see it. Just last week a Federal judge in Nebraska invalidated a State constitutional amendment preserving traditional marriage in that State. If that opinion is upheld, that will bind every State in the Union under the full faith and credit clause. Talk about activism.

But I am sure that my colleagues on the other side will find that that judge was in the judicial mainstream or the mainstream of American jurisprudence. If they want to argue that Justice Owen's interpretation of a popular parental notification statute is an activist one, I will be here to debate that all day long. I might add that parents, in many of the cases, who are concerned about their daughters, ought to have at least the privilege of being in a position to help their daughters through those trying times. That is what the courts and the statutes have said. That is what any reasonable person would say. Yet they brand Priscilla Owen as an extremist.

Why didn't the American Bar Association do that? Why did the American Bar Association give her the highest possible rating that you can get? During the Clinton years that was the gold standard, the absolute gold standard. Why isn't it the gold standard today? Why is this really terrific person being called a judicial activist, outside of the

mainstream, and an extremist? It is awful.

Those opposed to Justice Owen ignore the host of decisions in which she protected workers, consumers, the environment, crime victims, and the poor—as though she didn't care about people. There is a host of decisions where she has shown great care for people. They select individual things and then distort them. It makes you wonder what their objection to this nominee really is. It is clear they are not really interested in having a serious debate on the merits of Justice Owen's nomination. For whatever reason, they are dead set on not having her on the Federal bench.

We are going to hear her described as an out-of-control activist. That couldn't be further from the truth. The senior Senator from Massachusetts has called her and others of the President's nominees Neanderthals. Come on here. This is supposed to be a sophisticated body. These are decent people. She was supported by virtually everybody in the State of Texas in her last reelection—84 percent of the vote—every bar association president and former president, 15 of them, every major editorial board. And we know they are not generally in favor of Republicans, but they all supported her.

She was first in her law school class, best bar exam in the State, partner in a major law firm, broke through the glass ceiling. She is a sitting justice on the Texas Supreme Court, reelected by an enormous majority, unanimously well-qualified rating from the American Bar Association. And she is a Neanderthal? Give me a break.

That is how far these debates have deteriorated over the years, especially when you find a moderate to conservative woman such as Priscilla Owen or a moderate to conservative African-American justice like Janice Rogers Brown.

Janice Rogers Brown, think about it—sharecropper's daughter, worked her way through college and law school as a single mother, went on to hold three of the highest positions in California State Government, State counsel to the Governor of the State of California, then-Governor Pete Wilson, nominated her for the Supreme Court of California. She writes the majority of the majority opinions on that liberal court. In other words, she is writing for all the of judges on that court in the majority opinions. She is a terrific human being. Her problem is she is a conservative African-American jurist, approved by the American Bar Association. And they call her an extremist.

We have had negotiations here where they were willing to throw these two women, Priscilla Owen and Janice Rogers Brown, off the cliff in favor of three or four men, white males, all of whom deserved being confirmed themselves. I thought they were all bad and extremist, according to them. Why would they allow any of them to go through? Then again, if they are not, why haven't they voted for them and why have they filibustered?

I yield the floor.

The PRESIDING OFFICER. The Senator from Oklahoma is recognized.

Mr. INHOFE. Mr. President, first of all, let me acknowledge that the senior Senator from Utah is so much more knowledgeable on all these issues than most of the rest of us—certainly much more than I am. He has been on the committee and has chaired the Judiciary Committee. He knows these things. He is an attorney. I am none of the above. I chair a committee called Environment and Public Works. But I think it is important for those of us who are not living this every day to express ourselves because we have just as strong feelings, even though we don't work with this on a daily basis.

Mr. President, what is the question pending before the Senate?

The PRESIDING OFFICER. The nomination of Priscilla Owen to be U.S. circuit judge.

Mr. INHOFE. Mr. President, today, I want to enter into this debate, as we have so many times, on these judicial nominees, including Justice Priscilla Owen and Justice Janice Rogers Brown, both of whom are highly qualified.

Priscilla Owen was nominated by President Bush to the U.S. Court of Appeals for the Fifth Circuit, a seat that has been designated a judicial emergency by the Judicial Conference of the United States. That means we have to fill the seat. She has served on the Texas Supreme Court since 1994 and was endorsed for reelection by every major Texas newspaper. She practiced commercial litigation for 17 years. She received her undergraduate degree from Baylor University and graduated third in her class from Baylor Law School in 1977. The American Bar Association has unanimously rated Justice Owen as ''well-qualified,'' the highest possible rating. She is the first nominee considered well-qualified by the ABA to be denied a floor vote by the Democrats.

Priscilla Owen even has significant bipartisan support from three former Democrat judges on the Texas Supreme Court and a bipartisan group of 15 past presidents of the State Bar Association of Texas. Justice Owen has served the legal field in many capacities. She was liaison to the Texas Supreme Court's mediation task force and on statewide committees on providing legal services to the poor and pro bono legal services. She has always been very sensitive to the poor.

Justice Owen organized a group called Family Law 2000, which warns parents about the difficulties children face when parents go through a divorce.

Similarly, President Bush has nominated Justice Brown to the U.S. Court of Appeals for the DC Circuit. This morning, I was at the White House. As I came back, I walked by that district court office and thought very much at that time about Justice Brown. She currently serves as an associate justice on the California Supreme Court, a position she has held since 1996. She is the first African-American woman to serve on California's highest court and was retained with 76 percent of the statewide vote in her last election.

It is kind of interesting that they use the term ''out of the mainstream'' quite often. Yet here is someone who got 76 percent of the vote in a statewide election. Justice Owen actually got 84 percent. I don't think anybody in this body has been able to gain those majorities.

Justice Brown was the daughter of a sharecropper. She was born in Greenville, AL, in 1949. She grew up attending segregated schools during the practice of Jim Crow policies in the South. Her family moved to Sacramento, CA, when she was in her teens, and she later received her B.A. in economics from California State, and earned her J.D. from UCLA School of Law in 1977.

She has participated in a variety of statewide and community organizations dedicated to improving the quality of life for all citizens of California.

For example, she has served as a member of the California Commission on the Status of African-American Males, as a member of the Governor's Child Support Task Force, and as a member of the Community Learning Advisory Board of the Rio Americano High School.

Two weeks ago, my colleague in the other Chamber, Congressman DAN LUNGREN of California—he is a Congressman I served with for many years when I was in the other body, and he went on to be the Attorney General from the State of California. He spoke of his professional experience with Justice Brown. I really think it is important to go back to people who have served with them at the grassroots level. He was in State government with her in the early 1990s. Congressman LUNGREN said:

> . . . It is my observation that in the absence of the opportunity to be voted up or down, to be subjected to a debate on the floor of the United States Senate in the context of such a consideration, that in fact the Janice Rogers Brown that I know in the State of California . . . is not the person that I hear discussed, the person that I hear characterized, or the person that I see presented in the press and other places.
>
> When I was elected the attorney general in the State of California and took office in January of 1991, I asked a number of people who had previously served in the attorney general's Office for recommendations of people who should serve at the top level of the department of justice in my administration. Her name (Justice Brown) was always offered by those who had experience in that office.
>
> During the confirmation hearings that we had, I had the opportunity to review the opinions that she had written while on the appellate court. Interestingly enough, every single member of the appellate court on which she served recommended her confirmation to the California supreme court. I recall at the time that the chief justice of the California supreme court, Justice Ron George, surprised the public hearing that we had by actually putting on the table every

single written opinion that she had done and advising everybody there that he had read every opinion that she had written at that point in time, not once but twice, and rendering his opinion that she was well qualified to serve on the California supreme court.

Further quoting:

If you look at her opinions, they are the opinions of someone who understands what I believe jurists ought to understand, that their obligation is to interpret the law, not make the law.

He concluded his statement by saying:

My point this evening is a simple one. That which we are observing in the Senate is denying the American people an opportunity to review the nominees of the President of the United States. It is my belief that Janice Brown should be presented to the United States Senate for consideration. She is an American story. From the humblest background, she has risen to the highest court in the most populous State in the Nation. She subscribes to a judicial philosophy considered radical in some circles, that the text of the Constitution actually means something. She holds to a consistent enforcement of individual rights that is not result oriented.

In my judgment, these are the qualities of a true jurist and is why she should be confirmed to sit on the DC Circuit Court of Appeals and, at the very least, that her story be told in open debate on the floor of the United States Senate in the context of the consideration of her nomination by the whole body.

That is what we are attempting to do today. This is a debate that could quickly be brought to an end by a simple up-or-down vote. We offered the minority as much time as they wanted to debate these nominees, as long as an up-or-down vote would follow. But this hasn't happened.

As a matter of fact, at least seven of my colleagues from the other side of the aisle have actually stated the same thing—that nominees deserve an up-or-down vote regarding previous nominees, and they all received an up-or-down vote. The same people now that are objecting to an up-or-down vote are the ones who stood up and said we think they should have an up-or-down vote previously. Somehow that has changed from the 1990s, and they don't want that.

Let me remind them that Senator DURBIN said this on September 28, 1998: We should vote the person up or down. That is all we want.

Senator FEINSTEIN, on September 16, 1999, said a nominee is entitled to a vote. Vote them up or down.

Again, Senator FEINSTEIN, a month later, said in October of 1999:

Our institutional integrity requires an up-or-down vote.

That is what we are talking about, our institutional integrity. I agree with Senator FEINSTEIN from 1999.

On March 7, 2000, Senator KENNEDY said:

The Chief Justice of the U.S. Supreme Court said, ''The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry, it should vote him up or down, which is exactly what I would like.

Senator LAUTENBERG said:

Talking about the fairness in the system and how it is equitable for a minority to restrict the majority view, why can we not have a straight up-or-down vote?

That was on June 21, 1995.

Senator LEAHY, who actually chaired that committee, said:

When President Bush nominated Clarence Thomas to the U.S. Supreme Court, I was the first Member of the Senate to declare my opposition to his nomination. I did not believe that Clarence Thomas was qualified to serve on the Court. Even with strong reservations, I felt that Judge Thomas deserved an up-or-down vote.

Again, 4 years later, Senator LEAHY said:

. . . I also took the floor on occasion to oppose filibusters to hold them up and believe that we should have a vote up or down.

Senator LINCOLN said:

It's my hope that we'll take the necessary steps to give these men and these women especially the up-or-down vote that they deserve.

That was in the year 2000.

Senator SARBANES said:

It is not whether you let the President have his nominees confirmed. You will not even let them be considered . . . with an up-or-down vote.

I could go on and on. In fact, I did the other day. I went over so many of these people who are demanding an up-or-down vote. Not only are my colleagues on the other side of the aisle holding up these qualified judges by not allowing an up-or-down vote, I also believe they are discriminating against people of faith.

I will reiterate a quote from an article in the L.A. Times that I read on the floor in April regarding the filibuster of qualified nominees, such as Justices Owen and Brown. It states, and I am quoting now the L.A. Times which has never been accused of being a Republican newspaper:

These are confusing days in Washington. Born-again conservative Christians who strongly want to see President Bush's judicial nominees voted on are leading the charge against the Senate filibuster, and liberal Democrats are born-again believers in that reactionary, obstructionist legislative tactic. Practically every big-name liberal senator you can think of derided the filibuster a decade ago and now sees the error of his or her ways and will go to amusing lengths to try to convince you that the change of heart is explained by something deeper than the mere difference between being in the majority and being in the minority.

I know that both Justice Brown and Justice Owen are active members of churches and are distinguished women of faith.

Justice Brown has taught adult Sunday school at her church for more than 10 years, and Justice Owen teaches Sunday school and is the head of the altar guild at her church.

One has to ask the question, Have we come to the point in America where Sunday school teachers are disqualified by the strength of their faith and the boldness of their beliefs?

The Bible urges us, like Justices Brown and Owen, to be bold in our faith. I Timothy 3:13 says:

For they that have used the office of a deacon well purchase to themselves a good degree, and great boldness in the faith which is in Christ Jesus.

Hebrews 4:16 says:

Let us therefore come boldly unto the throne of grace, that we may obtain mercy. . . .

I agree with Justice Brown, as she recently told an audience, that people of faith were embroiled in a war against secular humanists who threatened to divorce America from its religious roots, according to a newspaper quoted in an April 26, L.A. Times article.

One example of this attack is our parental notification and consent laws which require girls under 18 who are seeking an abortion to either notify or obtain permission—either notify or obtain permission—from one or both of her parents. Many States have such laws. However, there are many instances where these protective laws have been struck down by liberal judges who are bypassing the law and legislating from the bench.

For example, on August 5, 1997, the California Supreme Court issued its decision in American Academy of Pediatrics v. Lungren. The court held that the 1987 statute requiring minors seeking abortion to obtain parental consent or judicial authorization violates the California Constitution's explicit right to privacy.

This is outrageous. Parents have a right to know what their children are doing. Children who are not old enough to vote or drink, why should they be old enough to have an abortion without at least telling their parents? We are not talking about getting permission, we are talking about notifying them.

In another case, Planned Parenthood v. Danforth, the Supreme Court held that statutes, which allow a parent or guardian to absolutely prohibit an abortion to be performed on a minor child, were unconstitutional.

There are a number of such cases. The whole point is this is outrageous.

We keep hearing people say these two justices are out of mainstream America, and I suggest to you, Mr. President, that it is the individuals who are making the accusations who are out of the mainstream. It was not long ago that they did polling on all these traditional values, and it would seem to me that the traditional values are in the mainstream. It is the liberals who are opposing these nominations who are out of the mainstream.

To give an example, by 85 to 15 percent, Americans say religion is very or fairly important in their lives. Only 15 percent say it is unimportant.

In the case of Government should help faith-based initiatives to help the poor, 72 percent of Americans agree. On the issue of whether violent attackers of pregnant women who kill the baby should be prosecuted for killing the baby, 84 percent say yes. That is mainstream.

On the issue of whether children should be allowed to pray in school, 78 percent of Americas agree.

And 73 percent of Americans favor a law requiring women under the age of

18 to get parental consent for any abortion. Democrats are with the 24 percent who oppose it.

That is mainstream America, Mr. President. Also, 74 percent oppose removing all references to God from oaths of public office—74 percent—and 91 percent of Americans want to keep the phrase ''under God'' in the Pledge of Allegiance.

Those who are opposing them are on the other side of these issues. I suggest this all averages to over 78 percent of the American people believe these issues, and that is clearly the will of the American people. That is mainstream. That is what our Founding Fathers talked about when they founded this great country, this one Nation under God.

We have said it over and over again. I see the distinguished Senator from Nevada is here to speak. I agree with all the liberal Democratic Senators who in the 1990s said: All we want is an up-or-down vote; that is all we are asking today. They got theirs, now we deserve ours.

I yield the floor.

The PRESIDING OFFICER. The Senator from Nevada.

Mr. ENSIGN. Mr. President, I rise to discuss the issue of judicial nominees, their confirmation process and whether nominees should receive an up-or-down vote.

We are currently discussing Justice Priscilla Owen and her nomination to the Fifth Circuit Court of Appeals. There has been a lot said about this nominee. Her qualifications have been enumerated on the Senate floor. We have heard that she was elected with 84 percent of the vote in Texas. This is a very large percentage that represents overwhelming support in her home State of Texas.

My Democrat colleagues have questioned her position on the issue of parental notification. As my friend and colleague from the State of Oklahoma talked about, parental notification is supported by nearly 80 percent of the American people.

Before a school nurse gives a child an aspirin, the school will ask for the parent's permission. When it comes to an abortion, which is a surgical procedure, abortion providers do not want to be held to the same standard. The vast majority of the American people believe that a parent should be notified before a surgical procedure, like an abortion, is performed on a child.

The parental notification cases that Priscilla Owen has heard while serving on the Texas Supreme Court all involved a lower court decision that the child should tell a parent about her desire to have an abortion. So in many of these cases, Justice Owen was upholding the determination of the lower court judge who had directly listened to the testimony of the minor who wanted an abortion.

In these cases, there was disagreement among the justices on the Texas Supreme Court, but in cases where she voted in favor of parental notice, her determination was the same as the lower court. It was very reasonable. Anybody could look at that and say this is a reasonable person.

When we review the record of a judicial nominee, when we review their opinions, we should ask ''does that judge follow the law?'' We ask ''is this judge well reasoned?'' We ask ''did they look at the facts?'' Anybody who has reviewed Priscilla Owen's record and her opinions would conclude that she has a good temperament. They would conclude that she was not making law but was interpreting the law according to the way the Texas Legislature had intended. In cases involving parental notification, they would conclude that she had faithfully applied the law.

In addition to discussing Justice Owen's nomination, I also want to address the confirmation process as a whole. In the past, whether it was Judge Robert Bork or Clarence Thomas, Republicans were unhappy with the treatment that some nominees of Republican President's received. The reputation of Judge Bork and Justice Thomas had been attacked. These fine men were vilified. Republicans felt that those nominees were treated unfairly in committee and then on the floor.

When President Clinton was President, some of his nominees were likewise mistreated. The committee process was used to delay hearings or to bottle up nominees. In most cases though, those nominees were eventually given an up or down vote. We have heard the other side complain about the delays that President Clinton's nominees experienced. I believe that the Senate ought to fix that.

I think it is damaging to our system of government to deny any nominee an up or down vote. The Senate should, whether someone is nominated to serve as a judge or in the administration at an agency or department, provide each nominee with an up or down vote. The Senate should reject this delaying tactic which denies a nominee a timely up-or-down vote in committee and on the Senate floor. We ought to fix the whole process.

Unfortunately, both Republicans and Democrats have been escalating the fight over nominees for years. As I pointed out before, many Republicans felt that Judge Bork was mistreated. In response, President Clinton's nominees were too. What one side does, the other side will ratchet it up to the next level when they come into power. We can't keep doing that. Neither side is going to win if we continue on this path. But the American system of government and the American people will surely lose. Good people will no longer be willing to serve in the administration or in positions on the bench if we can't put an end to this. No American is going to want to have their name put up for a position if they are promised to be treated so horribly.

My home State of Nevada is part of the Ninth Circuit Court of Appeals. A few years ago, Nevada had an opening on the Ninth Circuit. I spoke with several people, people who would have been well-qualified as a candidate. I asked if they would be interested if I put their name forward? I consider it a great honor to be on the appellate court. The common feedback: ''Why would I want to put in my name and go through that process given all that you have to go through?''

My fear is that we are discouraging the very type of people who should apply for these positions from doing so. We need the absolute best legal minds to serve on the appeals courts and Supreme Court that we can possibly get. It should be an honor to serve there. We should not do anything to dishonor those positions with the political farce that we have going on in the Senate.

The Democrats have accused Republicans of wanting to change the rules. The rules changed 2 years ago. And it was the Senate Democrats that changed the rules with a partisan filibuster. A partisan filibuster was never done in the history of the Senate before 2003, never. Search the history books, it is very clear. The two cases Democrats bring up were not partisan filibusters. The one case about Abe Fortas, that was clear, he had engaged in objectionable practices while serving as an associate justice on the Supreme Court and was opposed by many Senators in both parties. He was not opposed on a party line basis. It was clear to President Johnson that his nominee did not have the votes to be confirmed as Chief Justice of the Supreme Court.

What we call the constitutional option—is an effort to reestablish the tradition of what the Senate has always done. The minority is correct that filibusters were allowed under the rules. But the people who considered them in the past, the majority of Senators, said it would do too much damage to the institution to actually carry out those filibusters. So, in a bipartisan fashion in the past, before the Democrats led the current filibusters, Senators got together and said: We will go ahead and have up-or-down votes on these nominees.

I believe, for the future of this institution and for the future of bringing good people to the judiciary, we need to fix this process once and for all. Whether it is a Republican President or a Democrat President and whether Republicans or Democrats are in control of the Senate, regardless of which party is in charge, good people should have an up-or-down vote in a timely fashion in committee as well as on the floor of the Senate.

I hope we can join across the aisle and fix this. I actually thought we should have fixed it last year before the Presidential election. I tried to extend my hand across the aisle last year and say to Democrats: We don't know who is going to win the Presidential election, so let's put something in place now so that the filibuster will not continue after the 2004 elections.

I don't think it should matter whether it is a Republican President or Democrat President sending nominees up here. It is OK to vote against them, but I don't believe that only 40 Senators of one party should be able to choose who is on the bench.

The PRESIDING OFFICER. The time of the majority has expired.

Mr. ENSIGN. Mr. President, I will conclude very briefly with this. For the good of our country, for the balance of powers, we need to end this process of filibustering good people. These good people deserve an up-or-down vote. It is only fair. Let's join together in a bipartisan fashion to do that.

I yield the floor.

The PRESIDING OFFICER. The minority now controls 90 minutes.

Who yields time? The Senator from Minnesota.

Mr. DAYTON. Mr. President, ''how a minority, reaching majority, seizing authority, hates the minority'' is attributed by the Library of Congress to a Leonard Robinson, in 1968. So I guess there is a historical precedent for the attitudes of the majority in the Senate today. The minority is treated often with contempt and disdain. Presiding Officers read their mail or sign photos while our Members speak on the Senate floor. Democratic conferees are excluded from the committee meetings. Our Democratic Senate leader is again smeared and targeted as an obstructionist. For what? For leading the minority party's lawful and proper dissent to the policies and practices of the majority, as though the expression of dissent on the floor of the Senate were improper or un-American or, now we are even being told, un-Christian, when, in fact, it is the intolerance of dissent that is improper, undemocratic, and the charges that political or policy disagreements here are actions ''against people of faith'' are the slurs of charlatans.

We are at this brink because during President Bush's first term, our Democratic caucus blocked approval of 10 of the President's judicial nominees, while 208 of his nominees were confirmed. That is a 95-percent approval rate. Ninety-five percent of President Bush's judicial nominees were confirmed by the Senate, but that is not good enough for this majority and this President. Nothing less than 100 percent is acceptable. It has to be their way all the time.

A President who said he was going to change the tone in Washington, promote bipartisanship, encourage democracy, does just the opposite. He demands congressional submission, insists on his way always, denounces and tries to destroy whoever disagrees with him.

I am astonished that the Senate Republican leadership has flip-flopped just because the President is now Republican instead of Democratic. Republicans were in the majority in the Senate for the last 6 years of President Bill Clinton's two terms, and they certainly did not champion their now precious principle of an up-or-down vote for the full Senate for each of his judicial nominees. To the contrary, they themselves prevented—or condoned others preventing—69 of President Clinton's judicial nominees from a vote by the full Senate. Many were denied confirmation hearings. Sometimes one Senator singlehandedly blocked judicial nominations. They received no votes by the Senate, not by part of the Senate, not by all of the Senate, not once, not ever, not this year, not next year, not in 4 years, not ever—69 judicial nominations. Republican leaders not only defended their actions to deny confirmation votes to Clinton nominees, they bragged about it.

Here are some of the statements they made at the time:

> The confirmation process is not a numbers game and I will not compromise the Senate's advise and consent function simply because the White House has sent us nominees that are either not qualified or controversial.

Another:

> So we are not abusing our advise and consent power. As a matter of fact, I don't think we have been aggressive enough in utilizing it to ensure that nominees to the Federal bench are mainstream nominees. Do I have any apologies? Only one, I probably moved too many judicial nominations already. When I go around my State or around the country the last thing I hear people clamoring for is more lifetime tenured Federal judges.

Regarding the use of the filibuster, Republican leaders were equally emphatic:

> It is very important that one faction or one party not be able to ride roughshod over the minority and impose its will. The Senate is not the House.

The filibuster is one of the few tools the minority has to protect itself and those the minority represents. Clearly, what distinguishes the Senate as a legislative body is unlimited debate, a traditional aspect that most Senators have felt very important for 200 years. The only way to protect minority views in the Senate is through extended debate.

Their judicial blocking tactics are right, but ours are wrong. Their use of the filibuster is good, and ours is bad. How convenient. How self-serving. And how wrong.

It is bad enough that the Senate Republican leadership wants to change the Senate rules to suit their purposes and disregard 214 years of bipartisan institutional wisdom which understood and cared about the proper role of the Senate in our carefully designed system of checks and balances. As James Madison, one of our Constitution's principal architects, said during the Constitutional Convention in 1787:

> In order to judge the form to be given to the Senate, take a view of the ends to be served by it. First, to protect the people against the rulers. Second, to protect the people against the transient impressions which they themselves must be led.

It is bad enough the Republican leadership wants to weaken the Senate's historic role and present responsibility. But what is even worse, much worse, is that they evidently intend to violate the procedures and disregard the rules by which the Senate can properly change one of its existing rules. They are going to use their own new and unprecedented procedure and disregard a ruling of the professional parliamentarian that their procedure violates Senate rules.

A senior Republican aide was quoted in today's Washington Post that Senator FRIST does not plan to consult the Senate Parliamentarian at the time the nuclear option is deployed. The Parliamentarian ''has nothing to do with this. He is a staffer and we don't have to ask his opinion.''

Of course they don't because they are going to throw out the existing Senate rules that they do not like and make up new rules that they do like. Then they are going to ask the Presiding Officer, one of their own, to rule in their favor and then all vote to ratify what they have just done, even though it is wrong, and they know it is wrong.

They can't change a wrong into a right with a vote. They cannot disguise a shameful abuse of power by calling it a constitutional option. There is nothing constitutional about violating Senate rules, there is nothing American about violating Senate rules, and there is nothing senatorial about violating Senate rules.

In my career, I have learned to be effective in politics you have to become a realist. To remain effective, you have to remain an idealist. When I came to the Senate almost 4½ years ago, I was both realistic and idealistic. I knew that the legislative process brings out the best and the worst in people. But I thought the Senate would inspire more of the best. That the 1,863 men and women who had preceded me into this institution, many of them the best, the brightest, and the wisest of their generations, I thought their collective wisdom embodied in the Senate's rules and procedures would elevate our individual conduct and our collective actions and protect us and, more importantly, protect the American people from the missteps or the misguided attempts of one Senator, of a minority, or even of a majority.

My faith in the uplifting effect of the Senate was perhaps wrong or, rather, it was right until now. Now we are at the brink of desecrating this great institution. It will be a disgrace and a desecration if the Republican leaders of the Senate disregard longstanding Senate rules and substitute their own new rules and if a majority of Senators vote to approve this wrongdoing.

Everyone here should know whatever their honest differences of opinion about Justice Owen, unilaterally breaking rules because you do not like them or because you will not get your way by following them, is wrong. It is terribly wrong.

Now, why would the Senate's Republican leadership do this to the institution? To prove what, to whom? This

week's Congressional Quarterly reports that the Senate majority leader told a group of conservative activists questioning his resolve to invoke the nuclear option:

Remember, before I came here I used to cut people's hearts out.

That is a very revealing statement. Not ''saved'' hearts or ''mended'' hearts, but cut them out.

This ploy will cut out the Senate's heart of integrity. Why do it? From much of what I have read, this is being set up as a presidential purity test. I respect the majority leader's right to run for President. I respect that absolutely. I wish that it would not involve the institution of the Senate.

According to the executive director of the American Conservative Union, if he—the majority leader—aspires to the 2008 Republican Presidential nomination, it is a test he has to pass. This is pass-fail. He does not get a grade here. He cannot get a C for effort. He needs to deliver on this.

So this is not a constitutional option. It is a campaign opportunity, except that Senate leaders are supposed to deliver the Senate from this, from the President—any President—demanding that every one of his nominees be approved by a submissive body, the Senate; from political zealots and ideological fanatics demanding we give up our role and our responsibility so they can fulfill their delusional rantings of how Federal judges cause everything they cannot tolerate. Because there is no doubt about it, getting 218 judges, instead of 208 judges, is just their beginning. And then, by God, those judges had better decide every case just right for them or it is ''impeach, impale or eliminate.''

Self-anointed evangelist James Dobson—recently, on a national televised rally appeared with the Senate Republican leader—has called the United States Supreme Court Justice Anthony Kennedy the ''most dangerous man in America,'' and he has demanded he be impeached, along with Justices O'Connor, Ginsburg, Souter, Breyer, and Stevens, that is, six of the nine members of the Supreme Court that he wants to impeach; a Court he has compared to Nazism and to the Ku Klux Klan.

Not to be outdone, and this is a contest of extreme, incendiary, vitriolic hysterics, the director of Operation Rescue has alleged that the courts of this land have become a tool in the hands of the devil, by which the culture of death has found access.

Pat Robertson has written that the out-of-control judiciary is the most serious threat America has faced in nearly 400 years of history, more serious than al-Qaida, more serious than Nazi Germany and Japan, more serious than the Civil War.

Don Feder of Vision America claims:

Liberal judges have declared unholy war on us, and unless Christians fight back their faith, family, and freedom will be lost.

He also promised that whatever prominent Republican was willing to take the lead on the issue of judicial reform and impeachment will probably have the Republican presidential nomination in 2008.

Not one to miss such an opportunity, House Majority Leader TOM DELAY declared that the judiciary has ''run amok,'' and poses a threat to self-government. He threatens Congress must take action to rein in the judiciary and that such actions must be more than rhetoric.

And remember, before he came here, he used to exterminate things. So the threat of a congressional leader in running amok to take action against Federal judges must be taken as ominously as he undoubtedly intended it to be.

God's will and Jesus's word are hijacked by false prophets like James Dobson and Pat Robertson. The independence of Federal judges is threatened by TOM DELAY. Now the integrity of the Senate's rules and procedures may be violated. And these are the men who want to run our country. They want to dictate who is elected, decide who will be appointed, and even determine who is on God's side, who is not.

Well, if ever—if ever—there were a need for 51 profiles in courage in the Senate, it is now, to save this Senate from those who would savage it for their own gain. The world will note and long remember what we do here, and we will be judged—as we should—whether we acted so that, as Abraham Lincoln said, government of the people, by the people, and for the people shall not perish on this Earth or here in the Senate.

Mr. President, I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mrs. MURRAY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mrs. MURRAY. Mr. President, I have been traveling around my State, like many of my colleagues have. When I travel around, people keep stopping me and asking me: Why should I hear about the judges you are debating back in Washington DC? Whether I am in Spokane talking to constituents at a town meeting or in a grocery store on Saturday or talking to family members at home, they all want to know what we are talking about and why this debate matters in their lives.

Well, my answer to those constituents, whether it is someone in a grocery store or just chatting with someone or a family member, is that we are here for a very important reason; that is, to fight for basic American values, values all of us hold dear. I tell them we are fighting for the rights of minorities so all of us have an opportunity for a voice and a seat at the table. I tell them we are fighting for the constitutional principles that were given to the Senate 200 years ago.

Today, in the Senate, unfortunately, those values are under attack. What we see in their continuing rush for power is that some here on the other side want to turn this great institution simply into a rubberstamp for the current administration. Nowhere is that more clear to me than with the nomination that is in front of us tonight, and that is of Judge Priscilla Owen.

Senator FRIST said the other day that the only argument he has heard against Justice Owen is on parental consent. I happen to agree with Senator FRIST that her views and her decisions on this subject are very important, but if he has not heard the arguments against Justice Owen, I think he has not been listening enough.

On everything from parental consent to victims' rights, to workers' rights, to bias towards her campaign contributors, Justice Owen is too far out of the mainstream. Her radical views make a lifetime appointment inappropriate by this body. Let me take just a few minutes to talk about some of those important objections.

In Read v. Scott Fetzer Company, a 1998 case, Justice Owen ruled that a rape victim—a rape victim—could not collect civil damages against a vacuum cleaner company that employed an in-home dealer who raped her while he was demonstrating the company's product even though the company had failed to check his references, and if they had, they would have found out he had harassed women at his other jobs and previously been formally charged and fired for inappropriate sexual conduct with a child. But Justice Owen ruled that rape victim could not collect civil damages against that company.

I believe it is pretty clear that Justice Owen does not protect victims' rights.

In another case, in GTE Southwest, Incorporated v. Bruce, a 1990 case, Justice Owen sided with an employer whom the majority in that case ruled inflicted intentional emotional distress on employees when he subjected them to ''constant humiliating and abusive behavior,'' including the use of harsh vulgarities, infliction of physical and verbal terror, frequent assaults, and physical humiliation. Justice Owen wrote her own opinion to make sure it was clear she thought the shocking behavior was not enough to support a verdict for the workers.

It is clear to me that Justice Owen will not protect workers' rights and should not be promoted to a lifetime appointment by this body.

Justice Owen's record shows she has consistently put huge corporations ahead of people. She took campaign contributions from companies including Enron and Halliburton, and then she issued rulings in their favor. Many of her campaign contributions came from a small group of special business interests that advanced very clear anticonsumer and anti-choice agendas. Critically, her record has shown that

her donors enjoy greater success before her than before the majority of the court. Again, it is very clear to me that Justice Owen will not protect the rights of the people against these huge special interests and is not deserving of being promoted to a lifetime appointment by this body.

But you do not have to just listen to me. Listen to what some of her colleagues on the Texas Supreme Court said about her decisions.

In FM Properties v. City of Austin, the majority called her dissent ''nothing more than inflammatory rhetoric.''

In the case of In re Jane Doe III, Justice Enoch wrote specifically to rebuke Owen for misconstruing the legislature's definition of the sort of abuse that may occur when parents are notified of a minor's intent to have an abortion, saying:

abuse is abuse; it is neither to be trifled with nor its severity to be second guessed.

And finally, as has been stated by my colleagues on the floor of the Senate, now-Attorney General Alberto Gonzales, then an Owen colleague, criticized her, not once, not twice, but 10 times in his rulings and called one of her interpretations of a parental consent law an ''unconscionable act of judicial activism.''

Unfortunately, this nomination is before us. This is the type of activist judge we are being asked to give a lifetime appointment. By stripping the Senate of its constitutional role, we are seeing the effort to pack the courts with radical judges, push an extreme agenda, and leave millions of Americans behind.

That is why I say to my constituents, whether they walk up to me in a grocery store or it is one of my family members or somebody I am talking to in Spokane or Yakima or Vancouver or Bellingham, the debate we are having is critically important. For the people we promote to lifetime appointments, we need to know they will be fair and evenhanded and that they will protect the rights of Americans no matter where they live. That is why this fight is important, and that is why my colleagues are here on the floor of the Senate.

I see my colleague from Illinois is on the floor. I know he is here to speak as well. I yield time to him.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. Mr. President, I thank the Senator from Washington who has been on the floor today addressing some of the major issues we are considering. This is an historic debate. Although there are few people gathered on the Senate floor, many people across Capitol Hill and across the Nation are following this debate. This is the first time in the history of the Senate where there is an attempt being made to change one of the most fundamental rules and one of the most fundamental values of this institution. To think how many Senators have come and gone in the history of this body—the number is fewer than 1,900 in total—In all of that time, no Senator has been so bold as to stand up and do what we understand the majority leader is likely to do very soon, the so-called nuclear option.

Why in the history of this Chamber has no Senator ever done this? Because, frankly, it strikes at the heart of this institution. It goes to the value of the Senate in our Constitution. When the Constitution was written, the Senate was created as a different place. I served in the House of Representatives for 14 years. I was proud of that service, enjoyed it, and value the House of Representatives and its role. But it is a different chamber.

The Senate was created so the minority would always have a voice. Think about it. There are two Senators from every State, large or small. Think of the rules of the Senate from the beginning which said: No matter who you are, what Senator you may be, you can take to this floor and do as I am doing at this moment, begin a debate which cannot be closed down unless an extraordinary majority of the Senate makes that decision.

Senator FRIST, now the Republican majority leader, has decided it is time to change that 200-year tradition, to change the rules of the Senate in the middle of the game. By this change, he will change a relationship between the Senate and the President. That is a bold move. It is a move we should think about very seriously. He will have Vice President CHENEY in the chair, but that is no surprise. Every President and every Vice President wants more power. That is the nature of our Government. But the Founding Fathers understood that, not just as a human impulse but a political impulse. They said: The way we will restrain too much power in the Presidency is to have checks and balances, to give to other branches of Government—the judiciary and the legislative branch—an opportunity to check the power of the President. We think about that today, and the rules of the Senate were part of those checks and balances.

A President can't appoint a judge to a lifetime appointment without the advice and consent of the Senate. In other words, the President's power is limited by the power of the Senate to advise and consent. The words were carefully chosen. The Senate wasn't directed to always approve the President's nominees. The President submits the nominees and the Senate, as a separate institution of Government, makes the decision as to whether those nominees will go forward. That is a limitation on the President's power.

This President, when we take a look at the record of how many judges he has submitted and how many have been approved, has done quite well for himself. This is the score for President Bush since he has been elected President: 208 of his judicial nominees have been approved, and only 10 have not. More than 95 percent of this President's nominees have been approved by the Senate.

How far back do you have to go to find another President with a batting record this good? Twenty-five years. This President has done better than any President in the last 25 years in having his judicial nominees approved. But from President Bush's point of view, from Vice President CHENEY's point of view, it is not good enough. He wants them all. He wants every single one of them, without dissent, without disagreement, without debate in the Senate. He wants them all.

Should every President have that power? I don't think so. Republican or Democrat, Presidents have to know they can go too far. They can make bad decisions, decisions which take America down a path that is not right. And they should know they will be held accountable for making those decisions. They should know they can come up with the names of nominees who are not good people for lifetime appointments and that when they come to the Senate, the Senate will review them and may say no. It is that check and balance which makes the difference.

One of the central arguments that has been made over and over again about triggering the nuclear option, which Senator FRIST is preparing to do, is the assertion that the Senate has never denied a judicial nominee with majority support an up-or-down vote. That argument is plain wrong and it is misleading. President Clinton had 61 judicial nominees who never received an up-or-down vote. I know. I was here. I watched it. I watched it as Senator ORRIN HATCH and the Judiciary Committee buried these nominees, refused to even give them a hearing. An up-or-down vote? They didn't get close to even an invitation to Washington. Nominated by the President, they were ignored and rejected by the Senate Judiciary Committee. Now we have these pious pronouncements that every judicial nominee deserves an up-or-down vote. I don't know if it is the water in Washington, water out of the Potomac River. It seems to create political amnesia among those who serve in the Senate. Some of the same Senators on the Republican side who have come to the floor and said every nominee deserves an up-or-down vote were the Senators who were stopping the nominees of President Clinton without so much as a hearing.

''We want fairness.'' They sure didn't want fairness when it came to that President and his nominees.

I am sure the vast majority of them, probably all of them, would have had majority support, had they received an up-or-down vote. But they were stopped in committee. I know it. I used to go and plead for judges from Illinois nominated by President Clinton. I can recall Senators—and I won't name names; I could—who just told me no. We are not going to let President Clinton fill these courts. We are hoping he will be gone soon, and we will put a Republican President in. We will take

care of those vacancies. We have some people we want to put on those spots. The fairness of an up-or-down vote wasn't the case around here at all. It was fundamentally unfair.

The Republicans exercised their filibusters, these pocket filibusters, against 61 nominees from President Clinton's White House who never received a vote in the Judiciary Committee. And the myth of the up-or-down vote is also demonstrated by looking at the history of Supreme Court nominations.

Norman Ornstein is well recognized on Capitol Hill, a thoughtful man. He pointed out today in an article in a newspaper known as Roll Call that there have been 154 nominations in our Nation's history to the Supreme Court. Of that 154, 23 never received an up-or-down vote; 1 out of 7 of the Supreme Court nominees never received an up-or-down vote. What a weak argument from the other side.

Not only does history argue they are wrong, their memories should argue they are wrong. They didn't offer an up-or-down vote to those nominees from President Clinton.

Let's talk about this particular circuit. Let's talk about what happened here in the context of the Priscilla Owen nomination for the Fifth Circuit. Justice Owen is the only judicial nominee ever nominated by the President on two occasions after being rejected by the Senate Judiciary Committee. Never before has a judicial nominee received a negative vote in committee and been confirmed by the Senate. The Republican leadership speaks at great length about the unprecedented maneuvers of Democrats, but their strategy on this nominee is a first. Surely Justice Owen and Charles Pickering, the former embattled nominee to the Fifth Circuit, are not the only people qualified to serve on that circuit. It is a circuit that covers the States of Texas, Louisiana, and Mississippi. This is an area of roughly 30 million people. It is amazing to me that President Bush and his fine people in the White House couldn't find another name to bring to us for that important court.

Justice Owen has been given two confirmation hearings, something which 61 Clinton nominees never had a chance to receive. Three of President Clinton's nominees for the very same circuit were denied even a single hearing. Let's take a look at these nominees.

Enrique Moreno, an accomplished trial attorney, nominated on September 16, 1999, by President Clinton to fill a vacancy in the Fifth Circuit. No hearing. No committee vote. No floor vote. Certainly, no up-or-down vote. I would hope that my friends on the Republican side would scratch their heads and search their memories and remember Enrique Moreno when they say every nominee is entitled to an up-or-down vote. He was found qualified. He was turned down to keep the vacancy, in the hopes of the Senate Republicans, that a Republican President would come along to fill it.

Let's look at another nominee in the same circuit. Jorge Rangel, a law firm partner, a former Texas district court judge, was nominated July 24, 1997. No hearing. No committee vote. No floor vote. This qualified man languished for months, waiting for his chance for even a hearing before the Judiciary Committee. But the Senate Republicans said, no; this wasn't about filling a vacancy. It was about keeping a vacancy so they, in the hopes of the next election, could fill it.

Finally, look at Alston Johnson. He was in a major law firm, nominated April 22, 1999, by President Clinton. He was renominated in 2001. He never received a hearing when Senator HATCH was chairman of the Judiciary Committee. He never received a committee vote. Certainly, he had no up-or-down floor vote. Why? To keep the vacancy alive for Priscilla Owen, in the hopes that someday there would be a Republican President who could fill it.

The Judiciary Committee chairman, Orrin Hatch, denied each of these nominees a vote and a hearing. Now the Republicans want to reap the benefits of their delay tactics. But they don't come to this with clean hands. This vacancy exists today because three people were treated very poorly. They never received the benefit of the hearing that Priscilla had. They never had the committee vote that Priscilla Owen had. They were not debated on the floor. They say she should be confirmed because she has a ''well-qualified'' rating by the American Bar Association. Let me tell you, it is an argument of convenience. The nominees I just mentioned—Jorge Rangel, Enrique Moreno, and Alston Johnson—all had ratings of ''well-qualified''. But their nominations were buried by Senator HATCH. So this ''good housekeeping seal of approval,'' the ABA rating, meant nothing to the Senate Republicans when it came to the Clinton nominees.

Much has been said today on the floor about Justice Owen's record in preventing pregnant minors in Texas from receiving abortions through a process known as a ''judicial bypass.'' What is that all about? Most States, in writing laws, say when it comes to a minor seeking an abortion, there can be extraordinary circumstances when parental consent is not appropriate. We can think about those. There are victims of incest. You would not expect the victim to go to the family member who perpetrated that crime for permission for an abortion. So they create a process where those victims, with the help of an advocate, can go to court and say to the court: My circumstances are unusual. I should be treated differently and given a different opportunity.

We have heard the comment made by then-Texas Supreme Court justice, and now our Attorney General, Alberto Gonzales. When Priscilla Owen issued an opinion in the case involving judicial bypass, he said—Attorney General Gonzales—that her dissenting position in this case:

> It would be an unconscionable act of judicial activism.

That is the Attorney General of the United States commenting on the record of Priscilla Owen, who the administration is now propounding to fill this vacancy.

Make no mistake, the vote on this nominee, Priscilla Owen, is not a referendum on the contentious issue of abortion. I don't oppose her because we differ on abortion rights. In fact, we have confirmed 208 of President Bush's judicial nominees, over 95 percent. Trust me, the vast majority of them do not share my view on the issue of abortion. But that is not the test, nor should it be. We expect President Bush to nominate people who have a position on abortion that may differ from mine. That doesn't disqualify anybody. That is why 95 percent of his nominees have been approved, despite those differences.

In my view, the Owen nomination is not just about abortion. I oppose her because I don't believe she has taken an evenhanded or moderate approach to applying the law. What distinguishes this nominee, Priscilla Owen, from other judges being confirmed is that she has repeatedly demonstrated her unwillingness to apply statutes and court decisions faithfully—on the issue of abortion and many other issues.

There is no dispute that Justice Owen is a woman of intellectual capacity and academic accomplishment. The question before the Senate, however, is whether she exhibits the balance and freedom from rigid ideology that must be the bedrock of a strong Federal judiciary. The answer, regrettably, is no.

Although the Senate is once again a house divided, concerns about Justice Owen cross party lines. Those who know her the best, including colleagues on the Republican-dominated Texas Supreme Court, have repeatedly questioned the soundness of her logic, her judgment, and her legal reasoning during her 10 years on that court.

Consider some of the published comments of her colleagues on the Texas Supreme Court.

In the case of FM Properties v. City of Austin, Justice Owen dissented in favor of a large landowner which sought to write its own water quality regulations. The court majority wrote:

> Most of Justice Owen's dissent is nothing more than inflammatory rhetoric and thus merits no response.

That was the majority of the Texas Supreme Court. Think about it. Attorney General Gonzales says she has taken part in unconscionable acts of judicial activism. The majority of her Texas Supreme Court says her dissent is nothing more than inflammatory rhetoric in this case.

Then look at her dissenting opinion in the case of Fitzgerald v. Advanced Spine Fixation Systems, in favor of limiting liability for manufacturers who made harmful products that injured innocent people. What they said

was that her dissent would in essence ''judicially amend the statute to add an exception not implicitly contained in the language of the statute.'' To put it in layman's terms, she is not being a judge, she is being a legislator and is writing law.

According to the majority, her dissent in a case involving the Texas open records law, City of Garland v. Dallas Morning News here is what the majority of the court said about this nominee, Priscilla Owen:

Effectively writes out the . . . Act's provisions and ignores its purpose to provide the public ''at all times to complete information about the affairs of government and the official acts of public officials and employees.''

According to six justices, including three appointed by George W. Bush when he was Governor of the State, Justice Owen's dissenting opinion in Montgomery Independent School District v. Davis is guilty of ''ignoring credibility issues and essentially stepping into the shoes of the fact-finder to reach a specific result.''

In other words, she is picking and choosing the evidence without treating it fairly. Who said that? Six justices on her own Texas Supreme Court. Three of them were appointed by George W. Bush. Her colleagues said that Owen's dissent, in this case against a teacher who was unfairly fired ''not only disregards the procedural limitations in the statute but takes a position even more extreme than that argued for by the [school] board.''

Judges can and should have lively debate over how to interpret the law. Senator CORNYN, our colleague from Texas, tried to assure us that judges in Texas always talk this way. But Justice Owen's tenure on the Texas Supreme Court is remarkable for both the frequency and intensity with which her fellow Republicans on the court have criticized her for exceeding the bounds of honest disagreement. These are Republican fellow justices carping, not Democrats. They are fellow justices, appointed by Governor George W. Bush and others.

According to those who served with her and know her best, she has often been guilty of ignoring plain law, distorting legislative history, and engaging in extreme judicial activism.

All too often during her judicial career, Justice Owen has favored manufacturers over consumers, large corporations over individual employees, insurance companies over claimants, and judge-made law over jury verdicts. This pattern is consistent with her State court campaign promises. But it ill suits a person seeking a lifetime appointment to the Federal bench who promises to be fair and balanced.

Let me mention one example, a case I asked Justice Owen about at her hearing in 2002, Provident American Insurance Company v. Castaneda. Justice Owen, writing for a divided court, ruled in favor of an insurance company that tried to find anything in its policy to avoid paying for critical surgery for a young woman named Denise Castaneda.

Denise suffered from hemolytic spherocytosis, a genetic condition causing misshapen blood cells, and she needed to have her spleen and gallbladder removed. Denise's parents obtained preapproval for the surgery, yet Justice Owen allowed the insurance company to deny coverage, in clear bad faith of their contractual obligation.

One of her colleagues on the court who disagreed with her in this case, Justice Raul Gonzalez, said Justice Owen's opinion ''ignores important evidence that supports the judgment . . . and resolves all conflicts in the evidence against the verdict [for the family that was denied coverage].''

Justice Raul Gonzalez concluded:

If the evidence of this case is not good enough to affirm judgment, I do not know what character or quantity of evidence would ever satisfy the Court in this kind of case.

Nor is it easy to satisfy Justice Owen in the judicial bypass cases. Her tortured reasoning in cases involving the Texas parental notification law exhibits the same inclination by Justice Owen for judicial activism I discussed earlier.

I am alarmed by her attempt to force young women seeking a legal judicial bypass under Texas law to demonstrate that they considered religious issues in their decision whether they were to have an abortion. This religious awareness test has no support in Supreme Court case law. She may view it as something to be added to the law. It is not the law. And when judges go beyond the clear limits of the law, they are writing the law, and that is not their responsibility.

Justice Owen told the Judiciary Committee she would not be an activist, that she would merely follow the law. That is a safe answer. We hear it from every nominee. But when it comes to the issue of abortion, the law is not well settled. One study shows that of 32 circuit court cases applying the 1992 case Planned Parenthood of Southeastern Pennsylvania v. Casey, only 15 of those cases were decided by unanimous panels. So in a majority of the cases, judges viewing identical facts and laws reached different conclusions.

Priscilla Owen is a member and officer of the Federalist Society. If you have never heard of it, this is the secret handshake at the White House. If you are a member of the Federalist Society, you are much more likely to progress, to have a chance to serve for a lifetime on the bench. I have tried, as nominees would come before the Judiciary Committee, to ask them: What is the Federalist Society? Why is it so important that résumés for would-be judges be checked by the Federalist Society for the Bush White House to consider you?

I asked Priscilla Owen if she agreed with the Federalist Society's published mission statement which says:

Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society.

Here is her response:

I am unfamiliar with this mission statement . . . I have no knowledge of its origin or its context.

She ducked the question. I can only conclude that she does not find that mission statement repugnant. She joined the Federalist Society, and that is the viewpoint.

It is a small organization. Fewer than 1 percent of lawyers across America are members of this Federalist Society. Yet over one-third of President Bush's circuit court nominees are members of the Federalist Society. If you do not have a Federalist Society secret handshake, then, frankly, you may not even have a chance to be considered seriously by the Bush White House.

When it comes to nominees to the appellate court, the White House has made political ideology a core consideration. President Bush did not take office with a mandate to appoint these kinds of judges. He lost the popular vote in his first election, won the electoral vote by a decision of the Supreme Court, and came back in this last election and won by virtue of one State. Had Ohio gone the other way, he would not be President today. What kind of mandate is that for rewriting the courts and the laws that they consider?

The Nation needs more judicial nominees who reflect the moderate views of the majority of Americans and who have widespread bipartisan support. Priscilla Owen is not one of them. I do not believe this nominee should receive a lifetime appointment, and I do not believe she is worth a constitutional confrontation.

Today we had a gathering on the steps of the Senate of Democrats serving in the House and the Senate. We were glad that our colleagues from the House came over to support us in this debate on the nuclear option. They do not have the constitutional responsibility of confirming nominees to the court, but they understand a little bit about debate.

Sadly, in the House of Representatives since I left, debate has virtually come to a standstill. Efforts are being made to close down debate, close down amendments. The House meets 2 or 3 days a week, if they are lucky, and goes home accomplishing very little except the most basic political agenda. What a far cry from the House of Representatives in which I served. We used to go on days, sometimes weeks, on critically important issues such as the spread of nuclear weapons around the world. They were hotly contested debates. There were amendments that passed by a vote or two where we never knew the outcome when we cast our vote. It does not happen anymore. The House of Representatives has shut down debate, by and large, and when they get to a rollcall vote that is very close, they will keep the rollcall vote open for hours, twisting the arms of

Congressmen to vote the way the leadership wants them to.

That is what is happening in the House. Sadly, that is what happens when a group is in power for too long. They forget the heritage of the institution they are serving. All that counts is winning, and they will win at any cost.

That is what is happening in this debate. There are forces in the Senate that want to win at any cost, but the cost of the nuclear option is too high. The cost of the nuclear option means we will turn our back on a 200-year-plus tradition. We will turn our back on extended debate and filibuster so this President can have more power.

You wonder if 6 Republicans out of 55 are troubled by this. That is what it comes down to. If 6 Republicans believe this President has gone too far, that is the end of the debate on the nuclear option—6 out of 55. It is possible it could reach that point where six come forward. I certainly hope they do. They will be remembered. Those six Republicans who step forward and basically say the President is asking for too much power, those six Republicans who say the special interest groups that are pushing this agenda so the President will have every single judicial nominee, those six Republicans will be remembered. They will have stood up for the institution.

It will not be popular. In some places I am sure they are going to be roundly criticized, and they may pay a political price. But we would like to think—most of us do—that at that moment in time when we are tested to do the right thing, even if it is not popular, we will do it. I certainly hold myself to that standard. Sometimes I meet it, sometimes I fail.

For those who are considering that today, I say to them there has never been a more important constitutional debate in the Senate in modern memory. ROBERT C. BYRD, the Senator from West Virginia, comes to the floor every day and carries our Constitution with him in his pocket. He has written a two- or three-volume history of the Senate. He knows this institution better than anybody.

I have listened to Senator BYRD, and I have measured the intensity of his feeling about this debate. It is hard for anyone to describe what this means to Senator BYRD. He believes what is at stake here is not just a vote on a judge. What is at stake here is the future of the Senate, the role of the issues, such as checks and balances, and I agree with him.

My colleagues made an argument that we have to go through these judicial nominees and approve them because we face judicial emergencies. Let me read what Senator FRIST, the Republican majority leader, said on May 9:

> Now, 12 of the 16 court of appeals vacancies have been officially declared judicial emergencies. The Department of Justice tells us the delay caused by these vacancies is complicating their ability to prosecute criminals. The Department also reports—

According to Senator FRIST—

> that due to the delay in deciding immigration appeals, it cannot quickly deport illegal aliens who are convicted murderers, rapists, and child molesters.

That was Senator FRIST's quote on May 9, waving the bloody shirt that if we do not move quickly on judicial nominees, it will leave vacancies that allow these criminals on the street.

Facts do not support what Senator FRIST said. In fact, you have to go back to 1996 to find a lower number of judicial emergencies. Think about this. In 1994, there were 67 judicial emergencies, meaning vacancies that badly needed to be filled. That, of course, was during the Clinton years, when many of the Republicans were not holding hearings and insisting we didn't need to fill vacancies. Today the number of judicial emergencies is 18. What a dramatic difference.

I think it is clear. There are fewer judicial emergencies now than there have been in the last 9 or 10 years. For any Senator to come to the floor and argue that we are creating a situation where criminals are roaming all over the streets—where were these same critics during the Clinton years when there were many more judicial emergencies and they were turning down the Clinton nominees, denying them even an opportunity for a hearing?

I think this debate is going to test us—in terms of the future of the Senate, in terms of our adherence to our oaths to protect and defend the Constitution of the United States.

Janice Rogers Brown is also a nominee who will likely follow Priscilla Owen to the floor. She, too, has been considered not only in committee but also on the floor, and she will have her nomination submitted for us to consider again.

She, of course, is looking for appointment to the second highest court in the land, the DC Circuit Court of Appeals. I have heard my colleagues, Senator BOXER and Senator FEINSTEIN, from Judge Janice Rogers Brown's home State of California, describe some of the things she has said during the course of serving as a judge. To say she is out of the mainstream is an understatement. She is so far out of the mainstream on her positions that you find it interesting that, of all of the conservative Republican attorneys and judges in America, this is the best the White House can do, to send us someone who has such a radical agenda that she now wants to bring to the second highest court in the land. And that is what we are up against.

There are some who argue, Why don't you just step aside? Let these judges come through. I hope it doesn't come to that. But I hope it does come to a point that we make it clear the nuclear option is over. I believe Senator HARRY REID, the Democratic leader, has said and I believe that we will conscientiously review every single nominee. The President can expect to continue to receive 95-percent approval, unless he changes the way he nominates judges—maybe even better in the future. But for us to change the rules of the Senate may give this President a temporary victory. It may have some special interest groups calling Senator FRIST, the Republican majority leader, congratulating him. But, frankly, it will not be a day of celebration for those who value the Constitution and the traditions of the Senate.

At this point I yield the floor.

The PRESIDING OFFICER. The Senator from Washington.

Mrs. MURRAY. Mr. President, I come to the floor this evening to join my colleagues to talk about the Senate's deliberations on some of our administration's judicial nominations. It is very clear to me this is a debate about basic American values. In drafting the Constitution, the Framers wanted the Senate to provide advice and consent on nominees who came before us to ensure that these very rights and values were protected. I believe as a Senator I have a responsibility to stand up for those values on behalf of my constituents from my home State of Washington.

Many activists today are complaining that certain Senators are attacking religious or conservative values. I must argue that it is others, not Democratic Senators, who are exercising their rights, who are pursuing a nomination strategy that attacks the basic values that were outlined in our Constitution.

Our democracy values debate. It values discussion. Our democracy values the importance of checks and balances. Our democracy values an independent judiciary. But with this nuclear option and the rhetorical assault that is being launched at Democratic Senators by activists around the country, we now see those values under attack. The nuclear option is an assault on the American people and many of the things we hold dear. It is an attempt to impose on the country, through lifetime appointments, the extreme values held by a few at the cost of many. It is the tyranny of the majority personified. Confirming these nominees by becoming a rubberstamp for the administration would be an affront to the 200-year-old system we have in place, a system of checks and balances. At the same time I have to say it would be an affront to the values I promised to defend when I came to the Senate.

It is not always easy. Building and maintaining a democracy is not easy. But our system and the rights and the values it holds dear are the envy of the world. In fact, the entire world looks at us as a model for government. It is our values they look to. We have to protect them, not only for us but for other fledgling democracies around the world.

I returned recently from a bipartisan trip we took to Israel, Iraq, Georgia, and Ukraine, where we saw up close leaders who are working very hard to

write constitutions, to write laws, to write policies. They were working hard, all of them, to assure that even those who did not vote in the majority in their country would have a voice.

The challenges were varied in every country we went to. They faced everything from protecting against terrorists to, in some cases, charging for electricity for the first time, to, in other cases, reforming corrupt institutions. But making sure that democracies survive means having debates, it means bringing people to the table, and it means making tough decisions. But in each case, the importance of not disenfranchising any group within that country was an important part of making sure that democracy worked.

So how we in this country accomplish the goal of sustaining a strong democracy and ensuring people—all people—participation is extremely important.

Elections are the foundation of our democracy. They actually determine the direction of our country. But an election loss doesn't mean you lose your voice or you lose your place at the table. Making sure we all have a seat at the table is increasingly important to keep our democracy strong. That is why those of us on this side are fighting so hard to keep our voice, to have a seat at the table.

Recently we have heard a lot from the other side about attacks on faith and values. In fact, some are trying to say our motive in this debate is somehow antifaith. I have to argue that just the opposite appears to me to be true. We have faith in our values, we have faith in American values, and we have faith that those values can and must be upheld.

This is not an ideological battle between Republicans and Democrats, it is about keeping faith with the values and ideals our country stands for. Having values and having faith in those values requires—requires that we make sure those without a voice are listened to. Speaking up for those in poverty to make sure they are fed is a faith-based value. Making sure there is equal opportunity and justice for the least among us is a faith-based value. Fighting for human rights, taking care of the environment, are faith-based values.

To now say those of us who stick up for minority rights are antifaith is frightening and, frankly, it is wrong. I hope those who have decided to make this into some kind of faith/antifaith debate will reconsider. This debate should be about democracy. It should be about the protection of an independent judiciary. And certainly it is a debate about the rights of minorities.

Our system of Government, of checks and balances, and our values, are under attack today by this very transparent grab for power. They are, with their words and potential actions, attempting now to dismantle this system despite the clear intent of the Framers and the weight of history and precedent. They think they know better, and I think not.

Today, it is fashionable for some of my colleagues on the other side of the aisle to disparage what they call activist judges. But this power grab, this nuclear option reveals the true motivation. There are those who want activists on the bench to interpret the law in a way I believe undermines important American values.

I believe we have a responsibility to stand up and say no to extreme nominees. But to know that, you do not need to listen to me. Just look back at the great Founders of this democracy. The Framers, in those amazing years when our country was founded, took very great care in creating this new democracy. They wrote into the Constitution the Senate's role in the nomination process. They wrote into the Constitution and spoke about protecting the minority against the tyranny of the majority and their words ring true today.

James Madison, in his famous Federalist No. 10, warned against the superior force of an overbearing majority or, as he called it, a dangerous vice.

He said:

> The friend of popular governments never finds himself so much alarmed for their character and faith as when he contemplates their propensity to this dangerous vice.

Years prior, John Adams wrote in 1776 on the specific need for an independent judiciary and checks and balance. He said:

> The dignity and stability of government in all its branches, the morals of the people and every blessing of society depends so much on an upright and skillful administration of justice that the judicial power ought to be distinct from both the legislative and executive and independent upon both so that it may be a check upon both as both should be checks upon that. The Judges therefore should always be men of learning and experience in the laws, of exemplary morals, great patience, calmness, coolness and attention. Their minds should not be distracted with jarring interests; they should not be dependent on any man or body of men.

I have to shudder at the thought of what some of the great thinkers, the great Founders of our democracy, would say to this attempted abuse of power. Frankly, one of the best interpretations of the thoughts was offered to this Senate by Robert Caro, the great Senate historian. He wrote a letter in 2003 and he talked about the need for the Senate to maintain its history and its traditions despite popular pressures of the day and of the important role that debate and dissension plays in any discussion of judicial nominations. In particular, he wrote of his concern for the preservation of Senate tradition in the face of attempted changes by a majority run wild.

He said, in part:

> In short, two centuries of history rebut any suggestion that either the language or intent of the Constitution prohibits or counsels against the use of extended debate to resist presidential authority. To the contrary, the nation's Founders depended on the Senate's members to stand up to a popular and powerful president. In the case of judicial appointments, the Founders specifically mandated the Senate to play an active role providing both advice and consent to the President. That shared authority was basic to the balance of powers among the branches.
>
> I am . . . attempting to say as strongly as I can that in considering any modification Senators should realize they are dealing not with the particular dispute of the moment, but with the fundamental character of the Senate of the United States, and with the deeper issue of the balance of power between majority and minority rights.

Protection of minority rights has been a fundamental principle since the infancy of this democracy. It should not—in fact, it cannot—be laid to rest in this Chamber with this debate.

I know there are a lot of people wondering why the Senate is spending so much time talking about Senate rules and judicial nominations. They are wondering why I am talking about nominees and quoting Madison and Adams. They are wondering what this means to them.

I make it clear: This debate is about whether we want a clean, healthy environment and the ability to enforce our laws to protect it fairly. This debate is about whether we want to protect essential rights and liberties. This debate is about whether we want free and open government. This debate is about preserving equal protection under the law. This debate is about whether we want to preserve the independent judiciary, whether we want to defend the Constitution, and whether we will stand up for the values of the American public.

I believe these values are too precious to abdicate. Trusting in them, we will not let Republicans trample our rights and those of millions of Americans who we are here to represent. We will stand and say yes to democracy, yes to an independent judiciary, yes to minority rights, and no to this unbelievable abuse of power.

I see my colleague from New York is here, and I know he has time tonight, as well.

I yield the floor.

The PRESIDING OFFICER (Mr. DEMINT). The Senator from New York.

Mr. SCHUMER. Mr. President, first, I compliment my friend and colleague from the great State of Washington for her outstanding remarks and leadership on this issue. She knows, because of her experience and her compassion and humanity, what this nuclear option would mean to this Senate. I thank the Senator for her leadership.

Mr. President, there are so many things to say here. The idea of blowing up the Senate, literally, almost, at least in terms of the rules, at least in terms of comity, and at least in terms of bipartisanship, all because 10 judges have not been approved, is just appalling.

I mentioned earlier today, it seems like a temper tantrum if we do not get our way on every single one, say the hard-right groups, we will show them they cannot stop us on anything. That is how ideologues think. That is how

people who are so sure they have the message from God or from somebody else, that they know better than everyone else, that is how they think. They cannot tolerate the fact that some of these judges, a small handful, have been held up.

We can tell in the debate today where the enthusiasm and the passion is. There is a weariness on the other side of the aisle. My guess is that more than half of those on the other side, if it were a secret ballot, would vote against the nuclear option. They know it is wrong. Ten have said to me: I am under tremendous pressure; I have to vote for it. The reason the majority leader has not called for a vote is because of the courageous handful who have resisted the pressure. Four of them have told me of the pressure on them.

We used to hear about these groups influencing things. Does anyone have any doubt that if not for the small groups, some dealing with social issues because they think America has been torn away from them, some deal with economic issues—they hate the fact that the commerce clause actually can protect workers. Their idea is that self-made businessman should not pay taxes, should be able to discriminate, should be able to pollute the air and water.

Janice Rogers Brown basically stands for the philosophy of the 1890s and said over and over again that we should go back to the days when if you had a lot of money and power, you could do whatever you wanted. It is an abnegation of history, of the knowledge we have learned. It is an abnegation of the free market principles are the best principles.

But we have learned over the years they need some tempering and some moderation. That is why we do not have the booms and busts that characterized America from 1870 to 1935. That is why people live better. Not because corporate America did good for them. They did do some good, and they do more good now. It was through unionization, through government rules that we transformed America from a nation of a very few rich, a small middle class, and a whole lot of poor people, into an America that had more rich people, a large—gigantic, thank God—middle class, and still too many poor people but fewer poor people.

But Janice Rogers Brown believes all government regulation is wrong. She believes the New Deal was a socialist revolution that had to be undone. Do mainstream conservatives believe that? Is it any wonder even the Chamber of Commerce is against the nuclear option? No.

There are so many points I wish to make, and fortunately it seems we will have a lot of time to make these points. I will focus on something that has not been focused on before, and that is this idea of an up-or-down vote.

First, we have had votes. Yes, the other side has needed 60 to prevail on the small number of judges we have chosen to filibuster. Yes, certainly there has not been a removal of cloture, but the bottom line is we have had votes, unlike when Bill Clinton was President and 60 judges were pushed aside and not given a vote.

The other point of the up-or-down vote is let 51 votes decide, let's each come to our own decision as we weigh the judges.

Let me show the independence of the decisions that have been made by those on the other side.

This is a compilation of all the votes taken by Republican Members of the Senate for every one of President Bush's court of appeals nominees. There have been 45. How many times has any Republican voted against any 1 of those 45 at any single vote? If, of course, we were all coming to an independent decision, do you think there would be 100, 200, 300 out of the 2,700-some-odd votes cast? You would think so. Independent thinking, let's have an up-or-down vote. Here is what it is: 2,703 to 1. Let me repeat that because it is astounding: 2,703 ''yes'' votes by Republicans for court of appeals nominees—45 of them—and 1 vote against.

Now, how is that? First, people ask, Well, who is the one vote? Why did one person, at one point, dissent from the marching lockstep to approve every single nominee the President has proposed? Well, I will tell you who it was. It was TRENT LOTT, the former majority leader. On what judge? On Judge Roger Gregory, who was nominated by Bill Clinton to be the first Black man to sit on the Fourth Circuit, which has a large black population. It is Virginia, North Carolina, South Carolina—I am not sure if it has Georgia in it or not; I think not Georgia.

And when President Bush renominated him, TRENT LOTT voted against him, maybe to help his friend, Jesse Helms, who blocked every nominee and certainly every African-American nominee on the Fourth Circuit. That is it. That is TRENT LOTT right there on Roger Gregory. TRENT LOTT on every other nominee, every other Republican Senator on every nominee: 100 percent of the time they voted for the President's nominee.

So this idea that we are a deliberative body, and we are going to look at each person on the merits, I heard our majority leader say: Let's look. Do you know what this means? Do you know what this spells, these numbers? R-U-B-B-E-R-S-T-A-M-P. This Senate, under Republican leadership, has become a complete rubber stamp to anyone the President nominates. Did maybe one of those nominees strike a single Member of the other side as going too far on a single issue? Did maybe one of those nominees do something that merited they not be on the bench? Did maybe one of those nominees not show judicial temperament? I guess not. Rubber stamp: 2,703 to 1. Once was there a dissent, only once, and on Roger Gregory, the first African-American nominee to the Fourth Circuit.

So what is happening here is very simple. The hard-right groups, way out of the mainstream, not Chambers of Commerce or mainstream churches, but the hard-right groups, as I said, either some who believe, almost in a theocratic way, that their faith—a beautiful thing—should dictate not just their politics but everyone's politics, and some, from an economic point of view, who do not believe there should be any Federal Government involvement in regulating our industries, our commerce, et cetera—these groups are ideologues. They are so certain they are right.

They have some following in this body, but it is not even a majority of the Republican side of the aisle. And they certainly do not represent the majority view of any Americans in any single State. But they have a lot of sway. And until this nuclear option debate occurred, they had very little opposition. People did not know what was going on. And now, of course, this debate allows us to expose the lie.

Let me say another thing about this idea. One out of every five Supreme Court nominees who was nominated by a President in our history never made it to the Supreme Court. The very first nominee, Mr. Rutledge, nominated by George Washington, was rejected by the Senate, in a Senate that had, I believe it was, eight of the Founding Fathers. Eight of the twenty-two people who voted in the Senate had actually signed the Constitution, defining them as Founding Fathers. Did they have votes like this? Of course not because the Founding Fathers, in this Constitution, wanted advice and consent. They say in the Federalist Papers, they wanted the President to come to the Senate and debate and discuss.

Has any Democrat been asked? Has PATRICK LEAHY, our ranking member of Judiciary, been asked about who should be nominees in these courts? Has there been a give-and-take the way Bill Clinton regularly called ORRIN HATCH, chairman of the Judiciary Committee? There is a story, I do not know if it is apocryphal, that ORRIN HATCH said: You can't get this guy for the Supreme Court. You can't get this guy, but Breyer will get through. And President Clinton nominated Breyer. Did Stephen Breyer have ORRIN HATCH's exact political beliefs? No. Did he have Bill Clinton's exact ones? No. It was a compromise. That is what the Constitution intended.

But when a President nominates judges through an ideological spectrum, when he chooses not moderates, and not even mainstream conservatives, but people who are way over—way over—we have safeguards. One of those safeguards is the filibuster. It says to the President: If you go really far out and do not consult and do not trade off, you can run into trouble.

Well, George Bush did not consult. He did what he said in the campaign,

that he was going to nominate ideologues. He said: I am going to nominate judges in the mold of Scalia and Thomas. There probably should be a few Scalias on our courts. They should not be a majority. And Bush nominates a majority. And he is now sowing what he has reaped—or reaping what he has sown. I come from New York City. We do not have that much agriculture, although I am trying to help the farmers upstate.

So that is the problem. This is not the Democrats' problem. This is the way the President has functioned in terms of judicial appointments. This is the way the Republican Senate, to a person, has been a rubber stamp without giving any independent judgment.

This is the way the Founding Fathers wanted we Democrats and the Senate as a whole to act. And that is what we are doing.

And then, when they do not get their way—quite naturally, we did what we are doing—they throw a temper tantrum. They say: We have to have all 100 percent. I want to repeat this because this was said by someone—I do not remember who—but I think it is worth saying. If your child, your son or daughter, came home and got 95 percent on a test, 95 percent, what would most parents do? They would pat him or her on the head and say: Great job, Johnny. Great job, Jane. Maybe try to do a little better, but you have done great. I am proud of you.

When President Bush gets the 95 percent, he does not do that. President Bush would advise—what he is doing, in effect, is saying to Johnny or Jane: You only got 95 percent?

This is not what President Bush does. It is what the far-right groups do, the hard-line far right. Only 95 percent? Break the rules and get 100 percent. What parent would tell their child that? Yet that is what these narrow-minded groups are saying. And wildly enough, the majority leader and most—and thank God, not yet all—of his caucus is agreeing. Break the rules, change the whole balance of power and checks and balances in this great Senate and great country so we don't have 95 percent, but 100 percent.

What is it that is motivating them? Some say it is a nomination on the Supreme Court that might be coming up, that they can't stand the fact that Democrats might filibuster. I can tell you, if the President nominates someone who is a mainstream person, who will interpret the law, not make the law, there won't be a filibuster.

They say: Well, they will have to agree with the Democrats on everything. Bunk. I haven't voted for all 208. I probably voted for about 195. I guarantee you, of those 195, I didn't agree with the views of many. No litmus test have I. I voted for an overwhelming majority who were pro-life even though I am pro-choice. I voted for an overwhelming majority who probably want to cut back on Government activity in areas that I would not cut back. But at least there was a good-faith effort by these nominees, at least as I interviewed them, being ranking Democrat on the Courts Subcommittee, to interpret the law, not to make the law.

There are some the President nominated you can't tolerate, that are unpalatable. I debated Senator HATCH on the Wolf Blitzer show. He keeps bringing up the old saw: You are opposing Janice Rogers Brown because you can't stand having an African-American conservative.

They said that about PRYOR in terms of being a Catholic and about Pickering in terms of being a Baptist. It is a cheap argument. I don't care about the race, creed, color, or religion of a nominee. If that nominee believes the New Deal was a socialist revolution, if that nominee believes the case the Supreme Court decided that said wage and hour laws were unconstitutional was decided correctly in 1906, even though it was overturned, I will oppose that nominee. That person should not be on the second most important court in the land. No way. We are doing what the Founding Fathers wanted us to do. We are doing the right thing.

One other point, and it relates to this hallowed document—the Constitution. In the 1960s and 1970s, one of the main bugaboos of the conservative movement was that the courts were going too far. They called them activist judges. They believed—from the left side, not from the right side—that these judges were making law, not interpreting the law. And there are cases where they were right. I remember being in college and being surprised as I studied some of the cases that the Supreme Court would do this.

So they created a counterreaction. Ronald Reagan nominated conservative judges, not as conservative as George Bush's, but the bench had largely been appointed by moderates, whether it be Kennedy, Johnson, Nixon, Ford, or Carter. So when Reagan came in and began to sprinkle some conservatives in there, people didn't make too much of a fuss, especially at the courts of appeal level.

The point I am making is this: So they didn't like activist judges, judges who would sort of read the Constitution and divine what was in it. And they had a movement that said: You only read the Constitution in terms of the words. If it doesn't say it in the Constitution, you don't do it.

I defy any Republican who says they don't believe in activist judges to find the words ''filibuster,'' ''up-or-down vote,'' ''majority rule,'' when it comes to the Senate. I would say that anyone who is now saying the Constitution says there cannot be a filibuster is being just as activist in their interpretation of the Constitution as the judges they condemned in the 1960s and 1970s.

I thank the Chair for the courtesy and yield the floor.

Mr. LEAHY, Mr. President, 3 years ago I first considered the nomination of Priscilla Owen to be a judge on the United States Court of Appeals for the Fifth Circuit. After reviewing her record, hearing her testimony and evaluating her answers I voted against her confirmation and explained at length the strong case against confirmation of this nomination. Nothing about her record or the reasons that led me then to vote against confirmation has changed since then. Unlike the consideration of the nomination of William Myers, on which the Judiciary Committee held another hearing this year before seeking reconsideration, there has been no effort to supplement the record on this nomination. Justice Owen's record failed to justify a favorable reporting of the nomination in 2002 and was inadequate to gain the consent of the Senate during the last 2 years.

In 2001, Justice Owen was nominated to fill a vacancy that had by that time existed for more than 4 years, since January 1997. In the intervening 5 years, President Clinton nominated Jorge Rangel, a distinguished Hispanic attorney from Corpus Christi, to fill that vacancy. Despite his qualifications, and his unanimous rating of well qualified by the ABA, Mr. Rangel never received a hearing from the Judiciary Committee, and his nomination was returned to the President without Senate action at the end of 1998, after a fruitless wait of 15 months.

On September 16, 1999, President Clinton nominated Enrique Moreno, another outstanding Hispanic attorney, to fill that same vacancy. Mr. Moreno did not receive a hearing on his nomination either—over a span of more than 17 months. President Bush withdrew the nomination of Enrique Moreno to the Fifth Circuit and later sent Justice Owen's name in its place. It was not until May of 2002, at a hearing presided over by Senator SCHUMER, that the Judiciary Committee heard from any of President Clinton's three unsuccessful nominees to the Fifth Circuit. At that time, Mr. Moreno and Mr. Rangel, joined by a number of other Clinton nominees, testified about their treatment by the Republican majority. Thus, Justice Owen's was the third nomination to this vacancy and the first to be accorded a hearing before the committee.

In fact, when the Judiciary Committee held its hearing on the nomination of Judge Edith Clement to the Fifth Circuit in 2001, during the most recent period of Democratic control of the Senate, it was the first hearing on a Fifth Circuit nominee in 7 years. By contrast, Justice Owen was the third nomination to the Fifth Circuit on which the Judiciary Committee held a hearing in less than 1 year. In spite of the treatment by the former Republican majority of so many moderate judicial nominees of the previous President, we proceeded in July of 2001—as I said that we would—with a hearing on Justice Owen.

Justice Owen is one of among 20 Texas nominees who were considered

by the Judiciary Committee while I was chairman. That included nine district court judges, four United States Attorneys, three United States Marshals, and three executive branch appointees from Texas who moved swiftly through the Judiciary Committee.

When Justice Owen was initially nominated, the President changed the confirmation process from that used by Republican and Democratic Presidents for more than 50 years. That resulted in her ABA peer review not being received until later that summer. As a result of a Republican objection to the Democratic leadership's request to retain all judicial nominations pending before the Senate through the August recess in 2001, the initial nomination of Justice Owen was required by Senate rules to be returned to the President without action. The Committee nonetheless took the unprecedented action of proceeding during the August recess to hold two hearings involving judicial nominations, including a nominee to the Court of Appeals for the Federal Circuit.

In my efforts to accommodate a number of Republican Senators—including the Republican leader, the Judiciary committee's ranking member, and at least four other Republican members of the committee—I scheduled hearings for nominees out of the order in which they were received that year, in accordance with longstanding practice of the committee.

As I consistently indicated, and as any chairman can explain, less controversial nominations are easier to consider and are, by and large, able to be scheduled sooner than more controversial nominations. This is especially important in the circumstances that existed at the time of the change in majority in 2001. At that time we faced what Republicans have now admitted had become a vacancy crisis in the Federal courts. From January 1995, when the Republican majority assumed control of the confirmation process in the Senate, until the shift in majority, vacancies rose from 65 to 110 and vacancies on the courts of appeals more than doubled from 16 to 33. I thought it important to make as much progress as quickly as we could in the time available to us that year, and we did. In fact, through the end of President Bush's first term, we saw those 110 vacancies plummet to 27, the lowest vacancy rate since the Reagan administration.

The responsibility to advise and consent on the President's nominees is one that I take seriously and that the Judiciary Committee takes seriously. Justice Owen's nomination to the court of appeals has been given a fair hearing and a fair process before the Judiciary Committee. I thank all members of the committee for being fair. Those who had concerns had the opportunity to raise them and heard the nominee's response, in private meetings, at her public hearing and in written follow-up questions.

I would particularly like to commend Senator FEINSTEIN, who chaired the hearing for Justice Owen, for managing that hearing so fairly and evenhandedly. It was a long day, where nearly every Senator who is a member of the Committee came to question Justice Owen, and Senator FEINSTEIN handled it with patience and equanimity.

After that hearing, I brought Justice Owen's nomination up for a vote, and following an open debate where her opponents discussed her record and their objections on the merits, the nomination was rejected. Her nomination was fully and openly debated, and it was rejected. That fair treatment stands in sharp contrast to the way Republicans had treated President Clinton's nominees, including several to the Fifth Circuit.

That should have ended things right there. But looking back, we now see that this nomination is emblematic of the ways the White House and Senate Republicans will trample on precedent and do whatever is necessary in order to get every last nominee of this President's confirmed, no matter how extreme he or she may be. Priscilla Owen's nomination was the first judicial nomination ever to be resubmitted after already being debated, voted upon and rejected by the Senate Judiciary Committee.

When the Senate majority shifted, Republicans reconsidered this nomination and sent it to the Senate on a straight, party-line vote. Never before had a President resubmitted a circuit court nominee already rejected by the Senate Judiciary Committee, for the same vacancy. And until Senator HATCH gave Justice Owen a second hearing in 2003, never before had the Judiciary Committee rejected its own decision on such a nominee and granted a second hearing. And at that second hearing we did not learn much more than the obvious fact that, given some time, Justice Owen was able to enlist the help of the talented lawyers working at the White House and the Department of Justice to come up with some new justifications for her record of activism. We learned that given six months to reconsider the severe criticism directed at her by her Republican colleagues, she still admitted no error. Mostly, we learned that the objections expressed originally by the Democrats on the Judiciary Committee were sincerely held when they were made, and no less valid after a second hearing. Nothing Justice Owen said about her record—indeed, nothing anyone else tried to explain about her record—was able to actually change her record. That was true then, and that is true today.

Senators who opposed this nomination did so because Priscilla Owen's record shows her to be an ends-oriented activist judge. I have previously explained my conclusions about Justice Owen's record, but I will summarize my objections again today.

The first area of concern to me is Justice Owen's extremism even among a conservative Supreme Court of Texas. The conservative Republican majority of the Texas Supreme Court has gone out of its way to criticize Justice Owen and the dissents she joined in ways that are highly unusual, and in ways which highlight her ends-oriented activism. A number of Texas Supreme Court Justices have pointed out how far from the language of statute she strays in her attempts to push the law beyond what the legislature intended.

One example is the majority opinion in *Weiner* v. *Wasson*, 900 S.W.2d 316, Tex. 1995. In this case, Justice Owen wrote a dissent advocating a ruling against a medical malpractice plaintiff injured while he was still a teenager. The issue was the constitutionality of a State law requiring minors to file medical malpractice actions before reaching the age of majority, or risk being outside the statute of limitations. Of interest is the majority's discussion of the importance of abiding by a prior Texas Supreme Court decision unanimously striking down a previous version of the statute. In what reads as a lecture to the dissent, then-Justice JOHN CORNYN explains on behalf of the majority:

> Generally, we adhere to our precedents for reasons of efficiency, fairness, and legitimacy. First, if we did not follow our own decisions, no issue could ever be considered resolved. The potential volume of speculative relitigation under such circumstances alone ought to persuade us that stare decisis is a sound policy. Secondly, we should give due consideration to the settled expectations of litigants like Emmanuel Wasson, who have justifiably relied on the principles articulated in [the previous case]. . . . Finally, under our form of government, the legitimacy of the judiciary rests in large part upon a stable and predictable decision-making process that differs dramatically from that properly employed by the political branches of government.

According to the conservative majority on the Texas Supreme Court, Justice Owen went out of her way to ignore precedent and would have ruled for the defendants. The conservative Republican majority, in contrast to Justice Owen, followed precedent and the doctrine of stare decisis. A clear example of Justice Owen's judicial activism.

In *Montgomery Independent School District* v. *Davis*, 34 S.W. 3d 559, Tex. 2000, Justice Owen wrote another dissent which drew fire from a conservative Republican majority—this time for her disregard for legislative language. In a challenge by a teacher who did not receive reappointment to her position, the majority found that the school board had exceeded its authority when it disregarded the Texas Education Code and tried to overrule a hearing examiner's decision on the matter. Justice Owen's dissent advocated for an interpretation contrary to the language of the applicable statute. The majority, which included Alberto Gonzales and two other appointees of then-Governor Bush, was quite explicit

about its view that Justice Owen's position disregarded the law:

The dissenting opinion misconceives the hearing examiner's role in the . . . process by stating that the hearing examiner 'refused' to make findings on the evidence the Board relies on to support its additional findings. As we explained above, nothing in the statute requires the hearing examiner to make findings on matters of which he is unpersuaded. . . .

The majority also noted that:

The dissenting opinion's misconception of the hearing examiner's role stems from its disregard of the procedural elements the Legislature established in subchapter F to ensure that the hearing-examiner process is fair and efficient for both teachers and school boards. The Legislature maintained local control by giving school boards alone the option to choose the hearing-examiner process in nonrenewal proceedings. . . . By resolving conflicts in disputed evidence, ignoring credibility issues, and essentially stepping into the shoes of the factfinder to reach a specific result, the dissenting opinion not only disregards the procedural limitations in the statute but takes a position even more extreme than that argued for by the board.

Another clear example of Justice Owen's judicial activism.

Collins v. *Ison-Newsome*, 73 S.W.3d 178, Tex. 2001, is yet another case where a dissent, joined by Justice Owen, was roundly criticized by the Republican majority of the Texas Supreme Court. The Court cogently stated the legal basis for its conclusion that it had no jurisdiction to decide the matter before it, and as in other opinions where Justice Owen was in dissent, took time to explicitly criticize the dissent's positions as contrary to the clear letter of the law.

At issue was whether the Supreme Court had the proper ''conflicts jurisdiction'' to hear the interlocutory appeal of school officials being sued for defamation. The majority explained that it did not because published lower court decisions do not create the necessary conflict between themselves. The arguments put forth by the dissent, in which Justice Owen joined, offended the majority, and they made their views known, writing:

The dissenting opinion agrees that ''because this is an interlocutory appeal . . . this Court's jurisdiction is limited,'' but then argues for the exact opposite proposition . . . This argument defies the Legislature's clear and express limits on our jurisdiction. . . . The author of the dissenting opinion has written previously that we should take a broader approach to the conflicts-jurisdiction standard. But a majority of the Court continues to abide by the Legislature's clear limits on our interlocutory-appeal jurisdiction.

They continue:

[T]he dissenting opinion's reading of Government Code sec. 22.225(c) conflates conflicts jurisdiction with dissent jurisdiction, thereby erasing any distinction between these two separate bases for jurisdiction. The Legislature identified them as distinct bases for jurisdiction in sections 22.001(a)(1) and (a)(2), and section 22.225(c) refers specifically to the two separate provisionsn of section 22.001(a) providing for conflicts and dissent jurisdiction. . . . [W]e cannot simply ignore the legislative limits on our jurisdiction, and not even Petitioners argue that we should do so on this basis.

Again, Justice Owen joined a dissent that the Republican majority described as defiant of legislative intent and in disregard of legislatively drawn limits. Yet another clear example of Justice Owen's judicial activism.

Some of the most striking examples of criticism of Justice Owen's writings, or the dissents and concurrences she joins, come in a series of parental notification cases heard in 2000. They include:

In *In re Jane Doe 1*, 19 S.W.3d 346, Tex. 2000, where the majority included an extremely unusual section explaining its view of the proper role of judges, admonishing the dissent, joined by Justice Owen, for going beyond its duty to interpret the law in an attempt to fashion policy.

Giving a pointed critique of the dissenters, the majority explained that, ''In reaching the decision to grant Jane Doe's application, we have put aside our personal viewpoints and endeavored to do our job as judges—that is, to interpret and apply the Legislature's will as it has been expressed in the statute.''

In a separate concurrence, Justice Alberto Gonzales wrote that to construe the law as the dissent did, ''would be an unconscionable act of judicial activism.''

A conservative Republican colleague of Justice Owen's, pointing squarely to her judicial activism.

In *In re Jane Doe 3*, 19 S.W. 3d 300, Tex. 2000, Justice Enoch writes specifically to rebuke Justice Owen and her follow dissenters for misconstruing the legislature's definition of the sort of abuse that may occur when parents are notified of a minor's intent to have an abortion, saying, ''abuse is abuse; it is neither to be trifled with nor its severity to be second guessed.''

In one case that is perhaps the exception that proves the rule, Justice Owen wrote a majority that was bitterly criticized by the dissent for its activism. In *In re City of Georgetown*, 53 S.W. 3d 328, Tex. 2001, Justice Owen wrote a majority opinion finding that the city did not have to give the Austin American-Statesman a report prepared by a consulting expert in connection with pending and anticipated litigation because such information was expressly made confidential under other law namely, the Texas Rules of Civil Procedure.

The dissent is extremely critical of Justice Owen's opinion, citing the Texas law's strong preference for disclosure and liberal construction. Accusing her of activism, Justice Abbott, joined by Chief Justice Phillips and Justice Baker, notes that the legislature, ''expressly identified eighteen categories of information that are 'public information' and that must be disclosed upon request . . . [sec. (a)] The Legislature attempted to safeguard its policy of open records by adding subsection (b), which limits courts' encroachment on its legislatively established policy decisions.'' The dissent further protests:

[b]ut if this Court has the power to broaden by judicial rule the categories of information that are ''confidential under other law,'' then subsection (b) is eviscerated from the statute. By determining what information falls outside subsection (a)'s scope, this Court may evade the mandates of subsection (b) and order information withheld whenever it sees fit. This not only contradicts the spirit and language of subsection (b), it guts it.

Finally, the opinion concluded by asserting that Justice Owen's interpretation, ''abandons strict construction and rewrites the statute to eliminate subsection (b)'s restrictions.''

Yet again, her colleagues on the Texas court, citing Justice Owen's judicial activism.

These examples, together with the unusually harsh language directed at Justice Owen's position by the majority in the Doe cases, show a judge out of step with the conservative Republican majority of the Texas Supreme Court, a majority not afraid to explain the danger of her activist views.

I am also greatly concerned about Justice Owen's record of ends-oriented decision making as a Justice on the Texas Supreme Court. As one reads case after case, particularly those in which she was the sole dissenter or dissented with the extreme right wing of the Court, her pattern of activism becomes clear. Her legal views in so many cases involving statutory interpretation simply cannot be reconciled with the plain meaning of the statute, the legislative intent, or the majority's interpretation, leading to the conclusion that she sets out to justify some pre-conceived idea of what the law ought to mean. This is not an appropriate way for a judge to make decisions. This is a judge whose record reflects that she is willing and sometimes eager to make law from the bench.

Justice Owen's activism and extremism is noteworthy in a variety of cases, including those dealing with business interests, malpractice, access to public information, employment discrimination and Texas Supreme Court jurisdiction, in which she writes against individual plaintiffs time and time again, in seeming contradiction of the law as written.

One of the cases where this trend is evident is *FM Properties* v. *City of Austin*, 22 S.W. 3d 868, Tex. 1998. I asked Justice Owen about this 1998 environmental case at her hearing. In her dissent from a 6–3 ruling, in which Justice Alberto Gonzales was among the majority, Justice Owen showed her willingness to rule in favor of large private landowners against the clear public interest in maintaining a fair regulatory process and clean water. Her dissent, which the majority characterized as ''nothing more than inflammatory rhetoric,'' was an attempt to favor big landowners.

In this case, the Texas Supreme Court found that a section of the Texas

Water Code allowing certain private owners of large tracts of land to create ''water quality zones,'' and write their own water quality regulations and plans, violated the Texas Constitution because it improperly delegated legislative power to private entities. The Court found that the Water Code section gave the private landowners, ''legislative duties and powers, the exercise of which may adversely affect public interests, including the constitutionally-protected public interest in water quality.'' The Court also found that certain aspects of the Code and the factors surrounding its implementation weighed against the delegation of power, including the lack of meaningful government review, the lack of adequate representation of citizens affected by the private owners' actions, the breadth of the delegation, and the big landowners' obvious interest in maximizing their own profits and minimizing their own costs.

The majority offered a strong opinion, detailing its legal reasoning and explaining the dangers of offering too much legislative power to private entities. By contrast, in her dissent, Justice Owen argued that, ''[w]hile the Constitution certainly permits the Legislature to enact laws that preserve and conserve the State's natural resources, there is nothing in the Constitution that requires the Legislature to exercise that power in any particular manner,'' ignoring entirely the possibility of an unconstitutional delegation of power. Her view strongly favored large business interests to the clear detriment of the public interest, and against the persuasive legal arguments of a majority of the Court.

When I asked her about this case at her hearing, I found her answer perplexing. In a way that she did not argue in her written dissent, at her hearing Justice Owen attempted to cast the FM Properties case not as, ''a fight between and City of Austin and big business, but in all honesty, . . . really a fight about . . . the State of Texas versus the City of Austin.'' In the written dissent however, she began by stating the, ''importance of this case to private property rights and the separation of powers between the judicial and legislative branches . . .'', and went on to decry the Court's decision as one that, ''will impair all manner of property rights.'' 22 S.W. 3d at 889. At the time she wrote her dissent, Justice Owen was certainly clear about the meaning of this case—property rights for corporations.

Another case that concerned me is *GTE Southwest, Inc.* v. *Bruce*, 990 S.W.2d 605, where Justice Owen wrote in favor of GTE in a lawsuit by employees for intentional infliction of emotional distress. The rest of the Court held that three employees subjected to what the majority characterized as ''constant humiliating and abusive behavior of their supervisor'' were entitled to the jury verdict in their favor. Despite the Court's recitation of an exhaustive list of sickening behavior by the supervisor, and its clear application of Texas law to those facts, Justice Owen wrote a concurring opinion to explain her difference of opinion on the key legal issue in the case—whether the behavior in evidence met the legal standard for intentional infliction of emotional distress.

Justice Owen contended that the conduct was not, as the standard requires, ''so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency . . .'' The majority opinion shows Justice Owen's concurrence advocating an inexplicable point of view that ignores the facts in evidence in order to reach a predetermined outcome in the corporation's favor.

Justice Owen's recitation of facts in her concurrence significantly minimizes the evidence as presented by the majority. Among the kinds of behavior to which the employees were subjected—according to the majority opinion—are: Upon his arrival the supervisor, ''began regularly using the harshest vulgarity . . . continued to use the word ''f——'' and ''motherf——r'' frequently when speaking with the employees . . . repeatedly physically and verbally threatened and terrorized them . . . would frequently assault each of the employees by physically charging at them . . . come up fast . . . and get up over (the employee) . . . and yell and scream in her face . . . called (an employee) into his office every day and . . . have her stand in front of him, sometimes for as long as thirty minutes, while (the supervisor) simply stared at her . . . made (an employee) get on her hands and knees and clean the spots (on the carpet) while he stood over her yelling.'' Justice Owen did not believe that such conduct was outrageous or outside the bounds of decency under state law.

At her hearing, in answer to Senator Edwards's questions about this case, Justice Owen again gave an explanation not to be found in her written views. She told him that she agreed with the majority's holding, and wrote separately only to make sure that future litigants would not be confused and think that out of context, any one of the outrages suffered by the plaintiffs would not support a judgment. Looking again at her dissent, I do not see why, if that was what she truly intended, she did not say so in language plain enough to be understood, or why she thought it necessary to write and say it in the first place. It is a somewhat curious distinction to make—to advocate that in a tort case a judge should write a separate concurrence to explain which part of the plaintiff's case, standing alone, would not support a finding of liability. Neither her written concurrence, nor her answers in explanation after the fact, is satisfactory explanation of her position in this case.

In *City of Garland* v. *Dallas Morning News*, 22 S.W. 3d 351, Tex. 2000, Justice Owen dissented from a majority opinion and, again, it is difficult to justify her views other than as being based on a desire to reach a particular outcome. The majority upheld a decision giving the newspaper access to a document outlining the reasons why the city's finance director was going to be fired. Justice Owen made two arguments: that because the document was considered a draft it was not subject to disclosure, and that the document was exempt from disclosure because it was part of policy making. Both of these exceptions were so large as to swallow the rule requiring disclosure. The majority rightly points out that if Justice Owen's views prevailed, almost any document could be labeled draft to shield it from public view. Moreover, to call a personnel decision a part of policy making is such an expansive interpretation it would leave little that would not be ''policy.''

Quantum Chemical v. *Toennies*, 47 S.W. 3d 473, Tex. 2001, is another troubling case where Justice Owen joined a dissent advocating an activist interpretation of a clearly written statute. In this age discrimination suit brought under the Texas civil rights statute, the relevant parts of which were modeled on Title VII of the federal Civil Rights Act—and its amendments—the appeal to the Texas Supreme Court centered on the standard of causation necessary for a finding for the plaintiff. The plaintiff argued, and the five justices in the majority agreed, that the plain meaning of the statute must be followed, and that the plaintiff could prove an unlawful employment practice by showing that discrimination was ''a motivating factor.'' The employer corporation argued, and Justices Hecht and Owen agreed, that the plain meaning could be discarded in favor of a more tortured and unnecessary reading of the statute, and that the plaintiff must show that discrimination was ''the motivating factor,'' in order to recover damages.

The portion of Title VII on which the majority relies for its interpretation was part of Congress's 1991 fix to the United States Supreme Court's opinion in the Price Waterhouse case, which held that an employer could avoid liability if the plaintiff could not show discrimination was ''the'' motivating factor. Congress's fix, in Section 107 of the Civil Rights Act of 1991, does not specify whether the motivating factor standard applies to both sorts of discrimination cases, the so-called ''mixed motive'' cases as well as the ''pretext'' cases.

The Texas majority concluded that they must rely on the plain language of the statute as amended, which could not be any clearer that under Title VII discrimination can be shown to be ''a'' motivating factor. Justice Owen joined Justice Hecht in claiming that federal case law is clear (in favor of their view), and opted for a reading of the statute that would turn it into its polar opposite, forcing plaintiffs into just the situation legislators were trying to avoid. This example of Justice

Owen's desire to change the law from the bench, instead of interpret it, fits President Bush's definition of activism to a ''T''.

Justice Owen has also demonstrated her tendency toward ends-oriented decision making quite clearly in a series of dissents and concurrences in cases involving a Texas law providing for a judicial bypass of parental notification requirements for minors seeking abortions.

The most striking example is Justice Owen's expression of disagreement with the majority's decision on key legal issues in Doe 1. She strongly disagreed with the majority's holding on what a minor would have to show in order to establish that she was, as the statute requires, ''sufficiently well informed'' to make the decision on her own. While the conservative Republican majority laid out a well-reasoned test for this element of the law, based on the plain meaning of the statute and well-cited case law, Justice Owen inserted elements found in neither authority. Specifically, Justice Owen insisted that the majority's requirement that the minor be ''aware of the emotional and psychological aspects of undergoing an abortion'' was not sufficient and that among other requirements with no basis in the law, she, ''would require . . . [that the minor] should . . . indicate to the court that she is aware of and has considered that there are philosophic, social, moral, and religious arguments that can be brought to bear when considering abortion.'' *In re Jane Doe 1*, 19 S.W.3d 249, 256, Tex. 2000.

In her written concurrence, Justice Owen indicated, through legal citation, that support for this proposition could be found in a particular page of the Supreme Court's opinion in Planned Parenthood v. Casey. However, when one looks at that portion of the Casey decision, one finds no mention of requiring a minor to acknowledge religious or moral arguments. The passage talks instead about the ability of a State to ''enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear.'' Justice Owen's reliance on this portion of a United States Supreme Court opinion to rewrite Texas law was simply wrong.

As she did in answer to questions about a couple of other cases at her hearing, Justice Owen tried to explain away this problem with an after-the-fact justification. She told Senator CANTWELL that the reference to religion was not to be found in Casey after all, but in another U.S. Supreme Court case, H.L. v. Matheson. She explained that in ''Matheson they talk about that for some people it raises profound moral and religious concerns, and they're talking about the desirability or the State's interest in these kinds of considerations in making an informed decision.'' Transcript at 172. But again, on reading Matheson, one sees that the only mention of religion comes in a quotation meant to explain why the parents of the minor are due notification, not about the contours of what the government may require someone to prove to show she was fully well informed. Her reliance on Matheson for her proposed rewrite of the law is just as faulty as her reliance on Casey. Neither one supports her reading of the law. She simply tries a little bit of legal smoke and mirrors to make it appear as if they did. This is the sort of ends-oriented decision making that destroys the belief of a citizen in a fair legal system. And most troubling of all was her indication to Senator FEINSTEIN that she still views her dissents in the Doe cases as the proper reading and construction of the Texas statute.

At her second, unprecedented hearing in 2003, Justice Owen and her defenders tried hard to recast her record and others' criticism of it. I went to that hearing, I listened to her testimony, and I read her written answers, many newly formulated, that attempt to explain away her very disturbing opinions in the Texas parental notification cases. But her record is still her record, and the record is clear. She did not satisfactorily explain why she infused the words of the Texas legislature with so much more meaning than she can be sure they intended. She adequately describes the precedents of the Supreme Court of the United States, to be sure, but she simply did not justify the leaps in logic and plain meaning she attempted in those decisions.

I read her responses to Senator HATCH's remarks at that second hearing, where he attempted to explain away cases about which I had expressed concern at her first hearing. For example, I heard him explain the opinion she wrote in F.M. Properties v. City of Austin. I read how he recharacterized the dispute in an effort to make it sound innocuous, just a struggle between two jurisdictions over some unimportant regulations. I know how, through a choreographed exchange of leading questions and short answers, they tried to respond to my question from the original hearing, which was never really answered, about why Justice Owen thought it was proper for the legislature to grant large corporate landowners the power to regulate themselves. I remained unconvinced. The majority in this case, which invalidated a state statute favoring corporations, did not describe the case or the issues as Senator HATCH and Justice Owen did. A fair reading of the case shows no evidence of a struggle between governments. This is all an attempt at after-the-fact, revisionist justification where there really is none to be found.

Justice Owen and Chairman HATCH's explanation of the case also lacked even the weakest effort at rebutting the criticism of her by the F.M. Properties majority. In its opinion, the six justice majority said, and I am quoting, that Justice Owen's dissent was ''nothing more than inflammatory rhetoric.'' They explained why her legal objections were mistaken, saying that no matter what the state legislature had the power to do on its own, it was simply unconstitutional to give the big landowners the power they were given. No talk of the City of Austin v. the State of Texas. Just the facts.

Likewise, the few explanations offered for the many other examples of the times her Republican colleagues criticized her were unavailing. The tortured reading of Justice Gonzales' remarks in the Doe case were unconvincing. He clearly said that to construe the law in the way that Justice Owen's dissent construed the law would be activism. Any other interpretation is just not credible.

And no reasons were offered for why her then-colleague, now ours, Justice Cornyn, thought it necessary to explain the principle of stare decisis to her in his opinion in Weiner v. Wasson. Or why in Montgomery Independent School District v. Davis, the majority criticized her for her disregard for legislative language, saying that, ''the dissenting opinion misconceives the hearing examiner's role in the . . . process,'' which it said stemmed from, ''its disregard of the procedural elements the Legislature established . . . to ensure that the hearing-examiner process is fair and efficient for both teachers and school boards.'' Or why, in Collins v. Ison-Newsome, a dissent joined by Justice Owen was so roundly criticized by the Republican majority, which said the dissent agrees with one proposition but then ''argues for the exact opposite proposition . . . [defying] the Legislature's clear and express limits on our jurisdiction.''

I have said it before, but I am forced to say it again. These examples, together with the unusually harsh language directed at Justice Owen's position by the majority in the Doe cases, show a judge out of step with the conservative Republican majority of the Texas Supreme Court, a majority not afraid to explain the danger of her activist views. No good explanation was offered for these critical statements last year, and no good explanation was offered two weeks ago. Politically motivated rationalizations do not negate the plain language used to describe her activism at the time.

When he nominated Priscilla Owen, President Bush said that his standard for judging judicial nominees would be that they ''share a commitment to follow and apply the law, not to make law from the bench.'' He said he is against judicial activism. Yet he has appointed judicial activists like Priscilla Owen and Janice Rogers Brown.

Under President Bush's own standards, Justice Owen's record of ends-oriented judicial activism does not qualify her for a lifetime appointment to the Federal bench.

The President has often spoken of judicial activism without acknowledging

that ends-oriented decision-making can come easily to extreme ideological nominees. In the case of Priscilla Owen, we see a perfect example of such an approach to the law, and I cannot support it. The oath taken by federal judges affirms their commitment to ''administer justice without respect to persons, and do equal right to the poor and to the rich.'' No one who enters a federal courtroom should have to wonder whether he or she will be fairly heard by the judge.

Justice Priscilla Owen's record of judicial activism and ends-oriented decision making leaves me with grave doubt about her ability to be a fair judge. The President says he opposes putting judicial activists on the Federal bench, yet Justice Priscilla Owen unquestionably is a judicial activist. I cannot vote to confirm her for this appointment to one of the highest courts in the land.

The PRESIDING OFFICER. The Senator from Oklahoma.

Mr. COBURN. Mr. President, what is the matter pending before the Senate at this time?

The PRESIDING OFFICER. The nomination of Priscilla Owen.

Mr. COBURN. I thank the Chair.

Mr. President, I would like to spend a few minutes talking about what we have heard on the Senate floor today. The Presiding Officer and I are new Members to the Senate. We were not here as this struggle began. I must say, I am pretty deeply saddened by the misstatements of fact, the innuendo, the half-truths we have heard on the Senate floor today. I also am somewhat saddened by the fact that the Constitution is spoken about in such light terms. Because what the Constitution says is that, in fact, the Senate sets its own rules and the Senate can change its own rules. The first 100 years in this body, there was not a filibuster, and that filibuster has gone through multiple changes during the course of Senate history.

I pride myself on not being partisan on either the Democratic or the Republican side. I am a partisan for ideas, for freedom, for liberty. I am also a partisan for truth. I believe, as we shave that truth, we do a disservice not only to this body, but we also do a disservice to the country.

Another principle I am trying to live by is the principle of reconciliation. As we go forward in this debate, it is important for the American people to truly understand what the history is in this debate. At the beginning of the Congress, the majority, whether it be Democrat or Republican in any Congress, whoever is in control, has a right to set up the rules.

Those rules were set up in this Congress with one provision—that an exception be made on the very issue we are talking about today. Why was that exception put there? That exception was put there in an attempt to work out the differences over the things that have happened in the past so we would not come to this point in time. I believe the majority leader, although maligned today on the floor, has made a great and honest effort to work a compromise in the matter before us.

I also believe what has happened in the past in terms of judges not coming out of committee probably has been inappropriate. That is not a partisan issue either. It has happened on both sides. As a matter of fact, there are appellate judges now being held up by Democratic Senators because they disagree on their nomination to come through the Judiciary Committee.

As a member of the committee and a nonlawyer on the Judiciary Committee, it is becoming plain to me to see the importance of the procedure within the committee.

Having said that, the Constitution gives the right to the President to appoint, under the advice and consent of the Senate. The debate is about whether we will take a vote.

President Bush's appellate court nominees have the lowest acceptance rate of any of the last four Presidents.

Is that because the nominees are extreme? Or is there some other reason why we are in this mess that we find ourselves in? I really believe it is about the question: where do Supreme Court judges come from? They come from the appellate courts most often. And whether or not we allow people—good, honest people—to put their names forward and come before this body and have true advice and consent is a question we are going to have to solve in the next couple of weeks.

There are lots of ways of solving it. One is doing what Senator BYRD did four times in his history as leader of this body—a change in the rules by majority vote because the majority has the majority. That is not a constitutional option; that is a Byrd option. That is an option vested in the power of the Senate under the Constitution to control the rules of the Senate.

Another little bit of history. Twenty-five years ago, the filibuster was eliminated on the Budget and Reconciliation Act. The Congress didn't fall apart. Under Senator BYRD's changes of the rules, the Senate did not fall apart. So the issue really is about whether or not the majority has the power to control the rules in the Senate. And the debate also is about whether or not we are going to have an up or down, a fair vote on judges—just like we should have a debate on whether we should have a process change in the Judiciary Committee for those judges who are appointed by any President to come through.

I said in my campaign for this office that conservative and liberal wasn't a test for me for judges. The foundation and principles of our country, and proof of excellence in the study of and acting on the law should be the requirements. We had the unfortunate example today—this week—of a Federal judge in Nebraska negating a marriage law that defined marriage as between a man and a woman—an appointed judge deciding for the rest of us—it could very well decide for all 50 States—whether or not we are going to recognize marriage as between a man and a woman. We have heard Priscilla Owen's name linked several times because of her decisions—there were 13 or 14 decisions that came before the Texas Supreme Court on judicial review of a minor's access to an abortion without parental notification—not consent, but notification.

In the one case that they bring up and misquote Attorney General Gonzales on, she in fact did what the law said to do. The federal appellate court is not entitled, nor is the Supreme Court of Texas, to review the findings of fact. The finder of fact is the original court. They cannot make decisions on that. So she dissented on that basis. Judge Gonzales' statement was about whether or not he could go along with that in terms of what would be applied to him in terms of judicial activism. He has since said under oath that in no way, or at any time, did he accuse Priscilla Owen of being a judicial activist.

Let's talk about activism. I want to relate a story that happened to me about 6 years ago. I was in Stigler, OK, having a townhall meeting. A father walked in, 35 years of age, with tears running down his cheek. In his hand, he had a brown paper sack, and he interrupted this meeting between me and about 60 people. His question to me was: ''Dr. Coburn, how is it that this sack could be given to my 12-year old daughter?'' Of course, I didn't know what was in the sack. What was in the sack was birth control pills, condoms, and spermicide. The very fact that his daughter could be treated in a clinic without his permission for contraceptives came about through judicial activism. The fact is that 80 to 85 percent of the people in this country find that wrong. Yet, it cannot be turned around. The fact is that 80 percent of the people in this country believe that marriage is defined as that union between a man and a woman, and a Federal judge—not looking at the Constitution—not looking at precedent, actually makes that change.

So it is a battle about ideas. Priscilla Owen recognizes what the law is. She has stated uniformly that she will follow the precedents set before the court. But we have gotten to where we are in terms of the issues that inflame and insight so much polarization in this body and throughout the country because we have not had people following the law, but in fact we have had judicial activism.

I congratulate President Bush for sending these nominees to the Senate floor. I have interviewed Priscilla Owen. Her history, her recommendations, her ratings are far in excess of superior. So why would this wonderful woman, who has dedicated her life to the less fortunate, to families, to reinstituting and strengthening marriage, to making sure people who didn't

have legal aid had it, why is she being so lambasted, so maligned because of her beliefs? The beliefs she has are what 80 percent of the people in this country have, but she doesn't fit with the beliefs of the elite liberal sect in this country.

So it is a battle of ideas. It is a battle that will shape the future of our courts. How is it that a woman of such stature will have the strength to withstand for 4 years—she has put everything about her, every aspect of her personal life, her public life, her judicial career out front and has stood strong to continue to take the abuse and maligning language that comes her way. Why would somebody do that? It is because she believes in this country. She believes in the foundational principles that our colleague from New York held up in the Constitution. She has sworn and believes in that Constitution. She has the courage to know that the fight for our children, for our parents to control the future for our children, is worth the fight.

I would like to spend a minute going over some poll numbers with the American public on the very issue of whether or not a minor child ought to have parental involvement in a major procedure such as an abortion.

Having delivered over 4,000 babies, having handled every complication of pregnancy that is known, I am very familiar with these issues.

There are five polls I would like to put in the RECORD. I ask unanimous consent that they be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

POLLS ON REQUIRING PARENTAL INVOLVEMENT IN MINORS' ABORTIONS

[March 23, 2005]

Polls	Favor (percent)	Oppose (percent)
"Do you favor or oppose requiring parental notification before a minor could get an abortion?" Favor: 75%; Oppose: 18%; DK/NA 7%. (Quinnipiac University Poll, March 2–7, 2005.) (1,534 registered voters; margin of error: ±2.5%)	75	18
"Next, do you favor or oppose each of the following proposals? How about— . . . A law requiring women under 18 to get parental consent for any abortion?" Favor: 73%; Oppose: 24%; No Opinion: 3%. (CNN/USA Today/Gallup, January 10–12, 2003.) (1,002 adults; margin of error: ±3%)	73	24
"Do you favor or oppose requiring that one parent of a girl who is under 18 years of age be notified before an abortion is performed on the girl?" Favor: 83%; Oppose: 15%; Don't Know/Refused: 2%. (Wirthlin Worldwide, October 19–22, 2001.) (1,021 adults; margin of error: ±3.07%)	83	15
"Should girls under the age of 18 be required to get the consent of at least one parent before having an abortion?" Required: All—82%; Men—85%; Women—80%. Not Required: All—12%; Men—9%; Women—14%. Depends: All—2%; Men—2%; Women—2%. Don't Know: All—4%; Men—4%; Women—4%. (Los Angeles Times, June 8–13, 2000.) (2,071 adults; margin of error: ±2%)	82	12
"Would you favor or oppose requiring parental consent before a girl under 18 could have an abortion? Favor: 78%; Oppose: 17%; DK/NA/Depends: 5%. (CBS News/NY Times, January 1998.)	78	17

Mr. COBURN. One is a March 2–7, 2005, poll from Quinnipiac University:

Do you favor or oppose requiring parental notification before a minor could get an abortion?

That is notification. Seventy-five percent of the people in this country agree with that. It is not an extreme position when 75 percent of our fellow Americans think that is right—think that in fact we don't give up rights to our children until they are emancipated and are adults.

Next, do you favor or oppose each of the following proposals: A law requiring women under 18 to get parental consent for any abortion?

That is not notification, that is consent. That is a CNN/USA Today/Gallup poll, January 10, 2003.

Seventy-three percent favor parents being involved in the health care of their children and major decisions that will affect their future.

Do you favor or oppose requiring that one parent of a girl who is under 18 years of age be notified before an abortion is performed on the girl?

Eighty-three percent favor the parent being notified. That is a Wirthlin Worldwide poll.

Should girls under the age of 18 be required to get the consent of at least one parent before having an abortion?

That is a Los Angeles Times poll. Eighty-two percent believe that.

What is described as extreme is mainline to the American public. What we have is a battle for ideas, a battle under which the future of our country will follow.

The word "activist" in reference to judges is a word that is wildly used. It is almost amusing that we hear it from one side of the Senate to the other side of the Senate. What is activism on one side is not activism on the other. What is activism to the minority is not activism to the majority.

What is activism? Activism is reaching into the law and the precedents of law and creating something that was not there before. Activism is intentionally misinterpreting statutes to produce a political gain. I will go back to the child and the father, 35 years of age, screaming at the depths of his heartache as to how in our country we have gotten to the point where a judge can decide ahead of the Senate, ahead of the House, ahead of both bodies and the President, what will happen to our minor children. That is what this debate is about.

Priscilla Owen exemplifies the values that the American people hold, but she also exemplifies the values of the greatest jurists of our time: a strict adherence to the law, a love of the law, and a willingness to sacrifice her life and her career and her personal reputation to go through this process.

Senator ENSIGN, the Senator from Nevada, made a very good point a moment ago, and I think it bears repeating. How many people will not put their name up in the future who are eminently qualified, have great judicial history, will have great recommendations from the American Bar Association but do not want to have to go through the half-truths, the innuendos, and the slurring of character that occurs, to come before this body?

My hope is that before we come to the Byrd option or a change in the rules, that cooler heads will decide that we will not filibuster judges in the future, and we will not block nominations at the committee. That is reasonable. We do not have to do that. A President should have his nominees voted on. If they come to the committee and they do not have a recommendation, they should still come to the floor, or if they have a recommendation they not be approved, they should still come to the floor, or if they have a recommendation they be approved, they should still come to the floor. But it is fair for a President to have a vote on their nominations.

We have seen this President's numbers on appointments. That is right. Why has he had so many people appointed? Because he has nominated great jurists, and could they have filibustered others, they would have. The ironic part is that they say that Priscilla Owen is "not qualified." However, in the negotiations leading up to the point we find ourselves, the offer has been made that we can pick two out of any four of the people who are on the queue to come before this body and let those two go through and two be thrown away. If that is the case, if any two will do, then they are obviously qualified. If they are acceptable under a deal, then they are obviously qualified.

The argument against qualification, the activist charges do not hold water. What does hold water is the fact that these individuals who stand in the mainstream of American thought, values, and ideals will be appellate judges and that someday maybe have an appointment or a nomination for a Supreme Court judgeship. That holds water. We have to decide in the Senate whether or not we are going to allow the process of filibustering judicial nominations to continue. If it continues, then lots of good people will never put their name in the hat. Lots of good people will never be on the court. What will be on the court are people who are not proven, people who do not have a record, people who are not the best. That is what will be on the court. The country deserves better, the Senate can do a better job than we are doing today, and it is my hope that we can resolve this conflict in a way that will create in the Senate a reputation that says reconciliation over the issues that divide us is a principle that we can all work on, that we can solve,

that we can do the work of the American people. But if that is not possible, then it is well within the constitutional powers of the leader of this body to change the rules so that we can carry out our constitutional responsibilities.

Mr. President, I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. FRIST. Mr. President, I ask unanimous consent the order for the quorum call be rescinded.

THE PRESIDING OFFICER. Without objection, it is so ordered.

MORNING BUSINESS

Mr. FRIST. Mr. President, I ask unanimous consent that there now be a period of morning business, with Senators permitted to speak for up to 10 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

HEALTH CARE

Mr. SANTORUM. Mr. President, at a time when the importance of the U.S. Food and Drug Administration is highlighted by concerns over the safety of pharmaceuticals, it would be foolish to move forward with importation policies that would circumvent the safety regulations of the FDA. I want to take this opportunity to highlight a recent international Internet pharma-trafficking network that was shut down in Philadelphia, which I strongly believe provides a very accurate, and disturbing, window on what exactly a prescription drug importation scheme would mean for Americans.

On April 20, 2005, the Department of Justice announced the unsealing of an indictment returned by a Federal grand jury on April 6, 2005. The indictment chronicled how the ''Bansal Organization'' used the Internet to fill orders for pharmaceuticals. In turn, this crime ring facilitated millions of unprescribed pills coming into the United States—of which the bio-efficacy and the safety have yet to be determined—to consumers who only needed a credit card. These drugs included potentially dangerous narcotics, such as codine and Valium, drugs that can cause serious harm if not taken under a physician's supervision, and which have been highlighted repeatedly as drugs that pose special concerns as we debate possible importation.

Stretching from America to countries such as India, Antigua, and Singapore, officials estimate that this international conspiracy provided $20 million worth of un-prescribed drugs to hundreds of thousands of people worldwide—most if not all of whom had no idea where their drugs originated. This drug scam exemplifies how the Internet can be a door to an unregulated world of just about any kind of pharmaceutical—including counterfeits and potentially dangerous narcotics. This is particularly concerning given the growing ease at which prescription drugs can be purchased over the Internet.

At the heart of the debate on foreign importation of prescription drugs is the concern over the cost of prescription drugs. Often proponents claim that importation would allow Americans access to other countries' drugs at a cheaper price, despite thorough analysis by the U.S. Health and Human Services Task Force on Prescription Drug Importation. The HHS Task Force reported that any associated cost savings with importation would be negated by the costs associated with constructing and attempting to safely maintain such a system, and ultimately concluded what both past and current Administrations have found: the safety of imported drugs purchased by individuals, via the Internet or other means, cannot be guaranteed. Moreover, generic prescription drugs in America are on average 50 percent less than their foreign counterparts. This holds true in the case of the ''Bansal Organization,'' in which the vast majority of the trafficked drugs were sold at prices higher than what a consumer would have paid at a legitimate pharmacy. The safety of the American drug supply should not be sacrificed for supposed savings. Those that continue to purport that importation would provide cheaper drugs are misleading the American people, and as a result putting their health and lives at risk.

Importation will not equate to cheaper drugs for Americans, but it will lead to an explosion of opportunities for counterfeiters to take advantage of the American people by compromising the safety of our drug supply. Many individuals, both patients and healthcare professionals, who testified during the HHS Task Force's proceedings expressed significant concerns that importation would compromise the integrity of the American drug supply by creating a vehicle through which terrorists could easily introduce harmful agents in the United States. Recall that in 1982, seven Americans died after ingesting Tylenol laced with cyanide. More recently, in July 2003 members of a Florida-based drug-counterfeiting ring who sold and diluted counterfeited drugs were indicted, and 18 million tablets of counterfeit Lipitor were recalled after evidence revealed that this popular anti-cholesterol drug had been manufactured overseas and repackaged in the United States to hide the deception. Importation would provide for any of these acts to be committed on a larger, exponentially more devastating, national scale. To put this in perspective, in 2003, 69 million prescriptions were written for Lipitor in the United States alone.

The ''Bansal Organization'' bust is but the latest in a series of illicit pharmaceutical trafficking scams, which are extremely lucrative, and which our law enforcement officials are already struggling to combat on a daily basis. Why would we elect to open the door to importation when we know that doing so will create infinite opportunities to compromise the safety of our drug supply?

As we continue to debate the best ways to ensure that Americans have access to the highest quality, affordable prescription drugs, I would caution my colleagues that importation is not the answer. It would be unconscionable to facilitate in any way the dangerous shortcuts utilized in the Philadelphia drug scam—shortcuts that circumvent the essential ongoing patient relationship with physicians and other licensed professionals trained to monitor potential medication interactions and side effects that can lead to serious injury and/or death.

Congress should uphold the strong regulatory standards on drug safety that exist today, and not open our borders to prescription drugs from a world of unknown sources.

VICARIOUS LIABILITY REFORM

Mr. SANTORUM. Mr. President, being mindful of yesterday's passage of SAFETEA, I rise to speak to an issue that was not addressed in the Senate bill. This is an area of the legal system needing reform that affects interstate commerce in the transportation sector—vicarious liability. These types of laws exist in only a handful of States where nonnegligent owners of rented and leased vehicles are liable for the actions of vehicle operators.

Although a vehicle renting or leasing company may take every precaution to ensure that a vehicle is in optimal operating condition and meets every safety standard, these companies can still be subject to costly lawsuits due to the actions of the vehicle's operator, over which the company has no control. Under these laws, leasing or rental companies can be liable simply because they are the owner of the vehicle.

Though only a few States enforce laws that threaten nonnegligent companies with unlimited vicarious liability, they affect consumers and businesses from all 50 States. Vicarious liability means higher consumer costs in acquiring vehicles and buying insurance and means higher commercial costs for the transportation of goods. Left unreformed, these laws could have a devastating, effect on an increasing number of small businesses that have done nothing wrong.

The House acted in H.R. 3 to address these unfair laws by creating a uniform standard to exclude nonnegligent vehicle renting and leasing companies from liability for the actions of a customer operating a safe vehicle. Under this provision, States would continue to determine the level of compensation available for accident victims by setting minimum insurance coverage requirements for every vehicle. Vicarious liability reform would not protect companies that have been negligent in