

Courts and the Making of Public Policy

Congress and the Supreme Court in a Partisan Era

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Executive Summary

- One of the perennial questions in American politics is, to what extent the Supreme Court is or should be influenced by politics, given that federal judges are nominated by the president and confirmed by Senate. To clarify the issue, it is useful to look at the evidence supplied by the Court and Congress over the last 12 years. To what extent did institutional rivalries trump ideological commonalities? How far did splits within the conservative camp influence issues reaching the Court? In which areas do Congress and the Court reinforce each other and in which do they disagree?
- William Rehnquist's (First Rehnquist Court, 1986–1994) opposition to federal court interference in the state's criminal justice system has had an induring impact. In various cases, new legislation gave the majority on the Supreme Court a powerful instrument for compelling lower courts to comply with their rulings. On issues such as habeas corpus and prison litigation the agenda of the Republican Congress merged with that of the conservative 'Federalist Five' judges.
- Seemingly incongruous alliances between conservative judges and criminal defence lawyers and the American Civil Liberties Union are not unknown, however, illustrated among others by cases involving the extent of federal power or the division of labour between judges and juries.
- Religious conservatism is an important element of the current Republican majority, having been drawn into national politics by Supreme Court decisions on school prayer, public financial support for religious institutions and abortion. Significantly, on issues such as abortion and gay marriage, the Religious Right has been disappointed by the Rehnquist Court.
- Nowhere is the imprint of the second Rehnquist Court (1995–2003) more obvious than in the area of federalism. The Court has limited the power of the national government and expanded the immunities of state and local governments in a number of activities which have appeared to dovetail nicely with the preferences of the post-1980 Republican Party. Interestingly, however, during the Bush administration, as the Court was strengthening its commitment to federalism, Republicans in Congress were moving in the opposite direction.
- In the highest public profile areas of Court activity: the social issues of abortion, affirmative action, gay rights and capital punishment, the Rehnquist Court most disappointed conservatives. This is as good an indication as any of how weak conservative control over the Court remained in 2005.
- There are significant lessons to be learned about relations between the Court and Congress from this analysis of the past dozen years. Firstly, while the appointment and confirmation process ensures some general congruence of thinking between Justices, presidents and members of Congress, the weakness of *ex post* controls guarantees that substantial differences appear regularly and enduringly. Secondly, the Court highlights the serious fissures that run through American conservatism on numerous key issues, since it sees it as its duty to tackle contentious issues which are rarely debated in Congress. Finally, institutional demands inevitably influence how judges, legislators and executives view issues. Even if Republicans continue to control the White House and appoint several more reliably conservative judges to the Supreme Court, they will continue to disagree on many issues.

Congress and the Supreme Court in a Partisan Era

One of the perennial questions in American politics is whether the Supreme Court does or should 'follow the illicion returns', as the political cartoon character Mr Dooley so aptly put it a century ago. Fifty years later Yale political scientist Robert Dahl echoed Mr Dooley's argument, claiming that the federal courts will not long be out of line with 'national lawmaking majorities'¹ for the obvious reason that federal judges are nominated by the president and confirmed by the Senate. The most dramatic example of the Supreme Court following the 'illicion returns' is the transformation of the Court and constitutional law after 1937. Within a few years, judicial appointments turned a conservative, anti-New Deal judiciary into an institution so reliable that it became known as the 'Roosevelt Court'.

One of the principal shortcomings of this understanding of a 'democratic' judiciary is its assumption that in the US a coherent 'national lawmaking majority' will not only form, but will persist long enough to shape the judicial branch. Roosevelt held office longer than any other president, commanding large and usually reliable majorities in both houses of Congress. But since 1954 – the year of the Supreme Court's landmark decision in *Brown v. Board of Education* – party government of this sort has been rare indeed. One party controlled the White House and both houses of Congress for only 14 of the 46 years between 1954 and 2000. And in those 14 years the dominant Democrats were riven with disagreements on precisely those matters that were at the heart of the Court's agenda: civil rights, abortion, religion in the public square, and other 'hot button' social issues. The collapse of party organization, the decline of

party ID among voters, and the weakening of party ties in Congress led many astute observers to conclude 'the party's over'. It seems reasonable to assume that the palpable decline of parties contributed to the undeniable increase in judicial activism during the 1960s, 1970s and 1980s.

By the early 1990s, though, it was clear that reports of the death of political parties in the US had been premature. In 1994 Republicans took control of Congress in an election that was by American standards unusually partisan and oriented towards national issues. Party unity in Congress reached levels not seen for nearly a century. Over the last decade and a half the national Republican and Democratic Parties have become increasingly internally homogeneous and ideologically polarized. Once Republicans took control of the White House as well as Congress in 2000, they moved aggressively to establish and entrench their policy preferences.

Given this transformation of the role of parties, it would seem reasonable to believe that there would be a closer fit between the policy preferences of the majority party in Congress and the rulings of the Supreme Court than one usually finds in American history. This, of course, is precisely what many liberal Democrats fear, and have tried to prevent. It may not be simply coincidence that what many court-watchers call the 'Second Rehnquist Court' began in the 1994–95 Term – the very same months that Republicans were establishing their control over Congress. Not only did the conservative voting bloc of Rehnquist, Scalia, Thomas, O'Connor, and Kennedy – the 'Federalist Five' – form more frequently after 1994, but the rate at which the Court struck down federal statutes as unconstitutional increased dramatically. During the 'First Rehnquist Court' of 1986–94, the justices invalidated only seven federal

1. Dahl, R.A. (1957) 'Decision-Making in a Democracy: The Supreme Court as a National Policy-maker', *Journal of Public Law*, 6: 279-95.

laws, a rate of 0.78 per year. Between 1995 and 2003, in contrast, they invalidated 33 federal statutes, for a rate of 3.67 per year: the highest in American history. Conversely, the First Rehnquist Court struck down about 11 state and local laws per year, while the Second Rehnquist Court invalidates less than five annually – a rate not seen since the early years of the twentieth century.² On top of this there is *Bush v. Gore*, the most notorious and most partisan of the 5–4 decisions of the Second Rehnquist Court.

Legal circles in the US are awash with speculation about the direction the Roberts Court will take. Will it overturn *Roe v. Wade*? Will it place new restrictions on congressional power? Will it make it harder for state and local governments to regulate private property? Obviously, much depends not only on the evolving jurisprudence of Chief Justice Roberts and Justice Alito, but on the outcome of elections in 2006, 2008 and beyond. Rather than speculate about such matters, (on which I can claim no special powers of prediction) this policy brief will look at evidence from the past 12 years. On what matters have Congress and the Court been moving in the same direction? To what extent did institutional rivalries trump ideological commonalities? To what extent did splits within the conservative camp become evident in issues reaching the Court? I will start with areas in which Congress and the Court seemed to reinforce each other, and then move to areas of greater disagreement.

Crime and punishment

One of the most important elements of William Rehnquist's jurisprudence was his opposition to federal court interference in the states' criminal justice systems. He opposed the Supreme Court's expansion of the rights of the accused under the Fourth and Fifth Amendments, its application of the exclusionary rule and the restrictions it placed on the

use of capital punishment. Perhaps most importantly, he opposed the expansion of the writ habeas corpus, which for nearly a half century has been an indispensable instrument of federal court review of actions taken by state and local police, prosecutors, courts and prison officials. Restrict the writ of habeas corpus, Rehnquist realized, and federal court supervision would wither. When Rehnquist joined the Court in 1971, he wrote many dissenting opinions, often alone. By the time he left the Court he was usually in the majority in criminal cases. This was one area in which the direction of the Rehnquist Court was both clear and conservative.

The resolutely conservative 104th Congress led by Newt Gingrich in 1995–96 proved better at picking fights with the Clinton Administration than at passing legislation. Two pieces of legislation which did manage to become law reinforced the Supreme Court's inclination to reduce federal judicial oversight of state criminal justice systems. The first, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), required federal courts to show greater deference to the findings of state courts, established a one-year statute of limitations for filing a writ and barred repetitious petitions from prisoners. In the process it codified a number of petition-limiting decisions of the Rehnquist Court. The Court, in turn, has frequently interpreted the law to prevent protracted litigation. The AEDPA has proved a convenient and effective instrument for reining in recalcitrant lower courts that for years had searched for methods of evading Supreme Court doctrines on habeas corpus.³

A second piece of legislation that reinforced the Rehnquist Court's effort to reduce federal court supervision of state criminal justice systems was the Prison Litigation Reform Act of 1996 (PLRA). This law made it more difficult for prisoners to challenge prison conditions in federal court, and created an unusual mechanism allowing state officials to reopen existing court orders. Under the terms of the PLRA, federal judges are required to terminate those parts of

2. Keck, T. (2004) *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism*. Chicago: University of Chicago Press, pp. 40–41. The best discussion of the Court's shift in 1994–95 is Merrill, T.W. 'The Making of the Second Rehnquist Court: A Preliminary Analysis', *St. Louis Law Journal*, 47: 569.

3. Hoffman, J.L. (2006) 'Narrowing Habeas Corpus'. In: C. Bradley, ed., *The Rehnquist Legacy*. Cambridge, p. 181.

previous orders that are not 'narrowly drawn' or do not use 'the least restrictive means necessary to correct for violations of the Federal right'. The law also specifies that the challenged court order will be automatically stayed 90 days after the filing of the challenge. Thus, only a new court ruling sustaining the old order can guarantee that it will remain in effect. Such congressional tinkering with existing court orders is rare, and is usually looked upon with disfavour by the federal court. By a 5-4 liberal versus conservative vote the Court upheld the PRLA in its entirety. Here again the new legislation gave the majority on the Supreme Court a powerful instrument for compelling lower courts to comply with their commands.

On both habeas corpus and prison litigation, it is fair to say that the agenda of the Republican Congress merged with that of the 'Federalist Five' on the Supreme Court. Congress wanted to show that it was tough on crime; at least five members of the Supreme Court wanted to correct what they saw as the Warren and Burger Courts' perversion of federalism. The 'tough on crime' emphasis of Congress, though, has at times collided with the Court's focus on federalism. The Chief Justice and many other federal judges have repeatedly criticized what has become known as 'the federalization of criminal law'; that is, the tendency to bring into federal court many crimes already handled at the state level. Federal judges – no matter whether liberal or conservative – hate to have their dockets clogged with hundreds of run-of-the-mill crimes involving drugs, guns and car-jackings. Both cases in which the Court struck down legislation as exceeding Congress's power under the Commerce Clause – *US v. Lopez* in 1995 and *US v. Morrison* in 2000 – involved extension of federal authority to criminal matters previously handled exclusively by the states. The Court has often adopted a narrow reading of federal criminal statutes in order to avoid encroaching on traditional state prerogatives. In these cases the Court's liberals and conservatives frequently find themselves in agreement.

Over the past eight years, the Supreme Court has also issued a series of decisions that has thrown a monkey wrench into the elaborate system of sentencing guidelines and 'sentence enhancers' constructed by Congress, the US Sentencing Commission, the federal courts and the states since the 1980s. An unlikely coalition of liberals requires that *all* factual matters relating to imprisonment be resolved by juries, not judges.⁴ In these cases the Court sided not with state prosecutors and the Bush Department of Justice, but with criminal defence lawyers and the American Civil Liberty Union, groups that have become increasingly critical of sentencing practices. Although Justices Thomas and Scalia are generally despised by civil libertarians, it is not unusual for them to side with criminal defendants in cases involving the extent of federal power or the division of labour between judges and juries. This is a good example of how issues that do not fit within the conventional left-right matrix, and are seldom considered during the nomination and confirmation of judges, can suddenly rise to prominence on the Court's docket.

Criminal justice demonstrates both the importance of the convergence of Court and congressional opinion and its limits. Although the Justices are hardly models of consistency on federalism, they take federalism considerably more seriously than do Republicans in Congress. Moreover, 'where you sit' often determines 'where you stand'. For members of Congress, expanding the scope of federal criminal law is a cheap way to claim credit with the voters; for judges it is yet another administrative burden placed upon them by grandstanding politicians. The sentencing decisions remind us that the Court is at times guided by institutional and constitutional concerns shared by virtually no one else in the political system. In an area so clearly within the bailiwick of the judicial branch, in the United States it is very hard for Congress and the executive to overturn court decisions, no matter how little public support those decisions command.

4. *US v. Booker* (2005), *Blakely v. Washington* (2004), *Apprendi v. New Jersey* (2000), and *Almendarez-Torres v. US* (1998).

Religion

Religious conservatives are obviously an important element of the current Republican majority. Among the factors drawing the religious right into national politics were Supreme Court decisions on school prayer, public financial support for religious institutions, and abortion. Republican presidents since Ronald Reagan have vowed to appoint Supreme Court justices who will not show hostility toward religion (the Republican formulation) and will lower the 'wall of separation' between Church and State (the Democratic formulation).

In recent years the Rehnquist Court adopted a more accommodative approach to Church-State relations, substituting the requirement of neutrality for the metaphor of a 'wall of separation'. The Court has required state and local governments to open public facilities to religious groups whenever they make the facilities available to non-religious groups. It has also loosened restrictions on public funding for religious schools.

This is hardly to say that the religious right has always prevailed in the Supreme Court. Most importantly, on the social issues of greatest importance to them – abortion and gay marriage – they have been deeply disappointed by the Rehnquist Court. Moreover, on Church-State issues the Court has frequently meandered, and at times created an incomprehensible muddle. The most obvious examples are the Court's 2005 decisions allowing some religious displays in public buildings, but prohibiting them in other (distressingly similar) circumstances.

On one important issue the Court found itself at odds with both Congress and a broad coalition of church groups. In a controversial 1990 decision authored by Justice Scalia, the Court substantially reduced the extent to which it would provide religious groups with exemptions from otherwise valid state and local laws.⁵ Churches of virtually

all stripes denounced this decision, and banded together to support federal legislation requiring the states and the federal government to accommodate a variety of religious practices. The Religious Freedom Restoration Act (RFRA), the law designed to overturn the 1990 Court ruling, passed with overwhelming bipartisan support in 1993.

Four years later in *City of Boerne v. Archbishop Flores*, the Supreme Court again infuriated this coalition of church groups, ruling both that in enacting RFRA Congress had exceeded its power under the Fourteenth Amendment and that Congress could not revise the Court's interpretation of the religion clauses of the First Amendment. In subsequent congressional negotiations over more limited legislation, liberal groups decided that the Court had been right to have doubts about this novel federal initiative.

City of Boerne is another instance in which standard liberal-conservative lines did not hold: the majority consisted of three conservatives, (Thomas, Scalia, and Rehnquist) two liberals, (Ginsburg, and Stevens) and that perennial swing voter Justice Kennedy. For members of Congress, passing RFRA was a painless way to show support for religion in general and for the free exercise of religion in particular. For members of the Court, RFRA raised three concerns that received little attention in Congress. The first was the recurrent issue of federalism: *City of Boerne* was another of the Court's many efforts to set limits on Congress's regulation of subnational governments. The second involved institutional rivalry: the Court was reluctant to allow Congress to second-guess the Supreme Court on the meaning of the First Amendment. The third was a matter of doctrinal consistency: if, as the Court was now claiming in other religion cases, the state must remain neutral on religion, never favouring one religion over another, religious groups over secular groups, or secular groups over religious ones, then how can it offer special exemptions *only* to the religious? Although the Court's conservatives are often portrayed in the press as reliable allies of the religious right, in this instance they were more willing to defy religious groups than were Democrats in Congress.

5. *Employment Division, Department of Human Resources of Oregon v. Smith* (1990).

Federalism

Nowhere is the imprint of the Second Rehnquist Court more obvious or significant than on federalism. In a variety of ways the Court has limited the power of the national government and expanded the immunities of state and local governments. These new doctrines on federalism, frequently the product of 5–4 decisions, seem to dovetail nicely with the preferences of the post-1980 Republican Party, particularly the anti-Washington rhetoric of the Newt Gingrich-led Congress. Starting in 1980, the Republican platform called for limits on federal power, protection of state sovereignty, and appointment of federal judges who would return power to state and local officials. Several elements in the Republican's famous 1994 'Contract with America' stressed federalism, calling for limits on unfunded mandates and greater state control over welfare programs. Although most of the legislation based on the Contract either failed to pass the Senate or was vetoed by President Clinton, the Unfunded Mandate Reform Act and the Welfare Reform Act of 1996 made their way through the obstacle course on Capitol Hill.

Although many law professors and journalists expressed alarm over the Rehnquist Court's federalism decision, Congress's response has been a collective yawn. Most members of Congress – Democrats and Republicans alike – paid little attention to the Court's decisions, neither praising the Court for limiting federal power nor blaming it for restricting congressional authority.

One reason for the muted congressional response to the Court's unprecedented rate of invalidating federal laws was that most of the cases decided by it involved relatively minor policy issues: the purely symbolic Gun-Free School Zones Act, patent and trademark laws, an Indian gaming statute, and state ownership of lakebeds. The importance of these decisions lay not in the individual cases immediately before the Court, but the complex new rules it established on federal-state relations. Complex and uncertain rules about judicial enforcement of federal statutes and regulations seldom make congressional

blood boil; nor do they mobilize many interest groups. Advocates for the disabled, environmental groups and civil rights groups could see that these decisions *might* cause trouble somewhere down the road. Even if Democrats still controlled Congress it would have been hard for them to rouse the House and Senate to take action on these convoluted topics. But with Republicans in charge, they could do little other than complain. Republicans were generally content to let the Court proceed. This is not to say that Republicans always agreed with the Court: among the victims of the court's new federalism were Republican-supported anti-crime measures and RFRA. Other Court decisions had the perverse effect of giving an advantage to state-run enterprises competing with private businesses – hardly a result pleasing to most Republicans. But none of these were major issues. Ironically, when the Court struck down symbolic legislation such as the Gun-Free School Zones Act, it gave Congress yet another opportunity to engage in grandstanding by revising the law.

A second reason for Congress's indifference was that most of the Court's decisions were relatively easy to circumvent. For example, in many cases the Court merely announced that if Congress intended to impose mandates on the states, it must do so in clear, unambiguous language. This meant, in effect, that whenever party leaders in the House and Senate really wanted to impose a restriction on the states, they could do so. The Court also stipulated that Congress can regulate the states under the Fourteenth amendment, provided it builds a record demonstrating 'a congruence and proportionality between the [constitutional] injury to be prevented or remedied and the [legislative] means adopted to that end'. This meant that Congress could at times protect its legislation by developing a more elaborate record. Moreover, while the Court limited the availability of private suits against subnational governments, it left open many other options for enforcing most federal mandates. The Court placed virtually no limits on Congress's spending power and its authority to place conditions on receipt of federal funds. This is a power Congress has not hesitated to wield.

Third, just as the Court's federalism revolution seemed to be gaining steam, a few of the 'Federalist Five' developed second thoughts. For example, in 2003 both the Chief Justice and Justice O'Connor sided with the four liberals to find that the Eleventh Amendment does *not* bar private suits for damages under the Family and Medical Leave Act of 1993 because that law is a 'prophylactic' measure that 'aims to protect the right to be free from gender-based discrimination in the workplace'. As the Court moved from attacking symbolic legislation to weakening legislation that has developed a more determined constituency, it blinked. No doubt some Republicans in Congress are disappointed that the Court has not been more aggressive in pruning federal regulation. Others, though, are probably happy not to have these issues thrown back in their lap.

Finally, and perhaps most importantly, the longer Republicans remained in power, the weaker their commitment to federalism became. We have already encountered two instances in which popular policies trumped federalism for most Republicans: criminal law and RFRA. There are many more. President Bush proposed and the Republican Congress passed the most prescriptive federal education law ever enacted – No Child Left Behind – quite a change for a party that two decades previously had promised to abolish the Department of Education. Rather than defend state autonomy on such matters as marriage, abortion and end-of-life issues, the Bush White House and many Republicans in Congress have supported a national definition of marriage, federal restrictions on partial birth abortion and federal preemption of state right-to-die laws. (They lost in the Supreme Court on the last two.) Congressional efforts to hand the Terri Schiavo case over to the federal courts was a glaring example of the party's willingness to jettison federalism concerns when they conflict with demands from the Religious Right. Republicans have been particularly intent upon using federal legislation to restrict tort litigation at the state level. In short, just as the Court was strengthening its commitment to federalism, Republicans in Congress were moving in the opposite direction.

Social issues

Most confirmation hearings and journalism focus not on such arcane matters as habeas corpus, the Eleventh Amendment and private rights of action, but on social issues such as abortion, affirmative action, gay rights and capital punishment. It is here that the Rehnquist Court most disappointed conservatives. In 1992 three Reagan and Bush appointees – Kennedy, Souter and O'Connor – banded together to save 'the essential holding' of *Roe v. Wade*. Eight years later O'Connor and Souter joined with Stevens, (also a Republican appointee) Breyer and Ginsburg to strike down a relatively narrowly drawn federal restriction on 'partial birth abortion'. In 2004 the Court gave colleges and universities a green light for using affirmative action so long as they did not employ explicit numerical quotas. That same term the Court decided *Lawrence v. Texas*, reversing its position on anti-sodomy laws. Although the Court has reduced litigational delay in death penalty cases, it has in recent years ruled that execution of the mentally retarded and those under the age of 18 violates the Eighth Amendment's prohibition of cruel and unusual punishment. On several occasions the Court has struck down federal laws designed to limit pornography on television and on the Internet. By the time she retired in 2005, Justice O'Connor, who was in the majority in most of these cases, had become the liberals' model for what a 'conservative' judge should be. Conservatives, in contrast, were determined to find a replacement who was neither an O'Connor or (worse yet) a Souter. This is as good an indication as any of how weak conservative control over the Court remained through 2005.

Conclusions

What can we learn about relations between the Court and Congress from this quick review of a few Court decisions over the past dozen years?

First, while the appointment and confirmation processes ensure that there will be some general similarities in the thinking of Justices, presidents, and members of Congress, the weakness of *ex post* controls on the courts in the US allows substantial differences to appear regularly and survive for years, even decades. The *ex ante* controls available to

Congress and the president – nominations and confirmations – simply do not give much power to current majorities. The composition of the Supreme Court in 2006 reflects the fact that Republican presidents had to compromise with Senate Democrats in 1975, (when a politically weak President Ford nominated Justice Stevens) in 1987, (when Robert Bork was defeated and Justice Kennedy subsequently confirmed) and in 1990 (when President George H.W. Bush chose a ‘stealth’ nominee, David Souter, to grease the confirmation process). To ‘pack’ the Court requires many years of unified government, a president who knows what he wants from judges, and a docile Senate. The only twentieth century president to succeed in this was Franklin Roosevelt, who had the enormous advantage of winning four presidential elections. In the US, it is extraordinarily hard to maintain a stable, coherent ‘national lawmaking majority’ capable of guiding the Court in this way.

Second, examining Congress and the Supreme Court reminds us of the serious fissures that run through American conservatism. As many writers have pointed out, libertarians often disagree with social conservatives on the issues that come before the courts. Republicans’ commitment to federalism conflicts not only with the religious right’s desire to establish uniform national policy on such matters as abortion, gay marriage, stem cell research, assisted suicide and drug use, but also with its business allies on such matters as tort law and federal preemption of state regulation. Recently, conservatives in both branches have split on the issue of executive power as well.⁶

Third, within Congress, Republicans have managed to remain unusually united by giving party leaders unprecedented power to set the legislative agenda, especially in the House. Matters likely to divide the party are either kept off the floor altogether or handled under rules that make defection politically

painful. In the Supreme Court, in contrast, the votes of any four Justices are enough to grant certiorari and the Justices do not seem particularly interested in avoiding divisive issues. The Justices also believe (for good reason) that they have the duty to resolve conflicts among the circuits and to review lower court decisions striking down state and federal laws. As a result, the schisms within conservatism are more apparent and the power of swing voters significantly greater on the Court than in Congress.

Finally, institutional demands inevitably influence how judges, legislators and executives view issues. This is particularly apparent in the area of criminal justice. Most members of Congress – Democrats as well as Republicans – have concluded in elections that it never hurts to be tough on crime, and it often hurts to appear less tough on crime than one’s opponent. This is the major cause of the federalization of criminal law. Federal judges, in contrast, must hear those thousands of cases diverted from state to federal court. Regardless of ideology, they resent the increase in their workload and believe that this is a poor use of the resources of the federal courts. They also resent the fact that their discretion in sentencing has steadily declined, sometimes requiring them to impose sentences they consider manifestly unjust. Paradoxically, while Congressmen frequently rail about the dangers of an imperial judiciary, it is judges who must deal with the day-to-day frustrations and challenges of adversarial legalism and who often become its harshest critics.

Even if Republicans continue to control the Senate and the White House long enough to appoint several more reliably conservative Justices on the Supreme Court, the branches will continue to disagree on many, many issues. What our Constitution has pulled asunder virtually no political party or ideology can unite.

6. See, for example, *Clinton v. City of New York* (1998), *Hamdi v. Rumsfeld* (2004) and *Hamdan v. Rumsfeld* (2006).

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