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Hope, Fear and Loathing, and the Post-Sebelius Disequilibrium: Assessing the Relationship between Parties, Congress, and Courts in Tea Party America

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Hope, Fear and Loathing, and the Post-Sebelius Disequilibrium: Assessing the Relationship between Parties, Congress, and Courts in Tea Party America

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I. INTRODUCTION

Over the past few decades, scholars in both law and political science,¹ not to mention journalists, judicial and political figures, and interest groups,² have examined purportedly increasing tension between courts and elected officials. In particular, this discussion has often documented, explored the significance of, and attempted to account for, conflict between the U.S. Congress and the federal courts. These legislative-judicial conflicts have been spurred by current events, including responses to salient court rulings, prominent criticisms of the judiciary by members of Congress, and reaction and counter-critique from judges and institutions sympathetic

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to judicial power. As Mark Miller succinctly contends, “there is more conflict today between Congress and the courts than there has been in a very long time.”

Being able to document and perceive the causes of clashes between the legislative and judicial branches is important not just for greater comprehension of our separation of powers, but to obtain analytic leverage on a number of important issue areas that preoccupy scholars and policymakers alike. To take just a few examples, those interested in judicial independence, the drivers of congressional leadership, “good government” reforms, and the “governance as dialogue” movement all have a vested stake in better understanding whether today’s court-Congress relations represent a familiar, recurring interbranch dynamic or something new and potentially destabilizing.

Existing scholarly frames provide useful perspectives for analyzing some of these phenomena. For example, the documented rise of partisanship within Congress, such that there is greater party conflict inside Congress today than at any point in the post-war period \(^5\) can help account for party leaders’ targeting of judicial figures and rulings that are tethered to major ideological struggles of the day. \(^6\) Alternatively, Charles Geyh, Keith Whittington, and others have suggested that we can comprehend today’s institutional conflicts with courts as a reflection of electoral realignments, or at least tensions between ascendant political coalitions and the older (and partly repudiated) ideological and policy preferences embodied in the judiciary.

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\(^{4}\) MILLER, *supra* note ___ at 5.


\(^{6}\) MILLER, *supra* note ___ at 180-81.
However satisfactory these paradigms have been in explaining criticisms of courts in the past, the American political scene of the early twenty-first century presents several new challenges for assessments of congressional-judicial relations. At least three factors suggest we need new analytic tools for understanding emerging relationships between lawmakers and judges. First, the rise of the “Tea Party” movement in 2009—and with it, a concentrated political emphasis on curbing government intervention, spending, and taxation—raises the prospect that some of today’s members of Congress may be judging court behavior with a new yardstick. In lieu of the historical emphases on civil liberties, civil rights, and federalism as the decisive issues that define how federal lawmakers assess the judiciary, the ascendance of “Tea Party issues” may mean that on the contemporary political scene, judicial treatment of questions related to “national power” will serve as the vital touchstone for shaping the terms under which members of Congress target (and praise) courts. 7

As a second basis for claiming that we stand at a distinct moment of court-Congress conflict, we point to preliminary evidence that traditional partisan and ideological relationships with courts are weakening. While liberals—and eventually Democrats—have been associated with allegiance to the judiciary since the New Deal, 8 conservatives and Republicans have a corresponding history of skepticism towards judicial power over the past half century or so. 9 To take just one example, since 1976, the Democratic Party’s platforms have generally praised the judiciary and individual court decisions, while analogous Republican platforms have been overwhelmingly negative and even hostile. 10

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7 David Campbell and Robert Putnam question the degree to which self-identified Tea Party members in the general public favor a basket of policies and preferences distinct from “highly partisan” Republicans. David Campbell & Robert Putnam, Crash the Tea Party, N.Y. TIMES, Aug 16, 2011.
9 See, generally, MILLER, supra note __.
10 See THE POLITICS OF JUDICIAL INDEPENDENCE, supra note __ at __.
In more recent years, however, some of the court cases most widely discussed by both pundits and political figures have involved decisions that have confounded these historical affiliations. In such areas as affirmative action, gun rights, and campaign finance, some of the most high-profile Court decisions over the past decade have simultaneously advanced longstanding conservative positions and agitated traditional ideological “progressives.” Besides the outcomes in these and other cases, we note the success of concerted strategies by conservatives to fill the courts with more ideologically sympathetic personnel, and to advance arguments and lines of litigation designed to produce favorable results. These factors, combined with the conservatism of many state court systems as well as much of the federal judiciary, invite speculation about whether we are at a historic moment for reevaluating the interplay of ideology, party, and the allegiance of members of Congress to the courts.

Third, and finally, we note that today’s understandings of the interactions between courts and Congress is likely to be flavored by the legislature’s institutional standing with the public, especially vis-à-vis the judiciary. Congress almost always suffers in comparison with the Supreme Court when it comes to the public’s assessments of institutional performance. But since 2004, the nation’s declining confidence in the national legislature has been especially dramatic.

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15 THE POLITICS OF JUDICIAL INDEPENDENCE, supra note ___ at ___.
and has offered new lows—observations that would plausibly shape Congress’s interactions with the bench.17

These observations are complicated somewhat by the Supreme Court’s recent and historically low standing in the eyes of the public18 and by the high percentage of voters who identify political (as opposed to legal) factors as driving court decisions.19 In this context, it becomes somewhat harder to argue that legislators will defer to the high bench, although we note that the 33 point gap between the percentage of the public approving of Congress’s job performance (13%) and the comparable public approval of the Court (46%)20 is still striking and impressive.

In this article, we argue that these three vital features of our recent political life—the rise of the Tea Party, instability in traditional party allegiance to the courts, and negative voter assessments of the legislature’s institutional performance—have combined to offer (a perhaps temporary) moment of disequilibrium when it comes to Congress’s assessments of courts, court power, and judicial independence. We contend, further, that several highly salient cases from the Supreme Court’s 2011 term21 (including the Court’s sustaining of the Obama administration

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19 Leigh Ann Caldwell, Poll: Most Think Politics Will Influence Supreme Court Health Care Decision, CBSNews.com, June 7, 2012, http://www.cbsnews.com/8301-503544_162-57449249-503544/poll-most-think-politics-will-influence-supreme-court-health-care-decision/?tag=cbsnewsLeadStoriesArea; Kaiser Health Tracking Poll, Apr 4, 2012 - Apr 10, 2012, http://www.kff.org/kaiserpolls/8302.cfm. Interestingly, some recent research corroborates this view, finding empirical evidence that the Supreme Court has behaved more strategically and politically in recent decades. See BAILEY & MALTZMAN, supra note __ at 3 (finding evidence that the Court’s legal deference to Congress has been replaced by a more strategic deference when the Court finds itself as a political outlier relative to the rest of the national government).
21 The 2011 term ran from October 2011 until June 2012.
health insurance law\textsuperscript{22} and its partial invalidation of Arizona’s S.B. 1070 immigration law\textsuperscript{23}) are exceptions that prove the rule. While both cases seemingly validated traditional liberal ideological positions, the muted and cautious responses of both parties to these rulings further corroborates our disequilibrium thesis.

Indeed, as discussed in greater detail below, our results show that for many Republican members of Congress there is, today, a positive perception of courts, especially as a result of ideologically and substantively favorable court rulings in several areas related to government powers. When looking at legislators’ engagement of courts on more traditional “social issues” on the other hand, we note that lawmakers sympathetic to the Tea Party do not so much diverge from their more traditional Republican peers, as they place less emphasis on these issues by comparison.

Overall, by examining the comments found on the government websites of members of the House of Representatives in the 111\textsuperscript{th} (2009-2011) and 112\textsuperscript{th} (2011-2013) Congresses, we are able to sketch a picture of institutional, partisan, and ideological engagement with the judiciary that departs from earlier paradigms of court-Congress interactions while corroborating many of our assumptions about the current political moment. Using a variety of demographic and political data, we explain which recent members of the House have been most active in both criticizing and praising judicial power.

We conclude our analysis by speculating on the likelihood these patterns will continue or transform, and by discussing the wider significance of our findings for scholarly treatments of legislative-judicial relations. We believe our approach, while limited in its sweep and application, offers new explanations for Congress’s interest in both critiquing and praising the judiciary, and

\textsuperscript{22} NFIB v. Sebelius, 566 U.S. ___ (2012).
has important implications for fields of study—and political problems—well beyond our immediate aspirations and focus.

**EXISTING RESEARCH**

Scholars in political science and law have long studied interactions between the U.S. Congress and the judiciary as a means of better understanding the operation of our separation of powers system and the decision making of judges and legislative. This focus on legislative-judicial relations is certainly warranted given the power of American courts and the presence of constitutional rules and political traditions that allow for and even invite significant, recurring interbranch interaction, collaboration, and disagreement.25

Indeed, some of this scholarship has emphasized the enduring constitutional, institutional, and policymaking roots of tension between the judicial branches and legislative officials, and, therefore, the essential “normalcy” of conflict and critique between the departments of government. More explicitly normative research in this tradition condemns or sanctions specific institutional checks or “court-curbing” techniques on legal, policy, and other grounds.27

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26 See, e.g., MICHAEL A. BAILEY & FORREST MALTZMAN, THE CONSTRAINED COURT 3 (2011) (“the legislative and executive branches may be able to push the Court in favored directions with threats and persuasion”); FISHER, CONSTITUTIONAL DIALOGUES, supra note __; GEYH, WHEN COURTS AND CONGRESS COLLIDE, supra note __; CHARLES O. JONES, THE PRESIDENCY IN A SEPARATED SYSTEM, (1994); PICKERILL, id.
27 JOHN AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY (1984); ROGER CRAMTON & PAUL D CARRINGTON, REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (2006); Mark Tushnet &
Other work, more closely related to the goals of this article, has attempted to outline and understand the conditions under which Congress is likely to question, challenge, or perhaps promote judicial power. Stuart Nagel, for example, delineated periods of greater and lesser interest in court-curbing efforts from 1789-1959, and attempted to isolate particular periods and political circumstances in which congressional efforts to limits court powers and decisions were more successful. Following up on Nagel’s work, Keith Whittington has outlined a model for understanding when “elected officials would either accept independent judicial review or seek to punish the Court and reduce its independence.” In a somewhat similar vein, Joseph Ignagni and James Meernik emphasize electoral and institutional influences in their empirical examination of factors that impel Congress to attempt to reverse judicial review. Tom Clark explores the “electoral connection” between legislators and the public to show that prominent criticisms of the courts are inextricably tied to constituent opinion. And Michael Bailey and Forest Maltzman have recently shown how the Supreme Court shifts its statutory and constitutional rulings when it is a policy outlier relative to the executive and legislative branches.


29 We adopt Tom Clark’s definition of a court-curbing bill as a congressional measure that seeks “to restrict, remove or otherwise limit judicial power.” Clark, *The Judiciary Under Siege, supra* note __.

30 Nagel, *Court-Curbing Periods in American History, supra* note __.


32 Ignagni and Meernik, *supra* note __.

33 Clark, *The Judiciary Under Siege, supra* note __.

34 BAILEY & MALTZMAN, *supra* note __ at 95-120.
Our project attempts to complement and develop this rather expansive body of research by considering recent political changes that may confound or revise traditional assessments of congressional-judicial relations. In particular, this study is driven by our sense that the individual and institutional factors inducing today’s lawmakers to both criticize and bolster courts are distinctive relative to the sweep of history over the past half century, a span which includes a longstanding pattern of liberal support for courts as well as steady, and often highly concentrated, conservative congressional criticism.

**HISTORICAL CONTEXT OF THE STUDY**

Four broad historical observations help to orient our analysis and discussion. First, as many scholars have noted, congressional critiques of courts are not new. Attacks on courts are as old as the writings of the Anti-Federalist Brutus, who predicted (and fretted about) the rise of judicial power even before constitutional ratification.35

Second, while criticism of courts in the second half of the twentieth century became associated with conservatives and Republicans, this alignment is historical and contingent. For example, as Barry Friedman has shown, political Progressives at the end of the nineteenth century and into the first few decades of the twentieth were highly critical of courts as impediments to legislative reform.36 A few decades later, Franklin Roosevelt (in)famously clashed with the Supreme Court, posing what Jeff Shesol describes as Roosevelt’s greatest challenge prior to the second world war.37

As a third point of historical orientation, we note that criticism of courts (and the often defensive calls for greater judicial independence and power) has some noticeable ebb-and-flow.

35 *The Politics of Judicial Independence*, supra note __.
36 *Barry Friedman, The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (2009); see also Miller, *supra* note __.
37 *Jeff Shesol, Franklin Roosevelt vs. The Supreme Court* (2010).
That is, we associate some eras of U.S. politics with more attacks on courts than others. For example, Nagel and other researchers have observed that there is considerable variation in Congress’s pursuit of proposals to restrict judicial power.\textsuperscript{38} Indeed, Figure 1 presents the occurrence of court-curbing sponsorship by members of Congress over time, sketching a picture in which this activity, while generally declining since its peak in the 1960s has had a noticeable “uptick” in recent years.

[Figure 1 about here]

As an extension of this last observation we note, fourth, that there are reasons to think the early part of the twenty-first century ushered in a span in which criticism of courts increased in profile and intensity.\textsuperscript{39} Thus, from 2003-2008, Congress averaged nearly three times as many court-curbing bills (over 13 such bills every year) compared to the period from 1984-2002 (an average of about 4.5 per year).\textsuperscript{40} The spike in especially conservative critiques of courts in the early twenty-first century can be attributed, in part, to high-profile state and federal cases\textsuperscript{41} and the emergence of entrepreneurial leaders in Congress who targeted these decisions and the purportedly “activist” judges who wrote them.\textsuperscript{42}

We believe the broad historical background encompassed by these four points provides both parameters and rationale for our investigation of today’s congressional-judicial dynamics. Among other questions, we are interested in whether the uptick in conservative critiques of the judiciary in the 2000s has continued, faded, or evolved by taking on distinctive dynamics in a

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\item \textsuperscript{38} GEYH, \textit{When Courts and Congress Collide} supra note ___; DONALD G. MORGAN, \textit{Congress and the Constitution} (1966).
\item \textsuperscript{39} Id.
\item \textsuperscript{40} THE \textit{POLITICS OF JUDICIAL INDEPENDENCE}, \textit{supra} note ___ at 7.
\item \textsuperscript{42} See Bruce G. Peabody, \textit{Legislating from the Bench: A Definition and a Defense}, 11 LEWIS & CLARK L. REV. 185 (2007) (discussing “legislating from the bench” as a basis for criticizing judges).
\end{enumerate}
new political environment in which the Obama administration, the Tea Party, and voter dissatisfaction with the legislature are prominent features.

In order to probe these issues, we consider and analyze a unique data source, website commentary about courts from the 111th and 112th Congresses—with the latter including discussions both before and after the landmark health insurance cases of the 2011 term including National Federation of Independent Business v. Sebelius (NFIB v. Sebelius). We discuss our complete methodology in greater detail below, but for the moment, we simply note that we have chosen to focus on these two Congresses not out of a sense that they are representative in any special sense, but because they occur over a span in which the phenomena we are interested in (especially the rise of the Tea Party and the decline of popular support for the legislature), are salient. We explain our decision to scrutinize the 112th Congress twice—once in the winter of 2012 and again in the summer of 2012 (just after the conclusion of the Supreme Court’s term)—as an interest in gauging congressional attitudes during both a relatively “normal” phase as well as in the context of the extraordinary, if not historic, media coverage and popular attention generated by the legal challenge to president Obama’s health care reform.

The 111th Congress (in operation from January 2009 to January 2011) represented a period of “unified” governmental rule, viz., where both houses of Congress and the presidency were all of one party. While Democrats held power in both houses in the previous Congress (110th), these majorities increased with the 2008 election.43 The Tea Party Caucus received congressional approval in July of 2010,44 and the main Tea Party push for congressional

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43 As noted, the congressional sessions closely preceding the 110th Congress included a number of high profile standoffs between the judiciary and the conservatives in the national legislature, fueled by such issues as gay rights and the Goodridge case, the Newdow Pledge of Allegiance controversy, and the salient interbranch dispute about Terry Schiavo, among other matters. These causes were taken up by both party leaders and ideological interest groups in ways that were likely to make court-curbing an attractive issue for garnering votes and publicity in the years that immediately followed.

representation took place during the 2010 midterm elections when the balance of power in Congress changed, a shift many attributed to Tea Party efforts. The 112th Congress saw a return to divided government as Republicans in the House came to power and Democratic control of the Senate was maintained but weakened.

**GENERAL HYPOTHESES**

So far, we have laid out the scholarly and historical context of this article, and in so doing, provided at least initial rationale for the importance and relevance of our focus on recent congressional dialogue about courts. We next identify and defend a number of different hypotheses that flow from our core assumptions about important features of the past two Congresses that are likely to help explain lawmaker interest in the judiciary.

*Relative Institutional Support:* First, we speculate that when Congress is less supported by the public it is less likely to engage in institutional critiques of any kind, and especially towards the judiciary, which historically enjoys higher levels of at least “diffuse” support than either the executive or legislative branches.45 Thus, we contend, the 111th and 112th Congresses (subject to particularly low public approval ratings by the electorate) are less likely to engage in critiques of courts, especially institutional critiques (as opposed to criticisms targeted at individual decisions).

*Partisan Uncertainty:* Over the past four decades, the U.S. Congress has become increasingly internally polarized, perhaps reflecting greater party polarization in congressional

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districts and states. According to David Rohde, growing ideological homogeneity within the parties has contributed to rank and file members giving party leaders additional powers to advance their agenda, a development that has further exacerbated partisan divisions.

While we do not contend that this polarization has declined within Congress (or in the nation as a whole), we do speculate that the two major parties are in a period of greater uncertainty with respect to how their agendas map with the anticipated rulings of the courts. For decades, one could explain a great deal of congressional behavior towards the judiciary through the analytic framework of party polarization and the consequent ideological battles over prominent social, cultural, and rights disputes such as abortion, gun control, affirmative action (and race more generally), gay marriage, and the role of religion in public life.

But a number of factors have weakened these longstanding relationships between the two major parties and the courts. To begin with, conservatives have effectively developed and executed litigation and personnel placement strategies, preparing and then professionally advancing lawyers and judges to support their policy and jurisprudential goals. Some of these developments reflect (and have been reinforced by) Republicans’ successes in securing the White House (with Republicans in control for 28 out of the past 44 years—and every Republican president having nominated at least one Justice). In addition, the later years of the Rehnquist Court moving into the Roberts Court witnessed a number of high-profile defeats for liberals (and victories for conservatives). Taken together, these observations surface the possibility that we

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47 ROHDE supra note __.
48 MARK BREWER & JEFFERY STONECASH, DYNAMICS OF AMERICAN POLITICAL PARTIES (2008); Tom Clark, The Separation of Powers, supra note __.
may be at a moment when we can no longer assume either that the Democratic party will unflinchingly defend the judiciary, or that Republicans will instinctively lash out at U.S. courts.\textsuperscript{50}

As a consequence, we speculate that in the 111\textsuperscript{th} and 112\textsuperscript{th} Congresses we should find an increased interparty distribution of both rebuke and praise, with party no longer as reliable a predictor—of conservative lawmakers’ animus against judges or liberals’ instinctual support of judicial power. As a corollary to this, we suspect, secondly, that the behavior of congressional leaders will serve as an especially good indicator of this postulated unsettled partisan orientation to courts. As our third “partisan uncertainty” hypothesis, we contend that when we do find critiques (and support) of courts advanced by members of Congress, we expect them to be more individual, case, and issue-based. Miller and others have argued that in an era of greater ideological division, the judiciary was taken to task as an institution, and its broad powers questioned.\textsuperscript{51} In contrast, we contend that in today’s climate of greater uncertainty about whose bread the courts are buttering, while some individual decision critiques will persist, party driven attacks (and defenses of) the judiciary as a whole are likely to diminish, especially by traditional Republican critics.

\textit{Tea Party Effects:} Our third broad hypothesis flows from our assumption that the past two Congresses have been affected by the rise of the “Tea Party” and its particular policy and political emphases. At a most rudimentary level, we postulate that the considerable sway of the Tea Party since 2009 means that for both Republicans as a whole (and for self-designated congressional Tea Party supporters in particular), court decisions that favor, support, or expand government powers (especially national powers related to programs that are at least perceived as costly) will be the objects of criticism, while court decisions that limit, invalidate, or curb

\textsuperscript{50} Ryan Grim & Sam Stein, \textit{A New Love Affair: Republicans Rally to Defend Judges}, HUFFINGTON POST, Apr 5 2012 (http://www.huffingtonpost.com/2012/04/05/republicans-judges-supreme-court_n_1406580.html).

\textsuperscript{51} MILLER, supra note __.
national powers and programs will be the object of praise from these groups. We additionally predict that the Tea Party “effect” will diminish individual lawmakers’ (and the parties’) emphasis on civil rights, civil liberties, and so-called “culture war” issues as sources of either praise or criticism of courts.

*Judiciary Committee:* Mark Miller has argued that the House Judiciary Committee was once known as the “Committee of Lawyers,” with participants who emphasized substantive policy and tended to serve as “champion[s]” of the courts. ⁵² In more recent years, however (Miller identifies the period from 1995-2006), the committee has become an important platform for anti-court sentiment. As Miller puts it, “[t]oday, the attacks against the courts seem to be led by lawyer-legislators, especially—surprisingly—those who serve on the House Judiciary Committee” ⁵³

Consistent with some of these assumptions, we think it likely that, due to their policy interests in judicial matters, the websites of members on the House Judiciary Committee (HJC), are more likely than those of the “average” members of Congress to include comments, positive and negative, about courts. At the same time, we also hypothesize that the HJC is likely to have cooled as a crucible of court criticism because of what we have identified as greater party uncertainty over the judiciary’s status as an ideological and partisan ally. In other words, like the House as a whole, we expect to find a more heterogeneous mix of criticism and praise from HJC members as they consider recent judicial activity and attempt to position themselves relative to important present and future decisions. Finally, due to the presence of a number of Tea Party caucus participants on the House Judiciary Committee, we expect that court decisions negating or restricting government powers are likely to be a particular focus of the Committee’s members.

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⁵² Miller, *supra* note ___ at ___.  
⁵³ Id. at 134.
In our effort to plumb the extent and nature of recent congressional dialogue on courts, we considered all official “government” websites (identified by “house.gov” in their URL) of members of the House of Representatives in the 111th and 112th Congresses. As indicated previously, we chose these two Congresses as a practical starting point for analyzing recent legislative activity and for developing our unique data set. In addition, given our interest in “Tea Party” effects, these were the only two Congresses in which the contemporary Tea Party was active.

Our decision to focus on the U.S. House rather than the Senate carries some obvious benefits and drawbacks. On the one hand, given its role in judicial confirmation hearings, the U.S. Senate might seem to be especially useful for tracking important changes in lawmakers’ attitudes and perspectives towards the courts. On the other hand, the House’s two-year terms and smaller constituency size may yield a sharper and less lagging “signal” of contemporary attitudes towards courts than would the U.S. Senate. We note, for example, that many Senators in the 111th Congress would have been elected before the “Tea Party” came into effect—a dynamic not in play in the House. Moreover, as Miller has argued, the House seems to have been more of a site of contemporary critiques of courts, making it a more suitable target for analyzing whether these dynamics are now evolving.

We did not, therefore, scrutinize members’ campaign websites, usually identified with a .com suffix. In general, official government websites have more devoted staff and appear to be more specific and frequently updated than campaign websites. In other words, our assessment was that “government” websites would provide a more detailed and current signal of lawmakers attitudes to any number of issues, including courts and recent judicial decisions.

We recognize that our data set, while providing a useful and promising source for analyzing legislative-judicial relationships, will be even more profitable intellectually if we can develop it longitudinally. Therefore we intend to continue collecting information for subsequent Congresses (while conceding the difficulty, if not impossibility, of gathering data for Congresses before our starting point of 2010).

Miller, supra note __.
Setting aside these issues about choice of chamber, one might question why we have elected to look at website commentary on courts rather than other measures of congressional interest in (and possible hostility to) the judiciary. Tom Clark, for example, has examined the introduction of “court-curbing” bills by members of Congress, and argued that these initiatives serve as signals to the judiciary when it lacks public support. Clark reasons that court-curbing legislation can impact the judiciary “independent of any threat of enactment” because such legislation serves as a “credible signal” to the court of “waning judicial legitimacy.”

Commentaries about courts on member websites are, by contrast, somewhat diffuse and indirect, and often completely un-tethered to specific legislation or formal efforts to alter the Court’s roles and powers. In these ways, therefore, websites could seem to be rather poor signals for exploring court-Congress interactions.

We concede that member websites are not likely to be direct influences on the judiciary. But we are not convinced co-sponsorship of court-curbing bills is much more effectual in this regard. More to the point, we think websites are likely to serve as a valuable “catch-all” forums—picking up a range of lawmaker sentiments in a way that other measures (such as sponsorship of court-curbing bills) would not. If a member of Congress is sufficiently motivated to introduce or co-sponsor court-curbing legislation, we think it likely that this legislator would also introduce a comment or a corresponding press release on his or her governmental website for credit-claiming, advertising, or position-taking purposes.

Moreover, member websites are more autonomous, inclusive, and flexible than bill co-
sponsorship. A member considering supporting an existing bill (or introducing a new one) might worry about how a bill will be perceived in light of other co-sponsors, or how it will be amended through the legislative process—dangers not present in generating one’s own web content. Additionally, lawmakers can register (and rapidly amend) any range of reactions to courts and cases in the context of a website in a way that would be much more difficult with other legislative instruments.

As a result of these points, we believe member website statements are especially likely to include positive as well as negative commentary on courts, and case-specific statements as well as more general institutional and substantive commentary. In addition to these claims, we think member websites should be one of the more responsive conduits between individual lawmakers and the public. Thus, to the extent we are interested in how legislators attempt to both reflect and guide constituent opinion on courts we believe our units of analysis are well-chosen and compatible with the goals of this research project.

In any event, for our analysis of legislative commentary on courts, we consulted member websites for the 111th Congress during June of 2010 and member websites for the 112th during February and March of 2012, and then, subsequently, during July of 2012 (after the Supreme Court’s 2011 term had come to an end). Our second (July) examination of websites for the 112th Congress was focused solely on member comments and reactions since June 1, 2012—in an effort to capture responses to some of the high-profile cases handed down at the end of the term.

We used the same search process for both Congresses. As indicated, we visited every

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60 We also suspect co-sponsorship of court curbing measures, which only rarely leads to actual bill passage, may be a more specialized activity, directed at specific interest groups as opposed to constituents as a whole. See Bruce Peabody, Congress, the Court, and the “Service Constitution:” Article III Jurisdiction Controls as a Case Study of the Separation of Powers, 2006 Mich. St. L. Rev. 269 (2006) (discussing congressional strategies with respect to interest groups).
available official member website. Where member website search options or engines were provided, we used the broad, over-inclusive truncated search terms “court” and “jud”—prompts that would trigger mentions of such terms as “courts,” “court,” “Supreme Court,” “judiciary,” and “judges.” Complementing this search technique, we also examined “policy” and “news” portions of the websites which included issue statements and press releases. When using press releases on member websites, we searched for references to courts and judges for a year prior to the date of our visiting of the website.

After following these search parameters, we collected and tallied the number of positive and negative comments and recorded the nature and sources for these statements. We identified “positive” and “negative” following a list of evaluative terms (such as “oppose,” “disappointed,” and “disagree” for negative evaluations and “proud,” “pleased” or “victory” for positive assessments). Both authors served as data coders and we cross-checked a number of our results to promote inter-coder consistency.

Overall, for our study, we included references to both state and federal courts, to individual decisions, to lines of cases, to debates about judicial reform, and to comments about individual judges. We excluded references to linked articles, op-eds, interviews, and other media commentary and stories in which the individual member of Congress was identified but he or she was not the actual author of a particular statement or reference to courts, judges, or the judiciary. If a member repeatedly praised or criticized a particular decision or judge, each distinct mention

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61 We did not visit websites for the six non-voting congressional delegates in the 111th Congress, an oversight we addressed in our later 112th data sets.
62 Fewer than 20 lawmakers did not have an internal search engine on their website.
63 Most members have a section of their websites, linked on their homepage, which identifies their stances on substantive issue areas or legislation. In addition almost every member has a “press” or “news” section that provides press releases and other media statements about the member’s position on different issues or their legislative behavior.
64 Again, as noted, in our second search involving the 112th Congress, we only looked at the period from June 1, 2012 through late July 2012.
was counted as a respective criticism or praise unless these comments occurred within the same page, web entry, or press release.

**RESULTS: CONGRESSIONAL WEBSITES BEFORE NFIB v. SEBELIUS**

We note first that discussions of the judiciary on member websites are now fairly common and, apparently, growing in frequency. Thus, in the 111th Congress, 42% of the House websites had some reference to the judiciary or court decisions, a figure that grows to 64% two years later (during the winter of the 112th Congress) before surging to a striking 81% in the immediate aftermath of the Supreme Court’s 2011 term.\(^{65}\) For both Congresses (and before and after the Supreme Court’s term), Republicans made more overall comments (combining positive and negative) than Democrats. Thus, in the winter of 2012, Republicans in the 112th Congress offered 58% of all website comments on the courts; roughly five months later, just as the Supreme Court handed down a number of major decisions, the balance is more even, with Republicans representing only 53% of the total commentary on courts. Both figures contrast with the 111th Congress, where Republicans contributed 62% of all comments on the courts.

While lawmakers in the past two Congresses surely did not reference and discuss courts as frequently as major domestic policy concerns such as, say, the economy and “jobs creation,” the judiciary has hardly been a fringe issue over the past few years.

Table 1 offers a brief look at the descriptive statistics related to a basic comparison of the two Congresses.\(^{66}\) The table provides both the overall and average number of positive and negative comments made about courts and judicial rulings for all members of Congress we surveyed—with the table further breaking down these figures for several important subgroups.

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\(^{65}\) In the 112th Congress (examined during the winter of 2012) 35% of all member websites examined did not post anything about courts one way or the other.

\(^{66}\) For the moment, and in order to get a more “true” comparison of the two Congresses during “normal” political periods, we separate out our results from June and July 2012 when member commentary was so heavily focused on the important decisions handed down by the Supreme Court of the United States at the end of its 2011 term.
Thus, the second column in Table 1 indicates 489 as the total number of positive comments made by all members of the 112th Congress with 1.10 as the mean number of positive comments made by this group. In other words, after taking all of the 440 House websites we examined in January and February of 2012 and dividing by the total number of positive comments identified, we find an average of slightly over one positive comment per lawmaker. In contrast, when looking at the average number of positive comments made by House leaders, we see (at the bottom of the same column of Table 1) a figure of 2.2—meaning that this small but important subset of the House was saying favorable things about the judiciary at double the rate of the overall “rank and file” membership. These “average” figures provide at least a shorthand for gauging federal lawmakers’ reactions to the judiciary and court decisions in recent Congresses.

Several aspects of Table 1 stand out. First, we note that for both our current and immediate past Congress, Republican lawmakers offered substantially more positive comments about courts and judges than Democratic lawmakers.67 Moreover, while Republican lawmakers in the earlier Congress also offered more negative comments than their partisan opponents, by 2012 that pattern has reversed. In the 112th Congress, House Republicans made almost twice as many positive comments about courts as Democrats—while also making fewer than three-quarters as many negative comments as their colleagues on the other side of the ideological aisle. Based strictly on this admittedly incomplete data, one might conclude that today’s public champion of courts and court decisions is more likely to be a Republican than Democrat, at least in an important, public forum for communicating with constituents.

[Table 1 about here]

67 As we will discuss below, this Republican support for courts looks a bit different when we examine lawmakers’ websites following the health care decision and the Arizona immigration case. That said, however, we are not convinced that, on its own, this short-term reaction is indicative of the “true” sentiments of members of Congress towards the judiciary.
In Table 2, we see a further breakdown of lawmakers’ website commentary for the current (112th) Congress, at least before the dramatic Supreme Court rulings of the summer of 2012. House Judiciary Committee Republicans and Tea Party Caucus members stand out as the two groups most inclined to weigh in with supportive statements towards courts. At the same time, Judiciary Committee members of both parties were most likely to assess courts and court decisions adversely as well.

[Table 2 about here]

With respect to substantive emphases, the websites we considered tended to center on specific, salient decisions, with the odd reference to state or more obscure court decisions. For Republicans, the focus of such commentary was overwhelmingly on the challenges to health care (including critiques of judges supporting the legislation, praise for those invalidating or setting aside aspects of the bill, and support for the Supreme Court for granting certiorari in the case). As we discuss in further detail later in this article, website commentary at the end of the Supreme Court’s term was largely oriented around the NFIB v. Sebelius decision.

Republican websites also mentioned older civil liberties and government power court decisions such as Roe v. Wade, Kelo v. City of New London, D.C. v. Heller, and McDonald v. Chicago, and included references to state gay rights cases (generally related to same sex marriage). These cases, with the exception of the Heller and McDonald Second Amendment decisions, reflected a more traditional view of the relationship (hostility) between Republicans and the courts.

On the other hand, Democrats in the two Congresses we surveyed tended to train their substantive ire on the Citizens United v. FEC decision as well as lower court health care decisions (praising rulings substantiating the law, critiquing judges setting aside the law, and,
interestingly, joining their Republican colleagues in supporting the Supreme Court for agreeing to hear challenges to the Patient Protection and Affordable Care Act or PPACA). Other Democratic websites praised court decisions that gave the EPA greater authority, and those that allowed for expanded stem cell research funding. While GOP members were uniform in their disapproval of the PPACA and court rulings supporting the law, some Democrats broke with the rest of their party and supported challenges to the health care legislation.68

These various initial results confirm some of our hypotheses and cast others into doubt. Our assumption that lower public support for Congress might translate into greater deference from lawmakers is not generally substantiated. Lawmakers made more negative comments towards courts in 2012 than 2010, and even the 2010 results do not paint a picture of a legislature especially reticent to engage the judiciary. Our more recent data, showing that more than four out of five members of Congress commented on judicial issues at the end of the Supreme Court’s term further corroborates this picture of active engagement with judicial politics.

While it is true that Republicans (at least before the Sebelius decision) were more forthcoming with praise for courts in 2012 (when Congress’s dim public approval sank even lower), it seems strained to attribute this behavior to some kind of institutional fawning, especially given the abundance of critiques from both parties. One obvious explanation for these observed developments is that members of Congress don’t tend to think about (or act on) public opinion as it relates to their institution as a whole—they are, understandably, preoccupied instead with more local, and immediate constituent opinion related directly to their reelection fortunes.69

Stated somewhat differently, at least for individual-level behavior, Congress’s interbranch public

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68 Many of these are self-labeled as “Blue Dog” Democrats. See http://ross.house.gov/BlueDog/Members/
69 MAYHEW, supra note __.
relations “problem” seems to matter very little.\textsuperscript{70}

We find much greater support for our partisan instability thesis—our speculation that recent Congresses have seen some breakdown in the relationship between party and attitudes towards courts. As predicted, we see a greater diversity of praise and blame between the two parties. As noted, if anything, by the winter of 2012, the Republican Party is more closely associated with defending judicial rulings, judges, and judicial power than Democrats.

Furthermore, our supposition about party leaders—that they would be emblematic of their parties’ new and perhaps unsettled orientation towards courts was largely corroborated. In the 111\textsuperscript{th} Congress, Democratic leaders were much more likely to both praise and criticize courts and judges than Democrats generally—and Republican leaders reflected the same dynamic. Somewhat interestingly, by the 112\textsuperscript{th} Congress, just two years later, Democratic leaders show slightly less inclination to criticize the courts than their partisan colleagues. For the most part, then, House leaders reflected and perhaps exaggerated the sentiments of their respective parties.

In addition to these points, we predicted that lawmakers over the past two Congresses would show some movement away from institutional critiques (and praise) of courts to more individual case and personnel based commentary. As noted, our website analysis is consistent with this view. Member commentary on the courts is dominated by critiques and praise of particular decisions such as \textit{Roe} and \textit{Citizens United}. We did note several Republicans who invoked “judicial activism” as a general institutional failing, and a handful of Democrats decried the general (deleterious) influence of politics on court rulings.

As part of our hypothesized “Tea Party effect,” we contended that today’s Congresses

\textsuperscript{70} As Table 1 suggests, party leaders (for both parties) seem to be more likely to praise courts, especially in the 112\textsuperscript{th} Congress than their caucus party colleagues. Conceivably, this could reflect a strategy of institutional diplomacy that captures Congress’s low public approval. Alternatively, it may simply suggest that leaders are like their “rank and file” membership—only more so.
would be more likely to engage courts (positively and negatively) on government power issues as opposed to the civil liberties, civil rights, and even federalism issues that have been central to at least the Supreme Court’s docket in recent terms. As already suggested, the most discussed judicial issue in the 112th Congress included the debate over health care, especially for Republicans. As Table 3 reveals, health care clearly was an important driver of many legislators’ comments about courts in websites surveyed in the winter of 2012. Indeed, of all Republicans’ positive commentary about courts and judges, more than two out of five were directed at the health care debate—and, usually, lower court decisions invalidating portions of the PPACA and also praise of the Supreme Court for agreeing to hear the challenges to the law. If one removes Republican “health care” commentary on judges and courts from the 112th Congress, Republicans suddenly shift from offering more praise than critique (320 positive comments and 161 negative comments) to the reverse (138 positive and 152 negative).

[Table 3 about here]

For Democrats, on the other hand, the 2012 commentary on the judiciary remains slightly more negative than positive whether health care is included or not. Again, this may point both to Democratic reticence about contemporary courts (especially with respect to the PPACA), as well as their continuing (liberal) orientation to traditional civil liberties and rights issues—subjects on which the Court is no longer a steadfast ally.

We also note that our speculation about the role of the House Judiciary Committee seems to have been largely supported by our member website data. HJC members were both more likely to criticize and support court decisions, personnel, and the judiciary as a whole compared with rank and file House membership.

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72 See BAILEY & MALTZMAN, supra note ___ at ___.
RESULTS: CONGRESSIONAL WEBSITES FOLLOWING NFIB v. SEBELIUS AND THE END OF THE 2011 TERM

As already indicated, much commentary in the 112th Congress in the winter of 2012 was preoccupied with the question of how the judiciary would (and should) resolve various legal challenges to the PPACA—with many Democrats as well as Republicans projecting their hopes and fears about the Supreme Court’s pending decision. In order to ascertain better lawmaker attitudes towards courts, and to see whether a concrete decision would alter the prior expressed viewpoints of lawmakers, we followed up on our “snapshot” of the early 2012 Congress with a second look from June 1 through July 31, 2012—a period covering a number of weeks in which the Court issued decisions on major decisions. Most notably on June 28, 2012, the Court issued NFIB v. Sebelius, upholding the PPACA under Congress’s taxing power, while denying its authorization under the commerce clause, and limiting the law’s tools for expanding Medicaid coverage in the states.\(^73\) Three days earlier, the Court handed down Arizona v. U.S., in which it struck down three provisions of Arizona’s Senate Bill 1070, a law that defined new crimes (and gave state law enforcement new authority) with respect to illegal immigrants. At the same time, the Arizona decision left (at least temporarily) intact the law’s “papers please” provision which required police to determine the immigration status of anyone arrested or stopped if they had reasonable suspicion to believe their residency status was illegal.\(^74\)

In examining lawmaker commentary on these, and other cases handed down by the Supreme Court in 2012, our general methodology and coding followed our earlier efforts. At a surface level, our results, especially with respect to the health care decision, suggest Democratic satisfaction and Republican disappointment with some of the most important cases handed down

during the 2011 term. As Table 4 depicts, of the 247 positive comments on courts and the judiciary advanced by lawmakers at the end of the Supreme Court term, 207 (about 84%) came from Democrats. Conversely, Republicans made 96% of the 292 negative comments during this span from June to July of 2012. Not surprisingly, the Sebelius decision dominated lawmakers’ remarks; of all comments about the judiciary during this period, 81% related to the Court’s decision to uphold PPACA under the congressional taxing power, One might reasonably wonder, therefore, whether the Court’s actual 2012 decisions weaken some of our earlier conclusions, including our speculation that recent Congresses may be experiencing some disequilibrium in their partisan attitudes towards courts—that is, some destabilization in the historic patterns of Democratic support (and Republican skepticism towards) the judiciary.

[Table 4 about here]

On closer inspection, however, the post-Sebelius results may be less telling, and can even be reasonably construed as the proverbial exception that proves the rule. To begin with, if one removes health care and reaction to the Sebelius case as a stimulus for congressional comments (admittedly a big “if” given the prominence of “Obamacare” related discussions on websites), we find a much more mixed and ambiguous record of reactions, more in accord with our prior observations. Thus, on all court-related remarks that did not have to do with health care or the Arizona immigration decision, Democrats offered more negative remarks (30) than positive remarks (26). In a similar vein, on the Arizona decision, we found more supportive comments coming from Republicans (15) than Democrats (10), with an additional 26 Democrats and 8 Republicans expressing “mixed” views on the decision—viz., expressing both praise and concern for the immigration ruling. In other words, setting aside reaction to the health care decision, by the end of the Supreme Court’s 2012 term we have returned to a picture of partisan
ambiguity and foment with respect to the judiciary. If anything, one can make a plausible case that Democrats, in this environment, are more skeptical about judicial power, with a good number of lawmakers decrying the results in Arizona and otherwise taking issue with Court decisions such as the *Bullock* decision, setting aside the state of Montana’s efforts to limit corporate campaign expenditures.\(^75\)

Perhaps even more revealing is the conversation about the PPACA ruling itself. The aggregate numbers—indicating widespread GOP disapproval of the *Sebelius* decision and Democratic lauding of the same—are a bit misleading. A finer grained analysis of lawmakers’ commentary points to a wider range of views, and greater continuum of reactions with respect to the health care decision. A sizable minority of Republicans offered broad condemnations of the Court’s health care decision, decrying the “precedent” set by the Court and the impact of the decision on American citizens.\(^76\) But many other critics were more tempered, expressing their “disappointment” with the ruling and indicating that it made them “unhappy,” but then quickly passing on to focus on the law as “bad” policy, and training blame on President Obama rather than the Court. Take, for example, the remarks of Representative Steve Stivers (a Republican from Ohio) who made the following statement in a press release issued on the date of the *Sebelius* decision:

> The U.S. Supreme Court’s decision to uphold the President’s health care law is a disappointment. The health care law is a huge burden that has hurt our economy by driving up costs and making it less likely that businesses will hire new employees, as well as placing a crushing financial burden onto future generations. We need to fully repeal this law and move forward with a deliberate, thoughtful approach that reduces the cost of

\(^{75}\) 567 U.S. __ (2012).

\(^{76}\) See, for example, the website of Congressman Walter Jones (North Carolina’s Third Congressional District) who identified the *Sebelius* decision as a ruling that “decreed that the federal government can use the power of taxation to force Americans to do whatever it wants…This should be a wake-up call for Americans. Their freedoms are rapidly being stripped away by an increasingly socialist government. We are headed down a dangerous path, and the only hope for reversing this course is through the ballot box in November.”
Still other Republicans, who expressed disapproval with *NFIB v. Sebelius*, were even more cautious, at times going out of their way to express support for the Court even while expressing disappointment with the ruling. Rep. Pete Olson (a Republican from the 22nd district of Texas) offered the following mixed judgment in a press release issued on his website:

I am carefully reviewing this decision in its entirety, and I encourage all to do so as well. The Court seems to have rightly ruled that the individual mandate is not constitutional under the Commerce Clause of the Constitution. The Court confirmed what Republicans have said from the beginning, that this is a tax...I look forward to voting—once again—in the House of Representatives to repeal it, and ObamaCare in its entirety...The Supreme Court, which has the responsibility of interpreting the law, found this overreach acceptable as a tax. While I do not agree, I respect its authority to make this interpretation.

Indeed, over a dozen Republican lawmakers expressed their simultaneous unhappiness with the ruling, while also indicating their “respect” and support for the Court and its role in addressing constitutional disputes. The somewhat mixed and adumbrated statements of many GOP lawmakers is also reflected in their House leadership: remarkably, Speaker of the House John Boehner made no website comments on the PPACA, and while Majority Leader Eric Cantor called the Court decision “a crushing blow to patients,” Conference Chairman Jeb Hensarling stated that while he was “extremely disappointed” with the *Sebelius* ruling, “I respect the Court’s ruling.”

Members of the congressional Tea Party Caucus were, not surprisingly, much more consistently and strongly negative in their assessments of the Court’s 2012 health care decision. Almost every member of the Caucus made a negative remark about the decision, sometimes in stark and sweeping terms.

On the other side of the aisle, qualitative reaction to the *Sebelius* decision seems to be

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77 See also the press release of Rep. Cynthia Lummus, who opposed the “unfortunate court decision” but also identified it as “far from the final word on Obamacare.”
more uniform—most Democratic lawmakers stated how “pleased” they were with the decision and many “applauded” the Court’s upholding of the health insurance expansion, calling it a “victory.” But again, this widespread praise should be placed in the wider context of considerable Democratic and liberal displeasure with other rulings—with a number of lawmakers stating their opposition to the Court’s Arizona decision (citing the “devastating consequences” of the “show me your papers” provision) and chiding the Court for upholding Citizens United in the Montana campaign finance decision.

**DISCUSSION AND FUTURE RESEARCH**

Our conclusions, based on website commentary from two recent Congresses, are necessarily preliminary and contingent. We do not know if we have identified anomalous phenomena or if we are registering activity in Congress that is limited to a historical moment—in part due to the current power of the Tea Party movement, or the recent fervor over the health care debate.

At the same time, we are fairly confident that, at least for the short term, something notable has changed in how many lawmakers are talking about courts. As our results indicate, more and more lawmakers are referencing courts on their websites—with as many as four out of five members of the House of Representatives weighing in, either positively or negatively, during our current Congress. Moreover, in contrast with what has been the prevailing general image over at least the past few decades (a picture of Republican skepticism towards courts and, generally speaking, Democratic defense of judicial prerogatives), our more recent snapshot suggests a more complex and evolving milieu. Over the past two Congresses, Republicans and conservatives have often been outspoken defenders of state and federal court decisions, while

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Democrats and liberals have voiced skepticism and dissatisfaction.

Again, these and our other observations invite inquiry into whether what we have observed represent short-term developments with perhaps little enduring significance or point instead to deeper transition. Stated somewhat differently, are the 111th and 112th Congresses more like funhouse mirrors, temporarily distorting our perceptions of court-Congress relations, or canaries in the coal mine, leading indicators of forthcoming, vital change?

One might believe that the long shadow cast by ongoing health care litigation corroborates the “anomaly” thesis. This is likely to be especially true for the 112th Congress, since the Supreme Court’s granting certiorari in *NFIB v. Sebelius* in the late fall of 2011 dramatically raised attention on the issue. Now that the Supreme Court of the United States has upheld the PPACA, are we likely to experience a Republican “backlash”79 and the undoing of the previously observed conservative “good will” towards the judiciary? Will *Sebelius* uncork a bottle of venom and return us to the *status quo ante* (or perhaps a state of even greater Republican hostility)?

Stated slightly differently, based on the array of findings presented in this article, one might conclude that the behavior of recent Congresses has been a relatively superficial posturing reflecting lawmakers’ hopes (and fears) about how the judiciary will resolve the status of the Obama administration’s signature legislation, rather than representing a fundamental statement about (and realignment of) lawmakers’ attitudes towards courts and judicial power.

While we concede there is some power to this skeptical view—the Obama health care legislation and its status vis-à-vis the U.S. courts was clearly an important issue for many lawmakers—we believe this perspective should not be extended too far. To begin with, conversation about courts was fairly robust in the 111th Congress when the legal fate of the

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79 *See* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 8 (Jack Citrin et al. eds., 2008).
PPACA was still emerging as an issue. Moreover, even in the 112th, Republicans are clearly interested in both praising and critiquing the judiciary on other issues besides health care, and Democrats seem to have little appetite for critiquing court decisions inhospitable to the ACA. In addition, as noted in our previous discussion, the seemingly dramatic and cohesive Republican opposition to Sebelius may be less than meets the eye when one appreciates the considerable range and nuance of actual lawmaker commentary about the decision and the Court’s role.

Finally, we think many previous transformations in Congress’s attitudes towards courts probably are facilitated by important, high-profile cases. As many commentators noted, the last time the Supreme Court conducted oral argument as lengthy as that experienced during the ACA debate was during oral argument for *Miranda v. Arizona*, a case that attracted a great deal of public and congressional commentary, and criticism. Observing that many (Republican) members of Congress are linking their praise of courts with their attitudes towards health care could still signal or bring with it a broader shift in legislative-judicial relations. And despite the instant sense that *NFIB v. Sebelius* was a clear judicial victory for Democrats and the Obama administration, the ruling’s rejection of the commerce clause as a source of authority and its limitations on Congress’s spending power are both factors that leave the case’s legacy somewhat ambiguous. Even after the decision, partisans of a variety of stripes have continued reasons for experiencing anxiety as well as hope when thinking about the Court as an ideological and policy partner.

We don’t yet know whether we are at a seminal moment for redefining the interplay of party and congressional attitudes towards courts. The data from 2010 and 2012 is teasingly suggestive, but it could, ultimately, be nothing more. Still, given both the evidence at hand and
the general rightward shift of courts since the 1980s\textsuperscript{80} (a shift that would seem to weaken historical perceptions of the courts as trenchant Democratic allies), it seems reasonable to pursue the question further: Are we in the first stages of a new political environment in which the judiciary’s support by key Democratic allies may be coming to an end, and in which we will find a new surge of Republican support?

The banal but honest response is that more research is needed to answer this question. One set of queries future scholars might explore involves drilling down further on what sorts of lawmakers are more and less inclined to praise and critique courts in the twenty first century. Is ideology a more helpful correlate for understanding court commentary than party? How about the partisanship (or competitiveness) in a member’s district? Are lawmakers who receive more campaign funding from (and perhaps pay more attention to) interest groups motivated by court issues more likely to use website commentary about courts as strategic fodder?\textsuperscript{81} These questions could be answered, in part, with complementary qualitative research as well as district level analyses of the relationships between website comments and a range of potentially revealing political and demographic information.

Our study treats U.S. courts as largely fungible. In other words, we aggregate a lawmakers’ criticism of \textit{Roe v. Wade} with another’s claim that state judges are being corrupted by today’s judicial elections process. It certainly bears investigation whether this conflation is too crude. Do (certain?) lawmakers’ regularly distinguish (and make different evaluations of) state and federal decisions and judges? Given the recent history of court critiques—in which members of Congress have, for example, simultaneously attacked state court decisions and called for regulations or curbs on \textit{federal} judges—we think it is plausible that courts are unrealistically

\textsuperscript{80} BAILEY & MALTZMAN supra note __.

\textsuperscript{81} As a related inquiry, future work might profitably investigate the interaction between lawmaker websites and prominent interest groups both supportive of and opposed to judicial powers, personnel, and decisions.
amalgamated in many legislators’ eyes. But the case needs to be made and demonstrated more systematically, and further scrutiny of member websites could help in this regard.

As indicated previously, commentary on the websites of members of Congress is not the only mechanism through which lawmakers register their (dis)pleasure with the judicial branch. Scholars have noted myriad ways in which lawmakers can communicate important information to courts, the public, the executive branch, and others. Do published website remarks differ in important respects from these other instruments? Given the personal, informal, and “unofficial” nature of these sites—as well as the ease with which they are modified—it seems reasonable to posit that they carry their own special dynamics; they may, for example, be more responsive reflections of members’ views than, say, court-curbing bills, “Dear colleague” letters, or other more formal forms of communications. But, again, this subject requires additional work.

CONCLUSION

Broadly speaking, we think the project pursued in this article, and the broader research agenda we have just sketched, can contribute importantly to three major fields beyond our immediate aspirations and focus. First, we note that a copious literature has emerged exploring the interaction between elected officials (including members of Congress) and the courts as a way of comprehending both how law and policy are fashioned and the overall determinants of judicial and legislative behavior. We believe the preliminary research presented here can help leverage a relatively neglected aspect of this important discussion: how are courts, and even

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82 THE POLITICS OF JUDICIAL INDEPENDENCE, supra note __.
83 Tom Clark, The Separation of Powers, supra note __; FISHER, supra note __; GEYH supra note __, MILLER supra note; PICKERILL supra note __.
individual judges, “branded” and “sold” as political commodities, especially in the context of relatively new, salient, and public forums?

Second, our study has a number of implications for scholars engaging various questions about judicial independence, and courts’ capacity to exercise their historic powers (and see their judgments enforced), especially in inhospitable political climates. Commenting upon recent critiques of courts, both scholars and political figures have concluded that a central purpose of these attacks is to delegitimize courts and “reflect the view of judges as policy agents.”

Our study suggests that while some of this strategic undermining is still in play, for a group of lawmakers it has become (temporarily at least) expedient to refrain from eliding judicial authority and credentials— and in some cases legislators are actively bolstering court powers and autonomy. In general then, this article is pertinent to scholars interested in questions of court legitimacy and public perceptions of the Court, as well as the circumstances under which the ordinary citizens, including those opposed to important Court decisions, will still abide by the Court’s rulings and support its institutional prerogatives.

Third, and perhaps least obvious, we think this project can contribute to understanding better the politics of judicial reform. Over the past few decades, a number of pundits, academicians, and political figures (often of diverse ideological backgrounds) have proposed various mechanisms and ideas for altering (and supposedly improving) American courts.

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85 MILLER, supra note __.
86 See Jeffrey Rosen, The Supreme Court has a Legitimacy Crisis, But Not for the Reason You Think, THE NEW REPUBLIC, June 11, 2012 (discussing the criteria through which Americans evaluate the Court).
87 SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006); LARRY SABATO, A MORE PERFECT CONSTITUTION: 23 PROPOSALS TO REVITALIZE OUR CONSTITUTION AND MAKE AMERICA A FAIRER COUNTRY (2007); Richard Brust, Supreme Court 2.0, ABA JOURNAL (2008) (providing an overview of recent judicial reform proposals); Tony Mauro, Profs Pitch Plan for Limits on Supreme Court Service, LEGAL TIMES, Jan. 3, 2005, at 1 (outlining a proposal to limit life tenure of Supreme Court justices); Bruce Peabody, ‘Supreme Court TV’: Televising the Least Accountable Branch? 33 J. Leg. 144 (2007) (discussing the constitutionality of a proposal to require the Supreme Court to televise its open sessions).
study does not address the substance of any of these proposals. But it does offer some hope for better understanding whether we are at a moment when longstanding conservative critics of courts might ally with increasingly dubious liberals to enact “hedge your bets” changes to an American judicial system that suddenly appears—to both parties and a range of other groups—to be in play as a policy force and ideological ally.

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88 We can imagine at least four central strategies adopted by lawmakers who praise courts, court decisions, and judges. First, these effort may be part of a short-term affiliation strategy. In this view, members of Congress identify, say, court decisions they support to take positions for constituents, especially in an area of politics where an individual member’s influence is attenuated and indirect. Second, lawmaker statements might be part of a communication and signaling strategy, especially directed at either courts themselves or relevant interest groups. Third, members of Congress might “talk up” courts to bolster judicial independence, out of a recognition that lawmakers’ political fortunes can change and, therefore, it can be beneficial to bolster an ideologically like-minded court or judge into an uncertain future (Ginsburg 2003; Hartley Finally, and related, legislators might support courts out of a belief that they can assist with trenchant, cross-cutting issues that threaten to divide and destabilize a partisan coalition and the claims to rule of superintending elites. See Graber, The Non-Majoritarian Problem, supra note __.
Source: Unpublished data set (Tom Clark, Emory University)
### Table 1: Summary Descriptive Statistics: Rank and File House Member (111th-112th Congresses) Comments on the Judiciary and Judges

<table>
<thead>
<tr>
<th>Category</th>
<th>Positive comment average/member</th>
<th>Negative comment average/member</th>
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<tr>
<td></td>
<td>111th</td>
<td>112th</td>
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<tr>
<td>House: Rank and File Membership**</td>
<td>.42 (N=183)</td>
<td>1.10 (n=489)</td>
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<td></td>
<td></td>
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<tr>
<td>House Democrats</td>
<td>.33 (n=183)</td>
<td>.86 (n=171)</td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>House Republicans</td>
<td>.69 (n=178)</td>
<td>1.32 (n=320)</td>
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<td></td>
<td></td>
<td></td>
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<tr>
<td>House Leadership: Democrats</td>
<td>.8 (n=4)</td>
<td>1.5 (n=6)</td>
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<td></td>
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<tr>
<td>House Leadership: Republicans</td>
<td>1.5 (n=6)</td>
<td>2.2 (n=11)</td>
</tr>
</tbody>
</table>

*Data for the 112th Congress in this Table are derived from member websites published in January and February of 2012.

**For the 112th Congress, total includes delegates without full floor voting power.

***The two figures separated by a slash represent numbers for the 111th and 112th Congresses respectively.
Table 2: Summary Descriptive Statistics: House Member (112th Congress)  
Comments on the Judiciary and Judges

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<th>Category</th>
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<th>Negative comment average/member</th>
</tr>
</thead>
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<td>n=440</td>
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<td>*includes delegates from</td>
<td></td>
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<tr>
<td>House Democrats</td>
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<td>.91</td>
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<td>n=198</td>
<td>n=171</td>
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<td>n=242</td>
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<td>n=161</td>
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<tr>
<td>Judicial Committee membership</td>
<td>2.15</td>
<td>1.79</td>
</tr>
<tr>
<td>n=39</td>
<td>n=84</td>
<td>n=70</td>
</tr>
<tr>
<td>Judiciary Democrats</td>
<td>1.25</td>
<td>1.43</td>
</tr>
<tr>
<td>n=16</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judiciary Republicans</td>
<td>2.7</td>
<td>2.04</td>
</tr>
<tr>
<td>n=23</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tea Party Caucus membership</td>
<td>1.92</td>
<td>1.08</td>
</tr>
<tr>
<td>n=60</td>
<td>n=115</td>
<td>n=65</td>
</tr>
</tbody>
</table>

*Data in this Table are derived from member websites published in January and February of 2012.*
Table 3: Summary Descriptive Statistics: House Member (112th Congress) Comments on Health Care and Other Areas

<table>
<thead>
<tr>
<th>Category</th>
<th>Positive comment average/member</th>
<th>Negative comment average/member</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Overall</td>
<td>Health Care</td>
</tr>
<tr>
<td>House: Rank and File Membership*</td>
<td></td>
<td></td>
</tr>
<tr>
<td>n=440</td>
<td>1.10</td>
<td>.47</td>
</tr>
<tr>
<td></td>
<td>n=489</td>
<td>n=201</td>
</tr>
<tr>
<td>House Democrats</td>
<td>.86</td>
<td>.10</td>
</tr>
<tr>
<td>n=198</td>
<td>n=171</td>
<td>n=19</td>
</tr>
<tr>
<td>House Republicans</td>
<td>1.32</td>
<td>.75</td>
</tr>
<tr>
<td>n=242</td>
<td>n=320</td>
<td>n=182</td>
</tr>
<tr>
<td>House Tea Party Caucus</td>
<td>1.92</td>
<td>1.05</td>
</tr>
<tr>
<td>n=60</td>
<td>n=115</td>
<td>n=63</td>
</tr>
</tbody>
</table>

*For the 112th Congress, total includes delegates without full floor voting power.
### Table 4: Summary Descriptive Statistics: House Member (112th Congress) Post-Sebelius Comments on Health Care and Other Areas

<table>
<thead>
<tr>
<th>Category</th>
<th>Positive comment average/member</th>
<th>Negative comment average/member</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Overall Positive</td>
<td>Health Care/Sebelius</td>
</tr>
<tr>
<td>House: Rank and File Membership*</td>
<td>.56 n=247</td>
<td>.43 n=190</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>House Democrats</td>
<td>1.04 n=207</td>
<td>.86 n=171</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>House Republicans</td>
<td>.17 n=40</td>
<td>.08 n=19</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>House Tea Party Caucus</td>
<td>.18 n=11</td>
<td>.08 n=5</td>
</tr>
</tbody>
</table>

*For the 112th Congress, total includes delegates without full floor voting power

**Figure does not include 34 “mixed” comments on the Arizona immigration decisions