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The State of the Union Is a Presidential Pep Rally

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INTRODUCTION

Some people were not very happy with President Barack Obama’s criticism of the U.S. Supreme Court in his 2010 State of the Union Address. Famously, Justice Samuel Alito was among those who took exception to the substance of the President’s remarks.¹ The disagreements over the substantive merits of the *Citizens United* case,² campaign finance, and whether that particular Supreme Court decision would indeed “open the floodgates for special interests—including foreign corporations—to spend without limits in our elections” are, of course, interesting and important.³ But the mere fact that President Obama chose to criticize the Court, and did so in the State of the Union address, seemed remarkable to some. Chief Justice John Roberts questioned whether the “setting, the circumstances and the decorum” of the State of the Union address made it an appropriate venue for criticizing the work of the Court.⁴ He was not alone.⁵

Criticisms of the form of President Obama’s remarks have tended to focus on the idea that presidential condemnations of the Court were “demean[ing]” or “insult[ing]” to the institution or the Justices or particularly inappropriate to

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1. Justice Alito, who was sitting in the audience in the chamber of the House of Representatives, was caught by television cameras mouthing “not true” in reaction to President Obama’s characterization of the *Citizens United* decision.
2. 130 S. Ct. 876 (2010).
3. President Barack H. Obama, Address Before a Joint Session of Congress on the State of the Union (Jan. 27, 2010).
4. Robert Barnes & Anne E. Kornblut, *Obama vs. Supreme Court, Round 2*, WASH. POST, Mar. 11, 2010, at A01.
5. See, e.g., Douglas E. Edlin, “It’s Not What You Said, It’s How You Said It”: Criticizing the Supreme Court in the State of the Union, 28 YALE L. & POL’Y REV. INTER ALIA 27 (2010).

the State of the Union address, even if acceptable in other contexts.⁶ Part of the ire seems to be driven by the particular setting of the State of the Union address. Randy Barnett, for example, painted the picture of the President “call[ing] out the Supreme Court by name, and egg[ing] on Congress to jeer” as the Justices sit “politely before him surrounded by hundreds [of] Congressmen.”⁷ Chief Justice Roberts seemed to agree, complaining that the members of Congress were “literally surrounding the Supreme Court, cheering and hollering, while the court—according to the requirements of protocol—has to sit there expressionless.”⁸ The State of the Union had “degenerated into a political pep rally.”⁹

In this Essay, I put the President’s remarks in a broader context in order to consider how unusual presidential criticism of the judiciary might be, in what contexts Presidents criticize the courts, and what the purpose of the State of the Union address is in the modern political and constitutional system. Presidents criticize the federal judiciary. They do so in a variety of settings, depending on what audience they hope to reach and what political goal they hope to accomplish. What truly distinguishes the State of the Union address from other contexts in which the President speaks is the mass audience and high salience of the event. If the Justices did not believe that the State of the Union addresses served as a presidential pep rally, then they have not been paying attention.

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6. Bob Barr, *Obama Insults Supreme Court with Uncivil Remarks*, The Barr Code, <http://blogs.ajc.com/bob-barr-blog/2010/01/28/obama-insults-supreme-court-with-uncivil-remarks/> (Jan. 28, 2010, 14:22 EST); see also Posting of Jordan Fabian to Blog Briefing Room, <http://thehill.com/blogs/blog-briefing-room/news/78529-hatch-obamas-jab-at-supreme-court-rude/> (Jan. 28, 2010, 12:50 EST) (quoting Sen. Orrin Hatch: “Taking on the Supreme Court like [President Obama] did, I thought it was kind of rude.”); Ashby Jones, *On Obama v. Alito, Who’s Right? Here’s Your Answer*, Law Blog, <http://blogs.wsj.com/law/2010/01/29/on-obama-v-alito-whos-right-heres-your-answer/> (Jan. 20, 2010, 10:17 EST).
 7. Randy Barnett, *State of the Union: How Did He Do?*, POLITICO, Jan. 27, 2010, http://www.politico.com/arena/perm/Randy_Barnett_79413362-DD20-46A2-A092-Do579CC7D13F.html.
 8. Barnes & Kornblut, *supra* note 4.
 9. *Id.*; see also Adam Liptak, *A Justice Responds to Criticism from Obama*, N.Y. TIMES, Feb. 4, 2010, at A17. (quoting Justice Clarence Thomas: “I don’t go because it has become so partisan and it’s very uncomfortable for a judge to sit there.”); Michael Smerconish, Op-Ed., *Reagan Deft in Dealing with Court*, PHIL. DAILY NEWS, Feb. 2, 2010, available at http://www.philly.com/philly/opinion/20100202_Michael_Smerconish_Reagan_defter_in_dealing_with_court.html (suggesting that President Reagan criticized judicial decisions in the State of the Union more effectively by avoiding direct reference to the Court).

I. CRITICIZING THE COURTS IN THE STATE OF THE UNION

Presidents have criticized the Supreme Court, judges, and judicial decisions in State of the Union addresses prior to 2010. Such criticisms are not especially common, but neither are they unprecedented. The examples are fairly widely spread across the nineteenth century but become more common since the turn of the twentieth century. Only three of the first twenty-two Presidents, or fourteen percent made critical remarks in their annual message to Congress.¹⁰ Of the next nineteen Presidents, six have been critical of the courts, or thirty-two percent.¹¹ Some Presidents are more direct than others. Some Presidents are harsher than others. But scoring points against judges and taking note of objectionable or problematic judicial decisions has become a recurrent feature of modern State of the Union addresses.

Three nineteenth-century Presidents raised objections to the Court in annual messages to Congress. In each case, the criticism of the Court was indirect. The President focused his objections on a decision that the Court had rendered and what Congress might do to remedy the situation. President Martin Van Buren was perhaps the first to raise criticisms of the Court in an annual message to Congress in 1838. He objected to the Court's decision in *Kendall v. United States ex rel. Stokes*,¹² which had provoked a dissent from three of the Jacksonian justices: Taney, Barbour, and Catron. The Court upheld a writ of mandamus against the Postmaster-General to credit a payment against the government. Van Buren was quite indirect in his critique of the decision. The Administration had strongly opposed the power of the courts to issue the writ, but in his message Van Buren merely observed that "certain proceedings of law . . . have resulted in the payment of money out of the National Treasury, for the first time since the establishment of the Government, by judicial compulsion exercised by the common-law writ of mandamus."¹³ The president went on to reassure his audience that "[n]o interference in the particular case is contemplated."¹⁴ Instead, he called on Congress to pass legislation to strip the Circuit Court of the District of Columbia of the power to issue such writs in the

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10. William McKinley was the twenty-second individual to deliver annual messages to Congress, and he delivered his last in 1900. The three critical messages were delivered by Martin Van Buren, Ulysses S. Grant, and Chester Arthur. The texts of the State of the Union messages can be found at The American Presidency Project, State of the Union Addresses of the Presidents of the United States, <http://www.presidency.ucsb.edu/sou.php> (last visited June 22, 2010).
 11. The nine critical messages since 1900 were delivered by Theodore Roosevelt, Franklin D. Roosevelt, Jimmy Carter, Ronald Reagan, George W. Bush, and Barack Obama.
 12. 37 U.S. (12 Pet.) 524 (1838).
 13. President Martin Van Buren, Second Annual Message (Dec. 3, 1838).
 14. *Id.*

future.¹⁵ In 1873, Ulysses S. Grant informed Congress that “[a]ffairs in Utah require your early and special attention” as a result of the Court’s decision holding that neither the U.S. marshal nor the territorial marshal was properly constituted to summon jurors for the territorial district courts.¹⁶ Grant complained that “[a]ll proceedings at law are practically abolished by these decisions Property is left without protection by the courts, and crimes go unpunished.”¹⁷ Congressional intervention was necessary to prevent the “anarchy” created by the Supreme Court’s decision.¹⁸ Chester Arthur was both more circumspect and more eloquent a decade later. He concluded his Third Annual Message thus:

The fourteenth amendment of the Constitution confers the rights of citizenship upon all persons born or naturalized in the United States and subject to the jurisdiction thereof. It was the special purpose of this amendment to insure to members of the colored race the full enjoyment of civil and political rights. Certain statutory provisions intended to secure the enforcement of those rights have been recently declared unconstitutional by the Supreme Court.

Any legislation whereby Congress may lawfully supplement the guaranties which the Constitution affords for the equal enjoyment by all the citizens of the United States of every right, privilege, and immunity of citizenship will receive my unhesitating approval.¹⁹

The Court had just decided the *Civil Rights Cases* striking down the Civil Rights Act of 1875 a few weeks before.²⁰ Congress did not answer Arthur’s call to respond to the Court and reinforce the “special purpose” of the Fourteenth Amendment.

In each case in the nineteenth century, Presidents focused their attention on the decision that the Court had rendered and the need for a congressional response. These remarks were all more or less critical of what the Court had done, but the criticisms were relatively oblique. The Justices themselves were not objects of criticism. The preferred response was relatively tempered. Presidents call for “lawful[] supplement[s]” to the existing web of law that would work within the contours of the Court’s decision, not defiance or interference.²¹

15. *Id.*

16. *Clinton v. Englebrecht*, 80 U.S. (13 Wall.) 434 (1871).

17. President Ulysses S. Grant, First Annual Message (Dec. 1, 1873).

18. *Id.*

19. President Chester A. Arthur, Third Annual Message (Dec. 4, 1883).

20. 109 U.S. 3 (1883).

21. This is consistent with what Donald Morgan and Bruce Peabody have called “deferential constitutionalists.” See DONALD G. MORGAN, *CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY* (1966); Bruce G. Peabody,

Nine twentieth-century presidents have been critical of the courts in State of the Union addresses. Theodore Roosevelt included more criticisms of the courts in his annual messages than all the presidents of the nineteenth century combined. Roosevelt included several mentions of court decisions in his fifth annual message in 1905. Even when he was critical of what the courts had done, he was relatively restrained in his rhetoric, though he spoke clearly and at some length on his views. The most relevant point related to the regulation of corporations by the states and federal government. Roosevelt led his message with this issue. Unlike earlier Presidents, he began with a constructive claim, arguing that the “makers of our National Constitution” had in fact provided the powers necessary for the government to act.²² Moreover, experience had shown that state action was inadequate to the task. It was only after laying this foundation that Roosevelt took note of the “very unfortunate condition of things” in which interstate businesses could “occupy the position of subjects without a sovereign.”²³ “[T]he courts” were at least partly responsible for this situation, and the President urged legislation “resolutely persevered in” and, if necessary, constitutional amendment “to assert the sovereignty of the National Government.”²⁴ The entire discourse was pitched as a response to those who doubted federal authority to engage in more robust regulatory action. The courts had been among those who had disagreed with Roosevelt’s constitutional argument, but Roosevelt did not believe that this difference should deter legislators from moving forward on his agenda. The next year, Roosevelt likewise ranged over a number of judicial decisions, and his message again featured an early criticism of the courts. In this case, he focused his sights on the “absurdity” of allowing a “single district judge” to affect regulatory policy, as had occurred in “a recent decision,” without an adequate right of appeal.²⁵ He followed this up with a call to curtail the injunction power. “[F]lagrant wrongs [had been] committed by judges in connection with labor disputes,” and “by their unwise action” they were inviting a popular backlash.²⁶ The judges needed to learn to accept “[j]ust and temperate criticism,” or the alternative was likely to be worse.²⁷

Congressional Attitudes Toward Constitutional Interpretation, in CONGRESS AND THE CONSTITUTION 39 (Neal Devins & Keith E. Whittington eds., 2005).

22. President Theodore Roosevelt, Fifth Annual Message (Dec. 5, 1905).

23. *Id.*

24. *Id.*

25. President Theodore Roosevelt, Sixth Annual Message (Dec. 3, 1906).

26. *Id.*

27. *Id.* Roosevelt was somewhat delicate in his handling of the problem of the income and inheritance tax. Without criticizing the Court’s earlier decision in the *Income Tax Cases*, the President suggested that the Court might be ready to distinguish or overturn those decisions if Congress proceeded carefully. President Theodore Roosevelt, Seventh Annual Message (Dec. 3, 1907).

In 1907, Roosevelt pointedly observed that “unless the courts will themselves deal with [the injunction issue] in an effective manner, it is certain ultimately to demand some form of legislative action.”²⁸ But the matter of “the tyrannical use” of the injunction power could wait since the Supreme Court was about to rule on the issue.²⁹ Roosevelt did not launch sustained attacks on the courts in his annual messages. His messages included criticism, praise, and neutral comment, and they ranged widely over numerous judicial decisions and issues that explicitly involved the courts. Unlike earlier Presidents, however, Roosevelt did not hesitate to criticize individual judges fairly directly and at some length. Moreover, those substantive criticisms were integrated into central features of Roosevelt’s policy and political program on matters relating to antitrust and labor relations, and they included not only calls for Congress to adopt appropriate legislation to remedy recent judicial decisions, but also implicit and explicit advice to the courts about how they ought to exercise their own powers.

The political and rhetorical significance of Roosevelt’s criticism of the Court can be seen in part by comparing it to the discussion of the Court by two of his Republican successors. Warren G. Harding had previously trumpeted Republican support of child labor laws on the campaign trail, but when the Court struck the laws down in the *Child Labor Tax Cases*, Harding’s comments were quite neutral in tone.³⁰ In his State of the Union address he noted that Congress had twice “attempted the correction of the evils incident to child employment,” but the Supreme Court “has put this problem outside the proper domain of Federal regulation.”³¹ He simply called for a constitutional amendment “to give the Congress indubitable authority.”³² His successor Calvin Coolidge used his first State of the Union address to suggest that Congress wait for the Court before moving ahead on railroad rate regulation. Coolidge warned that “confiscatory rates are of course unconstitutional” and

28. President Theodore Roosevelt, Seventh Annual Message (Dec. 3, 1907).

29. *Id.*

30. See ANNA L. HARVEY, *VOTES WITHOUT LEVERAGE: WOMEN IN AMERICAN ELECTORAL POLITICS, 1920-1970*, at 117 (1998). Some scholars focus on Harding’s relative conservatism and his appointment of William Howard Taft to the Court as indications of a fundamental hostility to child labor. See, e.g., STEPHEN B. WOOD, *CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA: CHILD LABOR AND THE LAW* 255-57 (1968). But political coalitions are diverse, and one benefit of judicial review is that it can allow politicians to appeal to conflicting constituencies simultaneously. GEORGE I. LOVELL, *LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY* 68-98 (2003); KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 120-52 (2007).

31. President Warren G. Harding, Second Annual Message (Dec. 8, 1922).

32. *Id.*

any scheme of railroad rate regulation must secure a “fair return” to railroads or be “abandon[ed]” altogether.³³ The constitutionality of a “new and important feature” of existing law was then before the Court for its consideration: “Their decision should be awaited before attempting further legislation on this subject.”³⁴ The President leveraged the prospect of judicial action both to slow down the legislative process and to set expectations about what a successful statute might look like. Somewhat differently, in 1953 Dwight Eisenhower called on Congress for “prompt specific action” to amend the Food, Drug, and Cosmetic Act to remedy a statutory flaw that had led the Court to invalidate the system of factory inspections designed to enforce the act.³⁵ Eisenhower offered no implicit or explicit criticism of the Court, but rather followed the Justices in explaining that “the present law contained inconsistent and unclear provisions,” which simply required correction.³⁶

In contrast to these fairly innocuous comments regarding judicial decisions, Franklin Roosevelt built on the example of Theodore Roosevelt in discussing the Court. Like Theodore Roosevelt in 1905, FDR in 1937 focused his attention on the meaning of the Constitution itself. Reflecting on his first term of office, Roosevelt characterized the challenge that had confronted his Administration and the Congress as one of “prov[ing] that democracy could be made to function in a world of today as effectively as in the simpler world of a hundred years ago.”³⁷ To do so required “mutual respect for each other’s proper sphere of functioning in a democracy which is working well, and a common-sense realization of the need for play in the joints of the machine.”³⁸ As he turned to reviewing specific policies, Roosevelt noted that the “statute of N.R.A. has been outlawed,” but the “problems have not.”³⁹ The lessons he had already noted were applicable here. A “growing belief” had emerged that “there is little fault to be found with the Constitution.”⁴⁰ The fault was with its interpretation. A “more intelligent recognition of our needs as a Nation” would “bring legislative and judicial action into closer harmony.”⁴¹ Indeed, “[m]eans must be found to adapt our legal forms and our judicial interpretation to the actual present national needs of the largest progressive democracy in the modern

33. President Calvin Coolidge, First Annual Message (Dec. 6, 1923).

34. *Id.*

35. *See* United States v. Cardiff, 344 U.S. 174 (1952).

36. President Dwight D. Eisenhower, Annual Message to the Congress on the State of the Union (Feb. 2, 1953).

37. President Franklin D. Roosevelt, Annual Message to Congress (Jan. 3, 1937).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

world.”⁴² The “Judicial branch also is asked by the people to do its part in making democracy successful.”⁴³ Roosevelt would find those “means” in his Court-packing plan, introduced shortly thereafter. Roosevelt is not specific in criticizing a particular decision by the Court, but his concerns are not limited to a specific decision. Likewise, he does not need or want Congress to pass remedial legislation to address what the Court has done. His focus is with the Court’s constitutional philosophy, which had implications across a range of cases and specific issues. What he needed was a philosophical conversion that would accept more “play in the joints of the machine,” and as a result his speech was more explicit about his expansive view of the Constitution than it was about his critique of the Hughes Court.⁴⁴

Recent Presidents have been less ambitious in their criticisms of the courts in their State of the Union addresses. In 1980, Jimmy Carter took the unusual approach of both issuing a written annual message and delivering an oral State of the Union address.⁴⁵ The longer, written message, rather ambiguously, called on Congress to undo “the problems created by the Supreme Court’s *Stanford Daily* decision.”⁴⁶ Ronald Reagan referred to “the terrible cost of abortion” and idea that “we are denied the right to set aside in our schools a moment each day for those who wish to pray,” but he refrained from identifying the courts as an obstacle on those issues and simply issued calls for policy initiatives ranging from funding bans to constitutional amendments.⁴⁷ When he segued from a discussion of abortion and school prayer directly into a call to confirm Anthony Kennedy and waiting lower court nominees “to protect the rights of all Americans,” the connection was subtle at best.⁴⁸ In previous years, Reagan had made a similar plea on abortion and prayer with no reference at all to judges and courts in the speech.⁴⁹ By contrast, George W. Bush included a very similar denunciation of “activist judges” obstructing the “will of the people” three years in a row as part of his call for a constitutional amendment on heterosexual

42. *Id.*

43. *Id.*

44. President Roosevelt’s orientation in this speech is consistent with his general reconstructive posture. See WHITTINGTON, *supra* note 30, at 53–64.

45. President Jimmy Carter, The State of the Union Annual Message to the Congress (Jan. 21, 1980) [hereinafter Carter Written Message]; see also President Jimmy Carter, The State of the Union Address Delivered Before a Joint Session of the Congress (Jan. 23, 1980).

46. Carter Written Message, *supra* note 45, at 157.

47. President Ronald Reagan, Address Before a Joint Session of the Congress on the State of the Union (Jan. 25, 1988).

48. *Id.*

49. See, e.g., President Ronald Reagan, Address Before a Joint Session of the Congress on the State of the Union (Feb. 6, 1985); President Ronald Reagan, Address Before a Joint Session of the Congress on the State of the Union (Jan. 25, 1984).

marriage.⁵⁰ Twice, he referenced the importance of having judges who would “be servants of the law and not legislate from the bench” while promoting his judicial nominees in the State of the Union address.⁵¹

II. PRESIDENTIAL SPEECH ABOUT THE COURTS OUTSIDE THE STATE OF THE UNION

Presidents frequently have taken other opportunities to respond to Court decisions or to voice criticisms of the judiciary. Presidents speak or issue statements in a wide variety of contexts. The State of the Union address is one of the most significant speeches that the President delivers, but Presidents communicate to the public and to policymakers in a variety of ways. At times, Presidents can be quite restrained and matter-of-fact in responding to judicial decisions. Richard Nixon, for example, reported to Congress that the Supreme Court had struck down provisions of the federal drug laws and urged the legislature to “close the gap now existing in the Federal law.⁵² Gerald Ford called for a revision of the Federal Election Commission, since the Court had found a constitutional “defect” in the original law.⁵³ And Bill Clinton explained that his proposed Gun-Free School Zones Amendments Act of 1995 was “required by the Supreme Court’s recent decision in *United States v. Lopez*.”⁵⁴ But often, Presidents have taken advantage of these platforms to be critical of judges and the Court’s work. In special messages to Congress, Ronald Reagan was more explicit than in his State of the Union addresses in indicating that the Supreme Court was responsible for preventing school prayer and had thus made a constitutional amendment necessary,⁵⁵ and likewise it was the Supreme Court

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50. President George W. Bush, Address Before a Joint Session of the Congress on the State of the Union (Jan. 31, 2004) [hereinafter Bush 2004 State of the Union]; President George W. Bush, Address Before a Joint Session of the Congress on the State of the Union (Feb. 2, 2005) [hereinafter Bush 2005 State of the Union]; President George W. Bush, Address Before a Joint Session of the Congress on the State of the Union (Jan. 31, 2006) [hereinafter Bush 2006 State of the Union].
 51. See Bush 2006 State of the Union, *supra* note 50; Bush 2005 State of the Union, *supra* note 50. A related variation can be found in President George W. Bush, Address Before a Joint Session of the Congress on the State of the Union (Jan. 28, 2008) (“I’ve submitted judicial nominees who will rule by the letter of the law, not the whim of the gavel”).
 52. President Richard Nixon, Special Message to the Congress on Control of Narcotics and Dangerous Drugs (July 14, 1969).
 53. President Gerald Ford, Special Message to the Congress Proposing Legislation To Reconstitute the Federal Election Commission (Feb. 16, 1976).
 54. President William J. Clinton, Message to the Congress Transmitting Proposed Legislation To Amend the Gun-Free School Zones Act of 1990 (May 10, 1995).
 55. President Ronald Reagan, Message to the Congress Transmitting a Proposed Constitutional Amendment on Prayer in School (May 17, 1982).

that had “erred in its decision in [*Roe v. Wade*]” and therefore created the need for remedial action relating to abortion.⁵⁶

Presidents often take a strong line in communications aimed at the general public (or attentive interest groups). President Clinton might have been matter of fact about *Lopez* when recommending a legislative fix to Congress, but he was more critical of the Supreme Court when commenting on the case in a Saturday radio address. In that venue, he paired the Court’s decision striking down the Gun-Free School Zones Act with the Oklahoma City bombing, and in the shadow of that event found the Court’s decision “terribly disappoint[ing]” and an affront to “common sense.”⁵⁷ The Court’s “decision could condemn more of our children to going to schools where there are guns” and as a result put them “in harm’s way.”⁵⁸ In urging the public to show its support for a school prayer amendment, President Reagan used a radio address to call attention to the “controversial decision” by the Supreme Court on the issue and wonder whether “the first amendment is being turned on its head” by the Court.⁵⁹ Pressing for support for judicial nominations provides a frequent occasion for expressing discontent with the present state of the judiciary. Again in a 1986 radio address, President Reagan recalled speaking during his presidential campaigns of “the distressing loss of faith by the American people in their criminal justice system.”⁶⁰ The “scales of justice had become seriously unbalanced.”⁶¹ The federal judiciary was too often dominated by “old-time liberals” who were “soft on crime” and believed in “interpreting the Constitution to please the special interests.”⁶² The problems in the courts could be resolved by confirming the President’s judicial nominees. Similarly, after the Haynsworth and Carswell nominations, President Nixon took to the stump in support of Senate candidates who would help confirm judges that would “strengthen the peace forces as against the criminal forces in this country” and who would be dedicated to “enforcing the laws and a strict interpretation of the Constitution.”⁶³

56. President Ronald Reagan, Message to Congress Transmitting the Pro-Life Act of 1988 (June 8, 1988).

57. President William J. Clinton, The President’s Radio Address (Apr. 29, 1995).

58. *Id.*

59. President Ronald Reagan, Radio Address to the Nation on Prayer in Schools (Feb. 25, 1984).

60. President Ronald Reagan, Radio Address to the Nation on the Federal Judiciary (June 21, 1986).

61. *Id.*

62. President Ronald Reagan, Radio Address to the Nation on Voluntarism and the Supreme Court Nomination of Robert H. Bork (Oct. 3, 1987).

63. President Richard Nixon, Remarks at East Tennessee State University (Oct. 20, 1970).

III. WHAT IS THE POINT OF THE STATE OF THE UNION?

Is there something distinctive about the State of the Union address, and, if so, what is it? The State of the Union address is distinctive in that derives from the constitutional directive that the President “from time to time give to the Congress Information of the State of the Union and recommend to their Consideration such Measures as he shall judge necessary and expedient.”⁶⁴ Most presidential communications do not have a constitutional basis (veto messages being the notable exception). The Constitution gives some indication about the content of the State of the Union address, but it gives no indication about the form (or even the timing) of the message. Throughout the nineteenth century, from Thomas Jefferson until Woodrow Wilson, the State of the Union was known instead as the “annual message” and was delivered in writing. The members of Congress and the Justices did not assemble to hear Theodore Roosevelt’s laundry list of policy recommendations and accounting of judicial decisions, favorable and unfavorable. Congress simply received a written report from the White House. The annual message was sent on a more regular schedule and covered a wider array of subjects than the “special messages” that Presidents sent to Congress throughout the year. The annual message was a good way to start the legislative session.

Woodrow Wilson began the process of converting the annual message into its modern form of the State of the Union address. For Wilson, the annual message was of limited value, but the State of the Union provided an opportunity. Notably, it provided an opportunity to present himself as a political leader and ultimately speak over the heads of the assembled Congress to the people broadly.⁶⁵ Congress had proven itself incapable of providing national leadership and a clear message or vision to the people. The President could emerge in the twentieth century as a leader capable of shaping public opinion.⁶⁶ Presidential authority would, in turn, rest on his ability to successfully lead and interpret public opinion.⁶⁷ The revised State of the Union address was one component of a broader program to position the President in that role.⁶⁸ The result has been shorter, more personal State of the Union addresses.⁶⁹

64. U.S. CONST. art. II, § 3.

65. JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 133 (1987); James W. Ceaser, *The Rhetorical Presidency Revisited*, in *MODERN PRESIDENTS AND THE PRESIDENCY* 15, 26 (Marc Landy ed., 1985).

66. TULIS, *supra* note 65, at 128.

67. JAMES W. CEASER, *PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT* 184 (1979).

68. Tulis, *supra* note 65, at 138-42.

69. Ryan L. Teten, *Evolution of the Modern Rhetorical Presidency: Presidential Presentation and Development of the State of the Union Address*, 33 *PRESIDENTIAL STUD. Q.* 333, 340-43 (2003).

Whether in written or oral form, the annual message is centrally an effort in presidential agenda setting. Presidents have long used the message to call Congress to action and launch presidential initiatives. In order to do so more effectively, Presidents have used the speeches to articulate a set of values that place the policies in context and create a supportive climate for their advancement.⁷⁰ The State of the Union address is generally distinguished from a mere ceremonial speech, such as the inaugural address or speech delivered at a celebratory event.⁷¹ The State of the Union address is functional, and often partisan. Unsurprisingly, the partisan opposition has long presented a formal, televised response to the President's State of the Union address, which would make little sense in the context of a ceremonial speech designed to be primarily unifying and uncontroversial in form. The effect was evident from Woodrow Wilson's very first modern State of the Union address, delivered orally to a joint session of Congress. The press reported breathlessly of his "personal triumph" as the assembled throng of legislators and onlookers in the gallery broke into a seemingly "spontaneous outburst of approval for his Administration" and "tumultuous" applause for his brief list of policy proposals. The *New York Times* reported that party leaders spent the night "congratulating themselves on what they consider the masterly political sagacity of the President's speech."⁷² The *Washington Post* observed that the portion of Wilson's address relating to "unlocking the resources of Alaska" was met with generous applause from the Republican side of the aisle, but "that was as far as their approval went."⁷³

The State of the Union address is one of the President's biggest public stages. Presidents have used the moment to mobilize their supporters and identify key priorities that can be advanced by bringing public pressure to bear on other government officials. Legislators generally have been the primary targets of such pressure tactics. Members of Congress have a direct interest in presidential leadership of public opinion and the tools of legislative bargaining. Moreover, the national policy agenda rarely involves issues directly relating to

70. See KARLYN KOHRS CAMPBELL & KATHLEEN HALL JAMIESON, *DEEDS DONE IN WORDS: PRESIDENTIAL RHETORIC AND THE GENRES OF GOVERNANCE* 52-53 (1990); Harold F. Bass Jr. & Charles C. Euchner, *Presidential Appearances, in THE PRESIDENCY, THE PUBLIC, AND THE PARTIES* 1, 22 (CQ Press ed., 3d ed. 2008).

71. CAMPBELL & JAMIESON, *supra* note 70, at 14; RODERICK P. HART, *THE SOUND OF LEADERSHIP: PRESIDENTIAL COMMUNICATION IN THE MODERN AGE* 219 (1988).

72. *Wilson Triumphs with Message*, N.Y. TIMES, Dec. 3, 1913, at 1.

73. *Reads Amid Cheers*, WASH. POST, Dec. 3, 1913, at 4. Some Republican congressmen doubted that the practice of oral delivery of the annual message could last since, if partisan applause was acceptable, then partisan "expressions of disapproval" during the speech were only to be expected and were likely to be embarrassing to the President. *Sees Danger in Applause*, BOSTON GLOBE, Dec. 10, 1913, at 20.

the Court. Space in the State of the Union address is valuable territory, and the judiciary as such rarely merits that level of attention.⁷⁴

Other forms of presidential communication create more opportunities to discuss the Court, and they often create different political calculations as well. Presidents have used various special messages, from radio addresses to press releases to special messages to Congress, to react to individual judicial decisions that are rendered over the course of the year. Such communications are lower in profile than the State of the Union address, but they are equally functional and less scarce. Of course, Presidents may also speak about the courts to targeted audiences, such as during stump speeches to partisans during campaign season. Such selected speech may be different in tone and style, if not necessarily in substance, than speech directed to a mass audience. President Nixon saved his harshest criticism of the courts for his stump speeches. President Reagan was more direct in his criticism of judicial decisions in his radio addresses.

President Obama was doing what Presidents do when he criticized the *Citizens United* case in his State of the Union address. The fact that a judicial decision had appeared on the presidential agenda of the big stage made his remarks seem more unusual and stinging than they otherwise would have. If he had said something similar about the policies of the Bush Administration or the congressional Republicans, no one would have thought it unusual. If he had said the same thing in a special message to Congress, a radio address, a press release, or a press conference, it is unlikely that it would have stirred much controversy. The goal and effect would have been the same: to bring public pressure to bear on the Justices, to pressure Congress to look for a legislative response on campaign finance, to engage in “position taking” on a popular political issue.⁷⁵

CONCLUSION

The State of the Union address *is*, in no small part, a partisan pep rally. Moreover, the address is specifically a presidential pep rally. Woodrow Wilson launched the modern State of the Union address, and subsequent presidents have developed it, precisely in order to enhance the individual political standing and agenda of the president. When judicial decisions run particularly counter to that agenda, as they did during the New Deal, or when they are especially unpopular and create ripe opportunities for the president to bolster his own political standing, as with the campaign finance decision, then they might well rise to a level of presidential notice. The justices will take their lumps. If they would rather read about it in the morning paper rather than witness it in

74. See Mark A. Graber, *Resolving Political Questions into Judicial Questions: Tocqueville's Thesis Revisited*, 21 CONST. COMMENT. 485 (2004); Frederick Schauer, *Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4 (2006).

75. On position taking, see DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 61-62 (2d ed. 2004); WHITTINGTON, *supra* note 30, at 134-43.

person, then they would be advised to stay away from such presidential speeches.