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A Tale Told by a President

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INTRODUCTION

President Barack Obama’s State of the Union address has been described both as “full of sound and fury” and as “signifying nothing.” The crucial passage declared:

With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections. . . . I don’t think American elections should be bankrolled by America’s most powerful interests, or worse, by foreign entities. . . . They should be decided by the American people. And I’d urge Democrats and Republicans to pass a bill that helps to correct some of these problems.¹

Critics have lambasted the President for insulting the Justices who were present for his address. Chief Justice John Roberts declared that President Obama’s comments were “very troubling,” and that his State of the Union “degenerated into a political pep rally.”² Professor Randy Barnett asked: “In the history of the State of the Union has any President ever called out the Supreme Court by name, and egged on the Congress to jeer a Supreme Court decision, while the Justices were seated politely before him surrounded by hundreds [of] Congressmen?”³ Others have indicated that the President’s rhetoric was

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1. President Barack H. Obama, Address Before a Joint Session of the Congress on the State of the Union (Jan. 27, 2010).
2. *Alabama: Justice Criticizes Scene at State of Union*, N.Y. TIMES, Mar. 10, 2010, at A16.
3. Randy Barnett, *State of the Union: How Did He Do?*, POLITICO, Jan. 27, 2010, http://www.politico.com/arena/perm/Randy_Barnett_79413362-DD20-46A2-A092-D0579CC7D13F.html.

moderate and a normal reaction to judicial rulings the chief executive thought were wrong. Jack Balkin observed that Franklin Roosevelt skewered the Supreme Court during the New Deal far more aggressively than the present chief executive.⁴ Linda Greenhouse observed: “The president’s tone was mild compared to the animation in some other parts of the speech.”⁵

Commentators might better appreciate the recent constitutional winter (“of our discontent”?) by remembering that Macbeth speaks of the “poor player” who “struts and frets his hour upon the stage” immediately before his famous observation that life is “a tale [t]old by an idiot.”⁶ Presidents only have a brief time to remake politics in their image. Time is short both because constitutional rules limit the chief executive to a maximum of two four-year terms and because, in American politics, the political window for substantial progressive reform tends to close quickly.⁷ In his first year of office, President Obama attempted to achieve his goals by rallying a bipartisan consensus in favor of health care and other measures. That effort failed. The State of the Union may have inaugurated a new phase in the Obama presidency. In this phase, President Obama begins the slow process of reconstructing national politics in ways that permit his policy coalition to achieve policy goals more effectively.

Whether Obama’s rhetoric “signifies nothing” or “struts upon the stage” depends on whether the president was engaged in symbolic politics or demonstrated a new willingness to play “constitutional hardball” with Republicans. Mark Tushnet defines that practice as:

[P]olitical claims and practices—legislative and executive initiatives—that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing pre-constitutional understandings. It is hardball because its practitioners see themselves as playing for keeps in a special kind of way; they believe the stakes of the political controversy their

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4. Posting of Jack Balkin to Balkinization, <http://balkin.blogspot.com/2010/01/bad-mr-obama-was-very-very-mean-to-poor.html> (Jan. 28, 2010, 11:37 EST).
 5. Posting of Linda Greenhouse to Opinionator, <http://opinionator.blogs.nytimes.com/2010/01/27/justice-alitos-reaction/?ref=opinion> (Jan. 27, 2010, 23:18 EST).
 6. WILLIAM SHAKESPEARE, *MACBETH* 133 (James M. Garnett ed., Benj. H. Sanborn & Co. 1922) (1897). Some comments also would insist that any speech by President Obama is “a tale told by an idiot.” See Posting of Paul Rosenberg to Open Left, *It’s Official: Obama Is an Idiot*, <http://openleft.com/diary/17112/its-official-obama-is-an-idiot> (Jan. 25, 2010, 22:30 EST); *Obama Is an Idiot T-Shirts, Shirts and Custom Obama Is an Idiot Clothing*, <http://www.zazzle.com/obama+is+an+idiot+tshirts> (last visited June 22, 2010).
 7. See PHILIP A. KLINKNER & ROGERS M. SMITH, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* 5 (1999) (noting that the periods in which Americans progress toward racial equality are far shorter than periods of racial stagnation).

actions provoke are quite high, and that their defeat and their opponents' victory would be a serious, perhaps permanent setback to the political positions they hold.⁸

Part I of this Essay makes the case for symbolic politics. Presidents often have political reasons for subjecting courts to mere words. Barack Obama is no different. Part II makes the case for constitutional hardball. It was presaged by mere words against the Republican-dominated federal judiciary but was manifested more seriously in the President's subsequent willingness to circumvent the various veto points, most notably the filibuster, in the national legislative process that had previously enabled Republicans to prevent the passage of health care reform. The majority Democratic Party, as Obama's State of the Union may have declared in retrospect, no longer will permit the minority Republican Party to rely on preexisting political procedures to prevent or stall progressive legislation. Both Parts attempt to make their different cases as strongly as possible. Whether the 2010 State of the Union Address was position-taking or constitutional hardball, however, is for the future to tell.

I. "SIGNIFYING NOTHING": OBAMA AS POSITION-TAKER

Presidential criticism of Supreme Court decisions and Supreme Court Justices is as American as baseball and apple pie. Martin Van Buren issued the first criticism of a judicial decision in an annual message to Congress when he complained about the Supreme Court's ruling in *Kendall v. United States ex rel. Stokes*⁹ that federal justices could issue a writ of mandamus to a Cabinet official.¹⁰ Theodore Roosevelt claimed he could have "carve[d] out of a banana a Judge with more backbone"¹¹ after Oliver Wendell Holmes rejected the Administration's understanding of antitrust law in *Northern Securities Co. v. United States*.¹² Dwight Eisenhower and Richard Nixon regularly groused in public about liberal Supreme Court Justices and decisions.¹³

Both Barack Obama and John McCain demonstrated on the campaign trail that they were prepared to continue this presidential tradition of judicial criticism. Both candidates condemned the judicial ruling in *Kennedy v.*

8. Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004) (footnotes omitted).

9. 37 U.S. (12 Pet.) 524 (1838).

10. President Martin Van Buren, Second Annual Message (Dec. 3, 1838).

11. HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 55 (5th ed. 2008).

12. 193 U.S. 197 (1904).

13. See ABRAHAM, *supra* note 11, at 235-36; Stephen J. Wermeil, *The Nomination of Justice Brennan: Eisenhower's Mistake? A Look at the Historical Record*, 11 CONST. COMMENT. 515, 536 (1995).

*Louisiana*¹⁴ that child rapists could not be executed.¹⁵ Obama “strongly disagree[d]” with the Supreme Court’s decision in *Gonzales v. Carhart*¹⁶ to sustain a federal law banning partial birth abortions.¹⁷ McCain routinely condemned *Roe v. Wade*¹⁸ and other instances of liberal judicial activism.¹⁹

Most Presidents and presidential candidates who criticize the Supreme Court simply attempt to make more favorable judicial appointments. Van Buren’s election marked the end of Jacksonian attacks on the federal judiciary.²⁰ Theodore Roosevelt proposed curbing judicial power when he ran as a Progressive in 1912.²¹ While President from 1901 to 1909, he sought only to place more progressive Justices on the federal bench.²² The Eisenhower Administration steadfastly refused to support efforts to curb judicial power.²³ The Detainee Treatment Act of 2005²⁴ aside, there was no bite whenever Bush II Administration officials barked at the federal judiciary.

Presidents and candidates for the presidency have the same reason as other politicians for criticizing federal courts. Product differentiation is important. Given the visibility of the presidential office, Presidents may have good reason to remind the public that they do not agree with what the Supreme Court is doing. By criticizing Justice Holmes, Theodore Roosevelt was communicating to opinion leaders and the general public that he favored a more aggressive antitrust policy than the judicial majority. Judicial criticism is an easy way to score political points. As Stephen Engel has noted, most attacks on courts are aimed at a politician’s political base and are not serious efforts to alter the balance of institutional power.²⁵ Political scientists describe such rhetoric as

14. 128 S. Ct. 2641 (2008).

15. *McCain, Obama Disagree with Child Rape Ruling*, MSNBC, June 26, 2008, <http://www.msnbc.msn.com/id/25379987/>.

16. 550 U.S. 124 (2007).

17. Robin Toner, *Court Ruling Catapults Abortion Back into ‘08 Race*, N.Y. TIMES, Apr. 19, 2007, at A23.

18. 410 U.S. 113 (1973).

19. See Toner, *supra* note 17.

20. Mark A. Graber, *James Buchanan as Savior? Judicial Power, Political Fragmentation, and the Failed 1831 Repeal of Section 25*, 88 OR. L. REV. 95, 142-43 (2009).

21. WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937*, at 134-36 (1994).

22. See *id.* at 87-88.

23. See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS 88-90*, 113 (2000).

24. Pub. L. No. 109-148, 119 Stat. 2739.

25. See Stephen M. Engel, ‘A Mere Party Machine?’ Judicial Authority, Party Development, and the Changing Politics of Attacking the Courts 55-57 (May

“position taking.” David Mayhew, the scholar who coined this phrase observes: “The electoral requirement is not that [a governing official] make pleasing things happen but that he make pleasing judgmental statements.”²⁶ Another term of art is “cheap talk,” the “communication of messages that are costless to produce, do not involve binding promises, and cannot be verified by the receiver.”²⁷

Presidential court-bashing tends to be position-taking or cheap talk for two related reasons. First, changing the course of judicial decisions is quite difficult. The Constitution of the United States created a government that permits strong minorities to exercise a practical veto on any policy that promises substantial change. Inevitably throughout American history, the Court has been saved by those veto points. National Republicans and Northern Democrats in Congress during the early 1830s successfully blocked Southern Jacksonian efforts to strip federal jurisdiction.²⁸ Southern Democrats, fearful of a more racially liberal Court, thwarted the Court-blocking plan.²⁹ Moreover, as numerous political scientists have noted, most Presidents have little reason to object to the Court.³⁰ More often than not, most of the Justices on the Supreme Court are appointed by either the sitting President or a President allied with the sitting President. Robert Dahl pointed out in a seminal article that “it would appear, on political grounds, somewhat unrealistic to suppose that a Court whose members are recruited in the fashion of Supreme Court justices would long hold to norms of Right or Justice substantially at odds with the rest of the political elite.”³¹ The judicial majority during the Van Buren presidency was appointed by Van Buren or Andrew Jackson. The second President Bush inherited a judicial majority appointed by Ronald Reagan and his father. No doubt such a tribunal occasionally makes a decision the President does not like. The same likely is true of the Secretary of State or the presidential press secretary. The important point is that most Presidents most of the time prefer a Supreme Court with which they occasionally disagree to some alternative institutional division of constitutional authority. The Court, as Martin Shapiro and Gordon Silverstein suggest, is a bit like a certain kind of “junkyard dog.” People who buy the

2009) (unpublished Ph.D. dissertation, Yale University) (on file with the Yale Law & Policy Review).

26. DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 62 (2d ed. 2004).
27. Daniel F. Spulber, *The Map of Commerce: Internet Search, Competition, and the Circular Flow of Information*, 5 J. COMPETITION L. & ECON. 633, 656 (2009).
28. See Graber, *supra* note 20, at 130.
29. See KEVIN J. MCMAHON, *RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO BROWN* 61-96 (2004).
30. See, e.g., KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* (2007).
31. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 291 (1957).

animal do so because they believe the benefits of canine protection outweigh the occasional moment when the dog bites the wrong person.³²

Much evidence suggests that President Obama was engaged in little more than position-taking or cheap talk when he criticized judicial decisions while on the campaign trail and during the State of the Union address. Although he called on Congress to consider a new campaign finance law, the Obama Administration has not made campaign finance a priority. Health care, jobs, and Afghanistan are the present Administration's priorities. Linda Greenhouse observed: "The president offered no specifics and did not endorse any of them"³³ when calling on Congress to regulate campaign finance. The appointment of Justice Sonia Sotomayor, who dissented in *Citizens United v. FEC*,³⁴ is the only contribution President Obama has presently made to the cause of campaign finance reform. The President appears to be even more toothless on *Kennedy v. Louisiana*. The Administration has done nothing to remove constitutional restrictions on executing child rapists. Although no hard evidence exists, the persons President Obama is appointing to the federal judiciary seem to be moderate liberals more likely to increase rather than remove constitutional barriers to executions. The message being communicated, it appears, is merely that the President of the United States does not like child rapists.

No good reason exists for thinking that President Obama would be able to issue a broad challenge to judicial power in the near future or that he would want to issue such a challenge. As the failed nomination of Dawn Johnson³⁵ indicates, powerful minorities still exercise powerful vetoes in the American constitutional system. Any attack on the federal judiciary likely would unite all Republicans and conservative Democrats against the Administration. The result would be almost certain failure. If Roosevelt's experience is any indication,³⁶ a failed attack on the Supreme Court would also be a fatal blow against other Obama Administration policies. Moreover, President Obama presently has little reason to act against the Supreme Court. *Citizens United* is the only decision inconsistent with important progressive priorities, at least as those priorities have been defined by the Administration.³⁷ Given that the present Supreme

32. MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, & JUDICIALIZATION 163-64 (2002); Gordon Silverstein, *Sequencing the DNA of Comparative Constitutionalism: A Thought Experiment*, 65 MD. L. REV. 49, 50 (2006).

33. Greenhouse, *supra* note 5.

34. 130 S. Ct. 876 (2010).

35. Charlie Savage, *Long After Nomination, an Obama Choice Withdraws*, N.Y. TIMES, Apr. 10, 2010, at A16.

36. David Adamany, *Legitimacy, Realigning Elections, and the Supreme Court*, 1973 WIS. L. REV. 790, 839-41, 844-45.

37. Most progressives have condemned such judicial decisions as *Heller v. District of Columbia*, 128 S. Ct. 2783 (2008). The Obama Administration has not.

Court remains committed to protecting abortion rights,³⁸ prohibiting school prayer,³⁹ and providing more protection for persons suspected of crime than most state or federal legislators,⁴⁰ progressives are unlikely to fare substantially better if constitutional authority is rerouted to elected officials.

II. “HIS HOUR UPON THE STAGE”: OBAMA AND CONSTITUTIONAL HARBALL

All presidential criticisms of Supreme Court Justices and decisions are not created equal. Most presidential criticisms do little more than increase the political temperature. Some presidential criticisms auger or complement stronger attacks on the federal judiciary. Thomas Jefferson in 1801 complained that the Federalists “have retired into the judiciary . . . and from that battery all the works of republicanism are to be beaten down and erased.”⁴¹ Two years later, Jefferson and his political allies began to impeach Federalist Justices. In 1832, Andrew Jackson made clear that he would not enforce the judicial decision in *Worcester v. Georgia* requiring Georgia to free two missionaries arrested in Cherokee Territory.⁴² The previous year, Jacksonians in Congress proposed legislation that would in practice strip the Justices of the power to declare state laws unconstitutional.⁴³ Republicans during the late 1850s and early 1860s both criticized and attacked judicial power. Shortly after claiming the Supreme Court was relying on a “horse-and-buggy definition of interstate commerce,”⁴⁴ Franklin Roosevelt proposed the Court-packing plan.⁴⁵

Keith Whittington details how these substantial attacks on federal judicial power are made by chief executives that political scientists classify as “reconstructive presidents.”⁴⁶ A reconstructive President is elected with a mandate to alter fundamentally the political and constitutional vision of the previous regime. They have an electoral warrant, Stephen Skowronek notes, to engage “in a wholesale reconstruction of the standards of legitimate national government.”⁴⁷ Abraham Lincoln was committed to repudiating the Jacksonian

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

39. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

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

41. Letter from Thomas Jefferson to John Dickinson (Dec. 19, 1801), in 10 *THE WRITINGS OF THOMAS JEFFERSON* 301, 302 (Albert Ellery Branch ed., 1907).

42. Graber, *supra* note 20, at 127.

43. *REPORT UPON THE JUDICIARY*, 7 REG. DEB. app. at lxxvii (1831).

44. President Franklin D. Roosevelt, Press Conference, (May 31, 1935).

45. President Franklin D. Roosevelt, Fireside Chat, (Mar. 9, 1937).

46. WHITTINGTON, *supra* note 30, at 49-50.

47. STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH* 37 (1993).

constitutional vision embodied in *Scott v. Sandford*⁴⁸ and the Kansas-Nebraska Act. Franklin Roosevelt challenged an inherited constitutional vision embodied by the liberty of contract and dual federalism. When reconstructive presidents attack the Court, they do so in order to implement a new constitutional vision and not merely to please their political base. The course of judicial doctrines must be changed, from their perspective, because the Justices are blocking the implementation of their program, not simply because they are disappointed in a particular ruling or two. “Because reconstructive presidencies are attempting to restructure inherited constitutional understandings,” Whittington writes, “they find the judiciary to be an intrinsic challenge to their authority.”⁴⁹

Presidential efforts to reconstitute the Court largely fail, even when promoted by a President with an apparent mandate to implement a new constitutional vision. The Roosevelt Court-packing plan was the most spectacular such failure. Democrats could not fundamentally alter judicial power, even in 1936 after they won the largest Electoral College landslide in history and gained unprecedented control of both houses of Congress.⁵⁰ Jefferson earns the silver medal in the presidential failure competition. Democratic Republicans from 1801 to 1804 were able to repeal a last-minute Federalist expansion of the federal judiciary and impeach one senile lower court Federalist judicial appointee. Nevertheless, after the failed impeachment of Justice Chase, no serious sustained effort was made for twenty years to challenge federal judicial authority.⁵¹ Jacksonian Court curbing efforts were rejected by nearly a three to one margin in Congress.⁵² Whittington suggests that the Reagan Administration’s effort to challenge courts was too weak as to even qualify for the court-curbing competition.⁵³

Lincoln and his fellow Americans launched the only successful assault on the federal judiciary in American history. The Judiciary Act of 1862⁵⁴ was the primary vehicle by which antislavery forces reconstructed judicial power. Although presently unknown, that measure dramatically altered the course of Supreme Court decision-making. When Lincoln took office, five of the nine federal judicial circuits were located entirely within slave states. Moreover, Presidents as a matter of practice appointed one Supreme Court Justice from each circuit. The result was that the Jacksonian Supreme Court always had a

48. 60 U.S. (19 How.) 393 (1857).

49. WHITTINGTON, *supra* note 30, at 52.

50. See McMAHON, *supra* note 29, at 61-65.

51. See RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 104 (1971).

52. 7 REG. DEB. 542 (1831).

53. WHITTINGTON, *supra* note 30, at 274.

54. 12 Stat. 576 (1862).

slave state majority.⁵⁵ Indeed, throughout most of antebellum American history, at least half of the Supreme Court Justices hailed from slave states. The Judiciary Act of 1862 changed this policy. That measure reapportioned the federal judiciary so that seven circuits existed entirely in the free states.⁵⁶ A special West Coast district was added shortly thereafter.⁵⁷ The result was that by the time Lincoln was murdered, eight of the ten federal circuits were in the free states. Lincoln’s judicial appointees created a northern judicial majority that has remained unbroken for the last 150 years.

Reconstructive Presidents are hardly failures, even when their direct attacks on the courts do not succeed. The judicial appointments process frequently obviates the need for court-curbing. Jacksonians enjoyed a judicial majority by the end of Jackson’s second term of office. No sooner had the court-curbing plan been defeated than a series of resignations and deaths enabled Franklin Roosevelt to gain a liberal majority on the Supreme Court the old-fashioned way. Moreover, as Whittington points out, presidential attacks on the Court open only one front in an all-out battle against every vestige of the ancient regime throughout the national government. “Conflicts with the courts,” he details, “are only a single skirmish within the larger presidential offensive to establish his authority to remake American politics.”⁵⁸ These broader attacks historically have been more successful than the narrow campaign against judicial pretense. The national government does business differently after a reconstructive presidency.

Reconstructive Presidents confront a political system containing substantial barriers to their reforming efforts. The problem is that institutions are structured in ways that make reform difficult, not simply that hostile partisans control rival branches of the national government. The presidential cabinet in the early national regime more often resembled a coalition of party chiefs than an instrument for governance. Roosevelt inherited an executive branch that was ill-equipped to manage the emerging administrative state. Hence, in order to achieve their ambitions, reconstructive Presidents must not only replace rivals with supporters, but they must also reconstruct the government so that its institutions are capable, when functioning properly, of achieving their cherished reforms. Skowronek notes how Presidents with ambitious agendas must engage in “an assault on the residual institutional infrastructure of the old order.”⁵⁹ Liberals during the 1960s, for example, had to change dramatically the

55. For a discussion of this aspect of federal judicial authority, see Justin Crowe, *Westward Expansion, Preappointment Politics, and the Making of the Southern Slaveholding Supreme Court*, 24 *STUD. AM. POL. DEV.* 90 (2010).

56. 12 Stat. 576, 576 (1862).

57. 12 Stat. 794 (1863).

58. WHITTINGTON, *supra* note 30, at 59.

59. SKOWRONEK, *supra* note 47, at 38.

support system for litigation in order to be able to implement the liberalism of the Warren Court.⁶⁰

All reconstructive presidencies are marked by important changes in the way governmental institutions do business. Jefferson and Jackson replaced a constitutional order where office was to be the primary marker of political loyalty and with a system in which governing officials were motivated more by political party obligations.⁶¹ How members of Congress voted on the censure and the expunging resolutions depended more on their alliances with Jackson than on their identity as members of the national legislature.⁶² Reconstructive Presidents also alter relations between Congress and the White House. Only during the Jackson Administration did the Secretary of the Treasury clearly become identified as an executive officer, and the veto become an instrument of public policy.⁶³ The Roosevelt Administration's executive reorganization created a modern presidency capable of managing the administrative state.⁶⁴ The Lincoln Administration exercised unprecedented presidential powers.⁶⁵

Upon taking office, President Obama found himself in a similar position to most reconstructive presidents. As was the case with Roosevelt, Lincoln, and Jefferson, President Obama was at the head of a relatively new majority party that nominally controlled all elected branches of the national government. Only the judiciary had a majority of hostile partisans. As was the case with Jefferson, Jackson, Lincoln, and Roosevelt, however, President Obama confronted institutional practices that made achieving his reform efforts difficult, if not impossible. In the current President's case, the major obstacle was a combination of political fragmentation through the national legislature and the filibuster in the Senate that made the passage of his reform agenda, perhaps any substantial reform agenda, nearly impossible. Health care, in particular, fell prey to these governing arrangements. Imprisoned by a political system which required the Administration to bargain with a bewildering number of Democrats in Congress, the legislation began to look more like a series of distinctive party gifts for all comers than a coherent piece of policy. Worse, rather than merely accommodate a majority of national legislators, President

60. See Howard Gillman, *Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism*, in *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* 138 (Ronald Kahn & Ken I. Kersch eds., 2006).

61. See RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840*, at 75 (1969).

62. DONALD B. COLE, *THE PRESIDENCY OF ANDREW JACKSON* 205-06, 252-53 (1993).

63. See LEONARD D. WHITE, *THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1829-1861*, at 28-38 (1954).

64. See WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL 1932-1940*, at 327-28 (1963).

65. See DANIEL FARBER, *LINCOLN'S CONSTITUTION* 118 (2003).

Obama was forced to accommodate three-fifths of the Senate in order to avoid what was becoming the routine use of the filibuster.

The reform ambitions of reconstructive Presidents and the frustrations of President Obama's first year in office suggest a broader, more interesting, framework for his critique of the Supreme Court in the 2010 State of the Union address. Commentators are mistaken if they see the sentence quoted on the first page of this Essay as simply an attempt to intimidate or put pressure on the Court. Instead, the 2010 State of the Union address inaugurated a period in which the President more aggressively confronted the institutional barriers against progressive reform. Rather than play by preexisting norms, he challenged the procedural obstacles that had thwarted progressive policies during his first year in office.

Health care is the most obvious manifestation of this new aggressive institutional stance. During the winter of 2010, the Obama Administration and health care supporters in Congress made clear that they would not abide by previous rules. From the very beginning, President Obama played far more constitutional hardball than had previously been the case. The President, Speaker of the House Nancy Pelosi, and Senate Majority Leader Harry Reid made clear that, should Democratic majorities agree on a bill, that bill would become law. The filibuster in 2010, they determined, would not block health care reforms. In March, President Obama called on the House of Representatives to treat their health care bill as a reconciliation measure, a process that would require only fifty-one Senators to support health care. He told Congress that health care “deserves the same kind of up or down vote that was cast on welfare reform . . . on the Children’s Health Insurance Program, . . . for Cobra health coverage for the unemployed and . . . both Bush tax cuts—all of which had to pass Congress with nothing more than a simple majority.”⁶⁶ Prominent legislators also suggested that the House of Representatives employ a constitutionally controversial “deem and pass” procedure. That procedure would, in effect, allow the House to vote on amendments to the Senate health bill and also serve as the vote to approve the Senate bill. Hence, health care would become law, even if the Senate rejected the House amendments.⁶⁷ While such a vote proved unnecessary, the very proposal indicated that legislative majorities would no longer let inherited governmental procedures derail their progressive agenda.

During the winter and early spring of 2010, the Obama Administration gave two other indications of an increased willingness to engage in institutional combat. Frustrated by the slow pace of the Senate confirmation process, the President made a series of controversial recess appointments on March 27, 2010. The most notable of these was a recess appointment to the National Labor

66. Sheryl Gay Stolberg & Robert Pear, *President Calls for Final Vote on Health Bill*, N.Y. TIMES, Mar. 4, 2010, at A1.

67. David M. Herszenhorn & Robert Pear, *Democrats Consider New Maneuvers for Health Bill*, N.Y. TIMES, Mar. 17, 2010, at A18.

Relations Board given to Craig Becker, a prominent labor lawyer vigorously opposed by most Republicans.⁶⁸ Obama's decision to nominate Goodwin Liu to the Court of Appeals for the Ninth Circuit, his most progressive judicial appointment to date, may also indicate that, after a dalliance with a centrist coalition, the Administration is moving to the left.⁶⁹ Such a leftward movement will necessitate further attacks on inherited political processes. If President Obama is to be a successful reconstructive President, the health care bill, the recess appointments, and the Liu nomination will only be the beginning of the full-scale challenge to the numerous veto points that presently make passing and implementing a progressive agenda nearly impossible.

CONCLUSION

Whether the State of the Union address and the recent politics of health care are the first of the skirmishes in this political reconstruction is impossible to determine at present. Even in the online edition of a law review, one should avoid making significant inferences on very few data points. President Obama in both his State of the Union address and subsequent actions has behaved differently than during in his first year in office. Still, to paraphrase Justice Scalia, we should be careful not to "mistake" "a fit of spite" for "a Kulturkampf."⁷⁰ Whether Americans this year witnessed a new pattern of presidential behavior or merely a desperate effort to pass a bill remains to be seen. Much will depend on how health care is received and on the election of 2010. Indeed, we will not know for a good many years whether we are living in the equivalent of 1932-1936, watching the beginnings of a new constitutional order, or 1838-1841, merely observing the historical equivalent of the Whig hiccup during a period of Jacksonian dominance.

The meaning of Obama's mild rebuke of the Supreme Court also cannot be presently determined. No one can predict the judicial response to more aggressive Obama Administration efforts to reconstruct American politics. Moreover, a reconstructive Obama presidency bent on challenging judicial pretense will have to overcome what Stephen Skowronek refers to as the "[w]aning of [p]olitical [t]ime."⁷¹ As governing institutions become increasingly independent and impervious to change, reconstructive Presidents have more difficulty achieving their goals. Skowronek observes "a pattern of greater institutional resilience in the face of . . . presidents' order-shattering authority, of an ever thicker government that can parry and deflect more of their

68. See Sheryl Gay Stolberg, *Obama Bypasses Senates Process, Filling 15 Posts*, N.Y. TIMES, Mar. 28, 2010, at A1.

69. See Charlie Savage, *Appeals Court Nominee Ignites a Partisan Battle*, N.Y. TIMES, Apr. 13, 2010, at A15.

70. *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

71. SKOWRONEK, *supra* note 47, at 407.

repudiative thrust.”⁷² The disappearance of the short-term Justice is a particularly recent phenomenon that complicates presidential efforts to rebuild the federal judiciary in their image. Justin Crowe and Christopher Karpowitz note that before the Great Society, many Justices served only a short period of time. The last short-termer was Arthur Goldberg, who left the Court in 1968. “[T]he modern Court is different not because the justices are setting new records in longevity,” they claim, “but because it does not include any short-termers like Benjamin Curtis or Sherman Minton, the kinds of justices whose relatively brief service has long been a staple on the Court.”⁷³ The extinction of the short-term Justices complicates the normal processes by which reconstructive Presidents remake the federal judiciary. If the five conservatives on the present Court live and do not retire until they are as old as Justice John Paul Stevens was when he stepped down, Democrats will have to win the next four presidential elections in order to fashion a judicial majority. This possibility may make future constitutional politics quite interesting should the conservatives on the Supreme Court challenge a newly emboldened Obama Administration on health care and other executive priorities.

72. *Id.* at 413.

73. Justin Crowe & Christopher F. Karpowitz, *Where Have You Gone, Sherman Minton? The Decline of the Short-Term Supreme Court Justice*, 5 *PERSP. ON POL.* 425, 426 (2007).