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Dems don't have to block Trump's SCOTUS pick — exploit GOP's divisions instead

BY ALLEN MENDENHALL, CONTRIBUTOR - 01/05/17 11:33 AM EST

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Democrats are understandably upset that Republicans succeeded in halting the confirmation process for Merrick Garland, President Obama's nominee to fill the vacancy left on the Supreme Court after the death of Antonin Scalia.

Senate Minority Leader Chuck Schumer, for one, has vowed to block President-elect Donald Trump's pick "if he doesn't nominate a mainstream candidate." He would leave the High Court with just eight members.

Republicans, however, enjoy a majority in the Senate, and a majority vote is all that's required to confirm a nominee to the Supreme Court. Of course, Democrats could attempt to filibuster the nominee, but Republicans would probably win the votes needed to invoke cloture (a procedure to end debate) if that occurred.

Efforts to prevent cloture could result in more Democratic losses during the midterm elections and fan the populist flame that appears to be spreading.

Democrats who view Schumer's proposal as futile or risky might consider another option, one with long-term potential to cause a rift in the conservative movement. The strategy is simple and painless and purely discursive or rhetorical, namely, asking the right kinds of questions of the Supreme Court nominee during Senate confirmation hearings ‖ and then sparking heated debate among conservatives.

It's the old divide-and-conquer tactic. Democrats would be reckless not to realize the tensions within the Right that are already there to exploit.

There's a growing divergence between conservatives over competing modes of judging: judicial restraint versus judicial engagement.

The nomenclature may differ depending on the audience ‖ judicial restraint is sometimes pejoratively called abdication, whereas judicial engagement is sometimes pejoratively called activism ‖ but it's the substance underlying those terms which matters.

Proponents of judicial restraint, following in the footsteps of Scalia and Robert Bork, believe that matters of policy are better left to the political branches ‖ where legislators are subject to electoral accountability ‖ and that federal judges should defer to state legislatures unless a state law violates some

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express provision of the Constitution.

Proponents of judicial engagement, however, believe that the federal judiciary should play a more active role, striking down state laws even when a case involves unenumerated rights — i.e., rights not mentioned in the Constitution.

They argue that deference to legislatures amounts to dangerous majoritarianism. In their view, courts should protect individual rights from improper legislation; we should not rely on citizens, they say, to hold legislators accountable through voting or impeachment or whatever.

The difference between these two modes of judging has enormous implications for the future of federalism in the United States.

One side is heir to a nationalist vision characterized by Hamilton, Webster, Story, Marshall, Lincoln, and Clay. The other favors decentralization in the tradition of Jefferson, St. George Tucker, John Taylor of Caroline, Calhoun, and Abel Upshur. Advocates on both sides have identified as both conservative and libertarian.

Most self-described conservatives support judicial restraint, but a growing chorus of self-described libertarians has championed judicial engagement. If they were smart, Democrats would try to drive these groups apart, turning them against each other.

So what kinds of questions should Democrats ask? They might ask whether the Ninth Amendment protects unenumerated rights, or whether it's a rule of construction that prevents parties from arguing that because the Constitution enumerates one right, the government can deny other rights that are not mentioned there.

Rather than asking about the predictable cases — Roe v. Wade, for instance, or Lawrence v. Texas — they might ask whether a state law, legitimately passed, can be invalidated if it does not offend any articulated terms of the Constitution.

They might ask whether the Fourteenth Amendment, through which certain parts of the Bill of Rights have been incorporated to apply against the states, contemplates the possibility that judges may find new rights or novel ways of applying extant rights. If they wish to focus on recent cases, they might ask whether Chief Justice Roberts's opinion in National Federation of Independent Business v. Sebelius represents restraint or engagement.

You get the picture.

Because the Constitution is silent about modes of judging — nothing in it commands a judge to practice restraint or engagement — and also about the matters of federalism that they implicate, one can imagine any number of questions emanating from this topic.

If Democrats want to protest and make noise for media attention, then by all means they should follow Schumer and refuse to vote for Trump's Supreme Court nominee. But if they wish to take the long view and divide Republicans, all they should do is ask a few simple questions — and then keep asking them until the Right is forced to define and prescribe the scope or essence of conservative modes of judging.

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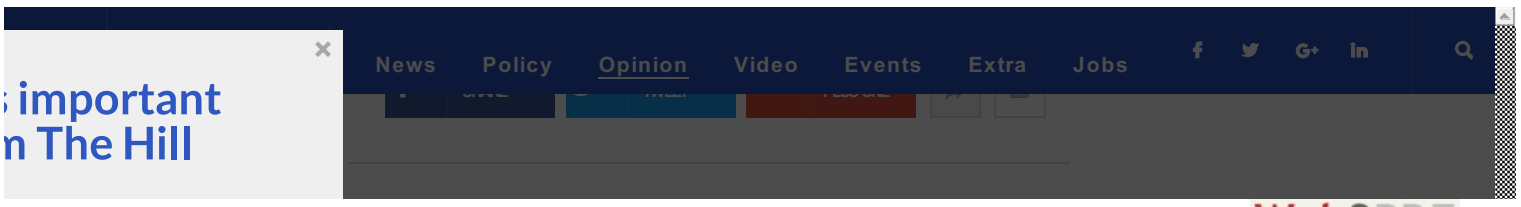

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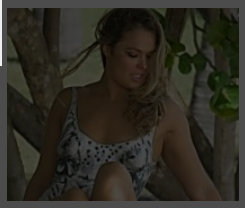

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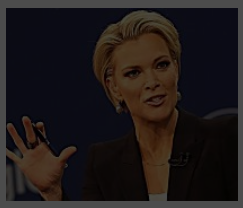

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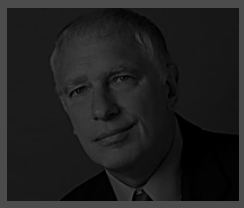

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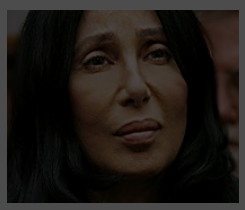

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