

POLITICIZING THE SUPREME COURT

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To state the obvious, Americans do not trust the federal government, and that includes the Supreme Court. Americans believe politics played “too great a role” in the recent health care cases by a greater than two-to-one margin.¹ Only thirty-seven percent of Americans express more than some confidence in the Supreme Court.² Academics continue to debate how much politics actually influences the Court, but Americans are excessively skeptical. They do not know that almost half of the cases this Term were decided unanimously, and the Justices’ voting pattern split by the political party of the president to whom they owe their appointment in fewer than seven percent of cases.³ Why the mistrust? When the Court is front-page, above-the-fold news after the rare landmark decision or during infrequent U.S. Senate confirmation proceedings, political rhetoric from the President and Congress drowns out the Court. Public perceptions of the Court are shaped by politicians’ arguments “for” or “against” the ruling or the nominee, which usually fall along partisan lines and sometimes are based on misleading premises that ignore the Court’s special, nonpolitical responsibilities.

The Framers of the Constitution designed a uniquely independent Supreme Court that would safeguard the Constitution. They feared that the political branches might be able to overwhelm the Court by turning the public against the Court and that the Constitution’s strict boundaries on congressional power would give way. As evidenced in the health care cases, politicians across the ideological spectrum have played into some of the Framers’ fears for the

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1. Lydia Saad, *Americans Issue Split Decision on Healthcare Ruling*, GALLUP (June 29, 2012), <http://www.gallup.com/poll/155447/Americans-Issue-Split-Decision-Healthcare-Ruling.aspx>; Frank Newport et al., *Gallup Editors: Americans' Views on the Healthcare Law*, GALLUP (June 22, 2012), <http://www.gallup.com/poll/155300/Gallup-Editors-Americans-Views-Healthcare-Law.aspx>.

2. Jeffrey M. Jones, *Confidence in U.S. Public Schools at New Low*, GALLUP (June 20, 2012), <http://www.gallup.com/poll/155258/confidence-public-schools-new-low.aspx>.

3. *Stat Pack for October Term 2011*, SCOTUSBLOG 5, 14 (June 30, 2012), http://dailywrit.com/blog/uploads/2012/06/SCOTUSblog_Stat_Pack_OT11_final.pdf.

Constitution by politicizing the decision and erasing the distinction between the Court's holding and the policy merits of the health care law. Paradoxically, many of the elected officials who proudly campaign under the battle cry of "saving our Constitution" endanger the Court and the Constitution with their bombast. Politicization of the Supreme Court causes the American public to lose faith in the Court, and when public confidence in the Court is low, the political branches are well positioned to disrupt the constitutional balance of power between the judiciary and the political branches.

THE FRAMERS' SUPREME COURT

It would have been unsurprising had the Constitutional Convention granted Congress the power to take a vote to change Supreme Court decisions. In fact, the antifederalists' chief argument against the judiciary was that it was too powerful without a congressional revisionary power on Court opinions.⁴ Many of the early state constitutions that were enacted between the Revolution and the ratification of the U.S. Constitution permitted the state executive and legislature to remove, override, or influence judges. Rhode Island judges were called before the legislature to testify when they invalidated legislative acts.⁵ The New Hampshire legislature vacated judicial proceedings, modified judgments, authorized appeals, and decided the merits of some disputes.⁶

Instead, the Framers created a Supreme Court that was independent from the political branches and insulated from public opinion. The Supreme Court would be the intermediary between the people and the legislature to ensure that Congress obeyed the Constitution. Congress could not be trusted to police itself for compliance with the Constitution's limited legislative powers. Courts would be "the bulwarks of a limited Constitution against legislative encroachments."⁷

Still, the Framers believed Congress would overshadow the Supreme Court. The Framers were so concerned about helping the Court repel attacks by the legislature that they considered boosting its power and inserting it into political issues. James Madison's draft of the Constitution included an additional check against congressional power, the Council of Revision.⁸ Instead

4. See BRUTUS NO. 15 (Robert Yates) (Morton Borden ed., 1965), available at <http://www.constitution.org/afp/brutus15.htm>.

5. DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 67 (2d ed. 2005).

6. Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, in THE CONFEDERATION AND THE CONSTITUTION: THE CRITICAL ISSUES 18 (Gordon S. Wood ed., 1973).

7. See THE FEDERALIST NO. 78, at 437 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

8. James Madison, *Tuesday May 29 in Convention*, in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., 1937).

of the presidential veto, the Council would have placed several Supreme Court Justices on a council with the President or asked the President and the Supreme Court to separately approve legislation before it became law. Justices would have had the power to oppose legislation on nonlegal, policy grounds.⁹ The Council is nowhere to be found in the Convention's final product, but delegates' arguments from the Council debates reveal a suspicion of Congress, fear for the Court's ability to defend itself, and concern for the Court's public reputation. Madison believed that even with the Council, Congress would be an "overmatch" for the Supreme Court and President and cited the experience of spurned state supreme courts.

Experience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex. This was the real source of danger to the American Constitutions; & suggested the necessity of giving every defensive authority to the other departments that was consistent with republican principles.¹⁰

Delegates ultimately decided that politicizing the Court would undercut its legitimacy. Luther Martin, a delegate who later became Maryland's longest-serving attorney general, offered the most prescient comment on the subject: "It is necessary that the Supreme Judiciary should have the confidence of the people. This will soon be lost, if they are employed in the task of remonstrating [against] popular measures of the Legislature."¹¹ "It was making the Expositors of the Laws, the Legislators which ought never to be done," added Elbridge Gerry, a Massachusetts delegate.¹²

"SAVING THE CONSTITUTION FROM THE COURT"

The Framers correctly connected loss of public confidence in the Court with judicial policymaking. Of course, the Constitution does not force judges to

9. It is difficult to visualize the Council of Revision in the Constitution. Imagine that when Congress approved the Affordable Care Act, it was never taken to the White House for presentment. If the Council included the two most senior Supreme Court Justices, then President Obama, Chief Justice Roberts, and Justice Scalia might have met in the Capitol at a regular Council meeting and announced in a postmeeting press conference that the Council had rejected it. Assume Chief Justice Roberts believed the law was bad policy. Justice Scalia might say the bill was unconstitutional and a bad bill, President Obama would say it was constitutional and a good bill, and Chief Justice Roberts might say it was constitutional but a bad bill. Had the Framers split the revisionary power between the Court and the President, perhaps the Court would have announced before President Obama's signing ceremony that it had rejected the bill by a vote of five to four, with Chief Justice Roberts casting the decisive vote against the bill on policy grounds despite majority support for the bill's constitutionality.

10. James Madison, *Saturday July 21 in Convention, in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 74 (Max Farrand ed., 1937).

11. *Id.* at 77.

12. *Id.* at 75.

“remonstrate” against legislation, but experience proves Martin to be correct. Too often that becomes the public perception when Congress and the President politicize the Supreme Court. Chief Justice Roberts started and ended his health care opinion with the basics—the important distinction between whether the Affordable Care Act is good policy from whether it is a constitutional law. Within two hours, President Obama and Mitt Romney, both Harvard Law School graduates, looked into television cameras and told Americans the opposite. “Today, the Supreme Court also upheld the principle that people who can afford health insurance should take the responsibility to buy health insurance,” said Obama.¹³ Romney criticized the majority for deciding not to “repeal Obamacare.” “What the Court did not do on its last day in session, I will do on my first day if elected President,” said Romney.¹⁴

Congress and the President have belittled the Court. President Obama told Americans at the 2010 State of the Union address that “the Supreme Court reversed a century of law” with its *Citizens United* decision and suggested that the Court opposed honest elections. The ensuing image was even more damaging. With 48 million Americans watching, the camera panned to a cadre of expressionless Supreme Court Justices sitting in the front row while lawmakers sitting next to them rose to their feet and applauded.¹⁵ Presidents Obama and Bush and members of Congress have derided the Court for its “unelected” nature, with President Obama publicly wondering before the health care decision whether “an unelected group of people would somehow overturn a duly constituted and passed law.”¹⁶

Judges lack clear defenses. Judges would risk their credibility if they shouted back at the President, did the Sunday morning talk show circuit, or held a press conference after a decision. Unlike speeches from members of Congress and the President, Supreme Court proceedings are difficult to follow without legal training. The media coverage of the Supreme Court can be incomplete or inaccurate. FOX News and CNN famously misunderstood Chief Justice Roberts’ oral opinion and misreported the fate of the individual

13. Remarks on the United States Supreme Court Ruling on the Patient Protection and Affordable Care Act, 2012 DAILY COMP. PRES. DOC. 521 (June 28, 2012), *available at* <http://www.gpo.gov/fdsys/pkg/DCPD-201200521/pdf/DCPD-201200521.pdf>.

14. Mitt Romney, Remarks on the Supreme Court’s Decision on President Obama’s Healthcare Law (June 28, 2012), *available at* <http://www.mittromney.com/news/press/2012/06/mitt-romney-i-will-repeal-obamacare-0>.

15. Address Before a Joint Session of the Congress on the State of the Union, 2010 DAILY COMP. PRES. DOC. 55, at 8 (Jan. 27, 2010), *available at* <http://www.gpo.gov/fdsys/pkg/DCPD-201000055/pdf/DCPD-201000055.pdf>; *Obama Criticizes Supreme Court in State of the Union Address*, YOUTUBE (Jan. 28, 2010), <http://www.youtube.com/watch?v=BiDiHX50zT4>.

16. The President’s News Conference with President Felipe de Jesus Calderon Hinojosa of Mexico and Prime Minister Stephen Harper of Canada, 2012 DAILY COMP. PRES. DOC. 241, at 7 (April 2, 2012), *available at* <http://www.gpo.gov/fdsys/pkg/DCPD-201200241/pdf/DCPD-201200241.pdf>.

mandate. The publicly available audio recordings of oral arguments contribute little to public understanding of the Court. Even before the decision, the Republican Party doctored audio clips of Solicitor General Don Verrilli coughing and pausing during oral argument to suggest in an ad that the health care law was indefensible.¹⁷

Politicization of the Court is dangerous because it primes the public for a power grab by the political branches. If the Court loses authority to check political power and make unpopular decisions, it cannot enforce the Constitution with the same effectiveness. Without enforcement of the Constitution, Congress is free to invade constitutional rights and exceed its lawful powers.

The Supreme Court came frighteningly close to losing some of its independence when the Court made politically significant decisions striking down parts of the New Deal, and President Franklin D. Roosevelt responded with the Court-packing plan. His arguments alleged misconduct by the Court.

The Courts, however, have cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic conditions. . . . The Court has been acting not as a judicial body, but as a policy-making body. . . . We have, therefore, reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself.¹⁸

Roosevelt's words from seventy-five years ago could be repeated today by Court opponents. In his recent presidential primary campaign, Newt Gingrich promised to employ the tactics of early state constitutions by ignoring disagreeable Court decisions and ordering Justices to testify to congressional committees.¹⁹ Proposals to invade the Court's independence ignore the Framers' fears for enforcement of the Constitution without the Supreme Court. Madison believed if the legislature and executive united behind a law and convinced the public that it was in their interest, the people could not properly judge its constitutionality, even if it was patently unconstitutional. The

17. Julie Hirschfeld Davis & Greg Stohr, *Republicans Tampered With Court Audio in Obama Attack Ad*, BLOOMBERG (Mar. 30, 2012), <http://www.bloomberg.com/news/2012-03-29/republicans-tampered-with-court-audio-in-obama-attack-ad.html>; see Republican Nat'l Comm., *ObamaCare: It's a Tough Sell*, YOUTUBE (Mar. 28, 2012), <http://www.youtube.com/watch?v=MXhLtb-NKY0>.

18. President Franklin D. Roosevelt, *Fireside Chat on Reorganization of the Judiciary* (Mar. 9, 1937), *available at* http://xroads.virginia.edu/~ma02/volpe/newdeal/court_fireside_text.html.

19. See Alexander Bolton, *Gingrich: Congress Can Send Capitol Police to Arrest Rogue Judges*, THE HILL (Dec. 18, 2011 12:06 PM), <http://thehill.com/blogs/ballot-box/gop-presidential-primary/200149-gingrich-congress-can-send-capitol-police-marshals-to-arrest-judges>; David G. Savage, *Newt Gingrich Says He'd Defy Supreme Court Rulings He Opposed*, L.A. TIMES (Dec. 17, 2011 1:52 PM), <http://www.latimes.com/news/politics/la-pn-gingrich-judges-20111217,0,1295899.story>.

“passions” of the people on the particular issues would prevail over well-reasoned constitutional judgment.²⁰

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The health care law’s closely watched journey through the three branches of government concluded in the Supreme Court, a rare opportunity in the sun for the Court. What would have been a shining moment for the Constitution in a vacuum was instead validation of the Framers’ apprehensions. Our Constitution is the oldest in the world because of Americans’ enduring reverence for it. But when elected officials exploit Americans’ patriotism to score political points, they jeopardize the Framers’ carefully constructed balance of power. Instead, honest public discourse on the Constitution and the Court is the surest security for our government.

20. See THE FEDERALIST NOS. 48, 49 (James Madison) (Clinton Rossiter ed., 1961).