

Smoke, Not Fire

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SMOKE, NOT FIRE

NEAL DEVINS*

One week before the 2004 presidential election, then 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 announcement about the Chief Justice had no impact on the electorate: exit polls revealed that the Supreme Court was a non-factor in the presidential election. In one poll, only one percent of voters (out of 569 polled) ranked the Supreme Court as the most important factor in their decision.² In another poll, fewer than 0.5% of registered voters (out of 900 polled) stated that the Supreme Court should be President Bush's top priority in his second term.³

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 be-

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

2. Press Release, Pew Research Ctr. for the People & the Press, Moral Values: How Important? Voters Liked Campaign 2004, but Too Much “Mud-Slinging” 15 (Nov. 11, 2004), *available at* <http://people-press.org/reports/pdf/233.pdf>.

3. Fox News/Opinion Dynamics, The Bush Administration, Supreme Court Nominations (Nov. 18, 2004), <http://nationaljournal.com/members/polltrack/2004/todays/11/1119fox.htm>.

4. See *infra* notes 32-58 and accompanying text.

tween lawmaker complaints about the Court and the Court's apparent irrelevance to the electorate.⁵ Specifically, I will argue that conservatives and liberals castigate the Court to secure support from their base. These attacks, however, are largely rhetorical. Conservatives and liberals are not upset with the Court. For reasons I will soon detail, the Rehnquist Court typically paid close attention to the signals sent to 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.⁶ Put another way: Rhetorical attacks on the Court serve the interests of lawmakers by securing their base; heartfelt aggressive attacks against the Court may alienate median voters.

* * *

It would be wrong to label the Rehnquist Court as either liberal or conservative.⁷ On the one hand, the Court had backed numerous liberal causes: abortion,⁸ affirmative action,⁹ campaign finance,¹⁰ gay rights,¹¹ school prayer,¹² *Miranda* warnings,¹³ constitutional protections for enemy combatants,¹⁴ and free speech on the Internet.¹⁵ On the other hand, the Court helped hand George Bush the 2000 presi-

5. No doubt voters are far more interested in the Supreme Court today (Fall 2005) than they were a year ago. The resignation of Justice O'Connor, the death of Chief Justice Rehnquist, and the Harriet Miers debacle have fueled voter interest in the Supreme Court. Whether or not voter interest in the Court continues, it is nevertheless true that Rehnquist Court decision making did not provoke voters into thinking that the Supreme Court was an important electoral issue in 2004.

6. Barry Friedman has written several articles on this topic. *E.g.*, Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596 (2003) [hereinafter Friedman, *Mediated Popular Constitutionalism*]; Barry Friedman, "Things Forgotten" in the Debate over Judicial Independence, 14 GA. ST. U. L. REV. 737 (1998).

7. This point is anything but novel. *See, e.g.*, MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW (2005); Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1264-66 (2004); William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1254 (2002); Kathleen M. Sullivan, Op-Ed., *A Court Not Easy to Classify*, N.Y. TIMES, June 29, 2000, at A31.

8. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

9. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

10. *McConnell v. FEC*, 540 U.S. 93 (2003).

11. *Lawrence v. Texas*, 539 U.S. 558 (2003).

12. *Lee v. Weisman*, 505 U.S. 577 (1992).

13. *Dickerson v. United States*, 530 U.S. 428 (2000).

14. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

15. *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

dential election.¹⁶ Moreover, its revival of federalism resulted in the invalidation of legislation regulating firearms,¹⁷ domestic violence,¹⁸ and anti-discrimination measures protecting the aged,¹⁹ the disabled,²⁰ and religious minorities.²¹

In making sense of these disparate rulings, I am quite convinced—as 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.”²² The Court’s 1992 reaffirmation of *Roe v. Wade*²³ 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 away from Washington, D.C. and to the states.²⁴

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 have favored judicial independence, especially when Supreme Court decisions do not upset majoritarian preferences.²⁵ Perhaps for this reason, a November 2001 poll revealed that eighty-four percent of Americans have either “some,” “quite a lot,” or a “great deal” of confidence in the Supreme Court.²⁶

16. *Bush v. Gore*, 531 U.S. 98 (2000).

17. *United States v. Lopez*, 514 U.S. 549 (1995).

18. *United States v. Morrison*, 529 U.S. 598 (2000).

19. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

20. *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

21. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

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

23. 410 U.S. 113 (1973).

24. I have spent much of the past five years writing books and articles that make this point. See, e.g., NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* (2004) (arguing that constitutional law is rightly shaped by many forces outside of the judiciary); Neal Devins, *The Majoritarian Rehnquist Court?*, 67 LAW & CONTEMP. PROBS. 63 (2004). On the issue of federalism, a caveat: I am not arguing that today’s Congress never seeks to shift power away from the states and towards the national government. My point, instead, is that today’s Congress is more willing to embrace states’ rights rhetoric and, as such, political conditions favored the Rehnquist Court’s federalism revival.

25. See Friedman, *Mediated Popular Constitutionalism*, *supra* note 6, at 2616-29 (discussing the findings of Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635 (1992), which documented that the public will support the Supreme Court even if it disagrees with particular decisions).

26. Roper Ctr. for Pub. Opinion, U.S. Public Opinion on the Supreme Court—Confidence in the Supreme Court (Nov. 2001), <http://www.ropercenter.uconn.edu> (search On-

Against this backdrop, lawmakers understand that there are real costs in pursuing court-curbing proposals.²⁷ 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.

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.²⁸ 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.²⁹ 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 “message politics,” that is, using the legislative process to make a symbolic statement to voters and other constituents.³⁰ Lawmakers, moreover, turn more and more to so-called “position taking” legislation. “The electoral requirement [of such measures] is not that [a lawmaker] make pleasing things happen but that he make pleasing judgmental statements.”³¹ 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 purported judicial overreaching.

line Access to Date, Public Opinion Matters). Fall 2005 polls, however, suggest that there is declining public support both for the Supreme Court and for judicial independence. See Neal Devins, *Should the Supreme Court Fear Congress?*, 90 MINN. L. REV. (forthcoming 2006) (discussing recent polls and their ramifications).

27. See generally John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353 (1999) (providing an insightful treatment of the political costs of court curbing).

28. See Keith Poole & Nolan McCarty, 108th House Rank Ordering (Aug. 23, 2005), <http://voteview.com/hou108.htm> (detailing how Republican and Democrat voting patterns were perfectly separated along liberal and conservative tendencies).

29. See Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415, 427-28 (2004) (arguing that gerrymandered districts eliminate the importance of the general election).

30. See C. Lawrence Evans, *Committees, Leaders, and Message Politics, in CONGRESS RECONSIDERED* 217, 219-26 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 7th ed. 2001) (explaining how parties develop a message that is furthered through both legislative and electoral strategies).

31. DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 62 (1974).

Consider, for example, Senate Democrat claims that the Rehnquist Court engaged in “conservative judicial activism” and House Republican efforts to prevent “activist” 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 “judicial 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. Senate Democrats called attention to differences between their message and that of the President and his party by contending—in the words of then Senate Judiciary Chairman Patrick Leahy—that the Supreme Court was stacked with “ideologically conservative Republican appointees,” making the “dominant flavor of judicial activism . . . right wing.”³² Through newspaper editorials, floor statements, television appearances, and hearings, Senate Democrats advanced a two-pronged message, namely: (1) the Rehnquist Court’s federalism campaign is “conservative,” “activist,” and targeting civil rights and individual liberties, and (2) Democrats must work hard to ensure ideological balance on a Supreme Court run amok.³³ “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.”³⁴

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 “conservative judicial activism” label served both as a rallying call and a 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 discuss—let alone criticize—these rulings.³⁵ Likewise, lawmakers did not

32. 147 CONG. REC. S1671-72 (daily ed. Feb. 28, 2001) (statement of Sen. Leahy).

33. This and much of the analysis on the Democrats’ campaign against conservative judicial activism is taken from Neal Devins, *The Federalism-Rights Nexus: Explaining Why Senate Democrats Can Tolerate Rehnquist Court Decision Making but Not the Rehnquist Court*, 73 U. COLO. L. REV. 1307, 1329-30 (2002).

34. Neil A. Lewis, *Washington Talk; Democrats Ready for Judicial Fight*, N.Y. TIMES, May 1, 2001, at A19.

35. Devins, *supra* note 33, at 1311-12.

openly challenge these rulings through proposed legislation or constitutional amendments.³⁶ This disjunction between Senate Democrat claims about the Rehnquist Court and lawmaker responses to Rehnquist Court rulings strongly suggests that the “conservative judicial activism” label was little more than a rhetorical device.

House Republican efforts in 2004 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 seventy-four Republicans from well-established red states and Ohio) to prevent federal courts from using foreign law.³⁷ Introduced on March 17, 2004, the committee held a two-hour hearing on March 25th and then let the matter drop.³⁸ Likewise, no vote was taken on the Constitution Restoration Act of 2004,³⁹ a bill that would have stripped the federal courts of jurisdiction in cases involving federal or state officials’ “acknowledgment of God as the sovereign source of law, liberty, or government.”⁴⁰ Introduced in February 2004, hearings were not held until September 13, 2004 (roughly two weeks before Congress’s pre-election recess).⁴¹

House Republicans, moreover, 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 bill⁴² was introduced in October 2003 (one month before the Massachusetts Supreme Court recognized same-sex marriage)⁴³ but

36. *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. *Id.* at 1312-13.

37. H.R. Res. 568, 108th Cong. (2004); [2003-2004 Transfer Binder] Cong. Index (CCH) 34,551 (Dec. 30, 2004).

38. *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H.R. 568 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. (2004).

39. H.R. 3799, 108th Cong. (2004); [2003-2004 Transfer Binder] Cong. Index, *supra* note 37, at 34,523.

40. H.R. 3799. Sponsors of this measure wanted to register their disapproval of federal court orders requiring Alabama Chief Justice Roy Moore to remove a granite monument of the Ten Commandments that he had installed in the state supreme court rotunda. Sam Rosenfeld, *Disorder in the Court*, AM. PROSPECT, July 2005, at 24, 24-25.

41. *Constitution Restoration Act of 2004: Hearing on H.R. 3799 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. (2004).

42. Marriage Protection Act of 2003, H.R. 3313, 108th Cong. (2003).

43. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 941 (Mass. 2003).

was not voted on until July 22, 2004⁴⁴ (one week after the Senate rejected a proposed constitutional amendment on same-sex marriage).⁴⁵ Approved by a party-line vote of 233 to 194,⁴⁶ the bill was referred to the Senate on September 7, 2004 (less than three weeks before Congress's pre-election recess).⁴⁷ The timing of the Pledge Protection Act of 2004⁴⁸ is an even more dramatic illustration of House disinterest in getting the bill to the Senate in time for meaningful Senate considerations. First referred to the House Judiciary Committee in May 2003,⁴⁹ no action was taken on the Pledge bill until the Judiciary Committee ordered it reported on September 15, 2004.⁵⁰ That left enough time for the House to vote and approve the bill on September 23 *but* not enough time to refer it to the Senate.⁵¹

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 *Newdow v. U.S. Congress*,⁵² but lawmakers waited (more than two years) for the Supreme Court to reverse the Ninth Circuit on standing grounds before taking up the bill.⁵³ More than that, when dismissing *Newdow*, three Justices signaled their support for the Pledge and no Justice suggested that the Ninth Circuit decision was correct.⁵⁴

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,⁵⁵ legislation that

44. [2003-2004 Transfer Binder] Cong. Index, *supra* note 37, at 34,517.

45. *See id.* at 20,536 (documenting the legislative history of the Federal Marriage Amendment, S.J. Res. 40, 108th Cong. (2004)).

46. *Id.* at 34,517.

47. *Id.*

48. H.R. 2028, 108th Cong. (2004).

49. [2003-2004 Transfer Binder] Cong. Index, *supra* note 37, at 34,508.

50. *Id.*

51. *Id.*

52. 328 F.3d 466 (9th Cir. 2002), *rev'd sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 124 S. Ct. 2301 (2004).

53. *Newdow*, 124 S. Ct. at 2312. The Supreme Court issued its *Newdow* decision on flag day, June 14. *Id.* at 2301.

54. Chief Justice Rehnquist, joined by Justices O'Connor and Thomas, argued that the Court should have decided the case on its merits and held that the Pledge of Allegiance did not violate the Establishment Clause. *Id.* at 2312. A fourth Justice, Antonin Scalia, recused himself from the case *because* he had given a speech defending the constitutionality of the Pledge. *Id.* at 2301.

55. 28 U.S.C. § 1738C (2000).

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*,⁵⁶ the triggering event for this proposal was "the demands of four unelected members of [the] Massachusetts State Supreme Court who have overturned the laws of the State of Massachusetts and sanctioned same sex marriages."⁵⁷ 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 statements 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 campaign to reelect the President and strengthen the GOP's hold over Congress.⁵⁸

* * *

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 "activist" 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.

56. 539 U.S. 558 (2003).

57. 150 CONG. REC. H6609 (daily ed. July 22, 2004) (statement of Rep. Weldon of Florida). A second trigger was the unilateral (and subsequently rebuffed) efforts of San Francisco's mayor to recognize same-sex marriage. 150 CONG. REC. at H6583-85 (statement of Rep. Chabot).

58. See Sarah Baxter, *It's Family Values, Stupid*, SUNDAY TIMES (U.K.), Nov. 7, 2004, at 15; Adam Nagourney, *'Moral Values' Carried Bush, Rove Says*, N.Y. TIMES, Nov. 10, 2004, at A20.

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. 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. For those who fear smoke inhalation, the current wave of incendiary anti-Court rhetoric is cause for concern. Nevertheless, the fires associated with a paradigm shift of Court-Congress relations are not yet upon us.