NOMINATIONS OF JANICE R. BROWN AND WILLIAM PRYOR

Mr. FRIST. Mr. President, today we will vote on the confirmation of Janice Rogers Brown to serve on the Court of Appeals for the D.C. Circuit. We are on a good path, a constructive, very positive path for getting up-or-down votes for these judicial nominees, and we will stay on that, as I just mentioned, over the remainder of this week, confirming these judges.

After 2 years of delay, Justice Brown will finally get the courtesy of an up-or-down vote. She will finally get the respect she deserves by getting an up-or-down vote. Indeed, all 100 Members, later today, will be able to come to the floor and vote to confirm or reject—yes or no, up or down—her nomination. I am delighted we have finally reached this point.

Following the vote on Justice Brown, we will move to the cloture vote on Judge William Pryor. Similar to Justice Brown, Judge Pryor's nomination, in the past, has faced deliberate delay and postponement and obstruction. But with the progress we are making, I believe William Pryor will also now get a fair up-or-down vote, a vote he deserves.

So I am very happy we have moved beyond the impasse on his nomination and that we are back to fulfilling our constitutional duty for advice and consent. That is what these nominees deserve. It gives them the respect they deserve. It gives them the courtesy they deserve.

Mr. President, I will yield the floor. We will continue to vote on judges this week, and then next week we will be turning our attention to lowering energy prices, to lowering natural gas prices for Americans, and we will be on that bill until completion. That is the Energy bill.

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

EXECUTIVE SESSION

NOMINATION OF JANICE R. BROWN TO BE UNITED STATES CIRCUIT JUDGE

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will proceed to executive session to resume consideration of calendar No. 72, which the clerk will report.

The legislative clerk read the nomination of Janice R. Brown, of California, to be United States Circuit Judge for the District of Columbia Circuit.

The ACTING PRESIDENT pro tempore. The Democratic leader.

Mr. REID. Mr. President, I ask unanimous consent that today the Democratic time for debate, with respect to the Brown nomination, be controlled as indicated on the list which I now send to the desk.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. REID. Mr. President, I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

The PRESIDING OFFICER (Mr. VITTER). Without objection, it is so ordered.

Under the previous order, the time from 11 a.m. until 12 noon shall be under the control of the Democratic leader or his designee.

The Senator from Wisconsin is recognized for 20 minutes.

Mr. FEINGOLD. Mr President, I will vote ''no'' on Justice Brown's nomination to the D.C. Circuit.

Let me first remind my colleagues of the importance of this particular circuit in our judicial system. The D.C. Circuit is widely regarded as the most important Federal circuit. It has jurisdiction over the actions of most Federal agencies. Many of the highest profile cases that have been decided in recent years by the Supreme Court concerning regulation of economic activity by Federal agencies in areas such as the environment, health and safety regulation, and labor law, went first to the D.C. Circuit. In the area of administrative law and the interpretation of major regulatory statutes such as the Clean Air Act, the Clean Water Act, the Occupational Safety and Health Act, and the National Labor Relations Act, the D.C. Circuit is generally the last word, as the Supreme Court reviews only a tiny minority of circuit court decisions.

The D.C. Circuit is now almost evenly split, and has been for some time, between nominees of Democratic and Republican Presidents. There are five judges who were appointed by Republicans, including John Roberts, who the Senate confirmed earlier this year, and four by Democrats, and there are three vacancies. President Clinton made two excellent nominations that were never acted upon by the Senate Judiciary Committee. In one case, the committee held a hearing but never scheduled a vote, and in another, that of now-Harvard Law School Dean Elena Kagan, the Clinton nominee was not even given the courtesy of a hearing.

I want to express my great disappointment that the administration has not been willing to seek a compromise on the many vacancies that now exist on this court. By insisting on its often highly controversial choices for this circuit in particular, the administration has continued to push the Senate toward the ''nuclear'' confrontation that loomed over the Senate before the recess. Regrettably, President Bush is responsible for much of the ill will that has plagued this body for the past few years and the potentially disastrous upending of Senate precedents that we faced last month and may well see again.

If only the President had really been a uniter and not a divider; if only he had truly tried to change the tone in Washington and repair some of the damage done to the nomination process by previous Congresses; if only he had not squandered the opportunity that the four vacancies on the D.C. Circuit as of his inauguration in 2001 presented, we would not be in this situation today.

In light of this history and the importance of this Circuit, I believe it is my duty to give this nomination very close scrutiny. After reviewing this nominee's record and her testimony, I will vote ''no.'' I do not believe she is the right person at this time to be given a lifetime appointment to this important court. The fact that a majority of the Senate is apparently willing to confirm a nominee whose record so clearly demonstrates that she is not suited for such an important position is surprising and discouraging. I do not and will never apologize for supporting the filibuster to protect the Federal courts and the people of this country from her ideological, results-oriented judging.

At her hearing, I asked Justice Brown about a case on age discrimination called Stevenson v. Superior Court. The majority in that case said that Ms. Stevenson's wrongful discharge violated a fundamental public policy against age discrimination. Justice Brown dissented, saying that the plaintiff had ''failed to establish that public policy against age discrimination . . . is fundamental and substantial.'' She went on: ''Discrimination based on age does not mark its victim with a stigma of inferiority and second class citizenship.''

These statements looked shocking when I read them, but I wanted to make sure I understood Justice Brown's views, so I gave her a chance to respond. I questioned her about the case in the Judiciary Committee, and concluded by asking if it was fair to say she believed age discrimination does not stigmatize senior citizens. She agreed that it was. I appreciate her candor, but I have to say I found that testimony very troubling. Senior citizens in this country live every day with the stigma of age discrimination; it is a real problem, and I think everyone here takes it very seriously. Just because we all will be old someday, and, therefore perhaps will be subject to prejudice and discrimination of this type, does not make it any less reprehensible. I have not heard anyone in the Senate trying to defend Justice Brown's view on this issue; nor do I expect to, because it is truly indefensible.

I was also concerned by a comment Justice Brown made in 2000 about senior citizens. She said: ''Today senior

citizens blithely cannibalize their grandchildren because they have a right to get as much free stuff as the political system will permit them to exact.'' When I asked her about this statement at her hearing, she made no effort to distance herself from it.

Justice Brown seemed to suggest at her hearing that we should ignore her inflammatory speeches because she was just trying to be provocative in talking to audiences of youthful lawyers. She said that in her judging she is nonideological. The problem with that position is that the caustic style and even some of the extreme language she used in her speeches makes its way into her opinions. For example, in a 2000 speech entitled ''50 Ways To Lose Your Freedom'' in which Justice Brown suggests there may be some validity to the substantive due process theory of the Lochner case, she says the following: ''[I]f we can invoke no ultimate limits on the power of government, a democracy is inevitably transformed into a kleptocracy—a license to steal, a warrant for oppression.'' That is a pretty provocative statement to be sure.

In 2002, Justice Brown issued a scathing dissent in a zoning case called San Remo Hotel v. San Francisco. In that case, San Francisco had a requirement that when residential hotels were converted into daily hotels, the owners pay a fee to help the government pay for affordable housing that would make up for the housing that was lost in the conversion. This seems like a fairly mild requirement to me, and the majority of the court saw nothing wrong with it. But her dissent used very strong language to criticize the requirement. She said, in words that sounds an awful lot like her speech, that San Francisco was ''[t]urning a democracy into a kleptocracy.'' In case that was not strong enough, she added that the government had imposed a ''neo-feudal regime.''

Frankly, I had a hard time imagining a more extreme statement than that, but Justice Brown came up with one: ''But private property, already an endangered species in California, is now entirely extinct in San Francisco.'' (*San Remo Hotel L.P.* v. *City and County of San Francisco*, 27 Cal. 4th 643 (2002).) She continued to use this dissent to showcase her extreme views on the takings clause: ''Where once government was a necessary evil because it protected private property, now private property is a necessary evil because it funds government programs,'' she said.

In her dissent, she argued that the zoning fee did not ''substantially advance legitimate government interests'' and therefore was ''obviously'' unconstitutional. Justice Brown's colleagues on the California Supreme Court rejected her analysis. They noted that Justice Brown's approach to takings law would open a Pandora's box of judicial activism, in that courts would have to examine the wisdom of a ''myriad government economic regulations, a task the courts have been loath to undertake pursuant to either the takings or due process clause.''

On May 23, 2005—just last month—the U.S. Supreme Court rejected the ''substantially advances'' test supported by Justice Brown in the San Remo case and affirmed that courts should not subject regulatory takings cases to heightened scrutiny. Other than Justice Kennedy's two paragraph concurrence, the entire court, including Justices Scalia and Thomas, unanimously agreed with Justice O'Connor's majority opinion in this case, *Lingle* v. *Chevron* (No. 04–163,—S. Ct.—, 2005 WL 1200710 (May 23, 2005).)

The U.S. Supreme Court's critique of the district court in Lingle paralleled the San Remo majority's critique of Justice Brown's dissent. In Lingle, the Supreme Court addressed whether a Hawaiian regulation that prohibited oil companies from charging extraordinary rent to franchisees constituted a regulatory taking. The Supreme Court held that it did not, and the Court explicitly rejected the test Justice Brown used in her takings analysis. Like the majority in the San Remo opinion, the Court noted that if the ''substantially advances'' test were the law of the land:

> [I]t would require courts to scrutinize the efficacy of a vast array of State and Federal regulations—a task for which courts are not well suited. Moreover, it would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies. Although the instant case is only the tip of the proverbial iceberg, it foreshadows the hazards of placing courts in this role. . . .

The Supreme Court rejected the district court's decision, and the view of the takings clause advanced by Justice Brown, because it would require that judges substitute their judgments for those of elected legislatures—something that many of Justice Brown's supporters have spoken out against on the Senate floor.

As a former State legislator and now a Federal legislator, I appreciate and respect the Supreme Court's reluctance to endorse this activist view of regulatory takings law promoted by Justice Brown. Some in this body, including many who style themselves advocates of judicial restraint, would like to enact her views by legislation. They have every right to try to do so. I will fight them hard, and fortunately, so far, they have not been successful. But for them to support a judicial nominee who so clearly wants to use her power as a judge to promote such a radical view of the law is disappointing.

Justice Brown's extreme comments in her opinions and speeches, and there are many, many such quotations that were discussed at her hearing, lead me to question whether she has the temperament to be a fair judge. Despite her testimony at the hearing that ''I am not an ideologue of any stripe,'' much of her record demonstrates the contrary. She seems to view the world through an ideological prism, and she expresses her views in the most divisive and striking language of any judicial nominee we have seen thus far.

Referring to cases upholding President Franklin Roosevelt's New Deal legislation, for example, Justice Brown has said that ''1937 . . . marks the triumph of our own socialist revolution.'' She went on to say that ''In the New Deal/Great Society Era, a rule that was the polar opposite of American law reigned.'' At her hearing, Senator DURBIN asked her about another speech, where she said that ''Protection of private property was a major casualty of the revolution of 1937.'' She said, ''I don't think that's at all controversial.''

The court to which Justice Brown has been nominated has a docket that is laden with challenges to government regulations and interpretations of Federal statutes dealing with economic regulation. I am not confident that Justice Brown will follow the law, rather than her personal views on the law, in hearing those cases.

I have heard my colleagues argue that Justice Brown will follow the law faithfully on the court, that she will be constrained by precedent, but I simply do not find these assurances reassuring. As Justice Brown herself acknowledged in the Hughes Aircraft case, ''all judges 'make law'.'' When they are faced with questions of first impression, they have no choice. And when they sit on a court of last resort, as Justice Brown does now, there is no one to stop them. Federal Courts of Appeals also often hear questions of first impression. And for all practical purposes, they are often courts of last resort, because the Supreme Court—again, an important point—reviews only a tiny percentage of their cases. So we must ask ourselves: How will Justice Brown use her enormous power as a Federal appellate judge when she has the opportunity to make new law?

Justice Brown's record does not give me comfort in answering that question. Too often, she seems to adopt contrary theories of judging and even statutory interpretation depending on which outcome she favors.

When the plaintiffs were victims of employment discrimination, she supported limits on punitive damages. (*Lane* v. *Hughes Aircraft*, Cal. 4th 405 (2000).) But when the plaintiffs were property owners prohibited from increasing rent in a mobile home park, she opposed any limit on damages. (*Galland* v. *City of Clovis*, 24 Cal. 4th 1003.)

When the California Supreme Court ruled that juries must be given a certain instruction to protect criminal defendants, Justice Brown dissented because of her faith in juries: ''I would presume, as we do in virtually every other context, that jurors are 'intelligent, capable of understanding instructions and applying them to the facts of the case.''' (*People* v. *Guiuan*, 18 Cal. 4th 558 (1998).)

But she suddenly stopped trusting juries when faced with the possibility

that they might award punitive damages to employers found liable for racial discrimination, writing: ''When setting punitive damages, a jury does not have the perspective, and the resulting proportionality, that a court has after observing many trials.'' (*Lane* v. *Hughes Aircraft*, 22 Cal. 4th 405 (2000).)

When property owners would benefit from a literal interpretation of a voter initiative, Justice Brown wrote: ''In my view the voters did not intend the courts to look any further than a standard dictionary in applying the terms. . . .'' (*Apt. Ass'n of Los Angeles Cty*. v. *City of Los Angeles*, 24 Cal. 4th 830 (Jan. 2000).) But only 11 months later, when those challenging an affirmative action program advocated a broad interpretation of a voter initiative, she had a different view. She said: ''We can discern and thereby effectuate the voters'' intention only by interpreting this language in a historical context.'' (*Hi-Voltage* v. *City of San Jose*, 24 Cal. 4th 537 (Nov. 2000).)

When she wanted to limit the explicit right to privacy in the California Constitution, she argued: ''Where, as here, a state constitutional protection was modeled on a federal constitutional right, we should be extremely reticent to disregard U.S. Supreme Court precedent delineating the scope and contours of that right.'' (*American Academy of Pediatricians* v. *Lungren*, 16 Cal. 4th 307 (Aug. 1997).)

But when the majority of her court relied on analysis from the United States Supreme Court on the question of remedies for a violation of constitutional rights, she said: ''Defaulting to the high court fundamentally disserves the independent force and effect of our Constitution. Rather than enrich the texture of our law, this reliance on federal precedent shortchanges future generations.'' (*Katzburg* v. *Regents*, 29 Cal 4th 300 (Nov. 2002).)

I urge my colleagues to review these cases before voting on this nomination. These examples lead me to conclude that the jurisprudence of Justice Brown is a jurisprudence of convenience. She is skilled at finding a legal theory to support a desired result. I do not think that kind of approach to judging should be rewarded with an appointment to the second highest court in the land.

This nominee has complained about ''militant judges'' while herself openly defying precedent when it suits her; she believes that the New Deal was a ''socialist revolution'' and that America's elderly ''cannibalize'' their grandchildren for handouts; she has expressed doubts about the application of the Bill of Rights to the States through the incorporation doctrine and has suggested a return to an era when the courts regularly overturned the judgment of legislatures on questions of economic regulation. Putting it simply, this nominee truly does have extreme views. To confirm her to a seat on the D.C. Circuit would be a grave mistake. So I cannot support this nominee, and I will vote ''no.''

I yield the floor.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. OBAMA. I thank the Chair.

I rise today to speak on the nomination of California Justice Janice Rogers Brown to the D.C. Circuit Court of Appeals. Let me begin by saying that the last thing I would like to be spending my time on right now is talking about judges. I am sure that is true for many in this Chamber. I know that I certainly do not hear about filibusters and judges when I go back to Illinois and hold townhall meetings with people across the State. What I hear about are veterans who are concerned about their disability payments and families who are talking about how high gas prices are or how difficult it is to pay for college. And so I think this argument we have been having over the last several weeks about judicial nominations has been an enormous distraction from some of the work that is most important to the American people.

Moreover, I am not so naive as to think that speaking to an empty Chamber for the benefit of C–SPAN is somehow going to change people's minds or people's votes. I recognize that most of my colleagues, on both sides of the aisle, are fairly locked into their positions.

I do not expect the President to appoint many judges of my liking. One of the things I have told some of my colleagues on this side of the aisle is that there is only one sure way to make sure Democrats are able to block what they consider to be bad judges, and that is to win elections.

And yet I feel compelled to rise on this issue to express, in the strongest terms, my opposition to the nomination of Janice Rogers Brown to the D.C. Circuit.

I think it is important for the American people to know just what it is we are getting. After the Supreme Court, as my esteemed colleague from Wisconsin just stated, the D.C. Circuit is widely viewed as the second highest court in the land. Three of our current Supreme Court Justices came directly from this court. Under its jurisdiction fall laws relating to all sorts of Federal agencies and regulations. This is a special court. It has jurisdiction that other appeals courts do not have. The judges on this court are entrusted with the power to make decisions affecting the health of the environment, the amount of money we allow in politics, the right of workers to bargain for fair wages and find freedom from discrimination, and the Social Security that our seniors will receive. It is because of this power that we deserve to give the American people a qualified judicial nominee to serve on the D.C. Circuit.

Now, the test for a qualified judicial nominee is not simply whether they are intelligent. Some of us who attended law school or were in business know there are a lot of real smart people out there whom you would not put in charge of stuff. The test of whether a judge is qualified to be a judge is not their intelligence. It is their judgment.

The test of a qualified judicial nominee is also not whether that person has their own political views. Every jurist surely does. The test is whether he or she can effectively subordinate their views in order to decide each case on the facts and the merits alone. That is what keeps our judiciary independent in America. That is what our Founders intended.

Unfortunately, as has been stated repeatedly on this floor, in almost every legal decision that she has made and every political speech that she has given, Justice Brown has shown she is not simply a judge with very strong political views, she is a political activist who happens to be a judge. It is a pretty easy observation to make when you look at her judicial decisions. While some judges tend to favor an activist interpretation of the law and others tend to believe in a restrained interpretation of the law providing great deference to the legislature, Justice Brown tends to favor whatever interpretation leads her to the very same ideological conclusions every single time. So when it comes to laws protecting a woman's right to choose or a worker's right to organize, she will claim that the laws that the legislature passed should be interpreted narrowly. Yet when it comes to laws protecting corporations and private property, she has decided that those laws should be interpreted broadly. When the rights of the vulnerable are at stake, then she believes the majority has the right to do whatever it wants. When the minority happens to be the people who have privilege and wealth, then suddenly she is countermajoritarian and thinks it is very important to constrain the will of the majority.

Let me just give you a couple examples. In a case reviewing California's parental notification law, Justice Brown criticized the California Supreme Court decision overturning that law, saying that the court should have remained ''tentative, recognizing the primacy of legislative prerogatives.'' She has also repeatedly tried to overturn the fact that California law recognizes Tameny claims, a line of cases that establishes that an employer does not have an unfettered right to fire an employee, but that the right has limits according to fundamental public policy. She says judicial restraint is critical. She claims that public policy is ''a function first and foremost reserved to the legislature.''

So on these cases dealing with a woman's right to choose, worker protections, punitive damages, or discrimination, she wants the judge to stay out of the legislative decisionmaking process. But Justice Brown doesn't always want the courts to exercise restraint and defer to the legislature. When Justice Brown wanted to limit the ability of juries to punish

companies that engage in severe discrimination, a fellow judge on the California Supreme Court accused her of engaging in ''judicial law making.'' Instead of denying it, Justice Brown defended her judicial activism. She called it creativity. This is what she said: ''All judges make law. It is arrogance, carelessness and a lack of candor that constitute impermissible judicial practice, not creativity.''

Justice Brown has also gone out of her way to use her position in the courts to advocate for increased protections for property owners. In a case about a developer that wanted to break a city rent control law, Justice Brown dismissed the fact that a majority of the city's voters had approved of that law and thought that the case should be an exception to the philosophy of narrow judicial review. Justice Brown believed that this case was one in which ''some degree of judicial scrutiny . . . is appropriate.'' Which is it, Justice Brown? In some cases you think we should defer to the legislature and in some cases, apparently, you think it is appropriate for judges to make law. What seems to distinguish these two types of cases is who the plaintiff is, who the claimant is.

If the claimant is powerful—if they are a property owner, for example—then she is willing to use any tool in her judicial arsenal to make sure the outcome is one they like. If it is a worker or a minority claiming discrimination, then she is nowhere to be found.

Judicial decisions ultimately have to be based on evidence and on fact. They have to be based on precedent and on law. When you bend and twist all of these to cramp them into a conclusion you have already made—a conclusion that is based on your own personal ideology—you do a disservice to the ideal of an independent judiciary and to the American people who count on an independent judiciary.

Because of this tendency, and because of her record, it seems as if Justice Brown's mission is not blind justice but political activism. The only thing that seems to be consistent about her overarching judicial philosophy is an unyielding belief in an unfettered free market and a willingness to consistently side with the powerful over the powerless.

Let's look at some of her speeches outside of the courtroom. In speech after speech, she touts herself as a true conservative who believes that safety nets—such as Social Security, unemployment insurance, and health care—have ''cut away the very foundation upon which the Constitution rests.''

Justice Brown believes, as has already been stated in the Chamber, that the New Deal, which helped save our country and get it back on its feet after the Great Depression, was a triumph of our very own ''Socialist revolution.'' She has equated altruism with communism. She equates even the most modest efforts to level life's playing field with somehow inhibiting our liberty.

For those who pay attention to legal argument, one of the things that is most troubling is Justice Brown's approval of the Lochner era of the Supreme Court. In the Lochner case, and in a whole series of cases prior to Lochner being overturned, the Supreme Court consistently overturned basic measures like minimum wage laws, child labor safety laws, and rights to organize, deeming those laws as somehow violating a constitutional right to private property. The basic argument in Lochner was you can't regulate the free market because it is going to constrain people's use of their private property. Keep in mind that that same judicial philosophy was the underpinning of Dred Scott, the ruling that overturned the Missouri Compromise and said that it was unconstitutional to forbid slavery from being imported into the free States.

That same judicial philosophy essentially stopped every effort by Franklin Delano Roosevelt to overcome the enormous distress and suffering that occurred during the Great Depression. It was ultimately overturned because Justices, such as Oliver Wendell Holmes, realized that if Supreme Court Justices can overturn any economic regulation—Social Security, minimum wage, basic zoning laws, and so forth—then they would be usurping the rights of a democratically constituted legislature. Suddenly they would be elevated to the point where they were in charge as opposed to democracy being in charge.

Justice Brown, from her speeches, at least, seems to think overturning Lochner was a mistake. She believes the Supreme Court should be able to overturn minimum wage laws. She thinks we should live in a country where the Federal Government cannot enforce the most basic regulations of transparency in our security markets, that we cannot maintain regulations that ensure our food is safe and the drugs that are sold to us have been tested. It means, according to Justice Brown, that local governments or municipalities cannot enforce basic zoning regulations that relieve traffic, no matter how much damage it may be doing a particular community.

What is most ironic about this is that what Justice Brown is calling for is precisely the type of judicial activism that for the last 50 years conservatives have been railing against.

Supreme Court Justice Scalia is not somebody with whom I frequently agree. I do not like a lot of his judicial approaches, but at least the guy is consistent. Justice Scalia says that, generally speaking, the legislature has the power to make laws and the judiciary should only interpret the laws that are made or are explicitly in the Constitution. That is not Justice Brown's philosophy. It is simply intellectually dishonest and logically incoherent to suggest that somehow the Constitution recognizes an unlimited right to do what you want with your private property and yet does not recognize a right to privacy that would forbid the Government from intruding in your bedroom. Yet that seems to be the manner in which Justice Brown would interpret our most cherished document.

It would be one thing if these opinions were confined to her political speeches. The fact is she has carried them over into her judicial decisionmaking. That is why the California State Bar Association rated her as ''unqualified'' to serve on the State's highest court. That is why not one member of the American Bar Association found her to be very qualified to serve on the D.C. Circuit, and why many members of the bar association found her not qualified at all.

It is also why conservative commentators, such as Andrew Sullivan and George Will, while agreeing with her political philosophy, simply do not see how she can be an effective judge. Here is what Sullivan said:

> She does not fit the description of a judge who simply follows the law. If she isn't a ''judicial activist,'' I don't know who would be.

Sullivan added that he is in agreement with some of her conservative views but thinks ''she should run for office, not the courts.''

Columnist George Will, not known to be a raving liberal, added recently that he believes Justice Brown is out of the mainstream of conservative jurisprudence.

Let me wrap up by making mention of a subtext to this debate. As was true with Clarence Thomas, as was true with Alberto Gonzales, as was true with Condoleezza Rice, my esteemed colleagues on the other side of the aisle have spent a lot of time during this debate discussing Justice Brown's humble beginnings as a child of a sharecropper. They like to point out she was the first African American to serve on the California Supreme Court.

I, too, am an admirer of Justice Brown's rise from modest means, just as I am an admirer of Alberto Gonzales's rise from modest means, just as I am an admirer of Clarence Thomas's rise from modest means, just as I am an admirer of Condoleezza Rice's rise from modest means. I think it is wonderful. We should all be grateful where opportunity has opened the doors of success for Americans of every background.

Moreover, I am not somebody who subscribes to the view that because somebody is a member of a minority group they somehow have to subscribe to a particular ideology or a particular political party. I think it is wonderful that Asian Americans, Latinos, African Americans, and others are represented in all parties and across the political spectrum. When such representation exists, then those groups are less likely to be taken for granted by any political party.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. OBAMA. Mr. President, I ask unanimous consent for a couple minutes to wrap up.

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

Mr. OBAMA. I thank the Chair.

I do not think that because Justice Brown is an African-American woman she has to adhere to a particular political orthodoxy, something that has been suggested by the other side of the aisle. Just as it would be cynical and offensive that Justice Brown be vilified simply for being a Black conservative, it is equally offensive and cynical to suggest that somehow she should get a pass for her outlandish views simply because she is a Black woman.

I hope we have arrived at a point in our country's history where Black folks can be criticized for holding views that are out of the mainstream, just as Whites are criticized when they hold views that are out of the mainstream. I hope we have come to the point where a woman can be criticized for being insensitive to the rights of women, just as men are criticized when they are insensitive to the rights of women.

Unfortunately, Justice Brown's record on privacy and employment discrimination indicates precisely such an insensitivity. I will give one example. In a case where a group of Latino employees at Avis Rent A Car was subjected to repeated racial slurs in the workplace by another employee, the lower court found that Avis, in allowing this to go on, had created a hostile environment. Justice Brown disagreed with and criticized the decision.

In her opinion, she wrote that racially discriminatory speech in the workplace, even when it rises to the level of illegal race discrimination, is still protected by the first amendment. This was despite U.S. Supreme Court opinions that came to the exact opposite conclusion.

Justice Brown went so far as to suggest that the landmark civil rights law, Title VII of the Civil Rights Act of 1964, could be unconstitutional under the first amendment.

I believe if the American people could truly see what was going on here they would oppose this nomination, not because she is African American, not because she is a woman, but because they fundamentally disagree with a version of America she is trying to create from her position on the bench. It is social Darwinism, a view of America that says there is not a problem that cannot be solved by making sure that the rich get richer and the poor get poorer. It requires no sacrifice on the part of those of us who have won life's lottery and does not consider who our parents were or the education received or the right breaks that came at the right time.

Today, at a time when American families are facing more risk and greater insecurity than they have in recent history, at a time when they have fewer resources and a weaker safety net to protect them against those insecurities, people of all backgrounds in America want a nation where we share life's risks and rewards with each other. And when they make laws that will spread this opportunity to all who are willing to work for it, they expect our judges to uphold those laws, not tear them down because of their political predilections.

Republican, Democrat, or anyone in between. Those are the types of judges the American people deserve. Justice Brown is not one of those judges. I strongly urge my colleagues to vote against this nomination.

The PRESIDING OFFICER (Mr. DEMINT). The Senator from Illinois.

Mr. DURBIN. Mr. President, I ask unanimous consent that the remaining time until 12 o'clock be allocated to me.

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

Mr. DURBIN. Mr. President, I thank my colleague. Naturally, I am a little bit inclined to be in his corner because he is from Illinois and he is my colleague in the Senate. But I also think what he demonstrated in his statement is the reason why he not only is so highly regarded in my State of Illinois, but across the Nation, despite his new status in the Senate. With his background as a professor of constitutional law and his life experience, he has brought special talents to this floor. I thank him for his eloquent statement on this important issue.

I guess most people are following this debate and are saying: What is the Senate doing? Why are they sitting around debating day after day, week after week about a handful of judges? Isn't there something more important to do? Shouldn't we be talking about the schools of America, whether they are doing a good job educating our kids? Isn't it about time Congress spends a few minutes talking about the cost of health insurance to businesses, to people working, to families? Why in the world won't somebody on the floor of the Senate stand up and talk about all the people across America who are losing their pensions, people working 25, 30 years, and they are losing everything? So why do they sit there hour after hour and day after day talking about a judge? What in the world is wrong with those people in the Senate? Are they so out of touch with ordinary families in America?

Good question. It is a valid question. We are spending entirely too much time on a handful of judicial nominees, nominees who, frankly, I believe personally, should never have been presented to the Senate in the first place. They are too radical, they are too extreme, they push the envelope. When it comes to the ordinary process where a President picks a judge, it is almost routine around here. Oh, we take a close look at this person. We want to know if that person is honest, has good temperament, has good legal skills, is somewhat moderate in their views, and if the answers to those questions are yes, that judge moves through the process quickly. There is not much to it.

In fact, take a look at the scorecard of what has happened with President Bush's judicial nominees: 209 of these nominees have almost skated through the process. It did not take any time at all. But over the last 4½ years, nine of them have run into resistance and debate, and that leads us to where we are today and where we have been for several weeks discussing nuclear options and constitutional crises and constitutional confrontations. It is because President Bush insists on sending some of the most extreme people to us for approval. If he picks moderate people, they fall into this category of 209 and move through here, but when some special interest groups get the attention of the White House and say, We have to have our person, then the process breaks down and the debate goes on. And instead of talking about issues that matter to the families of America, we end up consumed in this debate over a judge for the D.C. Circuit Court.

So you say to yourself: Why do you do this? Why do you spend all this time talking about one judge, for goodness' sake, out of the hundreds across America? There are several reasons.

No. 1, if you as a voter in America decide to choose a certain man or woman to represent you in Congress—either in the House or in the Senate—you are literally giving that person a contract to work for you, but it is a limited contract. In the House, it is 2 years. I will vote for you, they will swear you in, and I will watch you. If you do a good job, I may vote for you again. If you do a bad job, I will vote against you. It is 2 years in the House and 6 years in the Senate. It is a limited contract. So if I make a mistake as a voter and I choose someone to represent me in Congress and I watch him and say, Who in the world are they representing; they are not representing me or my family, I can try to correct that wrong in the next election—2 years in the House, 6 years in the Senate. The voters speak.

But when it comes to judges, it is a different world. When the judges go through this process and get the approval of the Senate, they are given lifetime appointments. If you love them, you have the benefit of their entire life on the bench committed to justice. If you do not like them, you are stuck with them for a lifetime, which means these men and women who go through this process are never reviewed again. Except for the most extraordinary cases of impeachment, they are there for life. So we take a little more time because this is an important decision. It is a lifetime appointment of someone to the Federal bench, and we should take the time to ask the most important questions, and we certainly should take the time when we find one who is so exceptional that it raises many questions about policy and philosophy.

We should take the time to ask hard questions, questions such as, Do we really want this person presiding on a Federal bench with all the power that brings for a lifetime if that person's views are so out of step with the rest of America? Is that what we want?

Secondly, this is an important court. I will say this: One could call all 100 Senators together today and give them a blank sheet of paper and ask them to write down the names of all the judges on the D.C. Circuit Court of Appeals, and I guess we could not come up with one or two. We kind of know who they are, but it is not as if we get up every morning saying: I wonder how that D.C. Circuit Court of Appeals is doing today. I wonder if they all showed up for work. I wonder what cases they are considering. No, it is not that. The D.C. Circuit Court of Appeals has a reputation. It has a reputation of being the launching pad for the Supreme Court. If one can get there, the highest regarded circuit court in America, they are one step away from the building across the street, the Supreme Court. And, yes, we do know the names of Supreme Court Justices, and we understand that many times each year they make decisions which can change America. So when we talk about the D.C. Circuit Court of Appeals, we are talking about a court with great potential for the judges on it, and we are talking about a court with jurisdiction over some of the most basic questions of government.

It is for those reasons, frankly, that we come to the Senate floor today to talk about Janice Rogers Brown. She is on the California Supreme Court. Of course, that is something that has been brought up many times as an indication of at least the voters in California having a positive view of who she is because they put her on the Supreme Court. But what they do not tell us about Janice Rogers Brown is that when she was first appointed to the California Supreme Court, she was judged not qualified by the Bar Association. Oh, they say, wait a minute, she was reelected with an overwhelming percentage. Ah, but that is not the whole story. She was not running against anybody. It is called retention. We have it in Illinois, too. What it means is you kind of run against yourself. It is not as if you run against another person. It is a ''yes'' or ''no'' vote on the ballot. Yes, she had a substantial percentage, but most judges running for retention do.

What we find in Justice Janice Rogers Brown is a person with such extreme views that it raises a serious question as to whether we want to give her a lifetime appointment to the second highest court in America, whether we want to position her for ascendency to the Supreme Court. That is what this boils down to. That is why this debate is beyond the usual debate.

President Bush's term will come to the end in 2008, absent some constitutional amendment, which I do not think will happen, and these judges, like Janice Rogers Brown, will be there long after George W. Bush is off to another career, whatever it happens to be. So we need to ask questions about who she is and what she believes.

What we do when we ask these questions is let her answer them. We have committee hearings where we ask the questions directly, but in other cases we ask the questions in hypothetical terms: What does she believe when it comes to certain things? We look to what she has said and what she has done for those answers.

When one looks at it, they find that she really is on the fringe. She is not a conservative; she is something else. She is something much more extreme. She has accused the courts of ''constitutionalizing everything possible'' and ''taking a few words which are in the Constitution like 'due process' and 'equal protection' and imbuing them with elaborate and highly implausible etymologies.'' Strip away the highfalutin language, and we get down to the bottom line.

The words ''due process'' and ''equal protection,'' which may be the foremost important words in that Constitution, she diminishes because she believes they have been used by courts to create rights. What does she say about the rights of Americans? Here is what she says: Elected officials have been ''handing out new rights like lollipops in the dentist office.'' She has complained that ''in the last 100 years, and particularly in the last 30, the Constitution has been demoted to the status of a bad chain novel.''

This is a woman who wants to sit on the bench and decide what the Constitution means, and the language she uses to describe what courts have turned to in this Constitution I believe gives us pause because we know that when it came 40 years ago yesterday, the Supreme Court across the street found what they thought was in our Constitution, though it was not explicit, and that was the word ''privacy.''

One can go through this entire Constitution and never find the word ''privacy.'' Forty years ago, the Supreme Court across the street was asked the following question: Can the State of Connecticut make it a crime for a married couple to buy birth control devices, pills, and other things? The State of Connecticut said: Yes, it is a crime, and we will send you to jail if you try to buy it, and we will send the pharmacist to jail who tries to fill the prescription.

Some people who are listening to this must be saying: The Senator from Illinois cannot be right. You mean it was against the law in Connecticut to even buy the birth control pill? Yes, it was.

So 40 years ago, the Supreme Court was asked: Can a State impose a law on its people so basic as to deny them the right to fill a prescription for birth control at a pharmacy? The Supreme Court across the street said: No, because we are dealing with a basic constitutional and human right of privacy. As an individual in America, one should be able to exercise their right of privacy to make their family decision when it comes to family planning. So in the case of Griswold v. Connecticut, 40 years ago yesterday, the Supreme Court said: We find in this Constitution the basic protection of your right of privacy. We do not care that some religious groups pushed through this statute in the State of Connecticut. They went too far. If they want to practice their religion, they can do that. But they cannot impose their religious views on every family who lives in Connecticut.

So today, 95 percent of families go to a drugstore and a pharmacy across America with no questions asked and buy basic family planning. They know what they want, and they are purchasing it. They have the right to do it because nine people sitting on the bench across the street said it is fundamental to being an American.

Listen to Janice Rogers Brown's view of what this Constitution says. Understand that when she faced the issue on whether there would be this basic right of privacy, she was the only dissenter on the California Supreme Court. Seven justices on the Supreme Court, six Republicans and one Democrat—she was one of the Republicans—she was the only dissenter. Here is what the case involved. It was the California antidiscrimination law providing health benefits for women. Janice Rogers Brown was the only dissenter. She argued that California could not require private employers to provide contraceptive drug benefits for women who wanted them. She ignored Griswold v. Connecticut. She ignored the inherent right to privacy. From her point of view, the State of California could prohibit the right of family planning information under health care plans sold in that State.

She wants to turn back the hands of time to a day when it became a legal struggle as to whether married men and women in this country could plan the size of their own families, or make the most intimate personal and private decisions without concern as to whether the Government would be watching over them and arresting them.

So when we say that Janice Rogers Brown is a danger if she comes to the D.C. Circuit Court, it is because she views the Constitution in such restricted terms that she could write out the conclusion of privacy which the Court found in Griswold v. Connecticut. That is how basic this is. That is how fundamental this is.

This is not just another judge in another court making decisions one will never hear about. It is a woman who is poised to move to the D.C. Circuit Court, the second highest court, one step away from the Supreme Court, whose view of America is very different than what we have seen across this country over the last 40 years when it comes to our basic rights of privacy.

The things she said about America trouble me, too. It is not just that she is conservative. President George W. Bush is conservative. He calls himself a compassionate conservative. He defends Social Security as an institution, though he sees its future a lot differently than I do. But when Janice Rogers Brown looks at Social Security and the other programs that came out of Franklin Roosevelt's New Deal, what she sees is socialism. Here is what she said. She calls the year 1937 ''the triumph of our own socialist revolution'' because the Supreme Court decisions that year upheld the constitutionality of Social Security. Is this a mainstream point of view? How many people do we run into who say we ought to get rid of Social Security because it is just pure socialism, it is too much government, we do not want to have Social Security there as kind of our last effort to provide a safety net for Americans? Janice Rogers Brown essentially reached that conclusion. Because of that extreme view, she became the poster child for the George W. Bush White House to put on the D.C. Circuit Court of Appeals. Why do we have to reach so far afield to find someone to fill this spot? Why do we have to turn to someone who is so out of touch with the mainstream of America?

These are not just her philosophical musings, things she dreams up and talks about among friends. This is how she rules on the bench. Given the opportunity, this is what we can expect in the future. She has been the lone dissenter in so many cases involving the rights of discrimination victims, consumers, and workers. Case after case, in 31 different cases, she was the only California Supreme Court justice to disagree with the majority. She said once in a speech: ''Since I have been making a career out of being the lone dissenter, I really didn't think anyone reads this stuff.''

Sorry, Justice, we do read it. Words matter, especially when they carry the weight of law and change human lives.

I am concerned not only about the views she has taken but the way she has expressed them. Justice Brown's extreme, often inflammatory rhetoric has no place on the bench. According to press reports, Justice Brown and the chief justice of her court are on such bad terms they do not even speak to one another; they communicate by memo. Boy, is that the kind of person we would like to have on a bench making big decisions, where she reaches the point where she cannot even talk to her fellow justice?

In her lone dissent in the case involving cigarette sales to minors, selling tobacco to kids, Justice Brown wrote: ''The result is so exquisitely ridiculous it, it would confound Kafka.'' She also wrote in her dissent in this case that ''the majority chooses to speed us along the path to perdition.''

Really? Regulating cigarette sales to kids is going to be leading us on the road to hell? Too much government? And they want this person to sit on the second highest court in the land and decide about safety and health for Americans? What a serious mistake.

The last point I make, as my time runs out, is one expected to be said by a Democrat on this side of the aisle, but not expected to have been read in the Washington Post on Thursday, May 26, in an article by George Will, a well-known conservative. He was very candid about Justice Janice Rogers Brown. He talked about the fact that she is one of the three who are part of the agreement here that is going to move forward. And he says:

> . . . Janice Rogers Brown is out of that mainstream. That should not be an automatic disqualification, but it is a fact: She has expressed admiration for the Supreme Court's pre-1937 hyper-activism in declaring unconstitutional many laws and regulations of the sort that now define the post-New Deal regulatory state. . . .

In a few words, George Will says it more elaborately.

She is out of the mainstream even for a conservative like George Will. If she is out of the mainstream for George Will and other conservatives, the big question today is whether five Republican Senators will agree with most Democrats that she should not be given a lifetime appointment to this bench to make the decisions and change the laws and try to reverse the course of America.

When it comes to matters of personal privacy, when it comes to programs as essential as Social Security, when it comes to protecting our children from tobacco companies and others who would exploit them, do we really want Janice Rogers Brown with the last word on the D.C. Circuit Court of Appeals? I think the answer is clearly no, and that is how I will be voting.

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

The PRESIDING OFFICER (Mr. ISAKSON). The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

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

Mr. MCCONNELL. Mr. President, in listening to our Democratic colleagues discuss the President's judicial nominees, I have often thought if I had a dollar for every time they use the words ''far right'' or ''extreme,'' I could one day retire a rich and happy man. Some have reached new heights, though, in histrionics and hyperbole in discussing the Janice Rogers Brown nomination.

For example, our very good friend from New York, Senator SCHUMER, actually said yesterday he could not think of any judicial nominee of President Clinton who was as far to the left as Janice Rogers Brown is to the right.

Just as an initial matter, many Senators on this side of the aisle have noted that 76 percent of Californians—that is not 76 percent of Texans, or 76 percent of Alabamians, or 76 percent of Georgians—voted to reelect Justice Brown to the highest court of our most populous State, not known as a bastion of conservatism.

That certainly belies the notion that she is too conservative for the Federal bench. And with respect to the remainder of Senator SCHUMER's assertion that there were no far-left Clinton nominees who should have been disqualified from judicial service in the way he would disqualify Justice Brown, it seems to me our friend is suffering from a little memory loss. I can think of a number of Clinton nominees who were very much on the far left of the political spectrum and yet who, today, wear the robe of a Federal judge. My friend from Alabama has mentioned Judge Paez, for example. Senator SESSIONS noted that Judge Paez once remarked that a judge ought to be an activist. Judge Paez said a judge ought to be an activist if he believed the legislature was failing to address a problem. That, as Senator SESSIONS points out, is the virtual definition of judicial activism.

There are quite a few other Clinton judicial nominees who reside over on the political ''Left Bank.'' I do not have the time now to go through all of them, but I would like to discuss one, just one Clinton nominee in particular, a nominee with whom we are all very, very familiar. At the time of her confirmation, she had previously made numerous provocative statements and public policy pronouncements. Even when looked at today, almost 30 years removed from when they were first made, these statements are certainly not, by any standard, mainstream. But our Democratic colleagues did not argue then, and I doubt they would argue now, that these statements disqualified this Clinton nominee from Federal judicial service.

I speak of Supreme Court Justice Ruth Bader Ginsburg, whom I supported. Let me note that Justice Ginsburg is a learned and experienced judge. As I just indicated, I and the vast majority of our colleagues voted for her. In 1993, she was approved 96 to 3 for her current position on the Supreme Court. We did so, even though in her private capacity she had made some very thought-provoking comments on public policy issues. She theoretically mused. These kinds of theoretical musings frequently occur, as we all know, in academia and other extrajudicial writings. This is a good thing, frankly, in terms of having a healthy marketplace of ideas. While people's opinions should be considered in evaluating their fitness for the bench, the fact that someone makes a thought-provoking comment is not necessarily a reason to bar them from judicial service. This appears, however, to be the standard our Democratic friends would apply to Justice Brown.

So I ask my friends, what would be their view of Justice Ginsburg, under

the new standard that they seek to apply to Justice Brown? For my friends on the other side of the aisle whose recollections may be just a bit foggy, let me remind them of some of her thoughts. She once proposed—this is Justice Ginsburg, for whom I voted and who has had a distinguished record on the Supreme Court. We are not arguing about that. But she once proposed abolishing Mother's and Father's Day in favor of a unisex ''Parents' Day.''

She also called for making prisons and reformatories co-ed, and sex integrated.

She argued that restrictions on bigamy were of questionable constitutionality, and she opined that the U.S. Constitution might guarantee a right to prostitution.

She argued that there is a constitutional entitlement to have the Government pay for abortions. And, incidentally, when she made this assertion, the Supreme Court had ruled not once but twice that there was no constitutional right to have taxpayers pay for abortions.

Justice Ginsburg has even suggested that statutory rape laws were discriminatory, and that the ''current penalty of 15 years for a first offense is excessive.'' She also suggested the adoption of a statute that would, among other things, lower the age of consent for sexual activity to age 12.

Given their past enthusiastic support for Justice Ginsburg's nomination—a nomination which I also supported—compared to their current vigorous opposition to Justice Brown's nomination, our Democratic colleagues must be saying one of two things: Either they believe that Justice Ginsburg's musings about a possible constitutional right to prostitution and the need to abolish Mother's and Father's Day and all the rest are in the mainstream—they either believe those comments are in the mainstream, or they are saying it is OK for a Democratic nominee to the Nation's highest court to make provocative statements like that, but it is not OK for a Republican nominee to a lower court to make thought-provoking statements about policy issues.

I would be surprised if my Democratic colleagues believed that these various musings of Justice Ginsburg were in the mainstream. In fact, I think they don't believe they were in the mainstream. So what we must have, then, is truly a double standard.

I see my friend from Alabama is on the floor. I ask if Senator SESSIONS is seeking time?

Mr. SESSIONS. Mr. President, I ask if the Majority Whip will yield for a question?

Mr. MCCONNELL. I am happy to yield.

Mr. SESSIONS. I thank him, first, for his insightful remarks. It is certainly appropriate and important that we distinguish between an American citizen's right to speak and say things that may be on their heart at a given time and maybe later they are not so sure they agree with. But we don't want to intimidate Americans and say you can never be a Federal judge if you don't say anything but vanilla statements your entire life. I thank him for his wise insight there.

It does seem we have a double standard here. It seems there has just been a deliberate effort to go back and sift through, bit by bit, line by line, speeches and statements and writings of nominees to try to take them out of context and make them appear to be extreme when her record is one of mainstream, effective service. Justice Ginsburg was not a nominee, certainly, that I would choose to nominate for the Supreme Court, but the Senate did not bar her from service on the Court, the highest court in this land, because of her extrajudicial statements that you just mentioned that are quite unusual, that she made in law review articles and such, even though her thoughts and comments were out of the mainstream.

I was not there at the time and the Senator was. But was it not true that, at her confirmation hearing, Justice Ginsburg swore under oath she would follow the law, and was it not also true that during her service on the D.C. Circuit Court of Appeals she often voted with Judge Bork and other conservative judges? In other words, just because she made these statements, once she put on that robe and read the briefs of the parties, she had some record that indicated she was committed to the rule of law?

Mr. MCCONNELL. The Senator from Alabama is absolutely correct. She swore she would uphold the law. You are absolutely right. When she put on the robes, she was no longer sort of musing and making provocative thoughts; she was making law. In fact, I think the record reflects that one year on the D.C. Circuit, before she was elevated to the Supreme Court, then-Judge Ginsburg on the D.C. Circuit voted with then-Judge Scalia 95 percent of the time and voted with Judge Bork, believe it or not, 100 percent of the time—100 percent of the time. That, in spite of the fact that she had made some rather provocative—I think we would all agree—observations on a variety of different issues that I expect the Senator from Alabama, and I, and the Senator from Georgia in the chair, and I bet virtually everybody on the other side of the aisle would consider way outside of the mainstream to the left.

Mr. SESSIONS. I couldn't agree more with the Senator from Kentucky. That whole insight and principle cannot be lost here. We can't expect people to be just ''Milquetoast'' human beings and never engage in debate over important issues in America and never make a provocative statement or they cannot be confirmed to the Federal bench. Frankly, as one who practiced a lot of law, and I note the distinguished Majority Whip has, as well, the true test of a judge is: Will they study the law and will they be faithful to it? Will they read it and study it?

But with regard to these statements, wouldn't you say that compared to what you have mentioned, and some of the statements made by some of the Clinton nominees, that Justice Brown's statements are mild, indeed?

Mr. MCCONNELL. I would certainly agree. I know that Senator BOXER made much ado about the fact that Justice Brown had dissented 31 times on the California Supreme Court. But our good friend from California neglected to mention that this puts Justice Brown about in the middle of the pack, in terms of the number of dissents issued on the California Supreme Court. In addition, I would point out to my good friend from Alabama—because of the esteem in which she is held by her peers out there on the California Supreme Court—Justice Brown was selected to write the second-highest number of opinions on the court, second only to the Chief Justice of that court. And numerous California jurists have, to put it mildly, enthusiastically endorsed this nomination—the people who know her best.

Mr. SESSIONS. I couldn't agree more. As I recall from the letter that was sent to Senator HATCH, then-chairman of the Judiciary Committee, all of her colleagues on the California Court of Appeals, which is just below the Supreme Court of California, have supported her, and four of the six sitting Justices on the California Supreme Court have overwhelmingly, strongly advocated for her confirmation. It seems to me the idea that she is out of the mainstream is farfetched and stretched.

I will ask one more question of the Senator. Isn't it true and isn't it sad that in this attempt to portray this nominee and others in a negative light, that there has been, unfortunately, a tendency to take things out of context? And isn't it true that some of these statements, that might seem a bit strange or hard to understand, are not so hard to understand in the context of the entire remarks? Would the Senator agree that is a problem today in the Senate?

Mr. MCCONNELL. I think the Senator from Alabama is entirely correct. It is simply amazing for our Democratic colleagues to say that Justice Brown, for example, has embraced the Lochner decision, when she has taken the opposite position and written in a published opinion that Lochner was a ''usurpation of power'' and the Lochner court seemed to believe it could ''alter the meaning of the Constitution as written.'' Indeed, many times her position has been essentially misrepresented.

To get back to the basic point of our exchange, we ought not hold against nominees—particularly those who have written a good bit, published a good bit—their provocative statements. We clearly did not do that against Justice

Ruth Bader Ginsburg, nor should we have. We ought not do that in this unfortunate attempt to demonize Justice Janice Rogers Brown, who has had by any standard not only an outstanding life story but an outstanding record on the California Supreme Court.

I thank my friend from Alabama for being here during this discussion. We hope this will help put the whole issue of provocative musings and writing into context as a relevant factor in considering how we are going to vote to confirm judicial nominees.

Mr. SESSIONS. If the Senator will yield, I will follow up on that.

I remember President Clinton nominated quite a number of justices, judges, who were active members—some lawyers—for the American Civil Liberties Union. If you look at the American Civil Liberties Union Web site, they favor and believe the Constitution allows the legalization of drugs; that there cannot be a law against legalization of drugs.

They oppose all pornography laws—even child pornography laws—on their Web site.

We confirmed Marsha Berzon from California. She was chairman of the litigation committee of the ACLU. There were quite a number of other members of the ACLU. We gave them a fair hearing. We asked their views. Some were answered satisfactorily to my view and some were not. Fundamentally, the question was, will you follow the law of the Supreme Court? Will you be faithful to those laws? Do you have a good reputation among your colleagues? Have you a record of integrity and achievement?

Most of those judges, virtually all of them, were confirmed.

Mr. MCCONNELL. The Senator from Alabama is correct, and Berzon and Paez were the poster children for nominees out of the mainstream to the left, yet the Senator from Alabama and others, and myself, joined in making sure these two nominees—dramatically out of the mainstream, to the left—got an up-or-down vote in the Senate. When they did, they were confirmed.

Mr. SESSIONS. I thank the Senator for his wisdom and his fine comments today.

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. SESSIONS. Mr. President, may I take a few minutes to go over some of the concerns that have been raised about Justice Janice Rogers Brown's rulings on some cases?

As the Senator from Kentucky and I discussed, some of her statements have been taken out of context. It is not fair. We ought to be fair to nominees. We ought to be sure their reasoning, their thought processes, the context of what they are doing, is brought to the attention of the American public before we start twisting it to make them look like someone who is not in the mainstream.

I will talk about a couple of things; there are many we could talk about. I will mention a few cases specifically that have been referred to by the attack groups that are attempting to put down these nominees, and by Senators who have picked up on it—maybe they are not lawyers, maybe they are—but perhaps have not fully comprehended what the case is about or have been careless with the facts.

One of the charges some have heard, I think made again today, is that Janice Rogers Brown opposes all zoning laws. That is not true. That is absolutely not true. One Senator, I believe Senator DORGAN, said she believes that zoning laws are the equivalent of theft and are unconstitutional. That is not true. That is not a fair characterization of her record.

This is what the San Remo case was about. First, she never said the zoning laws were unconstitutional. But the San Remo case in California came before her. It involved a Draconian, overreaching zoning law that forced hotel owners—I know the Presiding Officer has had some association with real estate—forced hotel owners who wanted to convert low-income residential units to hotel units to pay a large fee or replace the residential units that would be lost. It was a takings case. It was a question of whether this zoning law had taken away the ability of private property owners to use their property to the highest and best use.

That is a big deal in America today. Even the liberal Supreme Court of California was troubled by it. It was a 4-to-3 vote. Justice Brown was one of the three, but she was not the only one who dissented from this rule. Her dissent was consistent with U.S. Supreme Court precedent on property.

The classic case, not too far from the State of Georgia, was North or South Carolina. The person bought a lot on the beach, paid a lot of money for this, was going to build a dream home on the beach. They came along and said: We are going to rezone this and you cannot build a house on the beach.

He put all of this money in a lot that he was going to build his dream house on and they said: You can keep the sands, Mr. Property Owner, but you cannot build a house on it. The Supreme Court of the United States of America said—and the same principle I believe applies in California—that this was an effective taking of the value of that property.

If the Government wanted to take it and make it a wildlife refuge, they ought to take the property and pay them the fair market value for it. But what the zoning guys wanted to do, you see, is just say: You cannot use it. You cannot do anything with it. You have to do with it what we want you to do with it, but we are not going to pay you a dime for the ability to have that property set aside for what we want it to be set aside for.

That is why people who are concerned about property rights in America are upset about the abuse of zoning. But normal zoning goes on every day. And there is not one shred of evidence that Janice Rogers Brown opposes all zoning. In fact, she, as I said, had two other judges join with her in that important case. Justice Brown, in the case, complimented the State of California for having a laudable regulation to try to provide more housing opportunities for low-income individuals. She said that in her dissent, but noted that the California takings clause precluded the Government from achieving that goal by police power regulation.

Another case that still bothers me—I mentioned it yesterday; and it is worth talking about again—is the Aguilar case. Senator BOXER and I think maybe others on the floor have said that Justice Brown, an African American, the daughter of a sharecropper from rural Alabama—she grew up not too far from where I grew up—had said, in her opinion, that it was OK for Latinos to have racial slurs uttered against them in the workplace, that that was the position of Justice Janice Rogers Brown.

Now, this was the case of Aguilar v. Avis Rent A Car System. It involved a court injunction that barred a manager of the company from using various racial epithets in the future, raising grave first amendment concerns as a prior restraint. Justice Brown, in her dissent, stated: ''Discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.'' As to the specific slurs, she called them: ''disgusting, offensive, and abhorrent.''

In her dissent, however, she relied on the precedent of the Supreme Court of the United States, in expressing her concern about an injunction that placed an absolute prohibition, a prior restraint, on speech. Again, the court in this case was divided, 4 to 3. One of the dissenters who joined with her was the liberal icon, Justice Stanley Mosk—her colleague on the bench who is recognized as one of the great, most prominent liberal judges in America—because speech is important.

I offered into the RECORD Monday an article by Nat Hentoff in which he dealt with this particular case. He is a great civil libertarian lawyer. He has committed his life to American civil liberties. He believes in free speech. He said the majority opinion in Aguilar was an outrage, that it was totally wrong, that she was exactly correct, that this was a prior restraint of free speech that could not be done under these circumstances. So saying that Justice Brown believes it is OK for Latinos to have racial slurs uttered against them in the workplace is not a fair thing to be saying about her.

Senator BOXER also argued against Janice Rogers Brown, saying that Brown ''argued that messages sent by an employee to co-workers criticizing a company's employment practices was not protected by the First Amendment. In other words, you can't use your e-mail to write anything about your employer to another employee.''

That is what Justice Brown has been accused of doing in her role as a judge. But the truth of the case is quite different from that. Senator BOXER is apparently referring to Intel v. Hamidi. It involved a disgruntled employee who flooded Intel Corporation's servers with over 200,000 spam E-mails, a costly disruption of the business. It raised serious nuisance and trespass to chattel issues. The question in the case was whether you could commit a trespass to chattel through electronic communications. The California Supreme Court said no because there were no damages to the computer system nor impairments to the way it functioned. Justice Brown's dissent noted that Intel had invested millions of dollars to develop and maintain its computer system to enhance the company's productivity and had a right to protect that property from unauthorized abuse by 200,000 spam e-mails. It was a 4-to-3 vote, again. Two justices on the California Supreme Court joined with her.

This is not an extreme position to take, for heaven's sake. She again found herself on the side of liberal Justice Richard Mosk. He argued that the injunction should have been upheld because he was intruding upon Intel's proprietary network and his e-mails were equivalent to, according to Judge Mosk, ''intruding into a private office mail room, commandeering the mail cart, and dropping off unwanted broadsides on 30,000 desks.'' That is what the liberal Justice Mosk said in agreeing with Janice Rogers Brown.

So, goodness, it is a sad thing that we have to deal with these kinds of distortions of a fine justice's record. If this is all they can find to complain about, statements that are perfectly normal and proper, then there must not be much out here against this nominee. One Senator says: ''If a minority claims they are being discriminated against, she is nowhere to be found.''

Well, first of all, she is a minority. She left Alabama, I am sure, in some part, because when she was young, segregation was afoot and discrimination was very real to African Americans. She went to California. She commenced her legal career and her education and became a member of the California Supreme Court. But he accuses her of not being found on discrimination. But what about her lone dissents? She authored a lone dissent in People v. McKay, where an African American man was riding his bicycle the wrong way on a street and the police stopped him, searched him, found drugs and prosecuted him. She said that was racial profiling. She was the only one who said that. Who was standing up for someone who could have been a victim of discrimination? Janice Rogers Brown.

Another Senator said that ''she favors the powerful over the powerless.'' But how about her lone dissent in In re Visciotti—only she dissented in this case—where she said a defendant's death sentence should be overturned, because the defendant did not have an adequate counsel, he was given ineffective assistance of counsel. She was very vigorous in her dissent in explaining why she thought it was inadequate and why she thought this individual deserved a new trial.

Well, those facts, to me, do not indicate we have a justice who is out of the mainstream or a justice who is not willing to defend individuals with no power, no prestige, no money, those who deserve a fair hearing by a court. It is clear she is willing to give it to them, to give them that fair hearing, and to dissent even if six other justices on the liberal California Supreme Court do not agree with her. So the other justices did not agree, but she stood up for these people. That is her record. That is her heritage.

She is a wonderful, wonderful nominee. I am pleased she is up. Hopefully, we will get her nomination confirmed today, and she can take her place on the federal courts of the United States. It will be a good day for America and a proud day for the people of Alabama who have seen her do well.

Mr. President, I see my colleague from Mississippi, Senator LOTT. I yield the floor.

The PRESIDING OFFICER. The Senator from Mississippi.

Mr. LOTT. Mr. President, I thank the Senator from Alabama, Mr. SESSIONS, for his leadership on the Judiciary Committee and his aggressive support for this fine nominee to serve in our Federal judiciary.

It is a great pleasure for me to rise today in support of the confirmation of the Honorable Janice Rogers Brown to the U.S. Court of Appeals for the DC Circuit.

There are a lot of people who I would like to commend and congratulate for bringing us to this point of justice for a very fine nominee to our Federal judiciary. We can be critical of how we reached this point, the so-called compromise that was developed by the 14 Senators who came together. You can give credit to the leaders in both parties in certain respects. But the fact of the matter is the Senate voted finally to give Justice Brown an up-or-down vote. I am proud of that.

I think the Senate should take some pride and credit for allowing this nominee to reach this point in the debate and in the voting process. I was pleased, yesterday, to see that 65 Senators voted to invoke cloture to bring this nomination to an up-or-down recorded vote. So a lot of people deserve credit, and I want to make sure they have it. I want to thank them for it.

I also want to ask for the forgiveness of this nominee for the way she has been treated. I do not think this has been one of the Senate's proudest hours.

I think this nominee has such an outstanding personal story to be told, and I will not repeat the history of where she was born and where she was educated and what she has been through, but she has lived the American dream, and she has lived it well. She did not just complain about her status. She worked and got an education. She applied herself. She has been given opportunities, and she has taken advantage of them.

I am proud to say I support her nomination. I think she will make an excellent judge. I really do believe most opposition to her has just been simply the fact that she is an African-American conservative woman. I do not think we should vote for or against judges because they are conservative, moderate, or liberal. I think we should vote on them based on their background, their education, their experience, their decorum. Do they have the ethics for the job? Do they have conflicts of interest?

If they meet all of those qualifications, in my opinion, they should be confirmed. That is what Presidential elections are about. They are about electing men or women to that office who will nominate people to the Federal judiciary who agree with their philosophy. When President Clinton nominated people to the Supreme Court—and I have said this before, but I repeat it again—when he nominated Ruth Bader Ginsburg to the Supreme Court, I knew I did not agree with her philosophy. I knew I would not agree with many of her decisions in the Supreme Court. But she was qualified by experience and by education, by every criteria that we should evaluate, and I voted for her. I voted to confirm other judges whom I did not agree with philosophically.

There have been attacks on Justice Brown that she has a philosophy of life, certain moral values, as though that is disqualifying. I do not understand that. Are we not entitled to our opinions, personal opinions, even as judges, let alone as Senators? We certainly have ours and express them routinely. I think judges have a right to have personal and private lives and to be able to give a speech in which they state positions which may not necessarily be reflected in reasoned decisions as judges. You can have an opinion, but if the law is on the other side, you have to rule that way. There was a recent decision by a Federal district judge in my own State that I don't agree with, and I know he doesn't agree with it personally. But he upheld the law in a very reasoned decision. That is what has happened with Justice Brown. She has strong beliefs based on her life experience, but she hasn't tried to impose those in an unfair way as a member of the California Supreme Court. Yet she is attacked—attacked relentlessly and, in my opinion, unfairly and inaccurately on many occasions.

For instance, she has been attacked here for a quote in her dissent in Stevenson v. Huntington Memorial Hospital in which she distinguished age discrimination from race discrimination. Based on this quote, they suggest Justice Brown doesn't believe in public policy against age discrimination. To draw this conclusion based on what Justice Brown wrote is as wrong as making the same accusation against the U.S. Supreme Court, which drew the same distinction in Massachusetts Board of Retirement v. Murgia, a case Justice Brown cited.

It should be added that both Justice Brown and our Nation's highest court are correct. All of us will eventually get old, and we have parents and grandparents. But most of us will never know what it is like to be Black or Hispanic in America, to be pulled over for no reason other than your skin color, to have grandparents or parents who did not get to go to college or even sit at the same lunch counter or drink from the same water fountain.

These charges are totally out of line with other decisions that she cited and with her own life experience.

She has been attacked for opposing Social Security and Medicare as socialist programs that should be reversed. This is completely untrue. Not a single opinion of hers suggests that she opposes these programs. In fact, the ranking member of the Judiciary Committee directly asked her whether she regards New Deal programs such as Social Security, labor standards, and the Securities and Exchange Commission as socialist, and she replied, unequivocally, ''no.'' Has she raised some questions about some of those programs in her private speeches or even her public speeches? Perhaps so. I think it could be done on a principled and substantive basis. But, again, that doesn't disqualify her. If you look at the reasoning she has used while a member of the California Supreme Court, you will see that she cites the law and upholds the law. What she may have said in some speech should not disqualify her.

Senators here have cited a list of interest groups who oppose Justice Brown. But consider this. She is on the Supreme Court in California, not exactly a hot bed of conservatism or moderation. She was retained by the California voters by a margin of 76 percent of the vote, the highest margin of the four California Supreme Court justices on the ballot, six points higher than Stanley Mosk, a well-known liberal jurist in the State, and higher than California's chief justice. The people believe she is a good supreme court justice, qualified, and has been rational and moderate in her views on the supreme court, or they wouldn't have voted for her with 76 percent of the vote.

She has been attacked for her dissent in a case against companies that sold cigarettes to children. The truth is, Justice Brown clearly wrote in her opinion that selling cigarettes to minors is against the law and those guilty of it should be punished.

To suggest that she did not feel this way is totally inaccurate. Yet that has been said on the floor of the Senate during the days of debate we have had.

There are some people who don't exactly share her views who have endorsed her. I read one newspaper column being very critical of her, saying she should not be confirmed. But it went on to say that she has routinely written the decisions of the court, that her decisions are interesting, almost lyrical, and very professional. Yet you maintain in the same column she is not qualified?

In fact, in a recent column, law professor Jonathan Turley, a self-described pro-choice social liberal, points out that ''Brown's legal opinions show a willingness to vote against conservative views . . . when justice demands it'' and that Democrats should confirm her.

Even though Justice Brown has expressed personal opinions against too much government regulation, she has consistently voted to uphold regulations in every walk of life. You mean to tell me that you are disqualified for the Federal judiciary if you think that there are too many government regulations? I certainly believe there are. I would hope that we would have Federal judges that would quit compounding it by writing more and more regulations of their own.

Justice Brown joined in an opinion upholding the Safe Drinking Water and Toxic Enforcement Act of 1986, and expansively interpreted the act to allow the plaintiffs to proceed with their clean water claims. Justice Brown upheld the right of plaintiffs to sue for exposure to toxic chemicals using the Government's environmental regulations. Justice Brown upheld California's very stringent consumer safety standards for identifying and labeling milk and milk products, thereby ensuring that the government has a role in protecting the safety of our children and all Californians.

Justice Brown joined in an opinion validating State labor regulations regarding overtime pay. The list goes on and on and on.

I believe Justice Brown has been very unfairly charged. She is highly qualified. Some would even maintain she has been willing to take this abuse and to step down to this court that is not superior to the one on which she now sits. She has been willing to go through this crucible to be confirmed. She should be confirmed. I am pleased to see a woman, a nominee of this caliber, with her American life story, be nominated. I believe, and I certainly hope, she will be confirmed. I think that history will prove that she will be an outstanding member of the Federal judiciary.

I ask unanimous consent to place further examples of rulings by Justice Brown in the RECORD.

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

In Hamilton v. Asbestos Corp., she authored the court's opinion on a statute of limitations issue that allowed an injured plaintiff more time in which to file a personal injury claim against various asbestos defendants.

In County of Riverside v. Superior Court, she wrote the court's opinion holding that, under the Public Safety Officers Procedural Bill of Rights, a peace officer is entitled to view adverse comments in his personnel file and file a written response to a background investigation of the officer during probationary employment.

Ramirez v. Yosemite Water Company, she joined in the court's opinion validating State regulations regarding overtime pay.

In Pearl v. Workers Compensation Appeals Board, she upheld the role of the Board in applying a stringent standard of ''industrial causation'' for a worker's injury, validating the state's role in ensuring worker safety.

And in McKown v. Wal-Mart Stores, she wrote, again for the court's majority, that the employer of an independent contractor is liable for injury to the independent contractor's employee caused by the employer's negligent provision of unsafe equipment.

Mr. LOTT. I yield the floor.

The PRESIDING OFFICER. The Senator from Oregon.

Mr. SMITH. Mr. President, I come to the floor to speak on behalf of a woman I have never met, Janice Rogers Brown. I do so also to note the delicious irony in the recent comments by the chairman of the Democratic National Committee, former Governor Howard Dean. I am told that yesterday Mr. Dean said:

> Republicans are not very friendly to different kinds of people. They are a pretty monolithic party, behave the same, and they all look the same. You know, it is pretty much a white Christian party.

The delicious irony is that we have been here arguing on behalf of an African-American woman of great distinction for over 4 years. Other names like Miguel Estrada come to mind, and the fights we have had to confirm members to the Federal judiciary of all walks of life, of all kinds of diversity, of all kinds of hyphenations, if you will, who happen to be Republicans, who happen to be conservatives, but certainly represent every race, every ethnic background, and every national origin. Yet the chairman of the Democratic National Committee would make a statement like that. That is something that should not be missed by the American people.

I am not a terribly partisan person. I, frankly, think the American people are deeply weary of all the partisan bickering and name calling. But I also want to note the contrast of style between Chairman Dean and Chairman Mehlman of the Republican National Committee. Ken Mehlman has gone out of his way to speak at African-American universities, to speak to all kinds of groups, to include them in the Republican Party.

I also want to make this comment. When I read the other day Chairman Dean's saying ''I hate Republicans,'' I

want to say that I do not hate Democrats. Some of the finest people in this Chamber sit on that side of the aisle. They are my friends, as are my Republican colleagues. This kind of hate speech really doesn't have a productive place in our political discourse. It is important to recognize the humanity of Republicans and Democrats and the diversity that each party has as they try to include majorities of the American people.

I, for one, am tired of the bravado. I am tired of the hyperbole. I am tired of the name calling. But I do want to say that we in the Republican Party are trying to include people, women and minorities, who have historically been kept out of public service and much of the benefit of American law in our history. And I do not think that should be condemned. I think that is to be celebrated when both parties do that.

I, for one, see the Republican Party and our chairman doing that in a dramatic and constructive way. Chairman Dean's comments are not worthy of the great Democratic Party. I am not here to pick a fight with him, but I do want to note that I and others, particularly on the Judiciary Committee, have for a long time been waging the fight for an African-American woman who deserves to be confirmed to the DC Circuit Court of Appeals.

Any fair reading of Justice Brown has to remember that for over 25 years she has provided public service through her legal skills. She has most recently been a member of the California Supreme Court, since 1996. She is the first African-American woman to sit on that court. Prior to her appointment to the California Supreme Court, she was an associate justice of the California Court of Appeals. From 1991 to 1994, she served as a legal affairs secretary to a former colleague of ours from California, the former Governor Pete Wilson. Her office monitored all significant State litigation and had general responsibilities for acting as legal liaison between the Governor's office and executive departments. She performed the heavy duties of her office with unfailing fidelity. And Governor Wilson wrote in his letter to UCLA's nominating committee:

She often told me what I did not wish to hear.

In her 9 years on the California Supreme Court, Justice Brown has earned a solid reputation of being fair and competent in her jurisprudence and as one who is committed to the rule of law. In fact, it needs to be said again and again what was written of her by 12 of her current and former colleagues in the California judiciary. It is a bipartisan group, as many Democrats as Republicans. They wrote:

Much has been written about Justice Brown's humble beginnings, and the story of her rise to the California Supreme Court is truly compelling. But that alone would not be enough to gain our endorsement for a seat on the federal bench. We believe that Justice Brown is qualified because she is a superb judge. We have worked with her on a daily basis and know her to be extremely intelligent, keenly analytical, and very hard working. We know that she is a jurist who applies the law without favor and without bias, and with an even hand.

It is notable what many of her colleagues have said before. She was born in 1949 in Alabama to sharecroppers. She attended segregated schools and came of age in the midst of Jim Crow laws. Jim Crow laws were not a product of Republicans.

Janice Rogers Brown, however, is a conservative. Some conservatives, of course, have stated that she is more of a libertarian than a conservative. But I guess that is bad enough as far as liberal Democrats are concerned. At the heart of her judicial philosophy is the notion that property rights and economic liberty deserve judicial protection.

In an opinion on a California rent control ordinance, Justice Brown stated in her dissent:

. . . arbitrary government actions which infringe property interests cannot be saved from constitutional infirmity by the beneficial purposes of the regulators.

That is, the government and politicians cannot arbitrarily take away a person's right to property for the ''common good.''

Critics charge that Brown will be unable to separate her personal ideology and philosophy from judicial rulings.

Justice Brown has stated:

I do recognize the difference in the role between speaking and being a judge.''

I urge the confirmation of this distinguished African-American woman and ask my colleagues to support her.

The PRESIDING OFFICER (Mr. CHAFEE). The Senator from Massachusetts is recognized.

Mr. KENNEDY. Mr. President, Janice Rogers Brown should not be confirmed to the D.C. Circuit. I listened to the eloquent statement of my friend from Oregon. This is not an issue where we are voting on a life story. What we are talking about is a vote for a nominee to the D.C. Circuit and whether that person's votes will be consistent with our constitutional values and will that person have an understanding of the very special role the D.C. Circuit has in interpreting the laws which have been passed by the Congress and which are subject to the D.C. Circuit Court's interpretation. That is enormously important because there are so many of those laws that provide important protections—for example, OSHA legislation and whether we are going to have safe working conditions for workers.

As a result of the passage of the OSHA legislation, across this country we have seen a reduction in the number of deaths of workers in plants and factories and construction reduced by half. We have made progress. There are those forces who want to weaken OSHA because many of the companies believe the penalties under OSHA are a cost of doing business, and this puts workers at risk.

These very important legal issues and questions interpreting the legislation which we have passed and have updated are the same ones that will come to the D.C. Circuit.

As impressive as the life of this nominee is, if we are really interested in what is going to happen in the D.C. Circuit as it affects constitutional rights and liberties, as well as legislative actions we have taken, it is fair to insist that the person who is nominated is going to have a core commitment to the constitutional values and also a healthy respect for actions that have been taken by Republicans and Democrats and legislation that has been signed by the President. Using either of those standards, this nomination fails. I wish to take a few moments to elaborate on that issue.

The D.C. Circuit is widely considered the second most important court in the country after the Supreme Court. It is the court that most closely oversees the actions of Federal agencies, and its duty is to give a fair hearing in cases on governmental protections, environmental laws, civil rights, workers' rights, and on public health and safety. Nominees to this important court should have a clear commitment to upholding the law in these areas. And Janice Rogers Brown's record shows not only that she lacks the commitment but that she is hostile to any form of governmental action.

Although located here in the District of Columbia, the D.C. Circuit affects all Americans because its decisions have broad national impact. Some cases, such as those involving review of national air quality standards under the Clean Air Act and national drinking water standards under the Safe Drinking Water Act, can only be heard in the D.C. Circuit.

In this country over the last 4 years, we have doubled the deaths of asthmatic children in this Nation. Why? I think we can point to it: because of the relaxation and the change in the Clean Air Act and the relaxation of rules and regulations. As a result of that, children in downwind States from a lot of these companies that are burning toxins have experienced a dramatic increase in breathing difficulty and in asthma deaths. That is directly attributable to the change in the rules and regulations of the Clean Air Act. When there are new rules and regulations to the Clean Air Act and they are challenged, they go to the D.C. Circuit. The D.C. Circuit makes a judgment that will have a direct impact, for example, on whether your child or children may very well have enhanced problems with asthma.

I have a chronic asthmatic son who happens also to be a Congressman. I follow this issue very closely. I know what has been developing over recent times in terms of the relaxation of the Clean Air Act. We can directly attribute that to the relaxation of rules and regulations. Those judgments and decisions are made virtually jointly by

the administration with Executive orders and, secondly, by the D.C. Circuit. That is illustrative of the range of different issues that come before the D.C. Circuit Court.

Some cases, such as those involving the review of national air quality standards under the Clean Water Act and the national drinking water standards under the Safe Drinking Water Act, can only be heard in the D.C. Circuit. We know about the dramatic increase in mercury that is taking place in streams all across this country. It has had a devastating impact on the fish and the ecosystems of so many of the rivers. That has been ingested. It provides an important health hazard for expectant mothers. Those happen to be the health implications as a result of individuals who do not have a strong commitment to issues involving the clean drinking water legislation that has been passed by the Congress.

This court also hears the lion's share of cases involving rights of employees under the Occupational Safety and Health Act and the National Labor Relations Act. As a practical matter, because the Supreme Court can only review a small number of these lower decisions, the judges in the D.C. Circuit often have the last word on these important rights.

Other cases end up in the D.C. Circuit because the party bringing the appeal is allowed to choose to have the case heard there. That is true, for instance, in appeals of the National Labor Relations Board involving fair working conditions. So people from California to Alabama, Texas to Massachusetts, often find their cases decided by the D.C. Circuit.

Janice Rogers Brown has said that where government moves in, community retreats, and civil society disintegrates. She has said that government leads to families under siege, war in the streets. In her view, '' . . . when government advances . . . freedom is imperiled [and] civilization itself jeopardized.''

Her actions on the California Supreme Court match her words. Time and again she has struck down basic protections. Her supporters try to explain away her record. They say she is conservative but well within the mainstream of conservative thought. But that is not credible. Mainstream does not mean extreme, except possibly in George Orwell's dictionary.

Even George Will, the well-known conservative columnist, has admitted that Janice Rogers Brown is out of the mainstream. She does not belong on any court, much less the second most important court in the land.

President Bush has often said that he wants to appoint judges who will strictly follow settled law, not judges who will legislate from the bench. But Janice Rogers Brown is exactly that sort of judicial legislator. In fact, when she joined the California Supreme Court, the California State Bar Judicial Nominees Evaluation Commission had rated her ''not qualified'' based not only on her lack of experience but also because she was specifically ''prone to inserting conservative political views into her appellate opinions'' and was ''insensitive to established precedent.''

Since joining the California Supreme Court, she has written opinions stating that judges should not follow settled law if they disagree with it. She has said that judicial activism is not troubling, per se; what matters is the world view of judicial activists. As one conservative commentator in the National Review pointed out, ''if a liberal nominee . . . said similar things, conservatives would make short work of her.''

Last month, the D.C. Circuit decided several claims of discrimination. Yet Janice Rogers Brown has issued opinions that would have prevented victims of age and race discrimination from obtaining relief in State court. She dissented a holding that victims of discrimination may obtain damages from administrative agencies for their emotional distress. She has questioned whether age discrimination laws benefit the public.

Her record on civil rights is so abysmal that her nomination is opposed by respected civil rights leaders such as Julian Bond, chairman of the NAACP, and Rev. Joseph Lowrey, president emeritus of the Southern Christian Leadership Conference who worked with Dr. Martin Luther King, Jr., in the civil rights movement and who has fought tirelessly for many years to make civil rights a reality for all Americans.

Her nomination is also opposed by the Congressional Black Caucus, the Leadership Conference on Civil Rights, the National Bar Association, the Coalition of Black Trade Unionists, the California Association of Black Lawyers, the Delta Sigma Theta Sorority, the second oldest sorority of African-American women. Her nomination is opposed by Dorothy Height, president emeritus of the National Council of Negro Women, who last year received a Congressional Gold Medal for her service to the Nation.

Justice Brown should not be given the chance to rule on discrimination cases on the Nation's second most important court.

In May, the D.C. Circuit decided the cases of two retirees seeking retirement benefits. Yet Janice Rogers Brown has said that senior citizens cannibalize their grandchildren by seeking support from society in their old age. Do we want a judge such as that on the D.C. Circuit deciding claims for retirement benefits?

Last month, the D.C. Circuit also decided a case involving Social Security benefits for a widow and her children. But Janice Rogers Brown has called the New Deal which created Social Security the triumph of a socialistic revolution. Do we really believe she will deal fairly with claims involving Social Security if she is confirmed to the D.C. Circuit?

We have confirmed over 200 of President Bush's nominees. Almost all of them were confirmed with Democratic support. Almost all of them were very conservative. But there is a difference between being conservative, as those nominees were, and being committed to rolling back basic rights, which is what Janice Rogers Brown's record clearly shows.

There are many well-qualified Republican lawyers who would be quickly confirmed, but the President has selected Janice Rogers Brown, who is clearly hostile to the very laws the D.C. Circuit is required to enforce. In doing so, the President has guaranteed that the Senate would spend many weeks dealing with this controversial nomination.

Many people across the Nation are wondering why judicial nominations have recently consumed so much of our time in the Senate. Why have we seen so many more battles over judicial nominations than in other years? The truth is that there would be no need to spend so much time on nominations if the President picked mainstream nominees. Nominees could be more quickly confirmed if the President returned to the tradition of consulting with Republican and Democratic Members of Congress about them.

The bipartisan agreement by our 14 Senate colleagues on the nuclear option emphasized that the word ''advice'' in the Constitution speaks to consultation between the Senate and the President with regard to the use of the President's power to make nominations. The Federal courts are not supposed to decide cases to please special interests that have influence with the party in power. The courts do not belong to either party, Republican or Democrat. Americans expect, and deserve, judges who will treat everyone fairly and decide cases based on the law, not their own ideology. The only way to ensure that result is for Presidents to consult with both parties in the Senate before selecting a nominee.

We have spent endless hours, dozens of days, too many weeks debating radical judges and Republican attempts to abuse power. Meanwhile, look what is happening to the strength and the security of this country. Our military forces are protecting America amidst a growing insurgency and increasingly dangerous conditions. Our men and women in uniform need armored humvees and electronic jammers for protection against roadside explosives in Iraq.

It is unconscionable that month after month the Pentagon kept sending men and women on patrol without proper equipment. The Defense authorization bill will provide $344 million for up-armored humvees and armor kits and $500 million for electronic jammers. This money should be approved without delay. But there is a judgment and decision by the Republican leadership that we are going to spend more time on these judges that are so far out of

the mainstream, that are in the extreme in terms of their views about constitutional principles and values.

We know that this body should be finishing. If we are going to be finishing the work on judges this week, we should then be proceeding to the Defense authorization bill. The House of Representatives has completed it. Although the appropriators for the appropriations for the Defense authorization bill have not completed work, generally, that is the first appropriations bill that we consider. Generally, that is the legislation that passes here in the month of July. But, no, it has been the judgment and decision that we are going to spend more time on these judges who are clearly out of the mainstream. Mr. President, 96 percent of the judges have been approved, but it is the judgment of the President and the majority here that we are going to debate these judges who are clearly out of the mainstream of judicial thinking.

It is a question of priorities. It does seem to me this Nation is better served if we have judges in the mainstream of judicial thinking, that we give them the consideration, that we give them the approval, as we have on the 95 percent of those who have already been approved, and then be considering the Defense authorization bill—which is a priority. It is a priority not only getting it passed so the conferences can make progress, but it is an indication of our priorities, and it sends a message to our troops, as well, overseas and to the American people as to what we believe is important. Now that we have effectively spent all this time, these weeks, on judges who are so outside the mainstream—now we are going to be considering an Energy bill next week, not the Defense authorization bill. I think that is the wrong decision and the wrong priority.

Our citizens want lives of opportunity and fulfillment for themselves and their children. They wonder how they can afford the massive tuition cost increases that are putting college beyond the reach of so many students. If the President consulted with the Senate on judicial nominees, as the Constitution anticipates, and which any fair reading of the Constitutional Convention would indicate, we could be working on problems such as that. It is interesting reading about the Constitutional Convention. We find, for the great majority of the time of the Federal Constitutional Convention, the decision of the Founding Fathers was to give the Senate the complete authority for naming Federal judges and approving them. In the last few days, the last 8 days of the Constitutional Convention, they decided that the power should be shared and divided.

In sharing that power, we exercise our judgment, as Members of the Senate, whether we believe these nominees are committed to the values of the Constitution. That is what is tested with these nominees. If we were not considering these nominees who are clearly outside the mainstream, we would have a chance to consider the Defense authorization bill, and we would have a chance to perhaps debate why it is hundreds of thousands of young children of the middle class struggle to pay student loans? Student loans are guaranteed by the Federal Government, but because of a policy of the Department of Education, the loan companies are subsidized at a 9.5 percent rate of return. Why aren't we debating that? It can make a difference to the cost of education, to working families and middle-income families. Do you think that is on our agenda? No, that is not on our agenda. We can't consider that.

We can't consider the Defense authorization bill. We are only going to be considering the qualifications of judges who are out of the mainstream of judicial thinking.

Countless Americans are lying awake at night, wondering how they can afford their health insurance as their premiums constantly go up, year after year. Just today, Families USA released a report that $1,000 of your insurance premium, that is the average premiums Americans are paying—$1,000 comes out of your pocket because we refuse to act on the challenges of health insurance for average working Americans. We are not debating that. We are not discussing it. We refuse to consider it. No, we are right back to where we are in considering these controversial judges.

Here is Families USA: Every American ought to know they are paying $1,000 on their health insurance because someone else is not covered. We have seen the constant number of uninsured go up. So, America, wake up. Your health insurance costs are going to continue to go up, and we see more Americans losing their health insurance. Don't we think that is a national problem? Don't we think that is something we ought to be debating here in the Senate? No, that is not a priority. We are debating these controversial judges.

The working families of this country, the struggling middle class, is concerned about the decline in their standard of living. They have worked hard all their lives, but they keep facing rising prices, jobs that could disappear tomorrow and less secure retirement. They want to pay their bills, put a little aside for tomorrow, but that is harder and harder to do. This article says that General Motors just laid off 25,000. They will reduce hourly workers by 25,000. Plant closings seen. Plants hope to avoid layoffs in the biggest cutback since 1992.

Why aren't we doing something about this, this afternoon? Why aren't we debating what we ought to be doing to help those families? Can you imagine being one of the members of those families who had worked 10, 20, or 30 years and found out you are one of those 25,000 families?

No one is suggesting there is a quick, easy solution to it, but it is a problem, and it is a challenge. Just as we heard yesterday in our Human Resource Committee about the issue of pensions—you could not pick up your newspaper across America yesterday and not find out about unfunded pension plans in the airlines. The guaranty agency, the PBGC agency which is to guarantee these pensions, is $23 billion in deficit, with the prospect of additional airlines going into bankruptcy and the airlines dropping all those individuals where they will not get nearly what they have sacrificed for and paid into retirement. Don't you think that is important enough that we ought to be debating that issue, talking about that here on the floor of the Senate? Isn't that a priority for hundreds of thousands or millions of Americans? It certainly should be. It is in my State. But, oh, no, let's talk about Janice Rogers Brown.

Let's talk about William Pryor, who has an absolute disdain for the voting rights bill. He has a disdain for the Americans with Disability Act. I have been here. My friend TOM HARKIN and others, in a bipartisan way, we passed that Americans with Disabilities Act with the leadership we had with Bob Dole. Read the opinions of Mr. Pryor about that. He has an absolute contempt for the Congress in the way he addressed the Americans With Disabilities Act. We are going to be spending days to make sure the American people understand and know what Mr. Pryor said about the Americans With Disabilities Act, let alone what he said about voting rights, let alone what he said about family and medical leave. That is something which millions of families take advantage of—not paid family leave, but just emergency family leave to be able to go back and take care of a sick child or a sick parent. Not according to Mr. Pryor.

But, nonetheless, Republicans and this President sent this nominee up here, and it is important for us to be able to explain to the American people why we are opposed to that nominee. But they chose to nominate. They send the nominee. That is the President, he has that authority. He sends them up here when they are controversial, the other side supports it, we explain what our position is, they threaten to close us down and muzzle us and gag us by changing the rules in midstream—which we have fortunately been able to resist here. But all of that is a higher priority for the other side, for this administration, than to consider these workers who have been laid off; pension plans which are of such importance; the escalating costs we find out today for students in the middle class in terms of education—that is the failure of this institution at this time.

Oliver Wendell Holmes said we must be involved in the actions or passions of our times or risk not to have lived. What is involved in the actions and passions of the times, certainly for these 25,000 workers, is the fact they are not going to go to work. For the retirees, the millions, what is involved in

their actions and passions is their retirement program. And for all Americans, when they are paying an additional $1,000, which they should not be paying, and we are doing nothing about it. They care about that. Those are issues which they care about. The middle class is paying dramatically more than they should, in terms of the interest on student loans, than they should or need to. We ought to be debating those issues, but we are not able to do so because that is not the priority of this administration or this Senate.

Democrats would like nothing better than to turn to other issues rather than debate this controversial nomination. But we know that the work we do in Congress to improve health care, reform public schools, protect working families and enforce civil rights, is undermined if we fail in our responsibility to provide the best possible advice and consent on judicial nominations.

Needed environmental laws mean little to a community that cannot enforce them in the Federal courts. Fair labor laws and civil rights laws mean little if we confirm judges who ignore them.

Deciding who is confirmed to the D.C. Circuit is too important to ignore. The important work we do in Congress on all of these and other issues is undermined if we fail in our responsibility to provide the basic advice and consent on judicial nominations. Basic rights and important laws mean little if we confirm judges who ignore them.

I want to wind up with a headline of today in the Washington Post. Here it is: ''Tobacco Escapes Huge Penalty. U.S. Seeks $10 Billion Instead of $130 Billion.''

The $130 billion was the recommendation of the professional lawyers in the Justice Department. The political lawyers in the Justice Department recommended $10 billion. That is according to the news reports. We know historically that former Attorney General Ashcroft did not want to bring the case, but nonetheless the case was brought. The recommendation by the Government attorneys was for $130 billion but, oh no, the political lawyers evidently, according to the news reports, won the day and the amount recommended was for $10 billion. Even the tobacco companies were amazed.

What was that $130 billion going to be used for? That $130 billion was going to be used for smoking cessation to get them to stop smoking, to stop them from the addiction of nicotine. An important impact can be made in terms of stopping children from being involved with tobacco and cancer, especially lung cancer, but, no, the Department said: We want just $10 billion.

We ought to be debating that issue. We ought to be finding out—has my time expired?

The PRESIDING OFFICER. The Senator's time has expired.

Mr. KENNEDY. The next half hour is allocated to the Senator from New York; is that correct?

The PRESIDING OFFICER. That is the Chair's understanding.

Mr. KENNEDY. I ask unanimous consent to be able to proceed on Senator SCHUMER's time.

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

Mr. KENNEDY. I know my friend from New York is on his way, but that point should not be lost. Here we have just within the last several days an issue that can make such a difference to every parent in this country who has a teenage child. Every single day, 4,000 children start to smoke, and 2,000 become addicted. We have the opportunity with this judgment to have a major national program to discourage young children from going into it, and the Government says: No, we are going to go for not even a slap on the wrist.

We have evidence today about the increase in the cost of health insurance by more than $1,000 a year. That is something families understand. We have the increased cost of education. That is something families understand.

Then there are the pension problems of workers who have worked and contributed to their pensions over the years, and they are now virtually evaporating. These are real issues of real people. But, no, the President and the Republicans want us to spend our time on these controversial judges that fail to meet the fundamental requirement of core commitment to the values of the Constitution and the understanding of the legislative process which protects the lives, the well-being, and the future of our country and families in this Nation.

For all of those reasons, this nominee should be rejected, and we ought to get about the country's business and get away from these controversial judges who are clearly outside of the mainstream of judicial thinking.

I yield the floor.

The PRESIDING OFFICER. The Senator from New York.

Mr. SCHUMER. I ask unanimous consent that the time that was allocated to Senator FEINSTEIN from 1:30 to 2 be allocated to me.

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

Mr. SCHUMER. Mr. President, I am here once again to debate whether Janice Rogers Brown deserves to be placed on the D.C. Court of Appeals. I have been very actively involved in this issue. I could not feel more strongly about a nominee to the bench. I could not feel more strongly about whether somebody belongs on the bench than Janice Rogers Brown.

We know for a fact that she is intelligent. We know she is articulate. We know she is accomplished and we know she is passionate. I respect every one of those qualities. She has a particular world view. She is not shy about it. It is apparent in her speeches, it is apparent in her opinions, and it is apparent from her testimony before the Judiciary Committee.

Were she to be elected to the Senate, I would relish the opportunity to debate the merits of the various laws she might introduce because if one looks at her writings, it is pretty clear. She well might introduce legislation to repeal Social Security. She well might introduce legislation to erase child labor laws. She well might introduce legislation to eliminate workplace safety laws. She well might introduce a bill to abolish zoning laws because in all of her speeches and opinions she has stood for these things.

Were she a Senator, she would no doubt be a passionate champion of a far right legislative agenda, and that would be her mandate. That is clearly what she believes. That would be her right. She would be free to legislate to her heart's content. That is our job as Senators.

Were she a legislator she could not only continue to fulminate, as she has, about the New Deal being a triumph of our socialist revolution, she could actually introduce legislation to overturn it. Were she a legislator, she could not only vilify, as she has, ''senior citizens who blithely cannibalize their grandchildren because they have a right to get free stuff,'' she could introduce legislation to eliminate benefits for the elderly.

Were she a legislator, she could not only say, as she has, that ''where government moves in, community retreats, and civil society disintegrates,'' she could actually introduce legislation to erase environmental laws, worker protection laws, minimum wage laws and other laws that have protected a wide swath of American people for decades, some even centuries.

Janice Rogers Brown is not a legislator, although sometimes she plays that role. She has been nominated to the bench, not elected to the Senate.

I cannot put it any better than conservative commentator Andrew Sullivan, who said that given her judicial activism, ''Janice Rogers Brown should run for office, not the courts.''

Now, that is a conservative columnist who is hitting the nail on the head. It is not her views he opposes, it is, rather, the means by which she will attempt to impose those views on the American people, through the courts.

So while Janice Rogers Brown is smart, passionate, and articulate, Janice Rogers Brown is also hands down the worst nominee put forward by President Bush. She wants to make law, not interpret law. I thought that was what mainstream Democrats and mainstream Republicans alike wanted to avoid on the bench at all costs.

I have been asking a question on the floor for the last several days. How can moderates, or moderate conservatives, support Janice Rogers Brown when she does not meet any of the criteria they claim a judge must meet? Is she a strict constructionist? No. When it suits her. Is she a judicial activist? Yes, whenever she wants to find a result that meets her world view. Is she

out of the mainstream of even conservative thinking? It seems pretty obvious she is.

I have yet to hear a good answer from my colleagues about why they would vote for her. It should not be her history. It is an admirable history, but that is not why we place people on the bench.

I have heard a lot of rhetoric, I have heard a lot of tortured explanations, I have heard a lot of selective citations, and I have heard a lot of smokescreens. But you know what I have not heard. Little of what I have heard is a real response to the substance of comments made by distinguished conservative thinkers, not statements by DICK DURBIN, TED KENNEDY, HARRY REID, or CHUCK SCHUMER but by vocal conservatives, about Janice Rogers Brown.

My friend from Utah, Senator HATCH, said on this floor yesterday: Over the years, I have grown accustomed to talking points of Brown's liberal opposition. I think I have committed some of them to memory now. Some liberal elitists charge she is extreme. Some liberal elitists charge she is out of the mainstream. Some liberal elitists charge she is a radical conservative.

Liberal elitists? Let us take a look at the record of some of the liberal elitists the Senator from Utah so disdains.

Here is National Review writer, Ramesh Ponnuru, a very conservative writer. He says:

> Republicans, and their conservative allies, have been willing to make . . . lame arguments to rescue even nominees whose jurisprudence is questionable. Janice Rogers Brown . . . has argued that there is properly an ''extra-constitutional dimension to constitutional law.'' She has said that judges should be willing to invoke a higher law than the Constitution.

That is from the National Review—let me repeat, the National Review. How many liberal elitists make their living writing for the National Review?

Here is more from the National Review: Janice Rogers Brown has said that judicial activism is not troubling per se. What matters is the world view of the judicial activist.

Or how about George Will? Is he a liberal elitist, I ask my friend from Utah? Is he out of the mainstream? Well, he thinks Janice Rogers Brown is. He says that Janice Rogers Brown is out of the mainstream of even conservative jurisprudence. Maybe someone can tell me when George Will became a liberal elitist. Here is what he said:

> Janice Rogers Brown is out of that mainstream [of even conservative jurisprudence] . . . It is a fact. She has expressed admiration for the Supreme Court's pre-1937 hyperactivism in declaring unconstitutional many laws and regulations of the sort that now define the post-New Deal regulatory State.

Which mainstream was he talking about? George Will wrote that she was out of the mainstream of conservative jurisprudence.

How can somebody who calls the New Deal a socialist revolution be mainstream?

Or listen to the words of conservative writer Andrew Sullivan. He is such a Brown-bashing liberal elitist that he actually agrees with many of Justice Brown's views. He said there is a case to be made for ''the constitutional extremism of one of the President's favorite nominees, Janice Rogers Brown. Whatever else she is, she does not fit the description of a judge who simply applies the law. If she isn't a 'judicial activist' I do not know who would be.''

Sullivan also stated: I might add, I am not unsympathetic to her views, but she should run for office, not for the courts.

It is not the liberal elitists but thinking conservatives, remembering the principles that used to guide conservatives in picking judges, who are pointing out Janice Rogers Brown's shortcomings. What we really have on the other side by some is opportunism. Abandon the view of what a judicial activist should be. Abandon the view of what a strict constructionist should be. We like her views. We are supporting her. There has not been anyone like Janice Rogers Brown to come before us in a very long time. A conservative nominee, if the rhetoric from the President and the Republican leaders is to be believed, must be at least three things: a strict constructionist, judicially restrained, and mainstream.

We have not seen a more activist judge nominated than Janice Rogers Brown. We have not seen a judge who believes less in judicial restraint than Janice Rogers Brown. We have not seen a judge nominated more out of the mainstream than Janice Rogers Brown.

She is not a strict constructionist. When it came to proposition 209, she said she should ''look to the analytical and philosophical evolution of the interpretation and application of Title VII to develop the historical context behind'' proposition 209. That is not the legal analysis you would expect from a strict constructionist.

Is Janice Rogers Brown a dependable warrior against the scourge of conservatives everywhere—judicial activism? No, there has not been a nominee to the bench who is more a judicial activist than Janice Rogers Brown. Her own words demonstrate that she is quick to want to reverse precedent, the very definition of an activist judge.

Time and time again, she has jumped at the chance to reshape settled law. She said:

> We cannot simply cloak ourselves in the doctrine of stare decisis.

That was in People v. Braverman in 1998. That is anathema to the whole way judges make law. Stare decisis, looking at previous cases, is the governing principle; strict constructionists believe in it more than anyone else.

Again, I repeat this comment and I will be incredulous if people—particularly moderates or those who claim to want to uphold conservative judicial principles—can vote for her:

> We cannot simply cloak ourselves in the doctrine of stare decisis.

She also said she was ''disinclined to perpetuate dubious law for no better reason than it exists,'' People v. Williams.

> The commercial speech doctrine needs and deserves reconsideration, and this is as good a place as any to begin.

That was Kasky v. Nike, 2002.

Here is what the California State bar judicial nominees said, who gave her a ''not qualified'' rating when she was nominated to the supreme court in 1996: She was ''insensitive to established legal precedent.''

Again, the record shows the President has not nominated a judge more activist than Janice Rogers Brown. The President has not nominated a judge more out of the mainstream than Janice Rogers Brown. The President has not nominated a judge who has less respect for judicial restraint than Janice Rogers Brown.

Some of her views are so far out of the mainstream that for my colleague to compare Justice Ginsburg to Janice Rogers Brown is laughable. Let's remember how Justice Ginsburg was approved. Senator HATCH was called by Bill Clinton. Senator HATCH researched Justice Ginsburg and said she would be acceptable.

Has President Bush called anyone and asked about Janice Rogers Brown? No. If I were President Bush, I would not want to because the answer they would get back would be clear: She does not belong on the bench.

Let me give another example. If you ask most lawyers to name the worst Supreme Court cases of the 20th century, Lochner would be near the top of every list. But Justice Brown thinks it is correctly decided. That is a decision in 1905. Does that place her in the mainstream?

She described the New Deal as a triumph of America's socialist revolution. Does that place her in the mainstream?

On another occasion, she said:

> Today's senior citizens blithely cannibalize their grandchildren because they have a right to get as much 'free' stuff as the political system will permit them to extract.

Does that place her in the mainstream?

In another instance she wrote:

> Where government moves in, community retreats, civil society disintegrates, and our ability to control our own destiny atrophies.

Does that place her in the mainstream?

Janice Rogers Brown is so far out of the mainstream she cannot even see the shoreline. Janice Rogers Brown, as George Will has correctly pointed out, may be many things, but she is not even in the mainstream of conservative jurisprudence.

Some of my colleagues on the other side have said, well, she is being unfairly attacked because of a few ''musings'' and ''extra judicial'' comments. At her hearing, Justice Brown herself made the point we should view her speeches separately from her judicial opinions. A little defensive, I would say.

Let's compare her speeches and her judicial opinions. In a speech to the

Federalist Society, Justice Brown compared the end of the Lochner era to a socialist revolution. Her words: ''socialist revolution.''

She distances herself from that comparison by saying that it was part of a speech made to a young audience designed to ''stir the pot.'' I think that is a pretty radical comment for any sitting judge to make in any context, even if it is designed to stir debate.

But I am not satisfied it is just her personal view and has no bearing on her judicial opinions because time and time again what she says in these speeches is repeated in her opinions.

In Santa Monica Beach v. Superior Court she called the demise of the Lochner era the ''revolution of 1937.'' That is nearly identical to what she said in the Federalist Society speech.

Is this what she is going to do when she is on the court? Stir the pot?

It is not the only example. Here is another. She was asked about a speech given to the Institute of Justice where she said:

> If we can invoke no ultimate limits on the powers of government, a democracy is inevitably transformed into a Kleptocracy—a license to steal, a warrant for oppression.

She dismissed that speech saying it does not reflect necessarily her views as a judge.

But in San Remo v. City and County of San Francisco, she said, regarding a planning ordinance:

> Turning a democracy into a Kleptocracy does not enhance the stature of thieves; it only diminishes the legitimacy of government.

Her views as a private citizen, and her views as a judge seem to be, unfortunately, quite the same. It couldn't be more obvious. She cannot explain how virtually identical rhetoric that many would call extreme finds its way into both her speeches and her judicial opinions.

I will go back to my friend from Kentucky, Senator MCCONNELL. He drew a comparison in support of Janice Rogers Brown. He said, like Janice Rogers Brown, Ruth Bader Ginsburg had made some provocative comments early in her career, but she was confirmed by her Senate.

I say to my colleague from Texas: Senator, I know Ruth Bader Ginsburg. Ruth Bader Ginsburg is a friend of mine. Janice Rogers Brown is no Ruth Bader Ginsburg.

Justice Ginsburg established such a record of moderation on the D.C. Circuit Court of Appeals that President Clinton was able to nominate her after getting advice from Senator HATCH that she was a mainstream liberal.

No one expects our President to nominate liberal nominees. They are going to be conservative. We have supported these conservatives up and down the line. Now the number is 209 out of 219 because, with the approval of Priscilla Owen, we have no longer blocked 10. When someone is out of the mainstream, that is when we oppose them.

In the end, what does the record show about Janice Rogers Brown? Not the rhetoric, not the smokescreens. Again, I challenge my colleagues to discuss her record, not dismiss it, saying it is just rhetorical. How can anyone justify a record such as this?

Here is what Janice Rogers Brown's record shows. She is not strict in her construction. She is not mainstream in her conservatism. She is not quiet about her activism.

So I am left with the same question: Why is Janice Rogers Brown touted as the model conservative judge when she is anything but conservative in her judicial approach? There are many Senators from across the aisle who would vote against such a candidate because her judicial philosophy could not be more out of sync with theirs. But I worry that there is enormous political pressure from a few way-off-the-top groups, the Senators from the other side.

Here is the chart that shows the pressure. These are the ''yes'' votes for court of appeals nominees and ''yes'' votes for cloture on them compared to the ''no'' votes. Of all my Republican colleagues, every vote tabulated, 2,811 times did our Republican colleagues vote yes; twice did they vote no. One of those was the Presiding Officer who voted against Priscilla Owen the other day. The other was Senator LOTT who voted against Mr. Gregory on the Fourth Circuit a few years ago. Otherwise, none.

Senator FRIST has spoken in the last few weeks about leader-led filibusters of judges—whatever that means. What I am concerned about is a leader-led rubberstamping of nominees, nominees who have not even convinced noted conservatives they belong on the bench. I continue to believe Judge Brown was one of the worst picks this President has made to our appellate courts. That is based on her record, not on her race or her gender or her background.

I wish my friends across the aisle would look at that record. If my colleagues on the other side ask themselves three simple questions—is the nominee a strict constructionist? Is the nominee a judicial activist? Is the nominee a mainstream conservative?—they would be forced to vote against her.

I could not support Judge Brown's nomination the first time; I cannot support the nomination now. I urge my colleagues, especially my moderate colleagues from the other side of the aisle, to vote against her also.

I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

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

Mr. WARNER. Parliamentary inquiry: It is my understanding the senior Senator from Utah, Mr. HATCH, is to be recognized at the hour of 2 o'clock; am I correct?

The PRESIDING OFFICER. There is no such order.

Mr. WARNER. Well, then, I just simply, in my own right, seek the floor.

The PRESIDING OFFICER. The Senator from Virginia.

Mr. WARNER. Mr. President, I rise today in support of the nomination of Justice Janice Rogers Brown to serve as a judge on the U.S. Court of Appeals for the District of Columbia Circuit.

The court to which Justice Brown has been nominated is one with which I am, I say in a humble way, most familiar. I practiced law there. When I was an assistant U.S. attorney I appeared before the Circuit Court of Appeals for the District of Columbia on many occasions. But most significantly, upon my graduation from the University of Virginia Law School in 1953, I was privileged to serve as a law clerk to Judge E. Barrett Prettyman of the U.S. Court of Appeals for the District of Columbia Circuit. Judge Prettyman later became chief judge of this very important circuit court.

As a result of the profound respect so many people had, including myself, for Judge Prettyman, I had the honor several years ago of sponsoring, and with the help of others, passing, legislation to name the Federal courthouse in D.C. after Judge Prettyman.

Now, a half century later, after I had the honor of serving as a law clerk on this court, I am pleased, today, to strongly support the nomination of Justice Janice Rogers Brown to this very same court.

When I started to evaluate Justice Brown's qualifications for this prestigious judgeship, I turned first, as I do with every nomination, to the U.S. Constitution. Article II, section 2 of the Constitution gives the President the responsibility to nominate, with the ''Advice and Consent of the Senate,'' individuals to serve as judges on the Federal courts. Thus, the Constitution provides a role for both the President and the Senate in this process. The President has the responsibility of nominating, and the Senate has the responsibility to render advice and consent on the nomination.

I am very pleased to have been a part of the group of 14 who brought before this body a concept by which we could proceed on these Federal judges. Justice Brown is the second in that series. I speak with pride about our accomplishment. In no way do we intend to usurp the roles of our distinguished majority leader and the Democratic leader. But, nevertheless, after consulting with them, we went forward with our framework agreement. And this agreement now seems to be working for the greater benefit of the Senate and for the important role the Senate has with respect to its constitutional responsibilities of advice and consent to help establish the third

branch of our Government—our Federal judiciary. It is essential the vacancies be filled in a timely manner to enable that court to serve the people all across our Nation.

With respect to judicial nominees, I have always considered a number of factors before casting my vote to confirm or give advice and consent, as the case may be. The nominee's character, professional career, experience, integrity and temperament are all important. In addition, I consider whether the nominee is likely to interpret law according to precedent or impose his or her own views. The opinions of the officials from the State in which the nominee would serve, or States in the case of the circuit court of appeals, the views of the persons who have known and have observed the nominee through the years, and the writings and the record of the nominee, all are taken into consideration. That is because I believe our judiciary should reflect a broad diversity of the citizens it serves all across the Nation.

In this instance, I was privileged to invite Justice Brown to my office. We sat down, and I found her to be an extraordinarily accomplished individual. We had a very extensive exchange of views regarding the important post to which she has been nominated and the qualifications which she possesses. And she does possess outstanding qualifications; first, to have earned the nomination from our distinguished President and, secondly, to earn the support of this body in the advice and consent role.

I believe she will make an excellent jurist on this most respected court.

Her legal career spans more than a quarter of a century. After graduating with her bachelor's degree from California State University, Justice Brown went on to earn her law degree in 1977 from the University of California School of Law.

After passing the California bar exam, which I believe is considered nationwide to be one of the most difficult of the bar exams, she began a career in public service, mostly in positions with the State of California. She worked in the deputy attorney general's office for the State of California, and later worked in the deputy secretary and general counsel's office in the Business, Transportation and Housing Agency of California—again, giving her a breadth and depth of experience regarding the problems and challenges that face our citizens all over this country.

After practicing law in the private sector for about a year, Janice Brown returned to public service by working in Gov. Pete Wilson's legal affairs office from 1991 to 1994. How privileged I am to have served with Senator Pete Wilson, later Governor, in this body for a number of years. We became close friends. We worked together, particularly on matters regarding national security and the military. He was a former marine in his lifetime, as was I, and I have a great mutual respect for him.

In 1994, Janice Brown left the Governor's office to serve as a justice on the intermediate California Appellate Court. Subsequently, in 1996, my good friend, then-Gov. Pete Wilson of California, had the honor of promoting Justice Brown to the California Supreme Court. With her appointment, Justice Brown became the first African-American woman to sit on the California high court.

Mr. President, I take humble pride in having, during my career in the Senate, recommended to a President the first African American in our State's history to serve on the United States District Court for the Eastern District of Virginia. His name came before the Senate. Subsequent to confirmation, and years of experience on the court, he rose to become the chief judge of the district in which his court resides in my State. This very fine man, with his customary quiet and dignified pride, his superb knowledge of the law, and understanding, serves Virginia with great distinction today.

And such will be the case with Justice Janice Rogers Brown in her service to the Nation on this prestigious court.

Indeed, since 1996 she has served the citizens of the State of California on the California high court, and she has earned their confidence as a jurist.

In the California system, once a judge is appointed, he or she comes before the voting public for confirmation or rejection in the next general election. That moment came in 1998 for Justice Brown when she and four other justices on the California Supreme Court came before the public in that election. While all were confirmed by the California voters, it is notable that Justice Brown was confirmed with the highest percent of the vote, nearly 76 percent—an astounding vote of confidence.

But Justice Brown's accolades don't just come from the voting public in California, they also come from a wide range of other people who know her well. Judges who served with her on the California Court of Appeals, a bipartisan group of law school professors in California, colleagues on other courts across the Nation, and others—they all agree: Justice Janice Rogers Brown is a brilliant legal scholar who respects the doctrine of stare decisis and who would make an outstanding Federal appeals court judge.

All of this is reason enough to confirm this highly qualified individual. But, when you put all that Justice Brown has achieved in context, it becomes even more apparent what an amazing individual we have before us in the Senate today.

You see, Janice Rogers Brown was born to sharecroppers in Greenville, AL. She attended segregated schools in the South and came of age in the midst of Jim Crow laws. Through hard work, she has earned her education and her legal credentials, and today she comes before us as one of the most brilliant legal minds this country has to offer.

I am proud to speak on behalf of this outstanding nominee, and it is my hope that the Senate will soon confirm Justice Janice Rogers Brown to the Federal bench.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. SUNUNU). The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. HATCH. Mr. President, a few weeks ago, the debate in this Chamber captured the attention of the Nation. At stake was the maintenance of core constitutional principles of separation of powers and a limited judiciary against an unprecedented strategy of filibustering judicial nominees. Prior to 2003, Senators exercised self-restraint. In theory, the opportunity was always there for us to filibuster the President's judicial nominees, but out of proper respect for the President, whoever the President was, his power of appointment, and with an appropriate modesty about our own constitutional role, we refrained from exercising this power to filibuster judges.

We kept ourselves in check. In spite of real philosophical differences about the nature of judging and the meaning of the Constitution's fundamental guarantees, we all agreed on one thing: The Constitution's separation of powers prevented us from adopting a strategy of permanent minority-led filibusters of judicial nominees.

That self-restraint was tossed aside, however, in 2003. Led in large part by my friend and colleague, the senior Senator from New York, the Democratic leadership determined to engage in a full-blown inquiry of what they called the ideology of judicial nominees. Never before have opponents of a limited judiciary been so brazen with their litmus tests. They would now openly reject qualified nominees because of their strongly held personal beliefs, not for their judicial temperament, not for their experience, not for their character. Rather, nominees would be rejected because of their personal beliefs.

For some reason, what they termed ''strongly held personal beliefs'' were particularly suspect. California Supreme Court Justice Janice Rogers Brown, an eminently qualified jurist, was one of the primary targets of this radical strategy. For a few thought-provoking speeches she had given, some have tried to label her too extreme for the bench.

There is no doubt Janice Rogers Brown is conservative, but her views are hardly out of the ordinary. They are views shared by many millions of regular citizens, citizens of different economic, geographic, financial, ethnic, and religious backgrounds. Most importantly, however, it is clear that

her personal views, whatever they are, do not cloud her judgment on the bench. Justice Brown's opinions are fully within the mainstream of American jurisprudence. It is the liberal activist groups that are purposefully misrepresenting Justice Brown's opinions, and what they think are her views, that are stranded out on the far left bank of American politics. Those groups belong on the far left bank of American politics, and that bank is way out of the mainstream.

The President takes his constitutional responsibilities seriously when he nominates individuals to the Federal bench. I have worked closely with the White House for the last 4½ years on these judges, so I know that to be true. I know that as Senators, we take our responsibilities seriously when we review and confirm these individuals. When determining a person's fitness for the Federal bench, we evaluate their character and we inspect their records. We consider judicial experience, public service, legal work, academic achievement, personal character, and the ability for objectivity.

With these qualities in mind, it is worth considering the view of Justice Brown held by a number of prominent California law professors.

In a letter sent to me in my former capacity as chairman of the Judiciary Committee, a group of 15 distinguished California law professors had the following to say about Justice Brown:

> We know Justice Brown to be a person of high intelligence, unquestioned integrity, and evenhandedness. Since we are of differing political beliefs and perspectives, Democratic, Republican and Independent, we wish especially to emphasize what we believe is Justice Brown's strongest credential for appointment to this important seat on the D.C. Circuit: her open-minded and thorough appraisal of legal argumentation—even when her personal views may conflict with those arguments.

Having gotten to know Justice Brown during this unnecessarily protracted confirmation process, I fully concur in this bipartisan consensus. And I can tell you she has cultivated these virtues against many odds.

Janice Rogers Brown was born in Greenville, AL, in 1949. She attended segregated schools. She was a firsthand witness to the injustice of Jim Crow and its failure to extend the promise of the 14th amendment to the descendants of freed slaves. Equal protection under the law was only a dream in the Deep South at that time when young Janice Rogers Brown left her African-American family for California.

Yet this girl who grew up listening to her grandmother's stories about NAACP Fred Gray, the man who courageously defended Martin Luther King, Jr., and Rosa Parks, brought to the golden State of California a passion for civil rights and a need for impartial justice.

Janice Rogers Brown cultivated this passion for justice through a career of almost uninterrupted public service as an attorney. After graduating from law school at UCLA, she served 2 years as deputy legislative counsel in the California Legislative Counsel Bureau. Then from 1979 to 1987, she was deputy attorney general in the office of the California Attorney General. Her work there was of such high quality that it led to her appointment as the deputy secretary and general counsel for the California Business, Transportation, and Housing Agency in 1987 where she supervised the State's banking, real estate, corporations, thrift, and insurance departments. No dunce could have done that. No person as described by some of my colleagues on the other side would have been chosen in that great State of California to do that. She has been very badly derided by picking and choosing little snippets here and there and taking them out of context.

From 1991 until 1994, she served as the legal affairs secretary to California Gov. Pete Wilson. I personally chatted with Pete Wilson, who is an old friend. He said she was terrific. He relied on her legal abilities.

Then in 1994, she embarked on the professional journey that culminated in her nomination to the Circuit Court of Appeals of the District of Columbia. First, she was nominated and confirmed as an associate justice on the California Third District Court of Appeals. Then in 1996, Gov. Pete Wilson elevated her to the position of associate justice on the California Supreme Court.

I ask unanimous consent to print in the RECORD her funeral eulogy for one of the great judges on that first appellate court.

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

CALIFORNIA SUPREME COURT JUSTICE JANICE ROGERS BROWN'S EULOGY OF RETIRED JUSTICE ROBERT K. PUGLIA, FORMER PRESIDING JUSTICE OF THE CALIFORNIA COURT OF APPEAL FOR THE THIRD APPELLATE DISTRICT

Justice Robert K. Puglia was described—not too long ago—as ''a treasure'' to Sacramento's legal community. It is no exaggeration to say that his wit and wisdom will be irreplaceable. Justice Puglia once referred to himself—with the self-deprecating humor that was so characteristic—as ''a dinosaur.'' At his retirement dinner, I ventured to say that he was ''not so much a dinosaur as an ancient artifact. Like the Rosetta Stone. A text from which we could decipher the best of our past and—if we are lucky—find our way back to the future.''

We are here today, much too soon, to celebrate his life, his legacy to us. The Library and Courts Building was his home for nearly 30 years. He worked there as a newly minted lawyer during a brief stint as a deputy attorney general in 1958 and 1959, and returned in 1974 when he became a member of the Third District Court of Appeal, a court where he served as the presiding justice from 1974 until November 1998. In 1994, after a reception welcoming me to the court, we stood on the steps of the court building and looked across the circle toward Office Building 1 at the words carved on the pediment: ''Men to Match My Mountains,'' a fragment from a poem by Samuel Walter Foss called ''The Coming American.'' Justice Puglia gave me the sidelong, sardonic glance, which I already recognized as a sure prelude to some outrageous comment. Giving an exaggerated sigh, he said: ''I suppose we will have to sandblast those words and come up with something more politically correct. Perhaps—''People to Parallel my Promontories.'' We both laughed. In its fuller exposition, the poem is a paean to the westward expansion of the country:

Bring me men to match my mountains,
Bring me men to match my plains;
Men to chart a starry empire,
Men to make celestial claims.
Men to sail beyond my oceans,
Reaching for the galaxies.
These are men to build a nation,
Join the mountains to the sky;
Men of faith and inspiration . . .

In retrospect, it occurs to me that although Justice Puglia was inordinately proud of his Buckeye roots, like Norton Parker Chipman, the first Chief Justice of the Third Appellate District, he was also a citizen of California who filled a larger-than-life role. He was one of those men who matched her mountains.

As a young lawyer who did appellate work, I quickly came to admire Justice Puglia's jurisprudence. His opinions were intelligent, wise, witty, clear and completely accessible. He did not write in the dry, dull, bureaucratic style of most modern judges. His thoughts, clearly and eloquently expressed, were sometimes impassioned. Indeed, he made passion respectable. His opinions exude the rare sense of style and unique voice that Posner tells us is ''inseparable from the idea of a great judge in [the common law] tradition.''

Justice Puglia deserves a place in the pantheon of great American judges. He completely understood the role and relished it. He exhibited the classical judicial virtues: impartiality, prudence, practical wisdom, persuasiveness, and candor. He demonstrated complete mastery of his craft. He had a keen awareness of the ebb and flow of history, and of the need for consistent jurisprudence, and, above all, self-restraint. It may sound odd to describe a judge as both passionate and restrained, but it is precisely this apparent paradox—passionate devotion to the rule of law and humility in the judicial role—that allows freedom to prevail in a democratic republic.

The generation that fought in World War II has been labeled ''The Greatest Generation'' for their courage and selflessness, but that sobriquet belongs as well to their younger brothers who fought in Korea. Their attitudes were shaped by many of the same pivotal moments in American history, and Bob Puglia exemplified the best of his generation. He was born on the cusp of the Great Depression and came of age during Word War II. He became a devoted student of history, and perhaps that is why he seems to have had an instinctive appreciation of valor, duty, and sacrifice.

He scorned political correctness, but he treated every human being with dignity and respect. Whether he was dealing with the janitor or the governor, he never saw people as abstractions, proxies, or means to an end. He saw them as individuals and took them as he found them; expected the best of them; and never demanded more of anyone than he demanded of himself. His sense of fairness and justice applied to everyone, but his sense of humor was irrepressible. In one memorable case where a defendant filed an appeal quibbling over the deprivation of a single day of credit, Justice Puglia agreed with the inmate in a brief unpublished opinion. He found the court had miscalculated, and ended the opinion with the cheery admonition to ''have a nice day!''

In my youth, I admired and respected him and wanted to emulate him. As I grew older and had more opportunities to get to know him, to become first an acquaintance, then a colleague, and a friend, I came to love him. I do not think there is one person within his orbit who was not the beneficiary of his wisdom, encouragement, and generosity. He gave us his ''Rules to Live By'' to amuse us. But, the way he lived his life inspired us. He was devoted to his wife Ingrid and endearingly proud of his children. Indeed, he had a disconcerting tendency to adopt any of us when he felt we needed guidance.

He taught us that character counts and integrity is personal. He never allowed cruelty or deception or hypocrisy to go unchallenged. He did the right thing even when he would have benefited from doing the expedient thing. Freedom is not free he would often remind us, but, in Justice Puglia's view, it was worth the price—however dear.

His life experience and his understanding of history produced in him a certain toughness—the power of facing the difficult and unpleasant without flinching; discipline and intellectual rigor; physical courage; and, even more importantly, the courage to be different. Never one to follow the herd of independent minds, his was a unique voice. As California's Chief Justice has ruefully acknowledged, Justice Puglia was ''a strong personality . . . not shy of stating his beliefs, nor about challenging others to justify theirs'' but surprisingly willing to listen and modify his views. He was, as his long-time colleague Justice Blease noted: ''formidable'' and ''intimidating,'' but he had a ''heart of gold.''

There are so many themes and threads that run through Justice Puglia's life and the history of the Third District Court of Appeal that I do not think it can be mere coincidence. Norton Parker Chipman had stood on the battlefield at Gettysburg when Lincoln gave that memorable speech. Justice Puglia was a student of history—especially the Civil War era. He could speak of Andersonville and Robert E. Lee and the battles of that terrible war as easily as other people recite the latest baseball scores. There are similarities in the descriptions of Justice Puglia and President Lincoln that are striking.

In a speech in 1906, Norton Parker Chipman recalled that his friend Abraham Lincoln was ''firm as the granite hills,'' yet capable of great patience and forbearance. Carl Sandburg described Lincoln as ''both steel and velvet . . . hard as rock and soft as the drifting fog.'' Reading these words caused a shock of recognition, for I had been seeing exactly this sort of paradox and contradiction in the life of Justice Puglia.

Seeing these parallels, I have come to understand that this flexibility is neither paradox nor accommodation. It is just the opposite—a sense of sure-footedness and balance that is often the defining trait of people of great character and impeccable integrity. It is precisely this quality which makes the honest public intellectual, a man like Bob Puglia, so extraordinary.

In his first message to Congress in 1862, Lincoln warned that we might ''nobly save, or meanly lose, the last best hope of earth.'' Lincoln, of course, was referring to the Union. Justice Puglia felt that same sense of fierce commitment to the rule of law. The preservation of the rule of law and of the equality of all people under that rule was, in his view, the core principle of liberty and the only reason America might qualify for such a grand epithet.

My favorite movie scene is in To Kill a Mockingbird. It is the scene where Atticus Finch has argued brilliantly and raised much more than a reasonable doubt, virtually proving the innocence of the accused, but the jury still returns a guilty verdict. Most of the spectators file noisily into the street, gossiping and celebrating. Upstairs, relegated to the balcony, another audience has watched the proceedings and remains seated. As Atticus Finch gathers his papers and walks slowly from the courtroom, they rise silently in unison. The Black minister, Reverend Sykes, taps Scout on the shoulder and says: ''Miss Jean Louise, stand up. Your father's passin'.'' To me, this silent homage to a good and courageous man, who respects and believes in the rule of law—and is willing to defend it even at great personal cost—is the most moving moment in the whole film.

Justice Puglia was just such a man. And he was not a fictional character. Most of us have risen to our feet many times to mark his passage because he was a judge. Court protocol required us to show respect for the robe and what it represented. But Justice Puglia was the kind of man who earned and could command our respect by virtue of his life and character. In a way, the robe was superfluous.

We have had the great good fortune to know this extraordinary man. We can remember what he taught us. We need not be fearless to have courage. We can be tough and tender. We can do the right thing—and face the bad that cannot be avoided unflinchingly. We can laugh. And we must sing—even when people frown at us and advise us to keep our day jobs. We can care for the people around us. We can be generous. We can make our way, against the tide, without rancor or bitterness. And when we are tired and overburdened and feel we are not brave enough to go on, we will hear his voice in our ear. Hear him say in that quiet and steely tone: ''Yes, you can. You can.'' And we will know that we are being true to his legacy. The legacy of one who loved liberty. We will know that we are standing up . . . because Justice Puglia is passin'.

Mr. HATCH. Mr. President, Janice Rogers Brown's deep and uncompromising desire to secure equal justice for everyone who appears before her is evident off the bench as well. She has served as a member of the California Commission on the Status of African-American Males. This bipartisan commission made recommendations for addressing inequities in the treatment of African-American males in employment, business development, and the criminal justice and health care systems. This was noble work.

In addition, as a member of the Governor's child support task force, she made recommendations on how to improve California's child support enforcement system. No small matter. She would not have been trusted with that had she been as described by some of my eminent colleagues and friends on the other side.

Justice Brown's critics cannot escape this story, so they turn to her statements off the bench and to her decisions on the bench in California to assert misleadingly that she is extreme. The instances they cite do not support these hysterical charges, and I want to consider them at some length.

One of Justice Brown's speeches received quite a bit of attention. In April 2000, she was invited to speak at the University of Chicago Law School. I have had the same privilege, by the way. Evidently, her critics say what she said there was so radical that we should keep her off the Federal bench.

Never mind that a public speech is an opportunity to be provocative, especially at a law school. Never mind that judges, like most folks, are able to separate out their personal and political beliefs from their professional duties. And never mind that Justice Brown was doing a service to these students by coming to speak before them, jar their imaginations, and give them something more to think about.

The fact is, what she said was not that radical. Groups have keyed in on her colorful critique of the New Deal. Give me a break. The same people who come down here decrying Justice Brown's description of the New Deal as revolutionary turn around 5 minutes later and claim that our current Social Security system cannot be adjusted one iota to address contemporary concerns because it was central to the New Deal's political revolution. Can you imagine, these very same people who find so much fault with her? You cannot have it both ways.

Their real problem is that Justice Brown then went on to criticize some of the unintended social and political consequences of big Government. When she claimed that an increasing public sphere tended to undermine the individualist spirit present at America's founding, she was saying nothing other than what de Tocqueville, Ronald Reagan, Booker T. Washington, Robert F. Kennedy, and countless political philosophers and economists have noted over the years.

Everyone knows that it takes a village—families and communities—not a sterile Government-mandated bureaucracy to raise a child or, rather, that it takes a family, not the Government, to raise young citizens.

Yet her critics treat Justice Brown's claims as trying to prove that the world is flat. The senior Senator from Massachusetts was on the floor yesterday afternoon and today arguing that Justice Brown's claim that an increasing public sphere is detrimental to civil society is outside the legal mainstream. Again, give me a break.

I cannot help but think that for Janice Rogers Brown, this criticism of big Government is related to her experience growing up in the Deep South and her adulthood working for the State of California. She did not have to read about Jim Crow in books. She lived it. My sense is that part of Justice Brown's commitment to rugged individualism is related to this hard-learned lesson: There are limits to what Government can accomplish.

That is precisely what President Reagan stated in his first inaugural address. When he said this in 1981, some of the very same people who attack Janice Rogers Brown today said President Reagan was out of the mainstream. That was the argument by the very same people back then.

Nowhere was this well-intentioned governmental overreach more apparent

than in our failed experiment with welfare. Republicans and Democrats alike, originally led by the insights of our former colleague, the late Democratic Senator Daniel Patrick Moynihan, understood the detrimental impact of welfare on the urban poor in particular. I think Janice Rogers Brown understood that lesson as well.

But for articulating a similar skepticism about Government, Janice Rogers Brown has been branded a radical revolutionary. Quite the contrary. Her arguments have been based on reasonable concerns. And hers was a conclusion reached over the years by millions of Americans.

A few of Justice Brown's many decisions while a judge have also served as a source of the criticism that has been unfairly leveled at her. Of all the criticisms of Justice Brown, none more rankles than the claim she opposes civil rights. That is laughable. This is par for the course for some of these leftwing, fringe groups that have been smearing and attacking Republican nominees ever since I can remember, but certainly ever since Justice Rehnquist had his hearings and was confirmed to the Supreme Court as Chief Justice.

Just this week, the chairman of the Democratic National Committee was quoted as telling a group in San Francisco that Republicans are ''not very friendly to different kinds of people.'' He called the GOP ''pretty much a monolithic party. They all behave the same. They all look the same. It's pretty much a white Christian party.'' This is racial demagoguery, pure and simple, done by the chairman of the Democratic National Party. If I didn't know how bright he was, I would call him a raving idiot. But maybe he is just that part of the time.

This desperate rhetoric has a purpose: to mask the increasing attraction of conservative ideas to African Americans, Hispanic Americans, Jewish Americans, and other minorities the Democrats have felt they have an absolute claim to, no matter how outrageous some of their programs and ideas are.

So it is not surprising that when the organized critics of Janice Rogers Brown send their faxes to the press, her argument in the decision People v. McKay is notably absent. This is what she had to say there:

> In the Spring of 1963, civil rights protests in Birmingham united this country in a new way. Seeing peaceful protesters jabbed with cattle prods, held at bay by snarling police dogs, and flattened by powerful streams of water from water hoses galvanized the nation.
>
> Without being constitutional scholars, we understood violence, coercion and oppression. We understood what constitutional limits are designed to restrain. We reclaimed our constitutional aspirations. What is happening now is more subtle, more diffuse, and less visible, but it is only a difference in degree. If harm is still being done to people because they are black, or brown, or poor, the oppression is not lessened by the absence of television cameras.

She wrote those words while arguing for the exclusion of evidence of drug possession discovered after an African-American defendant was arrested for riding his bicycle the wrong way on a residential street. She believed that the only reason this person was stopped was because of his race, and she was the only one of her colleagues on the supreme court to argue for the exclusion of this evidence on the grounds that it was the product of improper racial profiling. Yet our colleagues over here say she is an opponent of civil rights. Give me a break.

I have seen and heard just about everything in my years in the Senate, but the highly partisan campaign of the NAACP against Janice Rogers Brown is particularly shameful. It is sad to see the NAACP, the Nation's foremost civil rights institution, become little more than a partisan special interest group.

The other day I received a fax from their office urging me to vote against Justice Brown's confirmation because she was, ''hostile towards civil rights and the civil liberties of African Americans and other racial and ethnic minorities.''

My stomach turned when I read this. Not only is this irresponsible rhetoric, not only is it unfair and uncharitable, it is without any real foundation. In other words, it is total bullcorn, and it is wrong.

The NAACP, along with a number of other groups, has turned to Justice Brown's opinion in Hi-Voltage Wire Works, Inc., v. City of San Jose to show that she is inhospitable to minorities because of her supposed stance on affirmative action. These arguments, again, are way off the mark and an analysis of them demonstrates not only that Justice Brown is a mainstream conservative judge but also that these interest groups are extremely liberal outfits attempting to gain through judicial fiat what they cannot fairly win through the legislative process through the elected representatives of the people.

The Hi-Voltage case involved California's proposition 209. In a popular referendum, the people of California were clear: Discrimination or preferential treatment on the basis of race, sex, color, ethnicity, or national origin violates core constitutional principles of equal treatment under the law. Therefore, proposition 209 prevented discrimination in any public employment, public education, or public contracting.

Now, at issue in this case was a San Jose minority contracting program that required contractors bidding on city projects to employ a specified percentage of minority and women contractors. In her opinion, Justice Brown merely did what every judge who ever reviewed this case did. Through the trial court, through the appellate court, to the Supreme Court, all concurred with Justice Brown that this program was exactly the type of noxious racial quota program that proposition 209 was designed to prevent.

Her critics charge this demonstrates her blanket opposition to affirmative action. Such a conclusion depends on a deliberate misreading of Justice Brown's opinion in this case. She could not have been any more clear. She did not oppose affirmative action in all circumstances. These are her words:

> Equal protection does not preclude race-conscious programs.

Contrary to the propaganda being issued by liberal interest groups, Justice Brown's opinion explicitly authorizes affirmative action programs.

I do not blame my colleagues on the other side completely because most of the time they just take what these outside leftwing radical groups give them and read it like it is true. So I say I do not blame them completely. But unlike the Supreme Court of the United States, the people of California have rejected quotas and race-based head counting.

Those are not affirmative action programs that merely take race into account. Programs such as the one under review in the Hi-Voltage case are improper quota programs. For following the mandate of California citizens on this subject, she has been called radical.

The NAACP's criticism is, as usual, overblown. They claim that Justice Brown's decision ''makes it extremely difficult to conduct any sort of meaningful affirmative action program in California.''

But what is a meaningful affirmative action program? I fear that these leftwing liberal interest groups are suggesting that the only meaningful type of affirmative action program is the type of quota program specifically banned by proposition 209. As it turns out then, Justice Brown's real failure in this case is that she did not tailor the law to suit her own moral and political preferences. For this, she is demonized as a radical. It is her failure to embrace full-blown judicial activism that is her principal failing in the minds of her detractors.

Consider her opinion in American Academy of Pediatrics v. Lundgren. This case involved California's parental consent law. Parental consent laws are not rightwing policies. They are moderate restrictions on abortion rights supported by substantial majorities of the American people.

I find it interesting that the same groups that champion the right of a woman to make an informed choice about obtaining an abortion also reject moderate restrictions on the accessibility of abortion to minors who routinely do not possess the judgment necessary for the profound moral and philosophical decision to obtain an abortion.

We should not forget the U.S. Supreme Court, while acknowledging the right to an abortion, also has held that it is permissible under the Constitution to establish parental consent laws such as California's. California courts have long relied on Supreme Court precedents when defining the boundaries of

their State's own constitutional right to privacy. That is the context of this decision, and in it Justice Brown dissented from the determination of an activist court to overturn California's moderate restriction on abortion rights. She wrote:

When the claim at issue involves fundamentally moral and philosophic questions as to which there is no clear answer, courts must remain tentative, recognizing the primacy of legislative prerogatives.

She continued, adding that:

The fundamental flaw running through its analysis is the utter lack of deference to the ordinary constraints of judicial decision-making—deference to state precedent, to federal precedent, to the collective judgment of our Legislature, and, ultimately to the people we serve.

This is not some debate over a speech that Justice Brown gave at a law school forum. We know that is not the real threat to these interest groups. They can see that judges such as Janice Rogers Brown take their oaths seriously. They will interpret the law rather than act as super legislators and make the law.

By showing deference to the people's representatives and the legislative and executive branches, these groups which too often today try to take the easy way out will now have to engage in the political process to win their points of view. Personally, I believe this would be a healthy development, but to those uncompromising special interest groups the democratic process is a threat, not a gift.

Soon we are going to have to vote on Justice Brown's nomination. I am glad and thankful that we are finally reaching this point after the number of years we have been at it. I know many people wanted to move beyond these divisive debates over judges. I appreciate their desire to move beyond this messy business of judicial nominations and I understand the desire to applaud the deal that has allowed last week's vote on Priscilla Owen and our vote later today on Janice Rogers Brown. The ultimate meaning of this compromise is yet unknown, but one thing we do know, these qualified women will have long careers on the bench in large part because the majority leader had the guts and decided to press this issue, reestablish longstanding Senate precedents, and tried to support the constitutional separation of powers.

Our senatorial power of advice and consent does not include the right to permanently filibuster judicial nominees. We have gone a long way to reaffirming what used to be an obvious truth, and we owe a debt of gratitude to the leader for helping to make this happen. We should also acknowledge the well-intentioned efforts of the 14 Senators involved in facilitating these votes. I know many conservatives are upset with this arrangement. I am myself. I am certainly not entirely comfortable with all the aspects of it myself, and I have said that it may prove to be a truce, not a treaty. We will have to wait and see what the full implications of this deal really are.

It does seem, however, that the cloture votes on nominees such as Priscilla Owen, Janice Rogers Brown, and William Pryor demonstrate the emergence of a filibuster-proof majority that believes even judges with conservative judicial philosophies are not the extraordinary cases that would trigger a filibuster and that even a conservative African-American woman has a chance to serve in this country. Unfortunately, some have been against her primarily because she is a conservative African-American woman.

We seem to be gaining ground in the fight against the erroneous belief that nominees with whom one disagrees politically are undeserving of an up-or-down vote. Of course, the acid test of this agreement will come in the weeks ahead when the Senate addresses nominees not specifically granted a safe harbor by the compromise.

This debate over Janice Brown and others with her conservative philosophy of judicial restraint is an important one. I will not compromise on the principle that the American people and their elected representatives, not judges, should make social policy. Our courthouses were never intended to be mini-legislatures. Judges do not have the constitutional responsibility, institutional capacity, the staff, or the wisdom to be good policymakers, and judges are not and should not be philosopher kings with some ability to divine the existence of rights not clearly expressed in statutory law created by the people's elected representatives or in constitutions established by the people themselves.

We are told by some that Justice Brown is a radical. Shortly after the President was elected in 2000, the Democratic Party held a retreat at which a number of liberal law professors urged them to ''change the ground rules'' on judicial nominations. That was radical advice. It upset longstanding constitutional balances, and unfortunately it was accepted by the former minority leader.

We must reject this effort. I, for one, am not afraid to have this debate. The American people know judicial activism when they see it. Just in the last few years we have been told by judges that the Pledge of Allegiance is unconstitutional, that our Bill of Rights should be interpreted in light of decisions by the European Court of Human Rights, and that well-considered bans on partial-birth abortion violate core constitutional principles.

Only a few weeks ago, a Federal judge in Nebraska invalidated the duly passed State constitutional amendment that preserved traditional marriage in that State. The definition of a judicial activist is someone who puts his or her own personal views ahead of what the law really is.

Some of the leading groups opposed to Janice Brown oppose her precisely because she will faithfully interpret the law rather than remaking it according to her own theory of justice. What they really object to is Justice Brown's refusal to revise legal guarantees according to some version of justice not present in a text.

I am proud of this body for allowing Justice Brown's nomination to finally, at long last, come up for a vote. My guess is that she will soon be sworn in as a Federal judge. That will be a great day not only for Janice Rogers Brown, who has had to endure these coordinated, calculated attacks on her character, but it will be a great day for this Nation as well, and it will bring a lot of joy to me personally.

In all of the hundreds of judges who now sit on the bench, Janice Rogers Brown is one of the finest people I have met and interviewed. So is Priscilla Owen. So is William Pryor, whom we will vote upon probably tomorrow. These are outstanding people, and so are the others who have been waiting for so long to just have the opportunity for a vote up or down on this floor.

I am tired of seeing these good people maligned with false facts, to begin with. I am tired of seeing them maligned with misinterpretations of the case law, primarily written by some of these outside groups that have real axes to grind and that are on the far left bank outside of the mainstream of the law itself.

I hope everybody will vote for Janice Rogers Brown. She will make a real difference on the bench. She is a good person. I interviewed her for more than 3 hours. I can say, I have seldom met a person of such capacity, decency, dignity, and honor as she and Priscilla Owen. It will be a great day to confirm her as a judge on the Circuit Court of Appeals for the District of Columbia.

I yield the floor.

The PRESIDING OFFICER (Mr. CORNYN). The Senator from California.

Mrs. BOXER. Mr. President, I rise to speak to this nomination of this very controversial nominee who is opposed by both Senators from California, which is fairly extraordinary. I remember well a time in the not too distant past when even if one Senator from a State opposed a nominee from his or her State, that sank the nomination. Then they said it had to be both.

We have a situation where both Senators from California oppose this nominee. I can assure the Senator from Utah, if he opposed a nominee who came from his State, and his colleague did as well, I think I would give it a little more, shall we say, attention than he is.

The fact is, if you have watched this debate, you know by now that this nominee is way outside the mainstream. You can stand up here and say all you want that she is in the mainstream and within the mainstream. You can even say that she won election in California. What you are not saying is she came up for election about 11 months after she had served a 12-year appointment, and she had no opposition. Nobody ran against her. Most of

her controversial decisions occurred after that vote.

Anyone who knows anything about California politics knows that it is very rare that judges are made into an election issue. We usually approve our judges. It is very different than what is being presented here, that everyone went out and said: Oh, hurrah, Janice Rogers Brown is running. This is not the case at all. We have Senator HATCH coming up and saying this woman is well within the mainstream and all the rest of it, but the two Senators from California are saying: Watch out. Because no statement could be further from the truth.

I have spoken on this nomination and on the broader issue several times. Sometimes you ask yourself, is it worth just one more time? I would say, in answering my own question, to me it is worth it just one more time because the issues surrounding these nominations we are addressing these next days will bring home to the American people why it was that we had all this fuss over 10 judges the Democrats blocked. These are 10 judges put forward by President Bush who were all extraordinary cases, outside the mainstream, whether dealing with employment rights or the environment or civil rights or human rights—any kind of rights you can think about: privacy rights, the right to make sure our kids are protected and our criminals are punished.

In these 10 cases, we found many examples where our people were left in the lurch because of decisions made by these judges. In some cases, these judges, fortunately, were in the minority. In the case of Janice Rogers Brown, she was in the minority many times because she is so out of the mainstream that not even her five Republican colleagues could join her in many of her dissents.

But this number, 208 to 10, reflects where we were when the Republicans threw a fit and the White House threw a fit and said: We want every one of our judges passed. We don't want to lose even 5 percent of our judges. They got 95 percent. They were not happy—208 to 10, and they threatened to change a system that has been in place well before the movie ''Mr. Smith Goes to Washington'' came out. For more than 200 years, the Senate has had the right to unlimited debate that can only be shut off by a supermajority. We have had that in place for a very long time.

The Republicans did not like it. They only got 95 percent of their judges and, by God, they wanted 100 percent. It reminds me of my kids when they were little, and probably I was that way when I was little. ''I want it all. I want everything. I don't want to give up a thing.'' That is not the way the Senate works. It is not the way the country works.

If you read what the Founders had in mind for our Nation, it was protecting minority rights. So when an appointment such as this, which is a lifetime appointment—at very high pay, by the way, and very good retirement—that there would be a check and balance against this nominee, so only those who deserve to be on the bench, who show that they had judicial temperament, who were qualified—underscore that, very important—and who were in the mainstream, will take their seats. So we had a crisis that, fortunately, I am very pleased to say, was resolved by some Republicans and Democrats who got together and stood up to the Republican leadership and said: Wrong. We are not going to do this. We are not going to see a packing of the courts. We are going to preserve the filibuster.

But what happened was three very controversial judges got past that filibuster. That was the deal that was cut, that Priscilla Owen, that Pryor, and here Janice Rogers Brown would be guaranteed their cloture vote, and then we will now be voting on them. It will take 51 votes to stop Janice Rogers Brown. I hope we can get that.

Senator HATCH said he hopes every single person in the Senate will vote for Janice Rogers Brown. I predict, if she gets confirmed, it will be by the fewest number of votes we have seen around here, probably, in many years. I think so.

Let me talk about the issue of qualifications because this is something I did not discuss with my colleagues up until now. On April 26, 1996, the Los Angeles Times wrote about an evaluation report that was written about Judge Janice Rogers Brown. This is what the Times reported:

> Bar evaluators received complaints that Brown was insensitive to established legal precedent . . . lacked compassion and intellectual tolerance for opposing views, misunderstood legal standards and was slow to produce opinions.

Can you imagine? This is the person who everyone who spoke on the other side today has said is so great, everyone who spoke on the other side said is so wonderful? This is the person they all said deserves to be promoted? Let's read it again because it is important. This woman is going to the circuit court of appeals in Washington. ''Bar evaluators''—these are the people who are the experts—''received complaints that Brown was insensitive to established legal precedent . . . lacked compassion''—and we are going to show that—''and intellectual tolerance for opposing views. . . .'' In other words, intolerant to opposing views. Can you imagine a judge who is intolerant to opposing views? How can that judge be independent? How can that judge be fair if, going in, they are intolerant to certain views? And they said she ''misunderstood legal standards.'' That is a condemnation for someone who is going to be judging. ''And she was slow to produce opinions.'' We all know that we would like to have justice be swiftly delivered. Justice delayed is justice denied. She was slow to produce opinions.

The LA Times goes on:

> She does not possess the minimum qualifications necessary for appointment to the highest court in the State,

That is my State, the California Supreme Court.

> . . . the bar commission that reviews judicial nominees told Governor Pete Wilson in a confidential report.

Janice Rogers Brown

> . . . does not possess the minimum qualifications necessary for appointment to the highest court in the State, the bar commission that reviews judicial nominees told Governor Pete Wilson in a confidential report.

This is the nominee Senator HATCH says he hopes everybody votes for. Now she is moving over to an area where she hasn't really practiced before, to the Federal bench.

Yesterday, I was at a press conference with some fantastic women lawyers, including Eleanor Holmes Norton, who you know, I think, is the delegate to the House of Representatives from DC, and also Elaine Jones. They went through, chapter and verse, her decisions, her writings, her minority views. They agreed this is a terrible appointment. What is interesting is these are African-American women speaking about an African-American woman. This is not easy to do. It is not easy for a female Senator to say this is a terrible appointment.

This nominee's personal story is remarkable. There are a lot of remarkable stories in America. We are all so proud of our country, that it gives people opportunity. But what I am fearful about is what she is going to do to those who want to grab that dream. Her attitude toward what the government can and cannot do, her attitude about what is permissible in a workplace, is shocking. Her attitude toward senior citizens, her attitude toward children, her attitude toward rape victims, all of this is very frightening, to think this woman, with a great personal story, is going to bring those kinds of values and this kind of record to the court that many consider to be second in importance to the Supreme Court of the United States of America.

There is no question that this nominee is way out of the mainstream. This is one of her famous quotes. You listen to these words. These are not the words of Senator BARBARA BOXER or Senator DIANNE FEINSTEIN or Senator PATRICK LEAHY or Senator HARRY REID or any other Senator who is opposing this nominee; these are the words of the nominee:

> Where government moves in, community retreats, civil society disintegrates, and our ability to control our own destiny atrophies. The result is: Families under siege; war in the streets; unapologetic expropriation of property; the precipitous decline of the rule of law; the rapid rise of corruption; the loss of civility and the triumph of deceit. The result is a debased, debauched culture which finds moral depravity entertaining and virtue contemptible.

I don't know what country she grew up in. I really don't know how she got her views of America because clearly she has been critical of the government in her writings, going back to the 1930s. So, presumably, because she has been in the minority view on all the things

she says and does, she has to be miserable about the state of America. She thinks our families are under siege, that there is war in the streets, that people are getting their property taken away from them, that there is a decline in the rule of law. I guess she doesn't know we are doing much better controlling crime. Who does she think is going to control crime if not government? Does she think we should have a private police force?

When government moves in, everything is terrible. Does that mean when we build a highway things get worse, or do they get better? Does that mean if we fund a transit system things get worse, or they get better? Does that mean when we fix a pothole or pass a law that you have to wear a seatbelt that things get worse, or things get better?

She is an idealogue because the answer is sometimes government does good things, and sometimes we don't. Sometimes we do things we should not do, and sometimes we don't do enough. But there is no way you can say when government moves in, deceit triumphs and we have a debauched culture and virtue is contemptible. Is she that critical of this country? Is she that down on this country? Is she that negative about the greatest country in the world? The answer is, she is.

Let's look at some of the other things she said. When we had the New Deal, this country was in the middle of a terrible depression, and the Congress and the President passed some overdue legislation such as the minimum wage because people were starving to death. They said it was important to have a 40-hour workweek because people were being worked to death. Social Security was instituted at that time. She calls this ''the triumph of our own Socialist revolution.''

I am assuming, therefore, she thinks we should go back to the days when we did not have Social Security. That is interesting because there are other people who feel that way around here. So they happily vote for Janice Rogers Brown. Does she think we should go back to the day when children worked in the workplace? Child labor laws were passed around that time. Does she think a boss can tell you, you have to work 100 hours? I guess she does because it is socialism.

And then her famous quote about senior citizens. This is a woman who this President wants to send to the second highest court in the land. Her view of senior citizens is extraordinary: She called senior citizens ''cannibals.'' I want everyone to think of their grandma right now. Does anyone think of their grandma as a militant? Does anyone think of their grandma as stealing from you? Or, rather, that your grandma thinks much more about you than she does about herself? I can assure you that is what we think of our grandmas. They will do anything for us, for their grandchildren. But not Janice Rogers Brown. She accuses senior citizens of ''blithely cannibalizing their grandchildren because they have a right to get as much 'free stuff' as the political system permits them to extract.''

What a view of our senior citizens. The greatest generation; the generation that fought in World War II. And now, getting to be the generation that fought Vietnam, one of the toughest wars because it was so controversial, and the suffering that guess on. These are the folks that are now the grandparents and the senior citizens. They are getting as much ''free stuff.'' Why? Because they served in the military and they get veterans' benefits, veterans' health care, and prescription drugs if they are sick. I resent Janice Rogers Brown's statements. I resent that statement on behalf of every senior citizen in this country. You can put lipstick on it, you can put nail polish on it, it is still ugly.

She calls government ''the drug of choice.'' She even goes after rugged midwestern farmers. She says they are looking for big government.

Who does she know—a rugged midwestern farmer who is looking for the Government to support them? And ''militant senior citizen.'' Every time I say that I think of grandmothers in Army uniforms marching down the street. These are visions so ridiculous that they have no place being brought into this D.C. Court of Appeals. At the end of the day, that means there is deep hostility toward our senior citizens, toward our workers, toward our farmers, toward our people.

Janice Rogers Brown is way outside the mainstream to the extreme.

I hope the American people understand why we held her up for so long. The only reason she is getting the up-or-down vote today is she is part of the deal to preserve the filibuster for future out-of-the-mainstream folks. We were on the verge of losing that.

She argued that e-mail messages sent by a former employee to coworkers criticizing a company's employment practices were not protected by the first amendment, but she supported corporate speech. That was in Intel v. Hamidi.

She argued that a city's rent control ordinance was unconstitutional and a result of the ''revolution of 1937.'' The woman is stuck in the past. She keeps going back to the New Deal, to 1937. Get over it. The things that worked well, we have continued—such as Social Security, minimum wage, or the FDIC, where we protect your deposits. Get over it. The American people demand those minimum protections.

But not Janice Rogers Brown. She does not demand it. She argues that it was a revolution that the New Deal began. She opposed it and says it is all about takings and it is all wrong.

Here is an interesting fact. Janice Rogers Brown is on a court with six Republicans and one Democrat. People say, it is California, it is California, everyone there is a liberal Democrat. Wrong. I would not be here if it were not for Republican, Independent voters, and Democratic voters. Here is the deal: She stood alone on a court of six Republicans and one Democrat 31 times. Think about it. You are a judge. You are a Republican. You have five Republican colleagues and one Democratic colleague. Yet 31 times you disagreed with those five Republicans and that one Democrat.

Who could actually stand up here, look the American people in the eye, and say she is a mainstream judge? That is just not true, based on the facts. Members can say whatever they want on the Senate floor, and I would die for a Members' right to free speech. You can put lipstick on it, nail polish, and dress it up, but the facts are the facts: She stood alone 31 times on a court of six Republicans and one Democrat.

Maybe it goes back to what the bar said about her, when she was put up for her position, that she was unqualified, that she did not understand legal precedent. Maybe that explains why she stands alone, she does not know what she is doing. Maybe she does not understand it. Maybe she does not get it; otherwise, why would she find herself alone so many times?

Let's go back to what has been said when she was appointed by Pete Wilson. They received complaints that Brown was ''insensitive to established legal precedent.'' In a court of appeals, that is a key fact. You have to understand what the law is, what has come before. She ''lacked compassion and intellectual tolerance for opposing views, misunderstood legal standard and was slow to produce opinions.''

Maybe she just couldn't follow the reasoning of her colleagues because she did not understand the legal precedence, or maybe they were moving too fast for her. Or, maybe she chose just not to follow it because she lacked compassion, and she has no intellectual tolerance for opposing views, even if it is legal precedent.

Let's see what else they said:

> She does not possess the minimum qualifications necessary for appointment to the highest court in the State [that is the California State court] the bar commission that reviews judicial nominees told Gov. Pete Wilson in a confidential report.

This was printed in the ''Los Angeles Times'' April 26, 1996.

One would think that the President's men who came up with this idea would have vetted this person. Why did we stop her from getting a vote? Simply because we knew the facts. If she wasn't qualified for the California Supreme Court, how does she now get to be qualified for this position? It makes no sense.

We will go back to some of the times she stood alone. This case is rather remarkable. We have Janice Rogers Brown, a female. A case comes before her of a woman who was 60 years old. She was a superstar working in a hospital, Huntington Memorial Hospital.

She was fired from her job based on age discrimination. Janice Rogers Brown said:

. . . discrimination based on age does not mark its victims with a stigma of inferiority and second class citizenship.

I ask the average American: A 60-year-old employee is perky, who is sharp, who is wise, who is experienced, who has gotten stellar reviews, who does better than almost anyone else, but she is fired because someone in management said, 60, you are out. So she is out of a job. And this woman had a lot of pride in her work. Maybe it was her whole life, maybe she was so devoted. We know people like that. Janice Rogers Brown makes a statement that ''discrimination based on age does not mark its victims with a stigma of inferiority and second class citizenship.''

Yesterday in the press conference where I was with a lot of minority women lawyers, one of them, Elaine Jones, made an important point about this case. She said it is fine for Janice Rogers Brown to think that discrimination based on age does not mark its victim with a stigma of inferiority and second class citizenship. If she feels that way, she should run for public office, run for the Senate, go to the House and change the laws we have written which say, in fact, it is a stigma to be the victim of age discrimination. This is hurtful, and it does confer second-class citizenship on the individual.

Her position is her own opinion. Everyone has a right to his or her own opinion. I don't have a problem with that. I don't agree with her. I think it is mean. I think it is nasty. I think it hurts our people. But she has a right to think that if she wants. What she does not have a right to do as a judge is to say that the law we passed simply does not exist. That is why she is so out of the mainstream. We have found that age discrimination brings with it a stigma of inferiority and second-class citizenship. We have said it is illegal. It is not legal. Her position is contrary to State and Federal law and puts her way outside the mainstream.

And now a look at some of the others. She is the only member of the court to vote to overturn the conviction of the rapist of a 17-year-old girl because she felt the victim gave mixed messages to the rapist.

Maybe my colleagues on the other side want to send someone to this very important court that stands with a rapist against a victim. I wouldn't think so. If one reads details of the case, members will be shocked by the details. The young woman already was raped once. This was a second rape. The first man pleaded guilty. He claimed innocence, but she was the only member of the court to say this young woman did not have a right to see this rapist confined to prison.

It is shocking to me that my colleagues on the other side of the aisle think this woman is in the mainstream. Is it in the mainstream of America to side with a rapist over a 17-year-old girl? Is it in the mainstream of America to side with an employer who fires you because you turn 60? It is totally against the State and Federal law.

She was the only member of the court to oppose an effort to stop the sale of cigarettes to children. That case was Stop Youth Addiction v. Lucky Stores. There is a reason there is an organization called Stop Youth Addiction—because we all know that tobacco is so addictive. When you start young, it is very hard to kick the habit. I am sure everyone in this Chamber who has ever smoked knows how hard it is to kick the habit. The younger you start, the more hooked you get.

Therefore, parents and others who are advocates are trying to make sure they cannot go into the store and purchase cigarettes at an underage level. She was the only member of the court to oppose the effort we had going on to ensure that kids do not buy cigarettes.

Is that mainstream thought, to go up against parents and families and say it is fine for a retail store to go ahead and sell cigarettes to a kid—your kid, my kid, my grandson? That is not mainstream. It is out of the mainstream.

This woman is out of the mainstream. That is why the Democrats have stopped her, until today. We did use the filibuster on her. We were glad to use the filibuster on her. If it did not happen that we had this deal, we would still be using the filibuster on her, to protect the people of the United States of America from her kind of values which stand with a rapist, which stand with the tobacco companies, which stand with those who discriminate.

She can explain in any way she wants. We know the results of her thinking. She could come up with a fancy explanation to tell this young 17-year-old woman, but look her in the eye and say: Well, your rapist has to get out because you didn't say it exactly the right way—when every other member of the court sided with this 17-year-old girl.

I am shocked my colleagues are supporting this nominee. And this issue is not going to go away. These decisions are not going to go away. There are going to be writings about these decisions. There is going to be discussion about them. People will be held accountable for their votes here. They should be, one way or the other.

If people in my home State are going to write and say, Why are you speaking out against someone from California, a woman who is a sharecropper's daughter, I am going to say, That is a good question, and let me tell you why. She is out of the mainstream to the extreme, and she is hurting our people. It is pretty simple for me.

She is bad on discrimination. She is the only member of the court to find that a State fair housing commission could not award certain damages to housing discrimination victims. And how about this? An African-American policewoman needed to rent a place and knocked on a door and had the door slammed in her face—more than once, again and again. She sued for discrimination. Every single member of that court, the highest court in California, ruled in favor of this policewoman—except Janice Rogers Brown. Oh, no. Oh, no. She said: You do not deserve any damages. You do not deserve any award for what you went through. Too bad.

Now, she may not have written it like that in her statement, but at the end of the day she had to look in this woman's eyes, this policewoman's, and say: Got the door slammed in your face three times? Too bad. That is the bottom line with how she ruled. She might as well have said that. And she stood alone. Is that American values? Is that mainstream America, that someone would stand on the side of someone who slammed the door in the face of someone simply because they did not like their appearance, they did not look like them? Seriously, folks, this is pretty basic American values 101.

She is the only member of the court to find that a disabled worker who was the victim of employment discrimination did not have the right to raise past instances of discrimination that had occurred. So here is someone who is saying they were victimized in an employment situation because they were disabled, they wanted to be able to tell about the series of events that led up to this particular lawsuit, how many times this had happened—she had MS and these discriminatory acts had taken place over many years—and Janice Rogers Brown stood alone and said she did not have the right to raise the past instances of discrimination.

Is that an American value, to tell someone who has multiple sclerosis, who has been discriminated against for years: Well, we are not interested; we are not interested in hearing about the past; just stick to this one case?

I do not think, if my colleagues really took the time and the energy and the effort to do the kind of work my great staff has done on this—and I have to say, I heard Senator HATCH say, well, all this comes from—what did he say?—liberal groups writing these things. This is painstakingly difficult work done by my staff. And they went through it because I said: Did she ever stand alone—because I knew her reputation is so out of the mainstream—did she ever stand alone? And they came back to me with this: She stood alone on the side of a rapist. She stood alone on the side of people who would discriminate. She stood alone on the side of tobacco companies against families. That is how I look at it.

She said a manager could use racial slurs against his Latino employees. Can you imagine coming to work every day and having to put up with a slur about yourself, about your ethnicity, about your religion, about your disability? There has to be some value

placed on human dignity. Well, you do not get it when you look at the writings of Janice Rogers Brown. You do not get it when you look at the way she comes down on a lot of these cases.

She was the only member of the court who voted to strike down a State antidiscrimination law that provided a contraceptive drug benefit to women. There is a very important law in my State that says if a woman wants to get contraceptives through her insurance, she should be allowed to. We talk around here a lot about the right to choose and all of that. All of us, I would hope, would come together in saying we do not want to see so many abortions. That is right. We want to make sure we reduce the number of abortions. Well, the way you do that is through contraception.

There was a time and place when contraception use was illegal in this country, until there was a case in the Supreme Court that was actually memorialized yesterday, the Griswold case, which said: No. It is legal. Well, if contraception is legal, why on Earth would we discriminate against people who try to use their health insurance to get it, their drug benefit to get it?

So this case comes before the California Supreme Court, and every member of the court—five Republicans and one Democrat—except her, except Janice Rogers Brown, says that is an appropriate law. So, again, we have someone out of the mainstream. If she is so out of the mainstream on contraception, imagine where she will be on the right to privacy, if she gets into that issue.

She is the only member of the court to find that a jury should not hear expert testimony in a domestic violence case about ''battered women's syndrome.'' Now, this one really touches my heart because, fortunately, many years ago, Senator JOE BIDEN phoned me when I was a House Member, and he said that he had written a bill called the Violence Against Women Act. We knew women were being battered and women were being raped. The violence against women was growing, and yet there was no Federal response. We have made tremendous progress in this area. We still have a long way to go.

Mr. President, I have been asked a question. I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. VOINOVICH). The clerk will call the roll.

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

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

The Senator from California.

Mrs. BOXER. As we learned more about stopping violence against women, we found out something very ugly, which is sometimes women are in such a desperate circumstance, after being battered for so long, that they lose their center and their balance and they fight back. Sometimes you will have a case that comes before a court, and in defending a woman they want to bring in an expert to talk about battered women syndrome—why is it that a woman, who is otherwise peaceful, otherwise decent, with no criminal record, no criminal history, would suddenly break out and do violence to another.

If you do not understand battered women syndrome, it makes it difficult. Janice Rogers Brown was the only member of the court to say a jury should not hear expert testimony in a domestic violence case about ''battered women's syndrome''—the only one. How is that in the mainstream of thinking? How is that in the mainstream of American values? How is that going to help us learn more about why people would act in a certain way? It does not say how a jury has to find. They just wanted to have this testimony. All of her colleagues found it would be perfectly appropriate. Not Janice Rogers Brown—out of the mainstream, in the extreme, standing alone time after time.

Janice Rogers Brown, the only member of the court who voted to bar an employee from suing for sexual harassment because she had signed a standard workers' compensation release form. She was the only member of the court who said: You do not have the right to sue if you have been sexually harassed because you have already signed a workers' comp release form. They are two different things. Yet for her, no, it was one and the same, and she stood alone in this case as well.

She was the only member of the court to find nothing improper about requiring a criminal defendant to wear a 50,000 volt stun belt while testifying. I think we discussed the fact that the U.S. Supreme Court recently made a judgment on this, that it is very important, in order to have a fair trial—and in America that is what we believe in.

Now, I, myself, am very tough on a criminal. I would do the worst of the worst to someone convicted of a heinous crime because I believe people give up their right to be among us if they commit a heinous crime. So I am very tough. At the same time, I understand you do not want to do something that would prejudice a case. When you bring someone into court, before they have been found guilty of anything, and they are wearing a 50,000 volt stun belt, it may give a message to the jury. And that may just result in an overturning of a conviction later on.

So the California Supreme Court found, except for Janice Rogers Brown, it was a mistake. She stood alone.

So let me finish up in this way. It is really an extraordinary nomination, this particular nomination. When the Democrats stood tall against this nominee, there were reasons. There were reasons we stood tall against 10 nominees. We allowed 208 to move forward, but we stood against 10. We stood against 10 and said: Do you know what. We are going to follow historic precedent. If we believe these nominees are out of the mainstream, we are going to stand and be counted.

It is not pleasant. It is not nice. It is not enjoyable. It is not something anyone looks forward to.

It is unusual to do it, and we did it 10 times. We gave this President a 95-percent ''yes'' record of judge confirmations, but he is not a happy camper unless he gets 100 percent. If I got 95 percent of the vote, I would be soaring high. If I got 95 percent of my bills passed through here, I would be soaring high. I would be so happy if my kids listened to me 95 percent of the time. I would be smiling. I would say: Yes, I think you are wrong on that 5 percent, but I feel good about it.

Not this President; he wants 100 percent. It is called the arrogance of power. It is called one-party rule. I think the American people want to be governed, not ruled. We had a King George once. It didn't work out very well. We like President George better than King George. But President George, as every President, whether it was Bill or Harry or you name it—some day it will be a woman, I can hope—every President who reads the Constitution knows there is an advice and consent clause. That means when you put people up for these lifetime appointments, the Senate has an important role to play. And instead of being annoyed about it, instead of being bothered about it, instead of feeling it is cramping your style, you should use your power, your effectiveness, your political capital, your charm, use whatever you have to come over to the Senate, to sit down with Senators, to say: Look, I am thinking of putting up Mr. X or Mrs. X. What do you think?

It is frustrating because early in the Bush Presidency, Alberto Gonzales, who was the White House counsel, came over and he did say to me—because I was against a Ninth Circuit Court nominee—do you have any good ideas for who else you might support? I did. I talked to my people, to my Republican supporters. We came in. We had six terrific Republican names. We sent them. Nothing. So they asked, but they never acted. Some of these people were quite conservative. I think they would have been pleased. But this seems to be an administration that wants 100 percent of what they want. They don't want the shared responsibility of governing. Either they don't want or they don't understand or they don't like the balance of powers, which is such a centerpiece of our Government.

We see it on the Bolton nomination as well. That is not for a judgeship. That is a nomination for U.N. ambassador. But, again, if we could just talk to each other, we could come up with someone who would be terrific, instead of having these standoffs, which are difficult. They are not pleasant. We are not getting a lot of work done because of how much time we are talking about Janice Rogers Brown, because many of us believe she is so out of the mainstream, we can't let it go. That is why

I so respect the moderates who came up with the agreement because part of that agreement said in the future the President should talk to us more, especially about Supreme Court nominees.

We are at a place and time where we have proven one point, that when we stood up against these 10 judges and allowed 208 to go through, it wasn't arbitrary or capricious or nasty or personal. It was because these people are out of the mainstream. I well remember when George Bush was declared the winner in 2000, he came right out and said: I am going to govern from the middle.

Here is where we are: George Will, ''Extraordinary' Rhetoric.'' George Will calls Janice Rogers Brown out of the mainstream. George Will is very rightwing and he calls her out of the mainstream. He says it is a fact that she is out of the mainstream.

The Mercury News says:

> As an appellate judge who would hear the bulk of challenges to Federal laws coming out of Washington, Janice Rogers Brown's appointment would be disastrous. She'd be likely to strike down critical environmental, labor laws and antidiscrimination protections. Brown, though, has infused her legal opinions with her ideology, ignoring higher court rulings that should temper her judgment.

That was the from San Jose Mercury News, a very mainstream newspaper in Silicon Valley.

From the Sacramento Bee that sits in the heart of the capital of California:

> The minority in the Senate certainly is justified in filibustering a lifetime appointment of Brown.
>
> . . . The Court of Appeals for the District of Columbia Circuit is the last place we need a judge who would impose 19th century economic theory on the Constitution and 21st century problems.
>
> The issue isn't Brown's qualifications; it's her judicial philosophy.

I see my friend from Colorado is here. I will stop now and thank him for the work he did on that compromise on the filibuster. I was not a happy person that Janice Rogers Brown was in the group, but our side had to give up something. I have spent days expressing why I hope there will be a strong vote against her. She is out of the mainstream.

I thank the Chair and yield the balance of my time to Senator SALAZAR.

The PRESIDING OFFICER (Mr. COBURN). The Senator from Colorado.

Mr. SALAZAR. Mr. President, I thank the distinguished Senator from California for her eloquent statement concerning Janice Rogers Brown.

I rise today to state my opposition to her confirmation to serve as a judge on the U.S. Court of Appeals for the District of Columbia. I have carefully considered her record and have unfortunately concluded that Ms. Brown is not the right choice to serve as a judge on the District of Columbia Federal court.

I have had the privilege of extensive experience in judicial selection in the State of Colorado, both for the Federal and State courts. For the years when I served the Governor of Colorado as his lawyer, I administered for the Governor the process of choosing judges in Colorado. When I later served as attorney general for my State, I chose, with Governor Owens and the chief justice of Colorado, those who could select judges under Colorado's Constitution.

My views on the qualifications of judges to serve on any court have been forged over years of working on judicial selections. Among the most important characteristics we rightly demand of our Federal judges are that they have an open mind, are free from bias, and a temperament that does not inflame passions. Janice Rogers Brown, in my view, fails these tests.

First, I do not think Ms. Brown will be fair in the ways a Federal judge must be fair. I have come to believe Ms. Brown is driven ideologically and that she will prejudge some of the most important legal cases and issues that come before a Federal appellate court. I base my conclusions on her written record and on her own statements. When any person has a case to bring before a Federal judge on any issue, that person has a right to insist that the judge will listen carefully to all the arguments on the facts and the law with an especially fair and open mind that considers carefully all the points made on every subject, pro or con. This right to absolute fairness by a Federal tribunal is a bedrock of our constitutional judicial system. It is just commonsense, and it is an idea that is very well understood by everyone in this Nation.

There is another simple way to say this. No one wants to walk into court before a case is heard and know already how the judge is going to rule. Yet this is exactly the problem with Janice Rogers Brown. She is so driven by her ideology on issues such as the proper role of the Government and administrative agencies—or the role of ideas of private property that separates constitutional and unconstitutional government regulation—that it is very obvious how Ms. Brown is going to rule on these matters, even before she hears a case.

There are many quotes from Ms. Brown that illustrate this point. A good example is from a speech to the Federalist Society on April 20, 2000, where she said:

> Where government moves in, community retreats, civil society disintegrates and our ability to control our own destiny atrophies. The result is: families under siege; war in the streets; unapologetic expropriation of property; the precipitous decline of the rule of law; the rapid rise of corruption; the loss of civility and the triumph of deceit. The result is a debased, debauched culture which finds moral depravity entertaining and virtue contemptible.

These are extreme views, to say the least.

Second, Ms. Brown is an activist judge. From my review of her record, I believe she will use the court as a vehicle to forward her own personal view of the law in society. She has done it consistently in the past. I believe that is the role of a legislator, not the role of a judge. I believe that kind of judicial activism is absolutely wrong in our courts, no matter what ideology it spawns from.

Third, I believe Janice Rogers Brown does not have the right temperament to be a judge on the Federal appellate bench. When a person accepts the solemn mantle of the robes and the duties of the judiciary, I believe she must agree by temperament to place her own personal legal and social views in the background. She must accept that while a judge, though she can have her own personal views, she must not cause people to perceive her as unfair, if she is as strident about those views as she has been demonstrated by her record.

Again, Janice Rogers Brown does not meet the test of the temperament of someone to be on the Circuit Court of Appeals for the D.C. Circuit. I believe litigants and others who watch the judiciary are correct to perceive that Janice Rogers Brown may not treat them fairly as she considers a particular case against the backdrop of her own personal views that are obviously so strongly felt.

I also believe Ms. Brown is nominated to serve on the wrong court. She is nominated to serve on the appellate court where her ideology can do the most damage to our Federal and State governments.

The Circuit Court of Appeals for the District of Columbia is our Nation's most prestigious court of appeals with regard to all matters dealing with Government. Through venue provisions found throughout the Federal statutes, Congress often and intentionally chooses this court exclusively to hear matters concerning Government agencies. These are legal matters that go to the very heart of how our Government operates through our administrative agencies, agencies that affect the lives of our citizens every day all across our country.

The District of Columbia court is our Nation's expert court in administrative law. While that is an abstract legal concept, it is also a very important matter to all ordinary citizens in Colorado and across the Nation.

Yet Janice Rogers Brown is absolutely hostile to our Government and to administrative agencies and to their essential work. Janice Rogers Brown is the wrong person to elevate to this important Federal appellate court. It is for these reasons that I will vote to oppose the nomination of Janice Rogers Brown to the District of Columbia Court of Appeals.

I also want to add another quick point. As I have listened to the debate here on the floor of the Senate today, there has been some sentiment expressed that perhaps the opposition of some of my colleagues in the Democratic caucus has to do with her background, with the fact that she is African American. I will tell you, from the

work of my colleagues on this side of the aisle, they have been champions of opportunity for all people, they believe we live in America, that we should be talking about uniting our country and not dividing our country, and yet it is a nomination of Janice Rogers Brown, with her views of activism in the Federal court, which they have called appropriately into question and which some of my colleagues on the other side have now been saying somehow has the Democratic caucus as being anti-African American.

There could be nothing further from the truth. The opposition that has been voiced against Janice Rogers Brown has nothing to do with her personal ethnicity. It has to do with the fact that the conclusions that have been reached based on a review of her record indicate that she will inject her own personal views as an activist judge into the D.C. Circuit Court of Appeals. Therefore, I again reiterate my position that I will vote against her confirmation, and I urge my colleagues in the Senate to do the same.

I yield the floor.

(At the request of Mr. REID, the following statement was ordered to be printed in the RECORD.)

• Mr. JEFFORDS. Mr. President, I would like to express my opposition to the nomination of Janice Rogers Brown to the D.C. Circuit Court of Appeals.

The D.C. Circuit Court of Appeals is considered the second highest court in the Nation. This court of appeals, compared to other circuit courts of appeals, has sole jurisdiction over many laws and Federal agency regulations and decisions. Given the limited number of cases the U.S. Supreme Court considers every year, this means the DC Circuit Court of Appeals has the last word on important laws and their interpretation.

Justice Janice Rogers Brown has a compelling life story, but a compelling life story is not enough to be confirmed to a lifetime appointment to the federal bench. While she deserves recognition for her upbringing and work in the community, I am concerned that Justice Brown's personal opinion, rather than the law, compels her decisions in some cases.

Some other areas of concern I have with Justice Brown's nomination include:

Justice Brown has advocated for a return to the time when the Supreme Court struck down many important economic regulations and workplace laws on constitutional grounds. The case is Santa Monica Beach v. Sup. Ct. of LA County, 1999, dissenting.

Justice Brown has argued that those seeking to enforce the statutory prohibition against disability discrimination are ''individuals whose only concern is their own narrow interest.'' The case is Richards v. CH2M Hill, Inc., 2001, dissenting.

Justice Brown has ignored or misconstrued Supreme Court precedent and legislative language to reach her decisions. The cases are San Remo Hotel v. City-County of San Francisco, 2002, dissenting; Richards v. CH2M Hill, Inc., 2001, dissenting; Catholic Charities of Sacramento v. Superior Court of Sacramento County, 2004, dissenting.

Justice Brown has stated in a lone dissent concerning the State statute requiring prescription contraceptive coverage that if the corporation's female employees do not like being discriminated against, they are free to find, ''more congenial employment.'' The case is Catholic Charities of Sacramento v. Superior Court of Sacramento County, 2004, dissenting.

Taken individually, these stances might not be cause for some to oppose this nomination. However, looking at the whole picture I believe there is a pattern of behavior that leads me to conclude that Justice Brown is not qualified to serve on the D.C. Circuit Court of Appeals. For these reasons, I opposed limiting debate on her nomination in 2003, and continue to do so today.

Unfortunately, I will be necessarily absent for the votes that will occur related to this nominee. However, I did feel it necessary to express my position on this important nomination.•

Mr. CORZINE. Mr. President, I urge all of my colleagues in the U.S. Senate to reject the nomination of Janice Rogers Brown to the District of Columbia Circuit Court of Appeals. I strenuously oppose this nomination because I believe that her appointment to a lifetime tenured position on the D.C. Circuit Court will lead to the destruction of so many of the achievements we have struggled to achieve during the past 70 years—the creation of a social safety net, the advancement of civil rights for all Americans, and the protection of workers throughout our country. When I say achievements I am talking about many of the laws passed by the U.S. Congress, for during the past 70 years we have created the heart of what is today our modern American government. Congress has set the standard for our Nation—from social security and minimum-wage laws to homeland security and regulation of the business industry—by establishing laws that provide tremendous benefits and protections for all Americans.

I am deeply troubled by the nomination of Janice Rogers Brown, a jurist who has made no secret of her disdain for government and her desire to overturn many of the most important laws passed by Congress during the past 70 years. She will dismantle the foundation of our democracy, challenging the right of Congress to pass laws to help our citizens. Keep in mind that when I speak about Congress, I am not discussing people from one political party or the other; rather, I speak of the collective will of the American people, which is forged so often through bipartisan agreement and compromise between legislators from both political parties. And so I ask, who is Justice Brown to try to dismantle the very laws that we have forged over time through debate and consensus to protect our rights and keep us safe in America today?

During the past 9 years, Justice Brown has made her legal philosophy clear through both her public speeches and her legal opinions as a Justice on the California Supreme Court. She has, time and time again, demonstrated that she will be a movement judge—someone who will determine the ultimate outcome of a case based on her political beliefs instead of on the facts and law before her. Justice Brown has been inconsistent in her interpretation of the law, following precedent when it helps her to arrive at a desired result and rejecting precedent as non-binding when it will not achieve her desired ends. This is precisely the type of individual who should not receive a seat on the D.C. Circuit Court of Appeals, which is considered the second highest court in the country and a steppingstone to a seat on the U.S. Supreme Court.

We should not approve any individual for a lifetime tenure position as a Federal judge who would use her position to achieve results consistent with an extreme political philosophy regardless of the facts and law. And I believe this to be true regardless of what the extreme political philosophy may be. Our goal must always be to ensure the independence and fairness of our courts. This is the very reason that Federal judges receive lifetime appointments: to guarantee that they will not be susceptible to political pressure or undue influence. Our goal must be to sustain this level of independence so that all citizens can be confident that, when they bring a case in Federal court, they will receive a fair hearing, based on the facts and law and not upon one individual's political beliefs.

We must place the value of an independent judiciary above the partisan politics of the day and refuse to approve purely partisan political nominees such as Janice Rogers Brown. The U.S. Senate has a constitutional obligation to advise the President on judicial nominations. As part of this obligation, the Senate must fight to ensure the continued existence of an independent and fair judiciary. We must never forget that our courts depend, first and foremost, on the judges who hear arguments, preside over trials, and issue rulings each and every day. The only way we can maintain a strong judiciary is if we approve only the most qualified individuals to lifetime appointments as Federal judges. And so we must approve nominees who possess the very traits we value most in our judiciary—fairness, independence, and an allegiance to the rule of law. That is why I urge my colleagues to reject Janice Rogers Brown, an individual who has consistently failed to demonstrate these traits. An individual who would, in my view, insert her extremist legal

philosophy into the courts in an attempt to undo years of Congressional legislation and legal precedent.

There should be no doubt that Justice Brown espouses an extreme legal philosophy far outside the mainstream of American legal thought. The President has selected a number of appellate court nominees, including Justice Brown, who embrace a radical legal theory frequently referred to as the ''Constitution in Exile.'' The ''Constitution in Exile'' theory is based on arguments put forth by Judge Douglas Ginsburg and Professor Richard Epstein. Ginsburg and Epstein believe that individuals have certain rights and liberties, including ''economic liberties'', and that any government that infringes upon these so-called liberties is ''repressive.'' This theory, advocated by Justice Brown, argues that the U.S. government represses its citizens when it takes land to build schools and pays the owner fair market value, establishes worker safety and minimum-wage laws, and institutes zoning and other regulations. Indeed, the ''Constitution in Exile'' theorists call into question the decisions of some of the most important government agencies—the EPA, the FCC, the SEC, and even the Federal Reserve—and argue that these agencies are themselves unconstitutional.

This legal theory is so far outside the mainstream that even the most conservative jurists on the U.S. Supreme Court recently rejected its premise. A unanimous Supreme Court—including conservative justices such as Scalia and Thomas, with whom I don't generally agree—handed down a decision on May 23, 2005, in *Lingle* v. *Chevron*, No. 04–163,—S.Ct.—, 2005 WL 1200710 (May 23, 2005) that squarely rejects the ''economic liberty'' theory of takings asserted by ''Constitution in Exile'' theorists.

Lingle addressed questions of economic liberty in the context of challenges to Hawaii's rent-control regulations. The case tested whether the ''Constitution in Exile'' theory operates within the mainstream of American legal thought because advocates of the theory, including Richard Epstein, argued that the Supreme Court should look more critically on economic regulations and give less deference to legislative judgments. The Supreme Court strongly rejected this approach; writing for the Court, Justice O'Connor dismissed the argument that the Court should adopt a more critical approach to economic regulations and noted the strong need for deference to the judgment of state legislatures. O'Connor further stated that '''government regulation—by definition—involves the adjustment of rights for the public good.''

Lingle demonstrates that Justice Brown stands far outside the legal mainstream. Beyond the defeat of the general principles espoused by the ''Constitution in Exile'' theorists, the Lingle decision serves as an explicit rejection of the legal theory set forth by Justice Brown in a lone dissent—one of her many—on the California Supreme Court. In San Remo Hotel L.P. v. City and County of San Francisco, a case contesting the legality of a San Francisco development fee used to promote affordable housing, Justice Brown issued a dissent espousing the same legal argument outlined by Epstein in Lingle—that the court should look more critically on economic regulations and give less weight to the wishes of the legislature. In rejecting the principles of the Constitution in Exile theorists, the Supreme Court explicitly rejected the argument set forth by Justice Brown in her San Remo dissent. Although there should be no need for additional evidence that Justice Brown's legal philosophy falls outside of the mainstream, the decision in Lingle provides powerful proof that Justice Brown falls far outside the boundaries of established legal thought.

For all these reasons, let me again urge my fellow colleagues to reject the nomination of Janice Rogers Brown. We must reject extremist judges like this who fall outside of the mainstream and who will use the federal judiciary to dismantle so many of the progressive accomplishments we have fought so hard to achieve during the past 70 years.

Mrs. FEINSTEIN. Mr. President, of all the nominations contested in the past few weeks, Justice Brown's is the clearest cut. Justice Brown has given numerous speeches over the years that express an extreme ideology that is far outside the mainstream of American jurisprudence. In those speeches, Justice Brown used stark hyperbole, and startlingly vitriolic language which has been surprising, especially for a State supreme court justice.

But statements alone would not be enough for me to oppose her nomination. Rather, my concern is that her personal views drive her legal decision-making. On far too many occasions, she has issued legal opinions based on her personal beliefs, rather than existing legal precedent.

I am troubled that Justice Brown is bound by her personal views of what the law should be rather than following the law as written and enacted. This is especially troubling for a candidate who is being nominated to the D.C. Circuit Court of Appeals.

The D.C. Circuit is an especially important court in our Nation's judicial system. It is recognized as the most prestigious and powerful appellate court below the Supreme Court because of its exclusive jurisdiction over constitutional rights and government regulations.

Given this exclusive role, the judges serving on this court play a special role in evaluating government actions.

Each year, the Supreme Court routinely reviews fewer than 100 cases. Therefore, circuit courts, like the D.C. Circuit, end up as the forums of last resort for nearly 30,000 cases each year. These cases affect the interpretation of the Constitution as well as statutes intended by Congress to protect the rights of all Americans, such as the right to equal protection of the laws and the right to privacy. Specifically, the D.C. Circuit Court is the most likely venue where Federal regulations and government actions will be upheld or overturned.

Yet Justice Brown, throughout her career, has demonstrated an open hostility towards government. This hostility is concerning given that, if Justice Brown serves on the D.C. Circuit, she will play a decisive role in evaluating government actions.

For example:

In a 1999 speech Justice Brown stated:

> My thesis is simple. Where government advances—and it advances relentlessly—freedom is imperiled; community impoverished; religion marginalized; and civilization itself marginalized.

At a 2000 Federalist Society event, Justice Brown stated:

> Where government moves in, community retreats, civil society disintegrates, and our ability to control our own destiny atrophies. The result is: families under siege; war in the streets; unapologetic expropriation of property; the precipitous decline of the rule of law; the rapid rise of corruption; the loss of civility and the triumph of deceit. The result is a debased, debauched, culture which finds moral depravity entertaining and virtue contemptible.

The Senate should not confirm a judge to this important court who has shown such blatant contempt for the government. Again, to be clear, if it were only hyperbolic statements in speeches then maybe we could look past the rhetoric. However, the extreme views expressed in Justice Brown's speeches also emerge in the opinions she has rendered as a judge.

In various cases involving even modest government regulations she has issued opinions that ignore the law and established precedent.

One example I would like to discuss involves a property issue in my home city, San Francisco, and it is a case with which I am familiar since the ordinance was enacted during the time I served in San Francisco's government.

The case is San Remo Hotel v. San Francisco. In response to a low-income housing emergency for elderly residents, San Francisco enacted an ordinance requiring hotels to obtain a permit before converting long-term residential housing into short-term tourist hotel rooms.

To obtain a permit, hotels either had to provide mitigation for the removal of the residential rooms by offering alternative housing, or pay a fee to be used for the relocation of tenants. In San Remo Hotel v. San Francisco, the owners of a hotel sued the City of San Francisco, claiming that the ordinance constituted an illegal ''taking'' of property by the city.

Following U.S. Supreme Court precedent, the California Supreme Court

held that the ordinance did not constitute a ''taking'' of the hotel's property since the ordinance did not physically ''invade'' the property and since the ordinance ''substantially advance[d] legitimate state interests.''

In contrast, Justice Brown wrote in her dissent in the San Remo case that:

> Private property, already an endangered species in California, is now entirely extinct in San Francisco. The City and County of San Francisco has implemented a neo-feudal regime where the nominal owner of property must use that property according to the preferences of majorities that prevail in the political process—or worse, the political powerbrokers who often control the government independently of majoritarian preferences.

The majority described Justice Brown's dissenting opinion by saying that she argued, with little citation or support, that ''government should regulate property only through rules that the affected owners would agree indirectly enhance the value of their properties.''

If this view were the law it would make it almost impossible for any city, State, or local government to make any policies for the benefit of the community as a whole. No local government could downzone property, no Federal agency could prepare a habitat conservation plan. Under Justice Brown's analysis they would all be illegal takings of one kind or another.

The majority decision of the California Supreme Court went on to criticize Justice Brown for attempting to ''impose'' her own ''personal theory of political economy on the people of a democratic state.''

Furthermore, Justice Brown's written opinion was at odds with the current legal precedent of the U.S. Supreme Court at that time. And, in fact, earlier this year, Lingle v. Chevron, the U.S. Supreme Court unanimously rejected a takings analysis similar to the one set forth in Brown's dissent in San Remo.

Nevertheless, Justice Brown permitted her personal views to overwhelm her obligation as a judge to follow the law. While Justice Brown certainly has a right to private views that may conflict with the law, a judge may not substitute her personal opinions for the law.

I also believe it is illuminating to put Justice Brown's views and legal opinions in the context of the court of which she is a member.

Justice Brown often stands on an island by herself as the lone dissenter on a court made up of six Republican justices and only one Democratic justice—approximately one-third of the cases she has written have been dissents, and in 10 percent of those cases, she has been the lone dissenter.

For example, in the 2004 case of Catholic Charities of Sacramento v. Superior Court of Sacramento County, Justice Brown cast the sole dissenting vote. She argued against upholding a State statute that requires employers whose insurance covers prescription drugs to include prescription contraceptives in their coverage. In her dissent, she suggested that, if women had a problem with their inequitable treatment, they were free to find ''more congenial employment,'' and stated that because women seeking contraception were a minority of insured employees, striking down the law would have a ''negligible effect.''

Based on her pattern of taking this contrarian role, she has been widely criticized, even among her Republican colleagues, for her caustic writings. Sources on the court reportedly stated that her fellow justices have privately complained about her ''poison pen'' and have called Justice Brown a ''loose cannon when she has a typewriter in front of her.''

Republican Chief Justice Ronald M. George has even taken the unusual step of pulling her aside and asking her to tone down her scathing criticism of majority rulings.

In addition to her tone, her legal reasoning has often been criticized by her colleagues. In one example, Nike v. Kasky, Nike was accused of providing abusive conditions for their overseas workers including forced overtime, exposing workers to health hazards, and subjecting workers to verbal, physical and sexual mistreatment.

Nike denied the mistreatment and made numerous statements touting a positive record and was sued for misrepresenting its labor practices at Asian factories.

The majority of the California Supreme Court determined the statements made by Nike were commercial speech and thus entitled to less constitutional protection.

Justice Brown dissented, saying the speech should have been protected even if false. In her dissent, Brown called on the U.S. Supreme Court to overturn a long line of cases which distinguish commercial and noncommercial speech.

Republican Justice Kenard criticized Brown's dissent, saying:

> Sprinkled with references to a series of children's books about wizardry and sorcery, Justice Brown's dissent itself tries to find the magic formula or incantation that will transform a business enterprise's factual representations in defense of its own products and profits into noncommercial speech exempt from our state's consumer protection laws.

I am deeply troubled when a Justice's own colleagues express grave concerns about an individual's legal reasoning, and demonstrate a willingness to openly criticize a fellow member of the bench.

An overarching principle of both Republicans and Democrats is that the role of a judge is to follow the law, regardless of one's personal ideology. Yet, repeatedly, Justice Brown has allowed her personal opinion to override a fair application of the law and has altered her legal reasoning in order to achieve a desired result. Law school professor Gerald Uelmen said that Justice Brown's opinions may be interpreted as ''motivated by politics rather than the law.''

When examining her record, it appears that the thread of logic sewn through her legal opinions is her desire to achieve a predetermined outcome based on her personal views. In case after case, Justice Brown significantly changes her legal reasoning to implement a results-oriented approach based on her view of what the law should be.

When Justice Brown wanted to limit the explicit right to privacy in California's Constitution, she argued: ''Where, as here, a state constitutional protection was modeled on a Federal constitutional right, we should be extremely reticent to disregard U.S. Supreme Court precedent delineating the scope and contours of that right.''

But when the question of remedies for a violation of constitutional rights arose, she said: ''Defaulting to the high court fundamentally disserves the independent force and effect of our Constitution. Rather than enrich the texture of our law, this reliance on Federal precedent shortchanges future generations.''

These cases both involved the role of precedent and following the decisions of previous courts. However, depending on the facts of the case Justice Brown changed her legal opinion about whether judges should follow precedent; in one case she discussed the importance of following precedent, yet in the other she argued that reliance on precedent can be harmful.

When examining the role of juries and their ability to evaluate a case, once again, Justice Brown makes conflicting arguments.

In order to limit damages against employers in worker discrimination suits, Brown wrote:

> When setting punitive damages, a jury does not have the perspective, and the resulting sense of proportionality, that a court has after observing many trials.

But, when criminal defendants' cases—not businesses—were being evaluated, Justice Brown wrote:

> I do not share the majority's dim view of jurors. Rather, I would presume, as we do in virtually every other context, that jurors are intelligent, capable of understanding instructions and applying them to the facts of the case.

Justice Brown's conflicting legal reasoning also appears when her decisions examine the assessment of damages. When the plaintiffs were victims of employment discrimination, Justice Brown supported limits on punitive damages. But, when the plaintiffs were property owners in a mobile home park who had to previously abide by rent control laws, she opposed any limit on damages.

In each of these contrasting examples, Justice Brown has used legal reasoning that has conflicted. It is concerning when a judge seems to alter her legal reasoning based on her personal view of a case, rather than employing consistent legal reasoning regardless of who is making the argument, or who would be impacted by its effect.

Based on this record, parties in a case have no idea whether Justice Brown will rely on precedent or decide it is an impediment, whether she will defer to the legislature or decide it's time for her or other judges to make law; whether she will trust the jury to evaluate the case or decide they cannot make the necessary evaluations; or whether she will protect unlimited damages or order that there needs to be limits on damages.

Those who come before a court need to be assured that they are going to be given a fair hearing with an impartial arbiter. Justice Brown's record demonstrates that those who come before her court will not have such assurances.

Not surprisingly, Justice Brown's nomination has ignited strong and far-reaching opposition. Both Senators from her home State and almost two dozen members of California's congressional delegation oppose her nomination.

The Congressional Black Caucus opposes her nomination, as does every major African American organization in the country, including the National Black Chamber of Commerce, NAACP, the National Bar Association, the California Association of Black Lawyers, and the Leadership Conference on Civil Rights.

The California Association of Black Lawyers stated:

> We would like to see an African American female be elevated to a higher court.

But as the group's president went on to explain:

> We do not see how we can support someone who is diametrically opposed to our goals.

In adddition, unlikely conservative commentators have affirmed concerns raised by opponents of Justice Brown's nomination:

> National Review Senior Editor Romesh Ponnuru discussed Brown's troubling statements and her willingness to embrace judicial activism and concluded that ''if a liberal nominee to the courts said similar things, conservatives would make quick work of her.''

George Will concluded that Justice Brown is ''outside of that mainstream'' of conservative jurisprudence; and

Conservative columnist Andrew Sullivan wrote:

> Whatever else she is, she does not fit the description of a judge who simply applies the law. If she isn't a 'judicial activist,' I don't know who would be.

Evaluating judicial nominations is a very difficult process, and it is one that ignites passionate feelings from all sides. Clearly, Presidents from different parties will choose very different nominees for the Federal courts. However, there are basic principles that every nominee must follow regardless of which party is in power.

As Senator HATCH stated in 1996 when opposing the confirmation of Judge H. Lee Sarokin to the U.S. Court of Appeals for the Third Circuit and Judge Rosemary Barkett to the U.S. Court of Appeals for the Eleventh Circuit:

> Many of these judges are activists who simply cannot understand that their role is to interpret the law, not to make it . . . I led the fight to oppose the confirmation of these two judges because their judicial records indicated that they would be activists who would legislate from the bench.

Legislating from the bench, being an ''activist'' judge, has been a concern of members of both parties. It is a basic principle used when evaluating nominees—judges must follow the law, not manipulate the law to serve their own political ideology.

As I have discussed today, Janice Rogers Brown is widely opposed by a broad coalition of prominent leaders and organizations, she has been criticized by her Republican colleagues on the court, and she has made astoundingly vitriolic statements about everything from senior citizens to the government.

While each of these concerns raises significant questions about her qualifications to serve on the D.C. Circuit Court of Appeals, for me, most importantly, Janice Rogers Brown does not meet the basic principle used to evaluate judicial nominees by both parties—will they follow the law?

Unfortunately, Janice Rogers Brown's record does not demonstrate that she will be able to put aside her personal views and follow the law.

Mr. KOHL. Mr. President, I oppose the confirmation of Justice Janice Rogers Brown to the U.S. Court of Appeals for the D.C. Circuit. It is unfortunate that the President has chosen to resubmit for our consideration this failed nomination from the President's first term. Both in her public record on the California Supreme Court and in her writings and speeches off the bench, Justice Brown has compiled a remarkable record of extremism, of ideologically motivated decision making, of intemperance in her public statements, and of a judicial philosophy unquestionably out of the mainstream. Such a record makes her entirely unsuitable for a life tenured position on the D.C. Circuit.

Justice Brown's extraordinary views on the role and nature of government convince me that there is a substantial risk that her views and legal philosophy are so far outside the mainstream as to pose a very real threat to our civil rights and civil liberties. Her views on the role and work of Government in modern America are particularly disturbing for someone nominated to the Federal bench, and specifically the D.C. Circuit.

Justice Brown has been nominated to what is considered by many to be the second most important court in the nation. The D.C. Circuit is unique among the Federal courts of appeals as the court that reviews decisions of the executive branch and the independent agencies. The rules and regulations reviewed by this court are felt by average citizens across the Nation every day. These include worker safety rules issued by the Occupational Safety and Health Administration; the rules of the Environmental Protection Agency regarding the purity of the water we drink and the air we breath; workers' right to the minimum wage and overtime compensation guaranteed by the Fair Labor Standards Act; rights to organize unions and bargain over the terms and conditions of employment under the National Labor Relations Act; and decisions by the Federal Trade Commission regarding deceptive or unfair trade practices that injure consumers. The decisions of the D.C. Circuit on these and many other subjects have a real and immediate impact on the lives of all Americans.

Justice Brown's hostility to the role and work of government in modern America are particularly disturbing for someone nominated to the D.C. Circuit. She has repeatedly said that she views government as a negative influence on American life, contrary to the moral fiber of our Nation. On one occasion, she stated that ''when government moves in, community retreats, civil society disintegrates, and our ability to control our own destiny atrophies. . . . The result is a debased, debauched culture which finds moral depravity entertaining and virtue contemptible.'' On another occasion, she wrote that ''where government advances . . . freedom is imperiled; community impoverished; religion marginalized and civilization itself jeopardized.'' She has also remarked that the New Deal era of the 1930s ''marks the triumph of our own socialist revolution.''

Her commentary on legal theory is no less extreme.

She has railed against what she sees as a judiciary that has distorted and misinterpreted the Constitution. She has stated that since the 1960s, ''we have witnessed the rise of the judge militant.'' She also claims that modern judicial rulings have caused the Constitution to be ''demoted to the status of a bad chain novel.'' She continues to argue in favor of long discredited and overturned legal doctrines which were used to strike down worker protection and social welfare laws over 100 years ago.

Other examples of Justice Brown's thinking are equally troubling. She has contended that senior citizens ''cannibalize'' their grandchildren by asking for society's support in old age via social security. And speaking recently at a church on ''Justice Sunday,'' Brown proclaimed a ''war'' between religious people and the rest of America.

We have heard nominees that have come before us before argue that they should not be held to their record because it merely reflects positions they advanced as advocates for their clients. This defense is not available to Justice Brown. These are opinions that she held solely on her own behalf, in her own speeches and writings in which she was advancing no one's agenda but her own.

Her record on the California Supreme Court does not allay our concerns. She has been consistently unsympathetic

to the rights of those asserting civil rights or employment discrimination claims. And, on many occasions, she has been the lone dissenter on an already conservative court. She dissented from a case which upheld a prohibition on an employee's use of hateful racial invective in the workplace; from a decision that held that a city rent control ordinance did not constitute an unconstitutional taking of private property; from allowing workers over age 40 to bring age discrimination claims; and from a case which found that sexual intercourse after a woman told her assailant to stop constituted rape. Her frequent dissents are compelling evidence regarding how her personal views affect her judicial decisionmaking.

In light of this record, it is not surprising—but nonetheless telling—that both of Justice Brown's home state Senators oppose her confirmation, a virtually unprecedented situation for an appellate court nominee.

An appeals court judge's solemn duty and paramount obligation is to do justice fairly, impartially, and without favor. An appeals court judge must be judicious—that is, she must be open minded, must be willing to set his personal preferences aside, and judge without predisposition. And, of course, she must follow controlling precedent faithfully, and be able to disregard completely any views she holds to the contrary. In the case of Justice Brown, we are presented with a nominee who has a well-documented record, in numerous writings and speeches, of views that are so extreme, and so far outside the mainstream, that she fails this basic test.

For these reasons, I must continue my opposition to her confirmation to this crucial judgeship.

Ms. LANDRIEU. Mr. President, Socrates said, ''Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially.'' To date, the Senate has confirmed 209 of President Bush's judicial nominees. The vast majority of them received overwhelming support from this body. We looked at their records and decided that they had the qualities that Socrates described. Janice Rogers Brown, however, lacks these qualities and falls far short of this ideal. I sincerely regret that the President has asked this body to confirm her to a lifetime appointment to the District of Columbia Circuit Court of Appeals.

This is no reflection on her individual accomplishments. She comes from a very humble background, a sharecropper's daughter, and has taken full advantage of all that this country has to offer to become a Supreme Court judge. She has gained some wisdom from this experience, I am sure, and I have no doubt that she will take her job as a judge seriously, soberly.

My greatest concern lies with her impartiality. Some of her statements and her decisions on the California Supreme Court lead me to believe that she will let her personal bias dictate her consideration of issues of law. I cannot trust the impartiality of someone who may be considering issues involving Medicare or Social Security who says that senior citizens ''blithely cannibalize their grandchildren because they have the right to get as much 'free' stuff from the political system.'' Nor can I accept that she will be impartial when she says that age discrimination ''does not mark its victim with a stigma of inferiority.'' Tell that to the 50 year old waitress who loses a job because she doesn't look ''pretty'' anymore, and ends up getting replaced by a younger, less experienced person.

Janice Rogers Brown has been nominated to the Court of Appeals for the District of Columbia Circuit, the court that closely oversees the actions of Federal agencies—more than any other Circuit Court. It is widely recognized in the legal community as the second most important court in the country. Citizens come to the D.C. Circuit to enforce fair labor practice decisions made by the National Labor Relations Board, worker safety protection regulations of the Occupational Safety and Health Administration, regulatory decisions made by the Federal Communications Commission and the Environmental Protection Agency, and much, much more.

But Janice Rogers Brown has said that ''where government moves in community retreats, civil society disintegrates. . . . The result is: families under siege; war in the streets; unapologetic expropriation of property; the . . . decline of the rule of law . . . a debased, debauched culture which finds moral depravity entertaining. . . . '' She also called the New Deal, which gave us Social Security and the Tennessee Valley Authority, programs that exist today, ''the triumph of our own socialist revolution.'' With sentiments such as these I can only wonder what she thinks of Medicare, Medicaid, child nutrition programs, agricultural subsidies, No Child Left Behind, and a whole host of other programs that give opportunity to our citizens and help people live up to their given potential. To me, these programs are not socialism; they are what a compassionate society does for its people.

So I will vote against the confirmation of Janice Rogers Brown. I do so knowing that she will likely be confirmed. Her nomination is moving forward because she was one of the nominees that 13 of my colleagues and I agreed to no longer filibuster. I want to talk about this agreement just for a moment.

First, I must say that the compromise was essential to avoid a serious breakdown in the Senate rules and its functions. It represents the Senate at its best and upholds the traditional constitutional role of the Senate as the protector of the rights of minority interests when they were seriously threatened and perhaps irrevocably ended.

But more than this, my colleagues and I helped steer a better course with this compromise. A course for jobs, opportunity, better education, and future peace. I hope the President will reflect upon the resolve of these 14 Senators to protect and respect the minority and do so by sending us nominees who will respect the law and not come exclusively from the far fringes of the political spectrum.

I am open to discussing nominees with the President. I make this offer in good faith and in the same spirit as one of his original campaign promises from 2000: to change the culture in Washington. Here is what then-Governor Bush said in a speech at that time: ''There is too much argument in Washington and not enough shared accomplishment. . . . As President, I will set a new tone in Washington. I will do everything I can to restore civility to our national politics.''

My colleagues on this compromise have already helped set that new tone for the Senate. I urge him to work with the entire Senate on judicial nominees. I am ready to forge this new civility in Washington. I know future nominees will be conservative just as all of the 208 previously confirmed Bush nominees have been. I fully accept that fact. But I also expect future nominees to be fair and to have shown their fairness and impartiality by their words and their deeds. Janice Rogers Brown has not.

The PRESIDING OFFICER. The time is now controlled from 4 to 4:10 by the Senator from Vermont.

Mr. LEAHY. Mr. President, I see the distinguished President pro tempore on the Senate floor. I understand that he is going to ask consent that we recess. I first ask unanimous consent that my time not begin until after the time necessary for the distinguished senior Senator from Alaska, and I yield to him.

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

VISIT TO THE SENATE BY MEMBERS OF THE U.S.-CHINA INTERPARLIAMENTARY GROUP

Mr. STEVENS. Mr. President, I have the honor to present to the Senate the Chinese delegation from the National People's Congress to the U.S.-China Interparliamentary Group meeting. Its leaders standing beside me are Vice Chairman and Secretary General of the Standing Committee of the National People's Congress, Mr. Sheng Huaren. He is joined by the Chairman of the National People's Congress Foreign Affairs Committee, Mr. Jiang Enzhu. We also have the Vice Chairman of the National People's Congress Law Committee, Mr. Hu Kangsheng; the Vice Chairman of the National People's Congress Foreign Affairs Committee, Mr. Yang Guoliang; then the Vice Chairman of the National People's Congress Foreign Affairs Committee, Mr. Lu Congmin; Mr. Lu Baifu, who is a member of the National People's Congress