

SMOKE, NOT FIRE

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One week before the 2004 presidential election, Chief Justice William Rehnquist disclosed that he underwent a tracheotomy in connection with a recent diagnosis of thyroid cancer.¹ That announcement left little doubt that the winner of the 2004 election would reshape the face of the Supreme Court. That announcement, however, fell on deaf ears. The press gave limited attention to the story and neither John Kerry nor George Bush used the announcement to focus attention on the Supreme Court. Not surprisingly, the Chief Justice's announcement had no impact on the electorate: Exit polls revealed that the Supreme Court was a non-factor in the presidential election. In one poll, no voter (out of 1200 polled) ranked the Supreme Court as the most important factor in their decision.² In another poll, fewer than .5% of 900 people polled ranked the Supreme Court as

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¹Press Release, Supreme Court of the United States, Press Release Regarding Chief Justice William H. Rehnquist (Oct. 25, 2004) at http://www.supremecourtus.gov/publicinfo/press/pr_10-25-04.html.

²The Pew Research Center for the People & the Press, *Moral Values: How Important? Voters*

Bush=s top priority.³

Liked Campaign 2004, But Too Much AMud Slinging, available at <http://people-press.org/reports/display.php3?ReportID+233>.

³NationalJournal.com, *The Bush Administration, Supreme Court Nominations@ available at <http://nationaljournal.com.proxy.wm.edu/members/polltrack/2004/todays/11/1119fox.htm> (poll conducted Nov. 16-17, 2004).*

Against this backdrop, one would think that Congress sees the judiciary as a low salience issue—something that does not merit time or attention. Think again. Over the past five years, the courts have been the whipping boy of both the left and the right. Liberals have condemned the Court for engaging in “conservative judicial activism”; conservatives, among other things, have proposed stripping the courts of jurisdiction on same sex marriage and the pledge of allegiance.⁴

What gives? If both sides have bones to pick with the Court, why not treat the Court as an important election issue? In the pages that follow, I will provide an explanation of sorts for the disjunction between lawmaker complaints about the Court and the Court’s apparent irrelevance to the electorate. Specifically, I will argue that conservatives and liberals castigate the Court in order to secure support among their base. These attacks, however, are purely rhetorical. Conservatives and liberals are not upset with the Court. For reasons I will soon detail, the Rehnquist Court typically pays close attention to the signals sent it by Congress and the American people. More than that, lawmakers understand that the aggressive pursuit of Court-curbing measures might come back to haunt them at the polls. Throughout our nation’s history, “median voters” have supported judicial independence.⁵ Put another way: Rhetorical attacks on the Court serve the interests of lawmakers (by securing their base); heart-felt aggressive attacks against the Court may alienate median voters.

⁴*See infra.*

⁵Barry Friedman has written several articles on this topic, including *Judging Judicial Review: Marbury in the Modern Era*, 101 MICH. L. REV. 2596 (2003) and *Judicial Review and Judicial Independence: Things Forgotten in the Debate Over Judicial Independence*, 14 GA. ST. U. L. REV. 737 (1998). For additional discussion, *see infra*.

It would be wrong to label the Rehnquist Court as either liberal or conservative.⁶ On the one hand, the Court has backed numerous liberal causes: abortion, affirmative action, campaign finance, gay rights, school prayer, *Miranda*, constitutional protections for enemy combatants, and free speech on the internet. On the other hand, the Court helped hand George Bush the 2000 presidential election. Moreover, its revival of federalism resulted in the invalidation of legislation regulating firearms, domestic violence, and anti-discrimination measures protecting the aged, disabled, and religious minorities.

In making sense of these disparate rulings, I am quite convinced that Robert Dahl put it in 1957 that the Court's constitutional decisions are never for long out of line with the policy views dominant among the lawmaking majorities of the United States.⁷ The Court's 1992 reaffirmation of *Roe* is linked to the Senate's rejection of Robert Bork in 1987 and public support for limited abortion rights; its approval of affirmative action in 2003 seems very much tied to the fact that elected officials, business interests, and elites strongly supported race preferences in education; most telling, its revival of federalism can be traced to public and lawmaker support for devolving power

⁶This point is anything but novel. See Kathleen M. Sullivan, *A Court Not Easy to Classify*, N.Y. TIMES, June 29, 2000 at A-1; William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1247 (2004); Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257 (2004); Mark V. Tushnet, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* (2004).

⁷Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957).

away from Washington D.C. and to the states.⁸

⁸I have spent much of the past five years writing books and articles that make this point. *See, e.g.,* Neal Devins and Louis Fisher, *THE DEMOCRATIC CONSTITUTION* (2004); Neal Devins, *The Majoritarian Rehnquist Court?*, 67 *LAW & CONTEMP. PROBS.* 63 (Summer 2004).

By issuing decisions that match the social and political forces that beat against it, lawmakers have not been pressured by voters or interest groups to curb the Court. More than that, the American people favor judicial independence, especially when Supreme Court decisions do not upset majoritarian preferences.⁹ Perhaps for this reason, a June 2001 poll revealed that eighty percent of Americans have A some, @ A quite a lot, @ or a A great deal @ of confidence in the Supreme Court.¹⁰

Against this backdrop, lawmakers understand that there are real costs in pursuing Court-curbing proposals.¹¹ That does not mean, however, that lawmakers do not have reason to bad mouth the judiciary. Indeed, the growing ideological divide in Congress creates incentives for both liberals and conservatives to strengthen their base by engaging in political grandstanding.

⁹See Friedman, *supra* at 1216-29 (discussing Greg Caldeira and James Gibson's *The Etiology of Public Support for the Supreme Court*).

¹⁰Gallup Poll, Roper Center for Public Opinion (June 8-10, 2001).

¹¹For an insightful treatment of the political costs of Court-curbing, see John Ferejohn, *Independent Judges, Dependent Judiciary; Explaining Judicial Independence*, 72 S. CAL. L. REV. 353 (1999).

Let me explain: Ever since 1980, an ever-growing ideological gap has separated Democrats and Republicans. In the House of Representatives, for example, the most liberal Republican is more conservative than the most conservative Democrat.¹² One outgrowth of this phenomenon is that lawmakers, especially in the House, are not interested in appealing to centrist voters. In particular, with computer-driven redistricting guaranteeing that Democrats will win certain seats and Republicans other seats, the party primary often controls who will win the election.¹³ Not surprisingly, lawmakers pay increasing attention to the partisans who vote in the primaries.

In an effort to secure their base, Democrats and Republicans are increasingly concerned with Amessage politics,@ that is, using the legislative process to make a symbolic statement to voters and other constituents.¹⁴ Lawmakers, moreover, turn more and more to so-called Aposition taking@ legislation. AThe electoral requirement [of such measures] is not that [a lawmaker] make pleasing things happen but that he make pleasing judgmental statements.@¹⁵ Correspondingly, even if a judicial ruling barely registers with voters and interest groups, lawmakers may nevertheless firm up their base by taking a position on supposed judicial overreaching.

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¹²See 108th House Rank Ordering at <http://voteview.uh.edu/hou108.htm>.

¹³See Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, WM. & MARY L. REV. (forthcoming).

¹⁴See C. Lawrence Evans, COMMITTEES, LEADERS, AND MESSAGE POLITICS IN CONGRESS RECONSIDERED 217 (Lawrence C. Dodd & Bruce I. Oppenheimer eds, 7th ed. 2000).

¹⁵David R. Mayhew, CONGRESS: THE ELECTORAL COLLECTION 62 (1974).

Consider, for example, Senate Democrat claims that the Rehnquist Court engaged in Aconservative judicial activism@ and House Republican efforts to prevent Aactivist@ judges from voiding the pledge of allegiance, embracing same sex marriage, and looking to foreign law when deciding cases. Rather than express heartfelt disappointment with Supreme Court decisions, Republicans and Democrats both used the Ajudicial activism@ label to solidify their base and, in so doing, distance themselves from each other.

In the wake of the 2000 presidential election (and, with it, *Bush v. Gore*), Senate Democrats launched their campaign against conservative judicial activism. ContendingBin the words of then Senate Judiciary Chair Patrick LeahyBthat the Supreme Court was stacked with Aideologically conservative Republican appointees@ and that the Adominant flavor of judicial activism is right wing,@¹⁶ Senate Democrats called attention to differences between their message and that of the President and his party. Through newspaper editorials, floor statements, television appearances, and through hearings, Senate Democrats advanced a two-pronged message, namely: (1) the Rehnquist Court=s federalism campaign is Aconservative,@ Aactivist,@ and targeting civil rights and individual liberties, and (2) Democrats must work hard to ensure ideological balance on a Supreme Court run

¹⁶147 Cong. Rec. S1671-72 (daily ed. Feb. 28, 2001).

amok.¹⁷ What we're trying to do, said Senator Charles Schumer, is set the stage and make sure that both the White House and the Senate Republicans know [what] we expect.¹⁸

¹⁷This sentence and much of this analysis on the Democrats' campaign against conservative judicial activism is taken from Neal Devins, *The Federalism-Rights Nexus: Explaining Why Senate Democrats Tolerate Rehnquist Court Decision Making But Not the Rehnquist Court*, 73 U. COLO. L. REV. 1307 (2002).

¹⁸Neil A. Lewis, *Washington Talk: Democrats Readying for Judicial Fight*, N.Y. TIMES, May 1, 2001, at A19 (quoting Sen. Schumer).

Senate Democrats had good reason to launch this attack on the Court. By suggesting that their vision of the federal judiciary (a Court that protects civil and individual rights) is at odds with the Republican vision, Democrats appealed to their base. More than that, the Aconservative judicial activism@ label served both as a rallying call and cover to Democratic efforts to prevent President Bush from appointing conservative judges and Justices. At the same time, there is little reason to think that Democrats, in fact, were especially disappointed with Supreme Court decisions invalidating federal statutes. A search of the *Congressional Record* reveals that lawmakers did not discussBlet alone criticizeBthese rulings.¹⁹ Likewise, lawmakers did not openly challenge these rulings through proposed legislation or constitutional amendments.²⁰ This disjunction between Senate Democrat claims about the Rehnquist Court and lawmaker responses to Rehnquist Court rulings strongly suggests that the Aconservative judicial activism@ label was little more than a rhetorical device.

¹⁹Devins, *supra* at 1311-12.

²⁰*Id.* at 1312-14. When enacting legislation responding to these Court rulings, lawmakers spoke about the need to conform with Supreme Court standards and, in so doing, treated these decisions as final and authoritative. *See id.*

House Republican efforts to strip federal court jurisdiction are cut from a similar cloth. Sponsors of these measures *did not* want to enact legislation countermanding the Supreme Court; instead, they wanted to make a symbolic statement. Republican leaders of the House Judiciary Committee, for example, never bothered to take a vote on a proposal (sponsored by 74 Republicans from well-established red states and Ohio) to prevent federal courts from making use of foreign law.²¹ Introduced on March 17, 2004, the Committee held a two hour hearing on March 25 and then let the matter drop.²² Likewise, House Republicans never intended to give the Senate a chance to vote on legislation that would restrict court power over same-sex marriage and the pledge of allegiance. The same sex marriage bill²³ was introduced in October 2003 (one month before the Massachusetts Supreme Court recognized same sex marriage) but was not voted on until July 22, 2004 (one week after the Senate rejected a proposed constitutional amendment on same sex marriage). Approved by a party line vote of 233 to 194, the bill was referred to the Senate on September 7, 2004 (less than three weeks before Congress's pre-election recess). The timing of the Pledge Protection Act²⁴ is an even more dramatic illustration of House uninterest in getting the bill to the Senate in time for meaningful Senate considerations. First referred to the House Judiciary Committee in May 2002, no action was taken on the pledge bill until the Judiciary Committee ordered it reported on September 15, 2004. That left enough time for the House to vote and approve

²¹H. Res. 568, 108th Cong.

²²Judicial Interpretation of Laws Based on Foreign Precedent, Hearings on H. Res. 568 before the Subcommittee of the Constitution, House Judiciary Committee, 108th Cong., 2nd Sess (2004).

²³H. R. 3313, 108th Cong.

²⁴H. R. 2028, 108th Cong., 1st Sess.

the bill on September 24 *but* not enough time to refer it to the Senate.

The timing of the pledge bill and same sex marriage bill are certainly suggestive. More significant, unlike nearly all court-stripping proposals, these bills have little to do with federal court decisions upsetting to lawmakers. True, the Ninth Circuit Court of Appeals ruled against the pledge in *Elk Grove Unified School Dist. v. Nedow*.²⁵ But lawmakers waited (more than two years) for the Supreme Court to dismiss *Nedow* on standing grounds before taking up the bill.²⁶ More than that, when dismissing *Nedow*, 3 Justices signaled their support for the pledge and no Justice suggested that the Ninth Circuit decision was correct.²⁷

²⁵328 F. 3d 466 (9th Cir, 2002).

²⁶The Supreme Court issued its *Nedow* decision on flag day, June 14. 124 S. Ct. 2301 (2004).

²⁷*See id.* at 2312-20 (Rehnquist, O'Connor and Thomas, concurring in the judgment). A fourth Justice, Antonin Scalia, recused himself from the case *because* he had given a speech defending the constitutionality of the pledge.

The same sex marriage bill is an even clearer example of Congress tackling an issue for symbolic reasons. No federal court had found a constitutional right to same-sex marriage. Indeed, no federal court had invalidated the Defense of Marriage Act, legislation that would protect state prerogatives over same sex marriage. And while the federal courts might someday extend the Supreme Court=s recognition of same sex sodomy in *Lawrence v Texas*, the triggering event for this proposal were Athe demands of four unelected members of Massachusetts= State Supreme Court who have overturned the laws of the State of Massachusetts and sanctioned same sex marriage.²⁸ In other words, lawmakers were responding to something they had absolutely no authority to police.

House Republicans were not dissuaded by such legal niceties. Their aim was to score points with their base by making judgmental statement about the sanctity of heterosexual marriage. After all, the November 2004 elections were weeks away and Republican strategists had identified same sex marriage as a linchpin of their efforts to make moral values the focus of their efforts to reelect the president and strengthen the GOP=s hold over Congress.²⁹

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²⁸150 Cong. Rec. H. 6580, 6609 (daily ed. July 22, 2004) (statement of Rep. Weldon). A second trigger was the unilateral (and subsequently rebuffed) efforts of San Francisco=s mayor to recognize same sex marriage. *See id.* at 6584-85 (statement of Rep. Chabot).

²⁹See Adam Nagourney, *Moral Values Carried Bush, Rove Says*, N.Y. TIMES, Nov, 10, 2004 at A-20; Sarah Baxter, *It=s Family Values, Stupid*, SUNDAY TIMES (London), Nov. 7, 2004 at 15.

That Democrats and Republicans in Congress see the Court as a rhetorical whipping boy is hardly surprising. Voters typically see the judiciary as a low salience issue. Consequently, increasingly ideological lawmakers can play to their increasingly partisan base by condemning Aactivist@ judges (even state judges!). It simply does not matter that lawmakers are not all that upset with the Court. What matters is that lawmakers can speak to issues that resonate with their base and, in so doing, call attention to differences between the two parties.

Ironically, lawmakers might pay a price if they were truly upset with the Court. Popular support for judicial independence may be sufficiently strong that the enactment of court stripping proposals might prompt a political backlash. The true test of this proposition is yet to come. As congressional districts become increasingly polarized and as presidential races turn more and more on the ability of each side to bring out their base, it may be that the conventional wisdom about judicial independence will give way to a new era of winner-takes-all politics.

In the meantime, the Rehnquist Court will fade from view without testing the willingness of Democrats or Republicans to push through draconian anti-Court measures. By issuing decisions that largely reflect majoritarian norms, the Rehnquist Court did not prompt the true ire of either Democrats or Republicans. . For that reason, newspapers, voters, and presidential candidates did not pay much attention to the Chief Justice=s cancer diagnosis and, with it, the Court.

Put another way: In this era of ideological polarization, it is inevitable that lawmakers will launch rhetorical attacks against the courts. The fact that Court decisions reflected majoritarian norms is simply beside the point. *But* so long as the Court steers a centrist course, ongoing attacks against the judiciary, as the title of this piece suggests, should be understood as little more than

smoke. The fires associated with a paradigm shift of Court-Congress relations are not yet upon us.