

Essay

Should the Supreme Court Fear Congress?

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Over the past two years, Congress has considered proposals to strip federal courts of jurisdiction over same-sex marriage,¹ the Pledge of Allegiance,² judicial invocations of international law,³ the public display of the Ten Commandments,⁴ and legal challenges filed by “enemy combatants.”⁵ And while none of these proposals were enacted,⁶ some of them were approved by the House of Representatives.⁷ More striking, Congress expressed its disapproval of state court decision making in the Terri Schiavo case by expanding federal court jurisdiction.⁸ Specifically, rather than accept state court findings that Terri Schiavo, then in a persistent vegetative state,⁹ would rather die

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1. Marriage Protection Act, H.R. 3313, 108th Cong. (2004).

2. Pledge Protection Act, H.R. 2028, 108th Cong. (2004).

3. Reaffirmation of American Independence Resolution, H.R. Res. 568, 108th Cong. (2004).

4. Ten Commandments Defense Act, H.R. 2045, 108th Cong. (2003).

5. See Eric Schmitt, *Senate Approves Limiting Rights of U.S. Detainees*, N.Y. TIMES, Nov. 11, 2005, at A1.

6. Congress, however, did enact legislation limiting federal court jurisdiction in cases involving detainees at Guantánamo Bay. In its final form, this legislation was not a rebuke of the Supreme Court for its decision in *Rasul v. Bush*, 542 U.S. 466 (2004), allowing habeas filings by enemy combatants. *Id.* at 484. Congress, instead, sought to balance judicial independence concerns with the military’s need not to be bogged down defending frivolous lawsuits. For additional discussion, see *infra* notes 59–60 and accompanying text.

7. The House approved proposals to strip the federal courts of jurisdiction in cases involving same-sex marriage and the Pledge of Allegiance. See *supra* notes 1–2.

8. An Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 2005 U.S.C.C.A.N. (119 Stat.) 15.

9. According to CNN, lower courts ruled that she was in a persistent vegetative state. *Schiavo’s Feeding Tube Removed*, CNN.COM, Mar. 18, 2005,

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.¹⁰

The specter of lawmakers expressing their disapproval of court decision making through retaliatory legislation seems more real today than it has since Congress pursued jurisdiction-stripping measures against the Warren Court in the late 1950s.¹¹ In addition to jurisdiction-altering proposals and legislation, Congress enacted legislation requiring that records be kept of judges who made downward departures of Sentencing Commission guidelines,¹² and debated the creation of an officer of "inspector general" to monitor federal court decision making.¹³ Commenting on how this dramatic increase in the criticism of judges has exacerbated "the strained relationship between the Congress and the federal Judiciary," Chief Justice William Rehnquist spoke, in January 2005, of his "hope that the Supreme Court and all of our courts will continue to command sufficient public respect to enable them to survive basic attacks on the[ir] judicial independence."¹⁴ Three months later, Justice Antonin Scalia sounded a more ominous message. Responding to Justice Stephen Breyer's claim that "the treasure" of this country is that people who criticize the Court will still follow its rulings, Scalia suggested that the Supreme Court "has become a very political institution. And when that happens, the people in a democracy will try to seize control of it."¹⁵

<http://www.cnn.com/2005/LAW/03/18/schiavo.brain-damaged>.

10. An Act for the Relief of the Parents of Theresa Marie Schiavo. For additional discussion, see *infra* notes 93–99 and accompanying text.

11. See *infra* notes 32–35 and accompanying text.

12. See Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 401(h), 117 Stat. 650, 672 (to be codified at 28 U.S.C. § 994(w)). Commenting on this legislation, Chief Justice Rehnquist complained that the "traditional interchange between the Congress and the Judiciary broke down when Congress enacted" this legislation "without any consideration of the views of the Judiciary." CHIEF JUSTICE WILLIAM H. REHNQUIST, 2003 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2004), <http://www.supremecourtus.gov/publicinfo/year-end/2003yearendreport.html>.

13. See F. James Sensenbrenner, Jr., Chairman, House Comm. on the Judiciary, Zale Lecture in Public Policy at Stanford University 3 (May 9, 2005), <http://judiciary.house.gov/media/pdfs/stanfordjudgesspeechpressversion505.pdf>.

14. CHIEF JUSTICE WILLIAM H. REHNQUIST, 2004 YEAR-END REPORT ON THE FEDERAL JUDICIARY, 4, 8 (2005), <http://www.supremecourtus.gov/publicinfo/yearend/2004year-endreport.pdf>.

15. *Constitutional Conversation with Justices Breyer, O'Connor and*

But should the Supreme Court fear Congress? In the pages that follow, I will argue that the Court need not moderate its decision making in anticipation of a political backlash by today's Congress. To make this point, I will highlight differences between today's Congress and the Congress that the Warren Court confronted in the late 1950s and early 1960s. In the late 1950s, Southerners (who opposed school desegregation) and anti-Communist lawmakers formed a coalition in response to Supreme Court rulings. These lawmakers truly wanted to undo what the Court had done, and had very strong feelings about Congress's power to independently interpret the Constitution.¹⁶

Today, Congress is polarized along ideological lines. Party identification is especially important—with Democrats and Republicans each seeking to send symbolic messages that reinforce their status with both party leaders and their political base.¹⁷ Proposed jurisdiction-stripping measures are cut from this cloth. The purpose of these bills is to make a symbolic statement. That statement can be made whether or not these measures are enacted.¹⁸

I will divide my comments into three parts. In Part I, I will look at the profound role that social and political forces play in shaping Supreme Court decision making. Part I will also explain why the Warren Court had good reason to take political backlash into account when pursuing its campaigns to desegregate public schools and to protect the free speech rights of Communists. In so doing, I will comment on whether and when the Supreme Court should calibrate its decision making to avoid political reprisals from Congress. In Part II, I will turn my attention to today's Congress. Initially, I will explain why today's lawmakers are more interested in strengthening their base than in independently interpreting the Constitution.

Scalia, Moderated by "Meet the Press" Host Tim Russert (C-SPAN 2 television broadcast Apr. 21, 2005), available at <http://www.constitutioncenter.org> (follow "Program Archives" hyperlink; then follow "Constitutional Conversation with Supreme Court Justices" hyperlink; then follow "View the entire program via RealVideo from CSPAN" hyperlink). A portion of this broadcast is transcribed in 'The Abrams Report' for April 22, MSNBC.COM, Apr. 25, 2005, <http://www.msnbc.msn.com/id/7629447/print/1/displamode/1098>.

16. See *infra* notes 39–43 and accompanying text.

17. See *infra* notes 62–76 and accompanying text.

18. See *infra* notes 62–76 and accompanying text. I also make this point in a short essay examining why the Supreme Court was a low-salience issue in the 2004 presidential elections. See Neal Devins, *Smoke, Not Fire*, 65 MD. L. REV. (forthcoming 2006).

Against this backdrop, I will discuss recent congressional efforts to slap down state and federal judges by expanding or restricting federal court jurisdiction. In Part III, I will discuss whether the Supreme Court should feel constrained in any way by Congress. Among other things, I will call attention to differences between federalism rulings (where the Court should not feel constrained) and rights-based rulings (where there is greater risk of a Court decision prompting a legislative backlash).

I. THE CHOICES JUSTICES MAKE¹⁹

Supreme Court Justices cannot escape the social and political forces that engulf elected officials. Consider, for example, the appointments and confirmation process: “[b]ecause presidents usually nominate Justices with philosophies similar to their own and the Senate generally confirms only nominees who have views consistent with the contemporary political mainstream, regular turnover results in a Court majority rarely holding significantly divergent political preferences from those held by the president and Congress.”²⁰ Under this view, even Justices who vote their policy preferences will generally reach conclusions that are palatable to elected officials.

Justices who do not have strong policy preferences, moreover, often take into account elected official preferences, public opinion, elite opinion (newspapers, academics), and interest group filings.²¹ For these Justices, it does not matter that their votes sometimes back liberal interests and other times back conservative causes. What matters, instead, is reaching outcomes that balance the needs of competing external interests (or at least those interests that these Justices think important).²²

19. The title of this part plays off of LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998). The analysis which follows is generally consistent with Epstein and Knight.

20. Lee Epstein et al., *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 586 (2001) (discussing Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as National Policymaker*, 6 J. PUB. L. 279 (1957)).

21. See generally LOUIS FISHER, *CONSTITUTIONAL DIALOGUES* (1988) (describing the process by which constitutional law develops and the sources that influence that development); Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 176–79 (1998) (discussing impact of elite opinion on Supreme Court decision making).

22. These Justices are also apt to use certiorari denials to steer away from

There is a third way that social and political forces shape Court decision making. Some Justices may seek to advance their preferred policy position by taking elected officials' desires into account. These Justices are concerned about both the refusal of elected officials to implement Court edicts and the prospects of elected officials negating or limiting an unpopular ruling by statute, constitutional amendment, or some other court-curbing action. Implementation concerns, for example, played a prominent role in the Watergate Tapes case, *United States v. Nixon*.²³ Recognizing that the President might fail to comply with a fractured Court ruling, the Justices negotiated a compromise position on the question of executive privilege in order to secure a unanimous ruling.²⁴ Likewise, in *Brown v. Board of Education*,²⁵ the Court crafted a unanimous opinion that took into account likely Southern opposition to the decision.²⁶ Specifically, rather than ask Southern school systems to desegregate, the Court both left it to local judges to take "varied local school problems" into account and spoke of school authorities as having "primary responsibility" for "assessing" and "solving" these problems.²⁷ Correspondingly, the Court waited until 1968 to demand that desegregation plans promise "realistically to work now."²⁸ At that time, Congress and the White House—through the 1964 Civil Rights Act and implementing regulations—made clear that the federal government backed school desegregation.²⁹

"no win" cases, that is, cases which place them in the middle of a political firestorm. For this very reason, the Rehnquist Court's swing Justices—Sandra Day O'Connor and Anthony Kennedy—often used delaying strategies to avoid Court consideration of divisive social issues. See Neal Devins, *Congress and the Making of the Second Rehnquist Court*, 47 ST. LOUIS U. L.J. 773, 776 (2003).

23. 418 U.S. 683 (1974).

24. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 344–47 (1979).

25. 349 U.S. 294 (1955).

26. For discussions of how the Justices bargained with each other and the importance of unanimity, see Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1 (1979); S. Sidney Ulmer, *Earl Warren and the Brown Decision*, 33 J. POL. 689 (1971).

27. *Brown*, 349 U.S. at 299.

28. *Green v. County Sch. Bd.*, 391 U.S. 430, 439 (1968).

29. See NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* 154–58 (2004). For identical reasons, the Court steered clear of the antimiscegenation issue until 1967 (when it invalidated state bans on interracial marriage in *Loving v. Virginia*, 388 U.S. 1, 2 (1967)). Fearing a backlash that would jeopardize its school desegregation decision, the Court refused to hear a

That a Court which lacks the powers of the purse and sword would take implementation concerns into account is hardly surprising. Likewise, it is to be expected that some Justices take into account lawmaker efforts to punish the Court for politically unpopular decisions. Justices with weak policy preferences do not want to precipitate an imbroglio with Congress; Justices with strong policy preferences want Congress to acquiesce to, not nullify, Court rulings.³⁰ For this very reason, jurisdiction-stripping proposals sometimes alter judicial behavior.³¹

Consider, for example, the Warren Court's retreat from mid-1950s decisions providing civil liberties protections to

1955 challenge to Virginia's antimiscegenation statute. See EPSTEIN & KNIGHT, *supra* note 19, at 83; LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 71–73 (2000).

30. See generally EPSTEIN & KNIGHT, *supra* note 19 (discussing the strategic nature of Supreme Court decision making); William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991) (using game theory to describe Supreme Court interaction with Congress and the President). For a critique of Epstein & Knight arguing both that the Court need not take congressional preferences into account and that the Justices rarely pay attention to lawmaker desires, see Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511, 527–31 (1998). See also Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 31–33 (1997) (noting reasons why the Court cannot predict and probably should not fear retaliation from Congress).

31. See Roger Handberg & Harold F. Hill, Jr., *Court Curbing, Court Reversals, and Judicial Review: The Supreme Court Versus Congress*, 14 LAW & SOC'Y REV. 309, 320–21 (1980); Stuart S. Nagel, *Court-Curbing Periods in American History*, 18 VAND. L. REV. 925, 943 (1965); Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369, 378–83, 386–94 (1992). In addition to jurisdiction-stripping proposals, court-curbing measures that limit judicial review include appropriations measures that prohibit Justice Department participation in lawsuits on specified topics and legislation dictating the type of relief a federal court can order when remedying a constitutional violation. See LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* 44–45 (1992) (discussing congressional efforts to limit court-ordered busing). For more recent examples, see Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1464–65 (2001). See also *supra* note 6 (discussing legislation limiting detainee access to federal courts). Finally, Congress may enact legislation that limits the reach of disfavored constitutional rulings. See Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 89 (1998) (listing examples).

Congress may also nullify unpopular rulings without denying (or limiting) the federal courts' role in our system of checks and balances. When Congress enacts legislation correcting a perceived judicial misinterpretation of a statute, Congress moots—but does not nullify—the Court's previous decision. Likewise, Congress may seek to moot a constitutional ruling by sending a constitutional amendment to the states for ratification.

Communists and other subversives. During its 1956–1957 term, the Court decided twelve cases involving Communists, ruling against the government in every case.³² Congress responded with a vengeance, coming—as Chief Justice Warren put it—“dangerously close” to enacting legislation that would have stripped the Supreme Court of appellate jurisdiction in five domestic security areas.³³ The Court relented, issuing decisions that limited the scope of earlier rulings and otherwise permitting the government to prosecute subversive cases.³⁴ As the *New York Times* editorialized in early 1960, “what Senator Jenner [the principal sponsor of court-stripping legislation] was unable to achieve [in Congress] the Supreme Court has now virtually accomplished on its own.”³⁵

The question remains: should the 1957 Warren Court have feared Congress? For the reasons that follow, I think that the answer to this question is a qualified “yes.” First, the Court could not take comfort in Congress’s longstanding tradition of defending judicial independence. FDR’s 1937 Court-packing proposal had almost been enacted.³⁶ Twenty years later, the received wisdom about Court-packing was that the Court had saved itself by executing an “astonishing about-face” in the spring of 1937, jettisoning the *Lochner* era by approving state and federal reform efforts in the midst of congressional consideration of the Court-packing bill.³⁷ Consequently, after Congress came close to approving jurisdiction-stripping legislation in 1957, the Court could not assume that the war had been

32. For a summary of these decisions, see POWE, *supra* note 29, at 90–99.

33. EARL WARREN, *THE MEMOIRS OF EARL WARREN* 313 (1977). For a similar assessment, see POWE, *supra* note 29, at 132–33. For an illuminating discussion of why President Eisenhower might well have signed such a bill (notwithstanding the fact that his Justice Department testified against it), see WALTER F. MURPHY, *CONGRESS AND THE COURT* 170–71 (1962).

34. See MURPHY, *supra* note 33, at 245–46; POWE, *supra* note 29, at 135–56. The fact that most of the 1956 decisions were grounded in the Justices’ interpretation of federal statutes, not the Constitution, allowed the Court to beat a hasty retreat without overruling itself. See Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. 397, 420–25 (2005).

35. MURPHY, *supra* note 33, at 245 (quoting Editorial, N.Y. TIMES, Mar. 2, 1960, at 36:1).

36. See WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN* 148–52 (1995).

37. See *id.* at 154–56. For a competing account suggesting that the 1937 “switch” had nothing to do with Court-packing, see generally BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* (1998).

won.³⁸ Second, Court decision making was truly upsetting to significant factions within Congress. Fears about Communism and its threat to domestic security resonated with both lawmakers and the American people. Even though the crisis atmosphere of the early 1950s had eased, Congress continued to beat the anti-Communist drum.³⁹ More than that, Southern lawmakers strongly disapproved of *Brown* and, with it, the Court. One hundred one of the 128 Southerners in Congress signed a Manifesto “pledg[ing] to use all lawful means to bring about a reversal of” the decision.⁴⁰ With Southern lawmakers joining forces with anti-Communist lawmakers, the Court understood that it could ill afford to agitate this potent coalition.⁴¹ Third (and relatedly), a substantial number of lawmakers in the late 1950s thought that courts should give great weight to congressional interpretations of the Constitution. These lawmakers embraced an “independent constitutionalist” perspective, emphasizing the distinctive constitutional responsibilities of the legislature and pointing to drawbacks associated with leaving interpretation strictly to judges.⁴² In particular, forty percent of lawmakers thought that courts should give “control-

38. Indeed, Congress did narrow a 1957 ruling (*Jencks v. United States*, 353 U.S. 657, 672 (1957) (allowing an alleged Communist to have access to all government documents touching the events and activities at issue in his trial)) by specifying that a criminal defendant can only gain access to documents involving his own statements or the statements of a witness called by the government to testify. Act of Sept. 2, 1957, Pub. L. No. 85-269, 71 Stat. 595 (codified as amended at 18 U.S.C. § 3500 (2000)). And while this may have only been a “watered-down measure to modify slightly one evidentiary rule used in criminal trials,” Barry Friedman, “*Things Forgotten*” in *the Debate over Judicial Independence*, 14 GA. ST. U. L. REV. 737, 752 (1998), Congress nonetheless used this bill to signal its willingness to enact correcting legislation.

39. See DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION 246–91 (1966).

40. 102 CONG. REC. 4515–16 (1956). The “true meaning” of this Manifesto, as Anthony Lewis observed, “was to make defiance of the Supreme Court . . . socially acceptable in the South.” ANTHONY LEWIS, PORTRAIT OF A DECADE 45 (1964). Correspondingly, a 1957 poll about public attitudes towards the Supreme Court revealed that twenty percent of Americans had changed their attitude in recent years, with three-quarters of those saying that they now had an unfavorable view of the Court. MURPHY, *supra* note 33, at 264 (discussing a Gallup Poll about the Court). Of those who changed their mind, six out of every seven Southerners reported that their opinion of the Court had changed for the worse. *Id.* at 265.

41. See MORGAN, *supra* note 39, at 270; POWE, *supra* note 29, at 134.

42. See Bruce G. Peabody, *Congressional Attitudes Towards Constitutional Interpretation*, in CONGRESS AND THE CONSTITUTION 39, 44 (Neal Devins & Keith E. Whittington eds., 2005).

ling weight” to congressional interpretations of the Constitution.⁴³ For these lawmakers, Congress had reason to assert itself in the face of Court decisions undermining lawmaker interpretations of the Constitution.

That Congress was poised to act, of course, does not mean that Congress would have acted. After all, Congress did not enact jurisdiction-stripping legislation in 1957. Congress, moreover, had signaled its support for an independent Court through word and deeds. FDR’s Court-packing plan was ultimately rebuked, and an “uninterrupted expansion of federal court jurisdiction . . . revealed a high degree of congressional respect for and reliance on the federal courts that a few unpopular decisions simply could not erode.”⁴⁴ More than that, there are numerous veto points in the legislative process. In addition to a possible presidential veto, proposed legislation must clear committees and gain approval by both the House and Senate.⁴⁵ Procedural obstacles placed by committee leaders, party leaders or members can also result in the tabling of proposed legislation.⁴⁶

On balance, however, the Court’s moderates—Felix Frankfurter and John Marshall Harlan—had good reason to reverse course. By approving government regulation of subversives, the Court “helped sap the vigor of the Court attacks” and “provided a ready means by which the Court foes could execute a face-saving retreat of their own.”⁴⁷ Assuming that Frankfurter and Harlan were ambivalent about the Court’s Communist rulings, the benefits of this retreat certainly outweighed the risks of jurisdiction-stripping legislation and, more generally, strained relations with Congress. But even if Frankfurter and Harlan firmly backed the initial rulings, the retreat may still have made sense. As Walter Murphy concluded in his study of this

43. *Id.* at 48 (extrapolating survey data found in MORGAN, *supra* note 39, at 365–83). Not surprisingly, Southern lawmakers disproportionately embraced this “independent constitutionalist” perspective. *See id.* at 45.

44. Charles G. Geyh, *Judicial Independence, Judicial Accountability and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 209 (2003); *see also* Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part Four: Law’s Politics*, 148 U. PA. L. REV. 971, 1028–46 (2000) (highlighting public support for the Court during the Court-packing periods).

45. *See* Segal, *supra* note 30, at 31–32.

46. This is what ultimately happened to the 1957 proposal. *See* POWE, *supra* note 29, at 131–33.

47. MURPHY, *supra* note 33, at 238.

episode: “The retreat of the Warren Court was a tactical withdrawal, not a rout.”⁴⁸ No constitutional rulings were overturned, and the Court held firm to its rejection of Jim Crow. Over the next few years, moreover, turnover in Congress and the White House facilitated a string of Court rulings that provided expanded civil liberties protections to Communists and other critics of the government.⁴⁹

The sensibility of the Warren Court calibrating its decision making in the face of a hostile Congress does not mean that the Supreme Court *ipso facto* should moderate its decision making when faced with criticism by Congress or other elected officials. Unlike the Warren Court, for example, the Burger Court had no reason to fear the enactment of Carter- and Reagan-era proposals to strip the courts of jurisdiction over abortion, school busing, and school prayer.⁵⁰ Not only did the Democratically-controlled House refuse to act on these proposals, the Reagan administration did not back Court-stripping proposals.⁵¹

The Burger Court experience is revealing for another reason. Even though the Court did not retool its doctrine on abortion, school prayer, and busing, it did not block Congress from expressing disagreement with these decisions. Congress, for example, was able to use its appropriations powers to signal its disapproval of abortion rights and busing remedies.⁵² Through the Equal Access Act (mandating that public schools allow religious organizations equal access to school facilities), moreover, Congress was able to facilitate religious expression in public

48. *Id.* at 246.

49. See Frickey, *supra* note 34, at 426–39; see also Neal Devins, *Commentary* to Philip P. Frickey & Gordon Silverstein, *Congress and the Earl Warren Court*, BULL. AM. ACAD. ARTS & SCI., Summer 2004, at 6, 15 (suggesting that the Court acted opportunistically in returning to the Communist issue at a time when it knew that Congress would not resist its decision making).

50. See EDWARD KEYNES WITH RANDALL K. MILLER, *THE COURT VS. CONGRESS: PRAYER, BUSING, AND ABORTION* 200–03, 217–44, 291–98 (1989).

51. See *id.* Notwithstanding its attacks on the Court for its lawless, activist decision making, administration officials contended that several of these proposals were unconstitutional and/or bad public policy. See *Nomination of Edwin Meese III: Hearings on the President's Nomination of Edwin Meese III to be Attorney General of the United States Before the S. Comm. on the Judiciary*, 98th Cong. 185–97 (1984) (statements of Attorney General nominee Meese and outgoing Attorney General Smith that Court-stripping proposals are often unwise and constitutionally impermissible).

52. See DEVINS & FISHER, *supra* note 29, at 132–34 (abortion); *id.* at 159–61 (busing).

schools.⁵³ By providing elected officials with an opportunity to register their policy preferences, the Court helped avoid a head-on confrontation with Congress and the White House.⁵⁴

The lesson here is simple: the Supreme Court can pursue its favored policies *so long as* Congress can pursue its favored policies. Congress's rejection of Court-packing in the 1930s and its failure to enact jurisdiction-stripping legislation in the 1950s or 1980s suggests that lawmakers are reluctant to challenge the premises of an independent judiciary.⁵⁵ Nevertheless, if Court decision making cuts at the core of lawmaker preferences, Congress may act and may act boldly. For that reason, the Court had good reason to retreat from both the *Lochner* era and from 1957 rulings protecting the civil liberty interests of Communists. The Burger era, in contrast, was a time in which Congress was divided over the soundness of Court rulings on abortion, school busing, and school prayer. A majority of members were willing to express disapproval through appropriation bans and other indirect challenges. A majority, however, could not coalesce around a more fundamental challenge to the Court's decision making. Consequently, the Burger Court made few concessions to Congress.⁵⁶

What then of the Roberts Court? Should it see recent attacks on judicial independence as a harbinger of things to come? In the next part of this Essay, I will argue that recent jurisdiction-stripping proposals are little more than rhetorical ploys. Indeed, Congress-Court relations during the past decade signal congressional disinterest in the Constitution and the Supreme Court.⁵⁷ For these and other reasons, the Roberts Court should not fear Congress.

53. *Id.* at 203–04.

54. For an illuminating treatment of how it is that judicial review does not impinge on important congressional interests—so long as there are outlets for Congress to advance its favored policies—see generally J. MITCHELL PICKERILL, *CONSTITUTIONAL DELIBERATION IN CONGRESS* (2004). For a review of this book that emphasizes this phenomenon, see Keith E. Whittington, *James Madison Has Left the Building*, 72 U. CHI. L. REV. 1137 (2005) (book review). For additional discussion, see *infra* notes 125–30 and accompanying text.

55. See *supra* notes 44–46 and accompanying text.

56. In fact, there is no reason to think that the Justices were not voting their sincere policy preferences when upholding congressional spending prerogatives (Burger Court) or equal access legislation (Rehnquist Court).

57. See *supra* notes 17–18 and accompanying text.

II. MAKING SENSE OF ONGOING LAWMAKER CHALLENGES TO JUDICIAL INDEPENDENCE

The current round of congressional attacks against the courts is much more a reflection of fundamental changes in Congress than it is about lawmaker disappointment with Supreme Court decision making. Unlike attacks against the Warren or Burger Courts, the Rehnquist Court did not issue decisions that were terribly upsetting to lawmakers.⁵⁸ If anything, Congress has not used jurisdiction-stripping measures to express its disapproval with the results of Rehnquist Court decision making. Only proposed legislation on habeas petitions filed by Guantánamo Bay detainees sought to nullify a Rehnquist Court decision.⁵⁹ But lawmakers rejected an outright ban on federal court jurisdiction, preferring legislation that allowed D.C. Circuit Court review of military tribunal judgments.⁶⁰ The only other court-stripping bill responsive to Supreme Court decision making did not target the outcome of any particular decision. Instead, lawmakers sought to forbid federal courts from considering foreign law.⁶¹

58. See Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435, 448–54 (2001).

59. See National Defense Authorization Act for Fiscal Year 2006, S. 1042, 109th Cong. § 1092(d) (as passed by Senate, Nov. 15, 2005). The bill was sponsored by Senator Lindsey Graham (R-S.C.) and took direct aim at the Supreme Court's recognition of detainee rights in *Rasul v. Bush*, 542 U.S. 466 (2004). According to Graham, detainees were enemy combatants and, as such, should not have meaningful access to civilian courts. Press Release, Senator Lindsey Graham, Senate Passes Graham Detainee Plan (Nov. 10, 2005), <http://lgraham.senate.gov/index.cfm?mode=presspage&id=248690>; see also Schmitt, *supra* note 5.

60. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 1405, 119 Stat. 3136, 3476–79 (to be codified at 10 U.S.C. § 801); see Jonathan Weisman, *Senators Agree on Detainee Rights*, WASH. POST, Nov. 15, 2005, at A1. By limiting federal judicial review of military commission verdicts to the D.C. Circuit, the Supreme Court may be without power to review detainee appeals. That issue may be decided by the Supreme Court in *Hamdan v. Rumsfeld*, No. 05-184, a lawsuit challenging the legality of U.S. military commissions at Guantánamo. See Charles Lane, *Court Case Challenges Power of President*, WASH. POST, Mar. 26, 2006, at A1. For additional discussion, see *infra* text accompanying notes 116–17. See also Charles Lane, *Case Tests Power of Judiciary, President*, WASH. POST, Mar. 29, 2006, at A6 (noting that Solicitor General Clement's efforts to argue that the Court was without authority to decide *Hamdan* “immediately landed him in trouble with several justices, who found the terms of the [Detainee Treatment Act] . . . too vague to warrant cutting back what they regard as a vital judicial check on unlawful executive detentions”).

61. American Justice for American Citizens Act, H.R. 1658, 109th Cong.

Rather than focus on the Supreme Court, lawmakers targeted *any* judicial ruling that was upsetting to its constituents. Some of these rulings come from state courts (the Massachusetts Supreme Court's gay marriage decision⁶² and decisions of the Florida courts in the Terri Schiavo case);⁶³ others come from lower federal courts (the Ninth Circuit's invalidation of the Pledge of Allegiance⁶⁴ and a district court order requiring Alabama Chief Justice Roy Moore to remove the Ten Commandments from the state Supreme Court rotunda).⁶⁵ It does not matter that some of these rulings involve issues that are not subject to federal court review (the Massachusetts gay marriage decision)⁶⁶ and others are about issues that the Supreme Court has signaled its likely agreement with Congress (the Pledge of Allegiance).⁶⁷ Proponents of these measures want to send a message: Congress will advance its policymaking agenda by striking back at the courts. This message, however, is a symbolic one. More significantly, this message is not directed at the courts; it is directed at interest groups and voters.⁶⁸

Dramatic differences between today's Congress and the Warren- and Burger-era Congresses explain why lawmakers have incentive to launch rhetorical attacks against the courts through jurisdiction-stripping and related proposals. The defin-

(2005).

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

63. The Schiavo litigation stretched on for years, with perhaps the most important decision coming in September of 2004 when the Florida Supreme Court struck down a law that gave Governor Bush the power to reinsert Schiavo's feeding tube. *Bush v. Schiavo*, 885 So. 2d 321, 324 (Fla. 2004).

64. *Newdow v. U.S. Cong.*, 292 F.3d 597 (9th Cir. 2002).

65. *Glassroth v. Moore*, 275 F. Supp. 2d 1347, 1349 (M.D. Ala. 2003).

66. *Goodridge*, 798 N.E.2d 941.

67. In *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004), no Justice concluded that the Pledge was unconstitutional. Five Justices concluded that the plaintiff was without standing to challenge the Pledge, *id.* at 17–18; three Justices (Rehnquist, C.J., O'Connor & Thomas, JJ.) filed concurring opinions defending the constitutionality of the Pledge, *id.* at 31, 33, 46; and one Justice (Scalia, J.) recused himself from the case after making specific remarks on it prior to its being appealed to the Court. See Linda Greenhouse, *Supreme Court to Consider Case on 'Under God' in Pledge to Flag*, N.Y. TIMES, Oct. 15, 2003, at A1. Justice Scalia specifically mentioned the Ninth Circuit decision "as an example of how courts were misinterpreting the Constitution to 'exclude God from the public forums and from political life.'" *Id.*

68. See Neal Devins, *Tom DeLay: Popular Constitutionalist?*, 81 CHL-KENT L. REV. (forthcoming 2006) (suggesting that interest group pressure explains Congress's intervention in the Terri Schiavo case).

ing feature of today's Congress is political polarization along ideological lines.⁶⁹ Liberal "Rockefeller Republicans" and conservative "Southern Democrats" no longer ensure ideological diversity within the parties. In the South, conservative Democrats were replaced with Southern Republicans—so that the remaining Southern Democrats are far more liberal.⁷⁰ Correspondingly, moderate-to-liberal Republicans were replaced by "Ronald Reagan's GOP." A 2004–2005 study, for example, documented that (with one exception) every Republican member of the House and Senate is more conservative than their Democratic counterpart.⁷¹

This ideological divide now seems a permanent feature of Congress.⁷² Outside of presidential elections, Democrats and Republicans have little reason to appeal to median voters. With only one-half of eligible voters actually voting, candidates and party leaders increasingly look to the party's partisan base for support.⁷³ Equally significant, there no longer are competitive races in the House of Representatives. District lines are drawn in ways that guarantee certain seats to Democrats and other seats to Republicans.⁷⁴ As a result, the party primary controls

69. My discussion of political polarization in Congress is drawn from Neal Devins, *The Academic Expert Before Congress: Observations and Lessons from Bill Van Alstyne's Testimony*, 54 DUKE L.J. 1525, 1526–27, 1534–45 (2005).

70. See Jason M. Roberts & Steven S. Smith, *Procedural Contexts, Party Strategy, and Conditional Party Voting in the U.S. House of Representatives, 1971–2000*, 47 AM. J. POL. SCI. 305, 306 (2003).

71. The one exception was former Senator Zell Miller, a Democrat from Georgia who was more conservative than a handful of Republican Senators. See 108th House Ranking Order (Aug. 23, 2005), <http://voteview.com/hou108.htm>; 108th Senate Rank Ordering (Oct. 24, 2004), <http://voteview.com/sen108.htm>.

72. See Sean M. Theriault, *The Case of the Vanishing Moderates: Party Polarization in the Modern Congress 5–6* (May 2, 2004) (unpublished manuscript), <http://www.la.utexas.edu/~seant/vanishing.pdf> (noting that party polarization is "one of the most obvious and recognizable trends" in the modern Congress and that the "overwhelming evidence" is that party members increasingly return to their "ideological homes").

73. David S. Broder, Editorial, *An Old-Fashioned Win*, WASH. POST, Nov. 4, 2004, at A25. For this very reason, President Bush targeted religious conservatives in his 2004 reelection campaign. 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*, WASH. POST, Nov. 7, 2004, at A7.

74. See Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415, 427–28 (2004).

who will win the election and, consequently, candidates focus their energies on the partisans who vote in these primaries.⁷⁵

Against this backdrop, it is not surprising that Democratic and Republican lawmakers increasingly see themselves as members of a party, not as independent power brokers. Correspondingly, Democrats and Republicans look to party leaders to formulate a message that will resonate with their increasingly partisan base.⁷⁶ Constitutional values certainly figure into this message: Democrats emphasize that they are the party of civil rights and individual liberties. During the Roberts and Alito confirmation hearings, for example, Democratic Senators spoke at length about abortion, voting rights, the use of torture in fighting the War on Terror, and federalism-based limits on Congress's power to enact antidiscrimination legislation.⁷⁷ Republicans, especially House Republicans, send a message that resonates with social conservatives. Republican-led efforts to countermand state and federal court decisions on same-sex marriage, the sanctity of life, the Pledge of Allegiance, and the Ten Commandments exemplify this practice.⁷⁸

The consequences of this shift to “message politics” are profound. *First*, lawmakers are less interested in what happens to legislation after it is enacted—including a court decision striking down legislation.⁷⁹ As compared to earlier Congresses (including the Warren-era Congress), “[t]he electoral requirement [for today’s lawmaker] is not that he make pleasing things

75. See *id.*; Jeffrey Rosen, *Center Court*, N.Y. TIMES, June 12, 2005, § 6 (Magazine), at 17. Furthermore, with more than half of all Senators having first served in the House, the partisan battle lines that characterize the House are increasingly spilling over to the Senate. See Rosen, *supra*.

76. See generally C. Lawrence Evans, *Committees, Leaders, and Message Politics*, in CONGRESS RECONSIDERED 217, 219–21 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 7th ed. 2001) (discussing the emergence of message politics).

77. See Adam Nagourney, *Partisan Tenor of Alito Hearing Reflects a Quick Change in Washington*, N.Y. TIMES, Jan. 10, 2006, at A17; Robin Toner & David D. Kirkpatrick, *Liberals and Conservatives Remain Worlds Apart on Roberts’s Suitability*, N.Y. TIMES, Sept. 16, 2005, at A22. For similar reasons, Democrats had earlier accused the Rehnquist Court of engaging in “conservative judicial activism.” 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, 1308 & n.3 (2002).

78. See *supra* notes 62–65 and accompanying text; *infra* notes 93–100 and accompanying text.

79. See Keith E. Whittington, *Taking What They Give Us: Explaining the Court’s Federalism Offensive*, 51 DUKE L.J. 477, 512–15 (2001).

happen but that he make pleasing judgmental statements.”⁸⁰ Indeed, a Supreme Court ruling invalidating a federal statute provides lawmakers with an opportunity to score political points by denouncing the Court.⁸¹

Second, today’s lawmakers do not place a high value on their power to independently interpret the Constitution. Consider, for example, congressional committee evaluation of constitutional questions. Over the past thirty years, the percent of hearings raising significant constitutional issues has declined throughout Congress.⁸² One explanation for this phenomenon is the growing ideological polarization in Congress.⁸³ 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.⁸⁴ Consider, for example, the Rehnquist Court’s federalism revival. Even though the Court invalidated all or part of twenty-three statutes from 1995 to 2000, Congress held as many hearings about federalism in the 1970s as it did in the 1990s.⁸⁵ More than that, the hearings that it did hold in the 1990s did not focus on the Court; instead, they were mainly concerned with the federalism implications of the 1994 Republican takeover of Congress.⁸⁶

80. DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 62 (2d ed. 2004).

81. For an excellent treatment of this topic (looking at Rehnquist Court federalism rulings), see Whittington, *supra* note 79, at 512–18. Lawmakers can also score political points by denouncing a state court ruling. Legislation mandating federal court review of the Terri Schiavo case and proposed legislation banning federal court consideration of same-sex marriage are examples of this phenomenon.

82. See Keith E. Whittington et al., *The Constitution and Congressional Committees: 1971–2000*, in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE (Richard Bauman & Tsvi Kahana eds., forthcoming July 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.*

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

84. See *supra* notes 79–81 and accompanying text.

85. See Whittington et al., *supra* note 82.

86. See *id.* For a more detailed treatment of 1990s hearings, see Keith E. Whittington, *Hearing About the Constitution in Congressional Committees*, in CONGRESS AND THE CONSTITUTION, *supra* note 42, at 87, 95–105. See also Barry Friedman & Anna L. Harvey, *Electing the Supreme Court*, 78 IND. L.J.

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.⁸⁷ 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.⁸⁸ In sharp contrast, committee hearings during the Warren and Burger Court eras reflected ideological diversity within the Democratic and Republican parties. 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.⁸⁹

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) forty percent of lawmakers thought that courts should give controlling weight to congressional interpretations of the Constitution; in 1999–2000 (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.⁹⁰ Correspondingly, seventy-one 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.⁹¹

123, 125 (2003) (arguing that lawmakers agreed with Rehnquist Court federalism decisions and, for that reason, did not seek to countermand the Court for invalidating federal statutes).

87. See Devins, *supra* note 69, at 1542–44.

88. See ROGER H. DAVIDSON & WALTER J. OLESZEK, *CONGRESS AND ITS MEMBERS* 217 (10th ed. 2006) (“Hearings are often orchestrated as a form of political theater . . .”). 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.

89. See Devins, *supra* note 69, at 1543 (making this point by comparing today's congressional practices with those in the 1970s).

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

91. *Id.*

Third, lawmakers have incentive to launch rhetorical attacks against the courts. As noted above, today's Congress is both more accepting of Supreme Court decisions invalidating federal statutes and less constrained by its responsibility to independently interpret the Constitution. By placing significant emphasis on the message they deliver to their base, lawmakers see court rulings as opportunities to make judgmental statements that resonate with their party and their constituents (voters and interest groups).⁹² Consider, for example, legislation expanding federal court jurisdiction in the Terri Schiavo case.⁹³ The National Right to Life Committee drafted the original bill.⁹⁴ More significantly, then-House majority leader Tom DeLay and Senate majority leader Bill Frist both pushed for legislation in order to strengthen their ties to Christian conservatives.⁹⁵ Frist spoke of the bill as "affirm[ing] our nation's commitment to preserving the sanctity of life"⁹⁶ to shore up support from right-to-life interests in his burgeoning 2008 run for the presidency. DeLay used the Schiavo issue to rally social conservatives behind him in the face of charges and attacks over alleged ethics violations.⁹⁷ In a speech to 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.⁹⁸ For DeLay: "[t]hat whole syndicate that they have going on right now

92. See Whittington, *supra* note 79, at 513.

93. An Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 2005 U.S.C.A.N. (119 Stat.) 15.

94. See Lynn Vincent, *The Fight of Her Life*, WORLD MAG., Mar. 19, 2005, <http://www.worldmag.com/articles/10431>.

95. See David Kirkpatrick & Sheryl Gay Stolberg, *How Family's Cause Reached the Halls of Congress*, N.Y. TIMES, Mar. 22, 2005, at A1; Shailagh Murray & Mike Allen, *Schiavo Case Tests Priorities of GOP*, WASH. POST, Mar. 26, 2005, at A1; *The Doctor's New Right Wing*, ECONOMIST, Apr. 30, 2005, at 32. For similar reasons, Frist spoke at "Justice Sunday," a nationally-televised Family Research Council event depicting Democratic opposition to George W. Bush judicial nominations as "tyranny to people of faith." *Frist Speaks to Christian Anti-Filibuster Rally*, CNN.COM, Apr. 25, 2005, <http://www.cnn.com/2005/POLITICS/04/24/justice.sunday/>.

96. Press Release, Office of Senator Bill Frist, *Frist Comments on Schiavo Bill Enrollment* (Mar. 21, 2005), http://frist.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=1886&Month=3&Year=2005.

97. See Carl Hulse & Adam Nagourney, *Briefly Back in the Spotlight, DeLay Now Steps Aside*, N.Y. TIMES, Mar. 26, 2005, at A9.

98. See *id.*

is for one purpose and one purpose only, and that is to destroy the conservative movement.”⁹⁹

Recent court-stripping proposals are cut from the same cloth. The Constitution Restoration Act of 2004, for example, sought to strengthen ties between the GOP and religious conservatives by denying federal courts the power to review a government official’s “acknowledgment of God as the sovereign source of law, liberty, or government.”¹⁰⁰ The bill responded to a longstanding grievance between the religious right and the courts, namely, that “since the famous prayer in school cases [in 1963], our Federal courts have showed increased hostility toward the acknowledgment of God in the public square.”¹⁰¹ More immediately, the bill expressed disapproval of a federal court decision ordering Alabama Chief Justice Roy Moore to remove a granite monument of the Ten Commandments from the state Supreme Court rotunda.¹⁰² The fact that Moore had been removed from office for failing to comply with this federal court ruling did not deter bill sponsors; if anything, Moore’s willingness to stand on conviction encouraged sponsors to strengthen their ties to religious conservatives by celebrating Moore’s faith-based campaign against the courts.¹⁰³

99. *Id.* In May 2005, conservative leaders threw a banquet in honor of DeLay; at that banquet, DeLay was presented with a petition signed by conservative leaders “decry[ing]” attacks on DeLay and calling on Congress to protect the country “from tyrannical judges who currently operate free of any restraints.” Sam Rosenfeld, *Disorder in the Court*, AM. PROSPECT, Jul. 2005, <http://www.prospect.org/web/page.ww?section=root&name=ViewPrint&articleId=9867>.

100. Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. (2004).

101. 150 CONG. REC. H7079 (daily ed. Sept. 14, 2004) (statement of Rep. Pence).

102. See Rosenfeld, *supra* note 99.

103. Indeed, Moore testified at both Senate and House hearings on the Constitution Restoration Act—hearings intended to publicize the federal courts’ hostility towards religion. See *Beyond the Pledge of Allegiance: Hostility to Religious Expression in the Public Square Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the S. Comm. on the Judiciary*, 108th Cong. 24–27 (2004) (statement of Roy S. Moore, Former C.J., Supreme Court of Alabama); *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. 74–98 (2004) (statement of Roy S. Moore, Foundation for Moral Law, Inc.); see also Rosenfeld, *supra* note 99 (arguing that the Moore hearings provided “another opportunity to stoke and sustain the outrage of the Christian right”).

Republicans have also used jurisdiction-stripping proposals on same-sex marriage,¹⁰⁴ the Pledge of Allegiance,¹⁰⁵ and judicial invocations of international law¹⁰⁶ to reaffirm their commitment to the social conservative agenda. In so doing, Republican leaders hope that religious and other social conservatives will back the GOP in congressional and presidential elections. For example, the House debated and voted on the Pledge and same-sex marriage bills immediately before the 2004 elections.¹⁰⁷ At that time, Republican strategists thought that President Bush's reelection might hinge on the willingness of religious conservatives to vote in the 2004 elections.¹⁰⁸ More generally, Republican leaders sought to detract attention from the war in Iraq by turning the 2004 election into a referendum on moral values.¹⁰⁹

In pursuing these objectives, it does not matter whether jurisdiction-stripping proposals are enacted (let alone found constitutional). Indeed, since Americans have historically supported judicial independence,¹¹⁰ Republican leaders have little to gain by pushing for the enactment of these bills. Perhaps for this reason, two of the 2003–2004 jurisdiction-stripping bills never made it out of committee (official acknowledgments of God, invocations of international law); the other two were approved, *but* the vote was so late in the 2004 session that the bills were never considered in the Senate (same-sex marriage, the Pledge of Allegiance).¹¹¹

In 2005, House Republicans reintroduced these measures.¹¹² Unlike the Warren-era, there is little reason for the

104. Marriage Protection Act of 2005, H.R. 1100, 109th Cong. (2005).

105. Pledge Protection Act of 2003, H.R. 2028, 108th Cong. (2003).

106. American Justice for American Citizens Act, H.R. 1658, 109th Cong. (2005).

107. H.R. Res. 781, 108th Cong. (2004); H.R.J. Res. 106, 108th Cong. (2004).

108. Peter Wallsten, *Conflicted Evangelicals Could Cost Bush Votes*, L.A. TIMES, Oct. 27, 2004, at A1.

109. See Milbank, *supra* note 73 (noting that while moral values ranked below security and economic issues as an explanation for the vote, the election was “unique in the assertiveness of evangelicals and the overt appeals made by the candidates to the faithful”).

110. See *infra* notes 120–21 and accompanying text; see also CHARLES GARDNER GEYH, WHEN COURTS AND CONGRESS COLLIDE 1–21 (forthcoming 2006).

111. For a detailed discussion of the timing of the votes, see Devins, *supra* note 18.

112. House Republicans, on December 16, 2005, also introduced the Safe-

Roberts Court to see these bills as a threat to their independence. For reasons detailed above, Congress has incentive to launch rhetorical attacks against the courts in order to score points with its partisan base.¹¹³ Correspondingly, rather than reflect heartfelt disappointment with decisions of the U.S. Supreme Court, the principal targets of recent congressional attacks against the courts have been state and lower federal courts.¹¹⁴ Indeed, the Supreme Court could have mollified lawmaker concerns by, for example, upholding the Pledge or state bans on same-sex marriage. Supporters of these measures, however, had no interest in waiting for the Supreme Court to speak. Their concern was with staking out a position on these issues. A state court or lower federal court ruling provided them with that opportunity and they seized it.¹¹⁵

Even when today's lawmakers are truly concerned about the ramifications of Supreme Court decision making, Congress remains reluctant to strip the federal courts of jurisdiction. The 2005 legislation limiting detainee access to federal courts is the exception which proves this rule. Rather than approve sweeping legislation that sought to nullify *Rasul v. Bush*, Congress approved a compromise bill that sought to preserve meaningful judicial review of the military's handling of detainees at Guantánamo Bay.¹¹⁶ By authorizing D.C. Circuit Court review of military tribunal decisions, Congress simultaneously ad-

guarding Our Religious Liberties Act, H.R. 4576, 109th Cong. (2005). This legislation would strip federal courts of jurisdiction over the Ten Commandments, the Pledge, and the National Motto. *Id.*

113. This is especially true of the House. With computer-driven redistricting guaranteeing some House seats to Republicans and others to Democrats, House members need only appeal to party partisans who vote in primaries. *See supra* notes 74–75 and accompanying text. Senators, in contrast, run in state-wide elections and must exercise caution before embracing proposals that can alienate median voters. Perhaps for this reason, House votes on court-stripping bills were taken too late in the legislative cycle for the Senate to feel any pressure to consider these bills. *See supra* note 111 and accompanying text. *But see supra* note 75 (noting that a majority of Senators first served in the House and, consequently, the Senate has become more and more like the House).

114. *See supra* notes 62–65 and accompanying text.

115. One other reason that recent jurisdiction-stripping proposals are rhetorical is that the George W. Bush administration has not been asked to stake out a public position on these bills. During the Warren and Burger Court eras (when court-stripping proponents were truly upset with Supreme Court decision making), the Eisenhower and Reagan administrations were asked to testify before Congress. *See FISHER & DEVINS, supra* note 31, at 40–44.

116. *See supra* note 6.

vanced the needs of the military (by eliminating often frivolous habeas filings in federal district court) and an independent judiciary (by upholding the core principle of *Rasul v. Bush*, namely, the need for independent judicial review of military decision making).¹¹⁷

In saying that the Roberts Court should not feel threatened by recent congressional attacks on judicial independence, I do not mean to suggest that the Court has *carte blanche* to rule as it likes on any issue before it. For reasons I will detail in the final part of this Essay, the Roberts Court has substantial, but not unlimited, authority to advance its favored policies and doctrines.

III. THE FUTURE OF JUDICIAL INDEPENDENCE

Unlike the Warren era (where a potent coalition of lawmakers was truly upset with Court decision making), today's Congress is not at all disappointed with Rehnquist Court decision making. Its anticourt rhetoric, for reasons detailed in Part II, is tied to lawmaker incentives to strengthen ties with their political base.¹¹⁸ Unless and until the goals of social conservatives are also acceptable to majorities in both houses of Congress and the White House, the current wave of attacks against the judiciary should be seen as symbolic politics.

Indeed, even if the social conservative agenda becomes the dominant agenda in Congress and the White House, there is good reason to think that elected officials would steer away from jurisdiction-stripping measures.¹¹⁹ *First*, median voters

117. See *supra* notes 59–60 and accompanying text. It is also noteworthy that the compromise legislation was explicitly linked to another Senate-approved measure banning torture and the abuse of terrorism suspects held by the U.S. military. See Weisman, *supra* note 60. In other words, Congress did not intend to slap the courts down for limiting military prerogatives. Congress, instead, sought to put into place its vision of appropriate military decision making—a vision that spoke both to military overreaching (torture) and the risk of frivolous habeas petitions unduly limiting military operations. See *id.*

118. Part II focused on the incentives of Republicans to reach out to social conservatives. Efforts by Democrats (who controlled the Senate in 2001 and 2002) to attack “conservative judicial activism” were cut from the same cloth. See *supra* notes 76–77 and accompanying text. For an extended treatment, see Devins, *supra* note 77, at 1325–35.

119. The arguments that follow would also apply to jurisdiction-stripping proposals that might be championed by Democrats—assuming that Democrats take over Congress and the White House. For additional discussion, see *infra* note 138.

have historically backed judicial independence. For example, although most Americans are disappointed with individual Supreme Court decisions, there is a “reservoir of support” for the power of the Court to independently interpret the Constitution.¹²⁰ Consequently, even though some Supreme Court decisions trigger a backlash by those who disagree with the Court’s rulings, the American people nonetheless support judicial review and an independent judiciary.¹²¹ Indeed, even President George W. Bush and Senate majority leader Bill Frist backed “judicial independence” after the federal courts refused to challenge state court factfinding in the Terri Schiavo case.¹²²

Second, there is an additional cost to lawmakers who want to countermand the courts through coercive court-curbing measures. Specifically, powerful interest groups sometimes see an independent judiciary as a way to protect the legislative deals they make.¹²³ In particular, interest groups who invest in the legislative process by securing legislation that favors their preferences may be at odds with the current legislature or executive (who may prefer judicial interpretations that undermine the original intent of the law). Court-curbing measures “that impair the functioning of the judiciary” are therefore disfavored because they “impose costs on all who use the courts, including various politically effective groups and indeed the beneficiaries of whatever legislation the current legislature has enacted.”¹²⁴

Third (and correspondingly), lawmakers who disapprove of court decision making can usually express that disapproval without pursuing court-curbing legislation. This is especially true of federalism rulings. Rather than foreclose democratic outlets, federalism rulings can be circumvented by both Con-

120. Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 658 (1992). For a good overview of the judicial independence literature, see generally Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596 (2003).

121. See Friedman, *supra* note 120, at 2624–29 (discussing, among others, Michael Klarman’s work on how Warren Court decision making on race issues prompted a political backlash).

122. Rather than follow the lead of some members of Congress (most notably Tom DeLay) and right-to-life interest groups, Bush and Frist thought it inappropriate to condemn the courts for refusing to overturn the Florida courts. Maura Reynolds, *DeLay Tempers His Statements*, L.A. TIMES, Apr. 14, 2005, at A11.

123. See William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 885 (1975).

124. *Id.*

gress and the states.¹²⁵ Congress can advance the same legislative agenda by making use of another source of federal power and/or enacting a scaled-down version of the bill.¹²⁶ Interest groups, moreover, need not rely exclusively on Congress. They can also turn to the states to enact state versions of the very law that Congress could not enact.¹²⁷ Rights-based rulings, in contrast, severely limit lawmaker responses. Consider, for example, abortion rights. After *Roe*, neither federal nor state lawmakers could regulate abortion in the first trimester.¹²⁸ Likewise, Supreme Court decisions on school busing and school prayer could not be nullified through legislation.¹²⁹ At the same time, rights-based rulings do not completely foreclose democratic outlets. Congress can eliminate federal funding and otherwise express its disapproval of the Supreme Court.¹³⁰

Fourth, jurisdiction-stripping measures do not nullify Supreme Court rulings (or, for that matter, any court ruling). Consequently, since proponents of court-stripping cannot count on state courts to back their policy agenda, these bills may not accomplish all that much.¹³¹ Accordingly, interest groups may be better off pursuing their substantive agenda through funding bans, constitutional amendments, the enactment of related legislation, and the appointment of judges and Justices. Court-curbing measures, in contrast, seem more a rhetorical rallying call than a roadmap for change.

125. See Neal Devins, *The Judicial Safeguards of Federalism*, 99 NW. U. L. REV. 131, 140–41 (2004).

126. See *id.* at 139–40.

127. Perhaps more significantly, interest groups rarely benefit from either a narrow or expansive view of congressional power. When Congress enacts legislation that backs its preferences, interest groups benefit from a broad view of congressional power. But interest groups benefit from a narrow view of congressional power in seeking to nullify legislation they oppose. See *id.* at 141.

128. *Roe v. Wade*, 410 U.S. 113, 164–65 (1973).

129. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 29–31 (1971); *Engel v. Vitale*, 370 U.S. 421, 424–25 (1962).

130. See DEVINS & FISHER, *supra* note 29, at 40–42, 132–34; *supra* notes 52–54 and accompanying text (discussing congressional responses to rights-based rulings in the 1970s and 1980s).

131. State supreme court justices, moreover, do not approve of federal efforts to push divisive federal constitutional issues into state courts. See, e.g., 128 CONG. REC. 689, 689–90 (1982) (reprinting resolution adopted at the Conference of State Chief Justices). Correspondingly, there is reason to think that state supreme courts would be reluctant to facilitate court-curbing legislation by backing the agenda of interest groups that challenge federal judicial independence.

That the Roberts Court need not worry about jurisdiction-stripping legislation is important, but ultimately does not answer the question of whether the Court should fear Congress. Congress, after all, can slap the courts down in other ways.¹³² Nevertheless, changes in Congress over the past twenty years suggest that the Roberts Court has less reason to fear Congress than did the Warren or Burger Courts. As detailed in Part II, today's lawmakers are less engaged in constitutional matters and less interested in asserting their prerogative to independently interpret the Constitution. Correspondingly, lawmakers place relatively more emphasis on expressing their opinions than on advancing their policy preferences. Consequently, even though the Rehnquist Court invalidated more federal statutes than any other Supreme Court, Congress did not see the Court's federalism revival as a fundamental challenge to congressional power.¹³³ Lawmakers, instead, preferred to appeal to their base by speaking out on divisive social issues—launching rhetorical attacks against lower federal courts and state courts.

Let me close on a cautionary note: the past may not be prologue. Widespread accusations of judicial activism may chip away at the Court's "reservoir of support."¹³⁴ That is the intent of social conservatives who see the current round of court-stripping proposals as a way to transform the electorate—so that a majority of voters will be comfortable with jurisdiction-stripping and other attacks on judicial independence.¹³⁵ More significant, there is some reason to think that this campaign is changing voter attitudes. A September 2005 poll, for example, suggests that a majority of Americans think that "judicial activism' has reached the crisis stage, and that judges who ignore voters' values should be impeached."¹³⁶ Time will tell whether

132. See *supra* note 130 and accompanying text; see also FISHER, *supra* note 21, at 200–30.

133. For additional discussion, see Devins, *supra* note 58, at 448–54, and Whittington, *supra* note 79, at 509–18.

134. Caldeira & Gibson, *supra* note 120, at 636–38. For additional discussion, see *supra* notes 120–21 and accompanying text.

135. See Rosenfeld, *supra* note 99.

136. Martha Neil, *Half of U.S. Sees 'Judicial Activism Crisis,'* A.B.A. J. E-REPORT, Sept. 30, 2005, <http://www.abanet.org/journal/ereport/s30survey.html>. This poll was about "judicial activism," not the Supreme Court. However, a June 2005 CNN/USA Today/Gallup Poll revealed a twenty percent drop over five years in people's approval of the Supreme Court (from sixty-two percent to forty-two percent) and a corresponding twenty percent increase in people disapproving of the Supreme Court (from twenty-nine percent to forty-eight percent). See PollingReport.com, Supreme Court/Judiciary Polls,

this poll reflects changing voter attitudes. In the meantime, the Roberts Court should recognize that today's Congress is all bark and no bite. Court-bashing is a rhetorical move, a political strategy that emphasizes defeat and "harness[es] the energy that such defeat stokes" among social—especially religious—conservatives.¹³⁷

There may come a time that the social conservative agenda is the dominant agenda of Congress and the White House. Were that to happen, the Court would run a great risk if it were to buck that agenda. Of course, if that does happen, it is likely that the appointments and confirmation process will result in the appointment of judges and Justices who share the beliefs of the social conservative agenda.¹³⁸

<http://www.pollingreport.com/court2.htm> (last visited Apr. 6, 2006).

137. Rosenfeld, *supra* note 99.

138. On the other hand, it is theoretically possible that Democrats will soon regain control of the Congress. See Robin Toner, *Democrats See Dream of '06 Victory Taking Form*, N.Y. TIMES, Oct. 13, 2005, at A1. Should that happen, it is possible that Democratic lawmakers would take aim at the Roberts Court. Against the backdrop of recent Republican efforts to strip the federal courts of jurisdiction, it is conceivable that Democrats too would be willing to pursue jurisdiction-stripping measures. And if a Democrat were elected president in 2008, it is possible that such court-curbing legislation would be signed, not vetoed. At the same time, for reasons detailed in this conclusion, Democrats would probably steer clear of jurisdiction-stripping measures. See *infra* notes 119–31 and accompanying text.