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Tom DeLay: Popular Constitutionalist?

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TOM DELAY: POPULAR CONSTITUTIONALIST?

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In the spring of 2005, Congress expressed its disapproval of state court decision-making in the Terri Schiavo case. Rejecting state court findings that Terri Schiavo (then in a persistent vegetative state) would rather die than be kept alive artificially, Congress asked the federal courts to determine whether the removal of a feeding tube violated Ms. Schiavo's constitutional rights.[1] In defending their intervention into the Schiavo case, lawmakers—especially the GOP leadership—embraced the culture of life and, with it, their belief that the Florida courts had wrongly denied Terri Schiavo her constitutional rights. More than that, lawmakers argued that they were putting into effect the will of the American people. Most notably, then-House Majority Leader Tom DeLay (R-Tex.) spoke of Ms. Schiavo's constitutional rights and said that "[t]he American people are not interested in squabbles between Republicans and Democrats, or between the House and Senate. They care, and we care, about saving Terri Schiavo's life."[2]

DeLay's comments sound a lot like the popular constitutionalism embraced by Larry Kramer.[3] For Kramer, the people—acting through their elected representatives—should put into place their vision of the Constitution.[4] Judicial decisions inconsistent with the people's will should be re-

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1. Act of Mar. 21, 2005, Pub L. No. 109-3, 119 Stat. 15 (2005).

2. Representative Tom DeLay, Majority Leader, U.S. House of Representatives, Terri Schiavo Is Alive—This Fight Is Not Over; House Continues to Work to Save Terri Schiavo (Mar. 18, 2005).

3. *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

4. *Id.* at 249. Kramer does not consider the interplay between Congress and the president in advancing potentially conflicting visions of the Constitution. As I have argued elsewhere, the president has comparative advantages over Congress in advancing his constitutional agenda, and so the president's view of the Constitution is likely to dwarf that of Congress. *See* Neal Devins, Commentary, *Reanimator: Mark Tushnet and the Second Coming of the Imperial Presidency*, 34 U. RICH. L. REV. 359 (2000) (arguing that the president, not Congress, would define the Constitution's meaning in a world without judicial review). Presidential dominion over Congress on constitutional questions (even by a president who embraces popular constitutionalism) may well be at odds with what Kramer seeks to accomplish in his book. As best I can tell, Kramer intends for Congress to dominate popular constitutionalism. For example, even though he speaks sweepingly of "constitutional understandings determined in politics" and "the thinking of ordinary citizens and politicians," he ultimately equates extrajudicial debates with Congress. KRAMER, *supra* note 3, at 235–41.

sisted, presumably through legislation that either repudiates court decision-making or remands wrongly decided cases back to the courts.[5]

DeLay's comments, however, also highlight some of the practical problems associated with implementing Kramer's popular constitutionalism. First, Congress and the American people care about outcomes, not constitutional interpretation. Increasing partisanship within Congress, moreover, has resulted in a regime in which lawmakers care less and less about constitutional questions. The focus, instead, is the crafting of a message that resonates with their party's political base. Second, and relatedly, an increasingly partisan Congress is not likely to speak the people's voice. The median voter is not well served by a system that validates interest group politics, the push for reelection, and the expectation that lawmakers will agree with their party's message. Indeed, the Supreme Court is far more likely than Congress to take into account majoritarian preferences. Third, even if Congress sought to put into place the people's will, it is very difficult to measure what people think. This is especially true on questions of constitutional interpretation (which are of little interest to the people).

In the pages that follow, I will support these claims. In part, I will talk about the Schiavo legislation. But I will make broader points about the lawmaking process and, with it, Congress's interest in constitutional interpretation.

I. DOES CONGRESS OR THE AMERICAN PEOPLE CARE ABOUT CONSTITUTIONAL INTERPRETATION?

Today's lawmakers and the American people have little or no interest in constitutional interpretation. Notwithstanding the Senate's prodding of Supreme Court nominees Samuel Alito and John Roberts on precedent, unenumerated rights, the unitary executive, and the balance of powers between the federal and state governments, lawmakers and their constituents do not care about constitutional interpretation. The Court, for example, played no role in the 2004 presidential election. John Kerry and George W. Bush largely ignored the Court. Voters likewise considered the Court a nonissue. Opinion polls revealed that less than 1 percent of voters either

5. Kramer does not speak about lawmakers remanding a case they think was wrongly decided back to the courts. For reasons detailed *infra*, I think that Kramer's brand of popular constitutionalism should extend to such cases. *See infra* note 45. Moreover, as Kramer recognizes, popular constitutionalism is about "the Justices' attitudes and self-conception," not about the "day-to-day business of deciding cases. There would still be briefs and oral argument and precedents and opinions." KRAMER, *supra* note 3, at 253. Consequently, it should not matter how lawmakers express their disapproval of judicial action—either way the courts will eventually rule on Congress's efforts to repudiate an earlier judicial ruling.

considered the Supreme Court the most important factor in their vote or thought that the Court should be President Bush's top priority in his second term.[6] Therefore, it should come as no surprise that what matters to both voters and elected officials is outcomes; the theories of interpretation that back up outcomes are largely irrelevant.

Consider, for example, federalism. The Rehnquist Court's federalism revival was largely ignored by Congress and the American people. Lawmakers did not hold hearings about these decisions and there was almost no mention of the precedential impact of these rulings in the Congressional Record.[7] The reason: lawmakers largely agreed with the outcomes the Court reached and, as such, ignored the fact that the Court was chipping away at congressional power.[8]

For their part, the American people were almost certainly unaware of Rehnquist Court federalism rulings.[9] Supreme Court decisions rarely register with the American people. Opinion poll data, for example, reveal that no more than 40 percent of Americans pay any attention to the Court.[10] In fact, only about 40 percent of Americans know that the Supreme Court permitted first-trimester abortions in *Roe v. Wade*.[11] And when it comes to identifying the Chief Justice of the United States, a 1989 poll revealed that "only 9 percent could name William Rehnquist as the chief justice, while 54 percent correctly named Judge Wapner as the judge on the television

6. 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), http://people-press.org/reports/pdf/233.pdf; Press Release, Fox News/Opinion Dynamics Poll (Nov. 18, 2004), http://origin.foxnews.com/projects/pdf/111804_poll.pdf. *See also* TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 165–67 (1999) (citing numerous studies on public's ignorance of the Supreme Court and its decisions); William G. Ross, Op-Ed, *Why the Supreme Court Is Not an Election Issue, and Why It Should Become One*, JURIST, Oct. 21, 2004, *available at* http://jurist.law.pitt.edu/forumy/2004/10/why-supreme-court-is-not-election.php. Considering that Chief Justice Rehnquist underwent a tracheotomy one week before the 2004 elections, these numbers are especially striking. For additional discussion, see *infra* notes 9–13 and accompanying text.

7. *See* Neal Devins, Commentary, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435 (2001) (detailing lawmakers' failure to discuss these rulings in Congressional Record); Keith E. Whittington, *Hearing About the Constitution in Congressional Committees*, *in* CONGRESS AND THE CONSTITUTION 87 (Neal Devins & Keith E. Whittington eds., 2005) (noting that Congress did not hold a significant number of hearings on federalism in response to the Rehnquist Court's federalism revival).

8. *See* Barry Friedman & Anna L. Harvey, *Electing the Supreme Court*, 78 IND. L.J. 123 (2003) (arguing that Congress agreed with the outcomes in 1990s Supreme Court cases revitalizing federalism).

9. There is no opinion poll data on these decisions, apparently because pollsters did not think these decisions were of interest to the American people.

10. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 126 (1991) (collecting studies on public knowledge of the Court); David Adamany & Joel B. Grossman, *Support for the Supreme Court as a National Policymaker*, 5 LAW & POL'Y. Q. 405, 407 (1983) (same).

11. THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 145 (1989).

show *The People's Court*."[12] Summarizing this data, political scientist Robert Carp observed that the "[C]ourt is an amorphous blob to most Americans."[13]

More significant, even if the American people and their agents were well informed, there is good reason to think that lawmakers, interest groups, and the American people have little incentive to check Supreme Court federalism decision-making. Unless judicial interpretations foreclose the pursuit of first-order policy priorities, it is unlikely that any constituency will push for a broad (or narrow) theory of federalism.[14] Women's interests, for example, sometimes back expansive national powers (e.g., the Violence Against Women Act), and at other times oppose a broad vision of federal power (e.g., federal partial-birth abortion legislation). Pro-life interests likewise pay attention to their substantive policy agenda when deciding whether to back or oppose expansive federal powers.

And while lawmakers and the American people may have a stronger sense of stake in constitutional questions involving race, religion, speech, and other rights,[15] the *real* concern of voters, interest groups, and political parties is and always will be first-order policy priorities.[16] Indeed, changes in congressional practice over the past two decades suggest that today's

12. PERETTI, *supra* note 6, at 167 (citing a 1989 Washington Post poll).

13. Richard L. Berke, *A Missing Issue in the Big Race*, N.Y. TIMES, Oct. 13, 1996, § 4, at 1. This phenomenon is explained, in part, by the fact that Court decisions generally conform to majoritarian preferences. *See infra*. As survey data of African-Americans and Southern whites during the Warren era reveals, individuals upset with Court rulings are far more likely to know about the Court than other Americans. *See* Walter F. Murphy & Joseph Tanenhaus, *Publicity, Public Opinion, and the Court*, 84 NW. U. L. REV. 985, 999–1004 (1990).

14. Neal Devins, *The Judicial Safeguards of Federalism*, 99 NW. U. L. REV. 131 (2004). For this very reason, Congress generally acquiesces to Court rulings that allow lawmakers to pursue their favored policy agenda in some other way. *See* J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM (2004) (noting that Congress is interested in finding some democratic outlet to pursue its favored vision of the Constitution, not in contradicting Court interpretations of the Constitution).

15. Perhaps for this reason, Mark Tushnet draws a distinction between the thin Constitution (structure) and thick Constitution (rights) in his proposal to "take the Constitution away from the courts." MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999). *See also* 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 (2002).

16. Judge Richard Posner put it this way:

> Even if there were [a federal town meeting at which 200 million Americans could deliberate and then take a vote], it would be unrealistic to suppose that their vote would be based on their ideas about constitutional law. It would be based on their visceral approval or disapproval of the judicial decision that had been appealed to them . . . .

Richard A. Posner, *The People's Court*, NEW REPUBLIC, July 19, 2004, at 32, 35. Correspondingly, while opinion polls have been taken about American attitudes towards gun regulation, opinion polls have not been taken on the Supreme Court's decision in *Printz v. United States*, 521 U.S. 898 (1997) (striking down a provision of the Brady Act on Tenth Amendment grounds). More generally, opinion polls have not been taken of Rehnquist Court rulings limiting congressional power on federalism grounds. *See* Devins, *supra* note 15, at 1320.

Congress is less interested in constitutional interpretation than earlier Congresses.

Party polarization is "one of the most obvious and recognizable trends" in the modern Congress.[17] Republicans, without exception, are to the right of Democrats. Moreover, the increasing ideological divide now separating Republicans and Democrats will likely grow.[18] In part, with only one-half of eligible voters actually voting, each party places greater emphasis on mobilizing its base. Correspondingly, with computer-driven redistricting guaranteeing certain seats to Republicans and others to Democrats in the House of Representatives,[19] candidates increasingly look to the partisans who vote in party primaries.

The consequences of this political polarization are profound. Cohesion within the parties, structural changes in Congress that shift power to party leaders, and the growing power of partisans in congressional elections have all contributed to the growth of "message politics"—that is, the use of the legislative process to make a symbolic statement to voters and other constituents.[20] This shift to message politics has also contributed to declining lawmaker interest in Congress's power to independently interpret the Constitution.[21] Consider, for example, congressional committee consideration of constitutional questions. Over the past thirty years, the percentage of hearings raising significant constitutional issues has declined throughout Congress.[22] One explanation for this phenomenon is the growing ideologi-

17. Sean M. Theriault, The Case of the Vanishing Moderates: Party Polarization in the Modern Congress 5 (May 2, 2004) (unpublished manuscript), *available at* www.la.utexas.edu/~seant/vanishing.pdf.

18. For a detailing of why this is so (including support for the assertions that I make in the balance of this paragraph), see Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415 (2004).

19. The November 2006 elections will test the proposition that nearly all House seats—thanks to computer-driven redistricting—are "safe" seats for either Democrats or Republicans. Popular disapproval of President George W. Bush may spill over to the 2006 elections and, consequently, there is some reason to think that "safe" Republican seats will be contested—so much so that Democrats hope to retake control of the House in 2006. For a news analysis linking computer-driven redistricting to Democratic efforts to regain control of the House, see Paul West, *Democrats Have Shot to Gain House or Senate: Bush's Slump, Voter Ire Shaping the Outlook of Fall Elections*, BALT. SUN, May 7, 2006, at 3A.

20. *See generally* C. Lawrence Evans, *Committees, Leaders, and Message Politics*, *in* CONGRESS RECONSIDERED 217 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 7th ed. 2001).

21. The balance of this paragraph and much of the next two paragraphs are taken from Neal Devins, *Should the Supreme Court Fear Congress?*, 90 MINN. L. REV. (forthcoming May 2006).

22. Keith E. Whittington et al., *The Constitution and Congressional Committees: 1971–2000*, *in* THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE (Tsvi Kahana & Richard Bauman, eds., forthcoming 2006). Of those committees that regularly considered constitutional questions (education, labor, foreign affairs, judiciary), the only ones that continue to hold the same number of constitutional hearings are the Judiciary Committees. *See id.*

cal polarization in Congress.[23] As compared to the Warren and Burger Court eras (where regional divides and ideological diversity cut back the power of party leaders), today's lawmakers are committed to their party's policy agenda. The question of whether the Supreme Court will find that agenda constitutional matters less to today's lawmakers.[24]

When today's Congress considers constitutional questions, moreover, lawmakers steer clear of nonpartisan witnesses, preferring instead to hear from witnesses that will back up the preexisting views of the party that selects that witness.[25] An increasingly ideological, increasingly polarized Congress sees hearings as staged events in which each side can call witnesses who will explain their views to the public.[26] In sharp contrast, committee hearings during the Warren and Burger Court eras reflected ideological diversity within the Democratic and Republican parties.[27] Most notably, several Senate committees made use of unified staffs and generally operated in a bipartisan way, so that hearings considering constitutional questions often featured nonpartisan academic experts.[28]

Another measure of how today's Congress differs from the earlier Congresses is lawmaker attitudes towards congressional interpretation of the Constitution. In 1959 (when lawmakers cared intensely about Warren Court decisions on school desegregation and subversives), 40 percent of lawmakers thought that courts should give controlling weight to congres-

23. For a more detailed treatment, see *id.*

24. For this and other reasons, the Supreme Court's federalism revival did not prompt a legislative backlash. As noted above, the federalism revival did not undermine the policy agenda of either progressive or conservative interests. *See supra* notes 7–8 and accompanying text. Consequently, even though Rehnquist Court federalism decisions curtailed Congress's power, today's lawmakers saw no reason to take a hard look at decisions that had little to do with the "message" they were seeking to craft. Indeed, the federalism-related hearings that Congress did hold in the 1990s did not focus on the Court; instead, they were mainly concerned with the Contract with America and other federalism-related reforms associated with the 1994 Republican takeover of Congress. *See* Whittington, *supra* note 7, at 93–95.

25. *See* Neal Devins, *The Academic Expert Before Congress: Observations and Lessons from Bill Van Alstyne's Testimony*, 54 DUKE L.J. 1525 (2005).

26. *See* ROGER H. DAVIDSON & WALTER OLESZEK, CONGRESS AND ITS MEMBERS 214–15 (9th ed. 2004) (hearings "are often orchestrated as a form of political theatre"). Furthermore, because there is rarely an academic consensus on the constitutional questions that divide Democrats and Republicans, committee staffers can always find a sincere, well-qualified constitutional law expert willing to back their position.

27. I do not mean to suggest here that constitutional values do not play a role in party politics. The Democratic and Republican parties, more than ever before, embrace an agenda that includes policy positions on race, privacy, and a host of constitutional issues. *See* H.W. Perry & L.A. Powe, Jr., *The Political Battle for the Constitution*, CONST. COMMENT. (forthcoming 2006). For reasons detailed here and in other writings, however, I do not think that the Democratic or Republican parties have a vision about constitutional interpretation. Their concern, instead, is advancing a policy agenda on issues that resonate with their increasingly partisan base. *See also* Posner, *supra* note 16, at 35–36.

28. *See* Devins, *supra* note 25, at 1543–44 (making this point by comparing congressional practices before and after 1985).

sional interpretations of the Constitution; in 2000 (during the height of the Rehnquist Court federalism revival), only 13.8 percent of lawmakers thought that the courts should give controlling weight to congressional interpretations of the Constitution.[29] Correspondingly, 71 percent of today's lawmakers adhere to a "joint constitutionalist" perspective whereby courts should give either "limited" or "no weight" to congressional assessments of the constitutionality of legislation.[30]

Today's Congress, as detailed above, is both more accepting of Supreme Court control of constitutional decision-making and less engaged in constitutional questions than previous Congresses.[31] Consequently, the Rehnquist and Roberts Courts had and have a freer hand to shape constitutional decision-making than did the Warren and Burger Courts.[32] Nevertheless, the Rehnquist Court regularly took social and political forces into account.[33] Rehnquist Court rulings on divisive social issues often turned on the votes of the Court's swing Justices—Sandra Day O'Connor and An-

29. Bruce G. Peabody, *Congressional Constitutional Interpretation and the Courts: A Preliminary Inquiry into Legislative Attitudes, 1959–2001*, 29 LAW & SOC. INQUIRY 127, 147 tbl.3 (2004).

30. *Id.*

31. Congressional acceptance of Supreme Court interpretations of the Constitution is not contradicted by recent lawmaker efforts to either strip or curtail federal court participation in same-sex marriage, the Pledge of Allegiance, the Ten Commandments, and lawsuits filed by enemy combatants. As I have detailed elsewhere, these lawmaker challenges are largely rhetorical attacks rather than heartfelt attempts to shift power away from the courts. *See* Devins, *supra* note 21.

32. As Powe observed in an outstanding review of *The People Themselves*, Kramer wrongly ignores the post-*Brown* efforts of lawmakers to shape constitutional decision-making. *See* L.A. Powe, Jr., *Are "the People" Missing in Action (and Should Anyone Care)?*, 83 TEX. L. REV. 855 (2005) (book review). At the same time, I think Powe overstates his case. Changes in Congress have resulted in increasing lawmaker acquiescence to the Supreme Court. And while (as Powe and H.W. Perry have argued) the Democratic and Republican parties embrace "messages" on a range of constitutional issues, their messages are about outcomes, not constitutional interpretation. *See supra* note 27.

33. In general, the Supreme Court cannot help but take social and political forces into account. The process of appointing and confirming Supreme Court Justices ensures that the policy preferences of the Justices are consistent with the values of elected officials. *See* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 284–86 (1957). More than that, there is good reason to think that (some) Justices take into account the views of elected officials, elites, and the American people (as measured by popular opinion). Lou Fisher and I recently published a book that demonstrates the pervasive role that elected officials and the American people play in shaping constitutional values. *See* NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION (2004). Several other studies make this point, including MARSHALL, *supra* note 11, at 192 (noting that "the modern Court has been an essentially majoritarian institution"), JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 424 (2002) ("Supreme Court decisions by and large correspond with public opinion."), and LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 12–13 (1998) (arguing that Supreme Court Justices "act strategically," realizing that their "success or failure depends on the preferences of other actors [including elected officials]"). *See also* Mark A. Graber, *Constructing Judicial Review*, 8 ANN. REV. POL. SCI. 425, 427, 447 (2005) (noting that adjudication is one of many means that politicians employ in order to "make their constitutional visions the law of the land" and, as such, "judicial review rarely pits the people against the courts. Political struggles over judicial power are between people who want courts to make certain policy decisions and people who prefer those decisions to be made by other institutions.").

thony Kennedy. These Justices did not have hard preferences on outcomes or reasoning.[34] As such, they embraced doctrinal formulas that allowed them to take into account elite opinion, elected government pressures, and the desires of the American people. Rehnquist Court decisions backing abortion rights, affirmative action, campaign finance, gay rights, school prayer restrictions, school vouchers, and much more are readily tied to majoritarian preferences.[35] Even the Rehnquist Court's federalism revival can be traced to public and lawmaker support for devolving power away from Washington, D.C., and to the states.[36]

Against the backdrop of increasing partisanship in Congress (partisanship that will likely persist in this era of computer-drawn congressional districts), there is reason to think that the Supreme Court will steer a more centrist course than Congress or the White House.[37] The Supreme Court, in other words, better represents median voters than does the Congress, whose energy is focused on the interest groups and partisans who dominate party politics and party primaries. Relatedly, congressional disinterest in constitutional questions is likely to continue, so the courts may prove a better vehicle than the legislature for the people to pursue popular constitutionalism. Time will tell, of course. After all, the Supreme Court's composition is in flux and it is impossible to predict the Court's willingness to listen to the American people, lawmakers, and the like. With that said, recent trends in Congress signal that today's lawmakers are less likely to engage in popular constitutionalism than the lawmakers of earlier Congresses.

II. POPULAR CONSTITUTIONALISM IN ACTION?: LESSONS FROM THE TERRI SCHIAVO CASE

When Congress enacted "An Act for the relief of the parents of Theresa Marie Schiavo,"[38] lawmakers argued that they were engaged in a heroic struggle to protect the constitutional right to life of a brain-damaged young woman. Castigating the failure of state courts in Florida to appropriately value the interest of Terri Schiavo (and all Americans) in life, Republican leadership affirmatively embraced the culture of life by arguing that

34. For a general treatment of swing Justices in general and O'Connor in particular, see Dahlia Lithwick, *A High Court of One: The Role of the "Swing Voter" in the 2002 Term*, *in* A YEAR AT THE SUPREME COURT 11 (Neal Devins & Davison M. Douglas eds., 2004).

35. *See* DEVINS & FISHER, *supra* note 33; Neal Devins, *The Majoritarian Rehnquist Court?*, LAW & CONTEMP. PROBS., Summer 2004, at 63.

36. *See* Devins, *supra* note 35, at 79–81.

37. *See* discussion *supra* note 33; *see also* Jeffrey Rosen, *Center Court*, N.Y. TIMES MAG., June 12, 2005, § 6, at 17 (making this argument).

38. Act of Mar. 21, 2005, Pub. L. No. 109-3, 119 Stat. 15 (2005).

Terri Schiavo should be given one final chance.[39] In particular, rather than accept state court findings that Terri Schiavo (then in a persistent vegetative state) would rather die than be kept alive artificially, Congress asked the federal courts to sort out whether the removal of a feeding tube violated Ms. Schiavo's constitutional rights.

Sponsors of the legislation (most notably Senate Majority Leader Bill Frist (R-Tenn.) and then-House Majority Leader Tom DeLay (R-Tex.)) also signaled that the American people were behind their efforts. Frist, for example, spoke of the legislation as "affirm[ing] our nation's commitment to preserving the sanctity of life."[40] DeLay noted that the "[American people] care, and we care, about saving Terri Schiavo's life."[41] Several other Republican lawmakers referenced the American people's approval of congressional intervention.[42]

Congressional consideration of the Schiavo bill also addressed constitutional questions. Supporters of the legislation spoke of Congress's responsibility in protecting the constitutional right to life; opponents invoked federalism and the separation of powers. For example, House Judiciary Committee chairman James Sensenbrenner (R-Wis.) spoke of Terri Schiavo's "right to life" and the larger fight for the "culture of life," saying that the "battle to defend the preciousness of every life in a culture that respects and defends life is not only Terri's fight, but it is America's fight."[43] In contrast, several House Democrats resisted the legislation by invoking constitutional norms. For Robert Wexler (D-Fla.), "the [Republican] majority wishes to undermine over 200 years of jurisprudence and a long history in this country for respect for our judicial independence as well as the States court systems and the jurisdictions assigned to it."[44]

39. *See* Shailagh Murray & Mike Allen, *Schiavo Case Tests Priorities of GOP*, WASH. POST, Mar. 26, 2005, at A1.

40. Press Release, Frist Comments on Schiavo Bill Enrollment (Mar. 21, 2005), http://frist.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=1886.

41. DeLay, *supra* note 2.

42. *See, e.g.*, 151 CONG. REC. H1720 (2005) (statement of Rep. Blunt (R-Mo.)) ("[M]ost Americans see a difference" between "giving someone food and water and putting someone on incredible life support systems."); *id.* at H1722 (statement of Rep. Kennedy (R-Minn.)) ("Americans believe in a culture of life, not a culture that tells the weak and vulnerable there is no place for them at the table.").

43. *Id.* at H1701 (statement of Rep. Sensenbrenner).

44. *Id.* at H1703. Likewise, Barney Frank (D-Mass.) and Jim Davis (D-Fla.) spoke about the separation of powers. Frank lamented, "Congress deals with broad policy. Individual adjudications are made by judges. . . . None of that has happened here. . . . Ideology is driving this, and that is why we have a separation of powers." *Id.* at H1708. Davis reiterated many of these arguments and said, "This Congress is about to overturn the separation of powers by disregarding the laws of Florida and the decision of a judge that have never been reversed. This Congress is on the verge of telling States and judges and juries that their laws, their decisions do not matter." *Id.* at H1710. *See also* Keith Perine, *Congress and the Rule of Law*, 63 CQ WKLY. 782 (2005).

Against this backdrop, it appears that the Schiavo case is an example of popular constitutionalism. Lawmakers invoked the will of the American people in sorting out the meaning of constitutional rights. Moreover, rather than embrace judicial supremacy, lawmakers were willing to second-guess the judgment and values of the Florida courts that ordered the removal of Terri Schiavo's feeding tube.[45]

Upon closer examination, however, Congress's intervention in the Schiavo case appears to be little more than special interest politics. Over the past few years, Republicans in Congress have partnered with religious conservatives in pursuing a raft of court-curbing measures, including proposals to strip the federal courts of jurisdiction in cases involving the Ten Commandments and same-sex marriage.[46] The Schiavo legislation exemplifies GOP efforts to solidify support among social conservatives. The original bill was drafted by the National Right to Life Committee. More significantly, by embracing the culture of life in the Schiavo case, Republican leaders sought to strengthen their ties with Christian conservatives. Knowing the critical role that Christian conservatives play both in ever-important party primaries[47] and in party efforts to bring out the vote in general elections, congressional Republicans think it important to deliver a message that resonates with religious conservatives. For this very reason, Republicans have long sought to build ties with right-to-life interests (interests that strongly backed the Schiavo legislation).[48]

45. I understand, of course, that Congress asked the federal courts to assume jurisdiction in the case—so that the legislation did not seek to overturn the state courts but, instead, facilitated the possible federal court overruling of state court decision-making. Nevertheless, lawmakers certainly signaled their disapproval of judicial findings based on an ostensibly independent interpretation of the Constitution. For additional discussion, see *supra* note 5.

46. *See generally* Devins, *supra* note 21; Sam Rosenfeld, *Disorder in the Court*, AM. PROSPECT, July 2005, at 24.

47. *See supra* notes 18–19 and accompanying text (noting dominant role that party primaries now play in electoral races for the House of Representatives).

48. President George W. Bush's support for the Terri Schiavo legislation follows a similar script. President Bush looked to party partisans when running for reelection in 2004. David S. Broder, *An Old-Fashioned Win*, WASH. POST, Nov. 4, 2004, at A25. In particular, Bush targeted religious conservatives—a strategy that proved successful in an election year that emphasized moral values. *See* Laurie Goodstein & William Yardley, *President Benefits from Efforts to Build a Coalition of Religious Voters*, N.Y. TIMES, Nov. 5, 2004, at A22; Dana Milbank, *For the President, a Vote of Full Faith and Credit: Evangelical Christians Shed Their Reluctance to Mix Religion and Politics on Election Day*, WASH. POST, Nov. 7, 2004, at A7. When it came time to sign the Schiavo bill (a bill his administration backed), the President cut short a trip to Texas and flew back to Washington, D.C. Anne E. Kornblut, *After Signing Schiavo Law, Bush Says 'It Is Wisest to Always Err on the Side of Life,'* N.Y. TIMES, Mar. 22, 2005, at A19. His signing statement embraced the culture of life, noting that "I will continue to stand on the side of those defending life for all Americans . . . ." Statement on Signing Legislation for the Relief of the Parents of Theresa Marie Schiavo, 41 WEEKLY COMP. PRES. DOC. 484 (Mar. 21, 2005).

In addition to longstanding Republican efforts to be the "party of life," Republican leaders Tom DeLay and Bill Frist were especially interested in using the Schiavo legislation as a way of strengthening their ties with Christian conservatives. Frist sought to shore up support from right-to-life interests as part of his planned run for the presidency in 2008.[49] DeLay, who was then the subject of ethics investigations, sought to protect his job as House Majority Leader by rallying social conservatives behind him.[50]

Democratic opposition to the bill emphasized the apparent politicization and interest group manipulation of Terri Schiavo's plight. Two of the loudest voices of opposition during the House floor debate were Barney Frank (D-Mass.) and Jim Moran (D-Va.).[51] On the floor, supporting the politicization argument, Frank said, "Does anyone think that this decision will be made without consideration of electoral support or party of ideology? Of course not."[52] Moran was more specific about the religious interests driving the Schiavo legislation, contending that the "reason this issue is before us, I think, is that it is all about religion and politics."[53]

For the most part, however, Democrats stood aside, voting with the Republicans while saying very little. Fearing that social conservatives would rally against them if they opposed the bill, Democrats thought it best to leave it to the federal courts to determine Ms. Schiavo's fate.[54] In other words, the Schiavo bill seems to be a classic case of Congress validating the views of a potent minority with intense preferences. The question remains: is this an example of "the 'exploitation' of the great by the small"?[55] In particular, what of congressional claims that the American people

49. *See* David D. Kirkpatrick & Sheryl Gay Stolberg, *How Family's Cause Reached the Halls of Congress*, N.Y. TIMES, Mar. 22, 2005, at A1; *The Doctor's New Right Wing*, ECONOMIST (U.S. ed.), Apr. 30, 2005, at 32. For similar reasons, Frist attended and spoke at a nationally televised rally sponsored by the Family Research Council, where one of its leaders depicted Democratic opposition to George W. Bush judicial nominees as "tyranny to people of faith." CNN.com, Frist Speaks to Christian Anti-Filibuster Rally, Apr. 25, 2005, http://edition.cnn.com/2005/POLITICS/04/24/justice.sunday/.

50. In a speech before the Family Research Council, DeLay linked the negative response to the Schiavo legislation from media elites to coordinated attacks on American conservatism and his own ethics battles. For DeLay, "[T]hat whole syndicate that they have going on right now . . . is for one purpose and one purpose only, and that is to destroy the conservative movement." Carl Hulse & Adam Nagourney, *Briefly Back in the Spotlight, DeLay Now Steps Aside*, N.Y. TIMES, Mar. 26, 2005, at A9.

51. *See* Richard E. Cohen, *Congressional Chronicle: Divine Intervention?*, 37 NAT'L J. 921 (2005).

52. 151 CONG. REC. H1708 (2005).

53. *Id.* at H1712. Moran also rebuked Congress by saying, "But does not every religion teach, first of all, that no human being has the right to play God? And is not one of the very first principles of politics is that we should not use individual human tragedies . . . to appease the interest groups that keep us in power." *Id.*

54. Joyce Purnick, *Passing Buck on Schiavo Cheats Public*, N.Y. TIMES, Mar. 24, 2005, at B1.

55. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 35 (1971) (emphasis omitted).

backed the Schiavo legislation? After all, Republican sponsors of the bill might have thought that they were advancing a bill that was backed by most Americans, not just Christian conservatives.

No way. The American people made clear their opposition to the Schiavo intervention in opinion polls taken both before and after Congress's approval of the bill. In 2003 (nearly two years before Congress acted), a Fox News poll showed that 61 percent of people asked would have removed Ms. Schiavo's feeding tube at that time.[56] On March 18, 2005 (days before the final bill was passed), a CNN/USA Today poll revealed that 56 percent of those polled felt the feeding tube should be removed.[57]

When enacting the Schiavo bill, lawmakers placed the intense preferences of social conservatives ahead of the presumably weak preferences of most Americans. What lawmakers did not anticipate was widespread voter disapproval of Congress's intervention into the case. Not only did most Americans support the removal of Ms. Schiavo's feeding tube, many individuals who disagreed with the Florida court order nevertheless thought that Congress's intervention was inappropriate. One opinion poll showed that 82 percent of Americans thought that the federal government should have stayed out of the Schiavo matter; and while other polls were less damning of Congress, *all* polls revealed widespread dissatisfaction with the federal government's intervention in the case.[58]

Perhaps for this reason, Senate Majority Leader Bill Frist, President George W. Bush, and most Republicans backed "judicial independence" after the federal courts refused to challenge state court fact-finding in the Terri Schiavo case.[59] And while a handful of lawmakers (most notably House Majority Leader Tom DeLay and Senator John Cornyn (R-Tex.)) vilified the federal courts as "arrogant, out-of-control, [and] unaccount-

56. Fox News/Opinion Dynamics Poll, Roper Ctr. for Pub. Opinion, Question ID No. USODFOX.103103, R38, Oct. 28–29, 2003.

57. Gallup/CNN/USA Today Poll, Roper Ctr. for Pub. Opinion, Question ID No. USGALLUP.05MAR18, R22, Mar. 18–20, 2005.

58. *See* CBS News Poll, Roper Ctr. for Pub. Opinion, Question ID No. USCBS.032305, R17, Mar. 21, 2005; ABC News Poll, Roper Ctr. for Pub Opinion, Question ID No. USABC.032105, R06, Mar. 20, 2005; Harris Poll, Roper Ctr. for Pub. Opinion, Question ID No. USHARRIS.041505, R2G, Apr. 5, 2005.

59. Frist said that he believed that the courts were "fair and independent," Jill Zuckman, *Democrats Accuse GOP of Trying to Undermine Judiciary*, CHI. TRIB., Apr. 6, 2005, § 1, at 16, and that "the balance of power among all three branches requires respect—not retaliation." Senator Bill Frist, Frist Statement for Family Research Council Telecast (Apr. 24, 2005), http://frist.senate.gov/index.cfm?FuseAction=Speeches.Detail&Speech_id=189.

able,"[60] lawmakers thought it better to defer to popular sentiment than interest group pressure and partisan positioning.

Congress's eventual backing of popular sentiment is anything but a rallying call for popular constitutionalism. Throughout the Schiavo affair, Congress signaled its disinterest in constitutional interpretation and the desires of the American people. Interest group politics trumped opinion polls before the legislation was enacted. Likewise, Congress was far more interested in pursuing a desired political outcome than in sorting out the underlying constitutional issues in the dispute over the removal of Ms. Schiavo's feeding tubes. Congress only relented after being confronted with surprising, overwhelming evidence of widespread disapproval of its intervention. Throughout the Schiavo litigation, moreover, the courts (state and federal) seemed far more in tune with popular sentiment than did lawmakers in Florida and Congress.[61] Put another way: if this is popular constitutionalism, Kramer might want to rethink his rebuke of judicial supremacy.

CONCLUSION: THE DEMOCRATIC CONSTITUTION

Larry Kramer's popular constitutionalism is both poorly timed and unworkable. Increasing partisan divides among lawmakers make today's Congress an ill-suited conveyor of the people's thinking on constitutional issues. Indeed, there is strong evidence suggesting that the Supreme Court may be a more accurate bellwether of the median voter than Congress. And even if lawmakers were willing to validate the desires of the American people, those desires are about outcomes, not constitutional interpretation. Further complicating Congress's pursuit of popular constitutionalism, it is often difficult to ascertain the thinking of the American people. For example, public attitudes shift; also, interest groups and other suppliers of information to Congress may spin the data in ways that make it hard to measure public sentiment.

60. Mike Allen, *GOP Seeks More Curbs on Courts: Sensenbrenner Proposes an Inspector General*, WASH. POST, May 12, 2005, at A3; Editorial, *Beyond the Pale*, WASH. POST, Apr. 17, 2005, at B6.

61. In 2003, the Florida legislature passed a law allowing Governor Bush to order Ms. Schiavo's feeding tube reinserted. Adam Liptak, *In Florida Right-to-Die Case, Legislation That Puts the Constitution at Issue*, N.Y. TIMES, Oct. 23, 2003, at A20. That law was eventually struck down by the Florida Supreme Court. Abby Goodnough, *Feed-Tube Law Is Struck Down in Florida Case*, N.Y. TIMES, Sept. 24, 2004, at A1. A broader bill was considered more than once but was ultimately defeated in the Florida Senate. John Kennedy, *State Senate Rejects Bill to Reinsert Feeding Tube*, ORLANDO SENTINEL, Mar. 24, 2005, at A12. Governor Bush was active throughout the controversy. Adam Nagourney, *In a Polarizing Case, Jeb Bush Cements His Political Stature*, N.Y. TIMES, Mar. 25, 2005, at A1. Polls suggested that Florida voters disapproved of political action taken in the case. Jerome R. Stockfisch, *Politicians' Handling of Schiavo Case Earns Disapproval*, TAMPA TRIB., Apr. 14, 2005, Nation/World, at 14.

The problems of popular constitutionalism are illustrated by Congress's intervention in the Terri Schiavo case. While legislative sponsors of the bill invoked the rhetoric of popular constitutionalism, the Terri Schiavo Incapacitated Protection Bill seems little more than special interest politics. Polling data suggesting public disapproval of the bill were initially pushed aside; intensity of position mattered more than numbers and congressional tradition. Religious conservatives determined both Democratic and Republican action: Republicans did not want to face a more conservative primary opponent armed with the support of the social conservative base, and Democrats did not want to face a challenger who could point at them and say, "You voted to kill Terri Schiavo."[62]

In highlighting the problems of putting popular constitutionalism into action, I do not mean to embrace judicial supremacy. Lawmakers and the American people, as Kramer argues, are ill-served by a system that gives the Court the final word on the Constitution's meaning. Indeed, as Lou Fisher and I have argued elsewhere, elected officials and the American people must challenge the Court.[63] More than that, the Court must listen to Congress and the American people (among others). Otherwise, the Court will become isolated and the Constitution less enduring.[64] At the same time, the Court needs to speak its voice.[65] That way all parts of government participate in shaping the Constitution's meaning. That way we can have a democratic constitution that endures and provides stability to all parts of government and the people as well.

62. William Schneider, *Political Pulse: The Public to Politicians: 'Keep Out,'* 37 NAT'L J. 1008, (2005); *see also* Charlie Cook, *The Cook Report: Déjà Vu, as the GOP Panders and Democrats Lack Spines*, 37 NAT'L J. 932 (2005).

63. *See* DEVINS & FISHER, *supra* note 33; Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83 (1998).

64. Lou Fisher and I make this point in Devins & Fisher, *supra* note 63, at 85.

65. For a critique of *The People Themselves* that highlights the important contribution that courts can make in engaging in constitutional dialogues with elected officials, see Lawrence G. Sager, *Courting Disaster*, 73 FORDHAM L. REV. 1361 (2005). I also make this point in Neal Devins, *The Democracy-Forcing Constitution*, 97 MICH. L. REV. 1971, 1990–91 (1999) (reviewing CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999)).