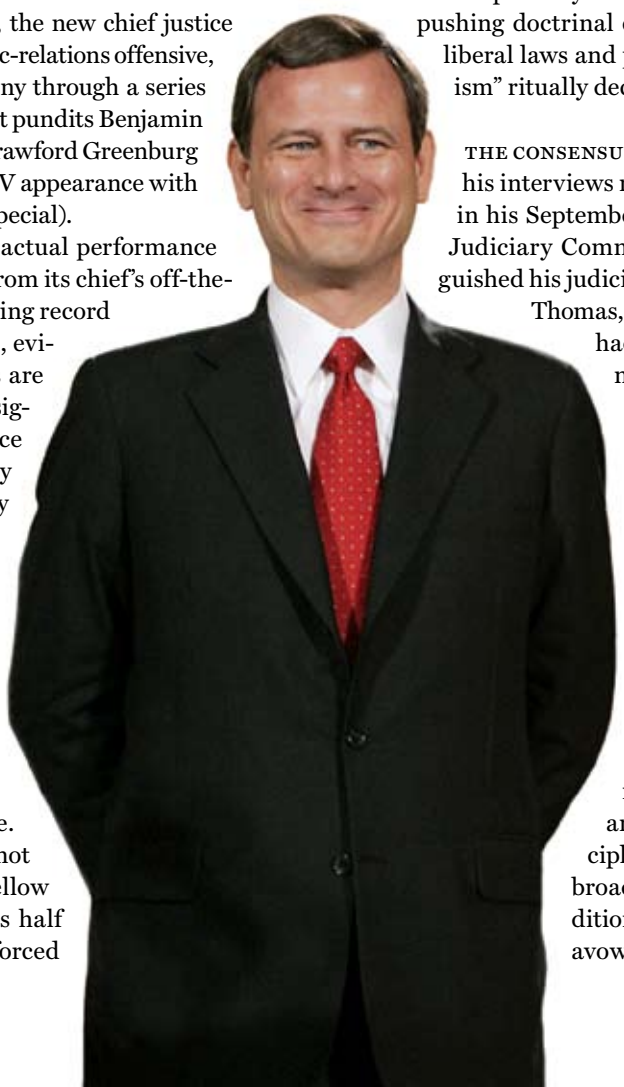
More Polarizing Than Rehnquist

Chief Justice John Roberts won Senate confirmation by vowing to shun ideological activism. Instead, by trashing judicial precedent and legislative statutes, he's reshaping law to fit conservative dogma.

BY SIMON LAZARUS

No one can yet foresee where 52-year-old Chief Justice John Roberts will take the Supreme Court during the several decades he will likely preside over it. But one thing is already clear: Roberts himself wants the public to understand that he is intent on steering away from the ideological, polarized warfare of the Rehnquist era and toward a new era of "consensus." On this point, he is not content to let his votes or the Court's decisions speak for themselves. Before his freshman term was complete, in the spring of 2006, the new chief justice launched an unprecedented public-relations offensive, proclaiming his quest for harmony through a series of interviews with Supreme Court pundits Benjamin Wittes, Jeffrey Rosen, and Jan Crawford Greenburg (most notably during a lengthy TV appearance with Rosen on a February 2007 PBS special).

And yet, the Roberts Court's actual performance draws quite a different picture from its chief's off-the-court presentations. In the evolving record of oral arguments and decisions, evidence is sparse that the justices are muting their differences. Most significantly, there is little evidence that Roberts has tried particularly hard to lead the way toward any such synthesis. On the contrary, at least in the big, controversial cases, the new Court is, if anything, more polarized than Rehnquist's was. News stories on decisions have cast the Court as split between robotic "conservative" and "liberal" blocs, with Anthony Kennedy the swing justice in the middle. In these reports, Roberts does not lead; he is twinned with his fellow Bush appointee Samuel Alito as half of a lockstep duo that has reinforced hard-line conservatives Antonin Scalia and Clarence Thomas.



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Of course, because the consistently right-leaning Alito has replaced the pragmatic centrist Sandra Day O'Connor, the new Court will be, as all commentators observe, "conservative." But what sort of conservative Court will it be, and what sort of leadership will the new chief justice provide? Will he be a true judicial conservative, practicing the restraint that he and other conservative leaders have long preached? Or will he solidify a bloc transparently driven by political ideology, constantly pushing doctrinal envelopes to overturn or undermine liberal laws and policies, mirroring the "liberal activism" ritually decried by conservatives?

The consensus seeker that Roberts portrays in his interviews meshes with the self-portrait he drew in his September 2005 testimony before the Senate Judiciary Committee. There, he elaborately distinguished his judicial philosophy from that of Scalia and Thomas, the two justices whom President Bush had repeatedly insisted he would use as models for his nominees. Pointedly, Roberts dismissed the pair's brand of "originalism," which contends that broad constitutional phrases like "cruel and unusual punishment" must be construed to uphold social practices—such as capital punishment for teenagers—that are offensive today but were prevalent when the Constitution was ratified. Roberts testified that he "departs" from that narrow view, insisting, as do liberal academic theorists, that "you need to look at the words they used, and if the words adopt a broader principle, it [the Constitution] applies more broadly." It is applicable "to changing conditions," and is "in that sense ... alive." Disavowing labels, Roberts "prefer[red] to

be known as a modest judge." That, he said, meant a "general approach to judging, which is good for the legal system as a whole"—respect for precedent, deference to democratic decision makers, and avoidance of "a dominant role in society and redressing society's problems."

"Judges," he said in a widely disseminated opening sound bite, "are like umpires. Umpires don't make the rules; they apply them." The subtext was clear: Though Roberts' personal views might tilt to the right, as chief justice, his priorities would be institutional, not ideological.

The pitch worked. Roberts won confirmation with genuinely bipartisan support. Three of the Senate Judiciary Committee's eight Democrats, including ranking Democrat (now Chairman) Patrick Leahy of Vermont, and 21 of the Senate's 44 Democrats, plus Independent James Jeffords, voted to confirm him. They chose to look past his record of opposing extension of the Voting Rights Act (back when he was a young firebrand in the Reagan administration) and to ignore impassioned demands for no votes from liberal advocacy groups. Roberts' 78-to-22 confirmation margin contrasted sharply with Samuel Alito's 58-to-42 (with all but four Democrats voting "no," including nine "no's" from red states), Clarence Thomas' 52-to-48 in 1991, and, of course, Robert Bork's rejection by a 42-to-58 vote in 1987. Even William Rehnquist, Roberts' affable and well-liked predecessor, received 11 more negative votes when he was confirmed as chief justice in 1986.

The Democrats who voted for Roberts made clear that his pledge to follow a principled, "modest" course was the reason they elected to defy their activist base. Leahy's statement, announcing his vote for Roberts in the Judiciary Committee, was typical: He cited "Judge Roberts' assurances that he will respect congressional authority," and that "he does not have an ideological agenda." Implicitly acknowledging charges by liberal advocacy groups that Roberts was not to be trusted, Leahy said he would take it on "faith that *the words he spoke to us have meaning*." [Emphasis added.]

Over the past decade, Court conservatives have struck down an unprecedented number of federal statutes—while Congress has kept silent.

Nor was this just a case of gullible liberals voting their hopes instead of their fears. The very day after President Bush nominated Roberts, Linda Greenhouse, *The New York Times*' respected Supreme Court correspondent, appraised Roberts as "someone deeply anchored in the trajectory of modern constitutional law, not ... someone who felt called to a mission to change the status quo ... [who unlike Scalia and Thomas] finds himself comfortably in the middle rather than at the margin." Two months later, after parsing Roberts' testimony and comparing his declared views on key issues with Rehnquist's, the conservative legal pundit Bruce Fein cautioned readers of the right-wing *Washington Times*, "The Supreme Court will hop marginally to the political left with John Roberts as chief justice."

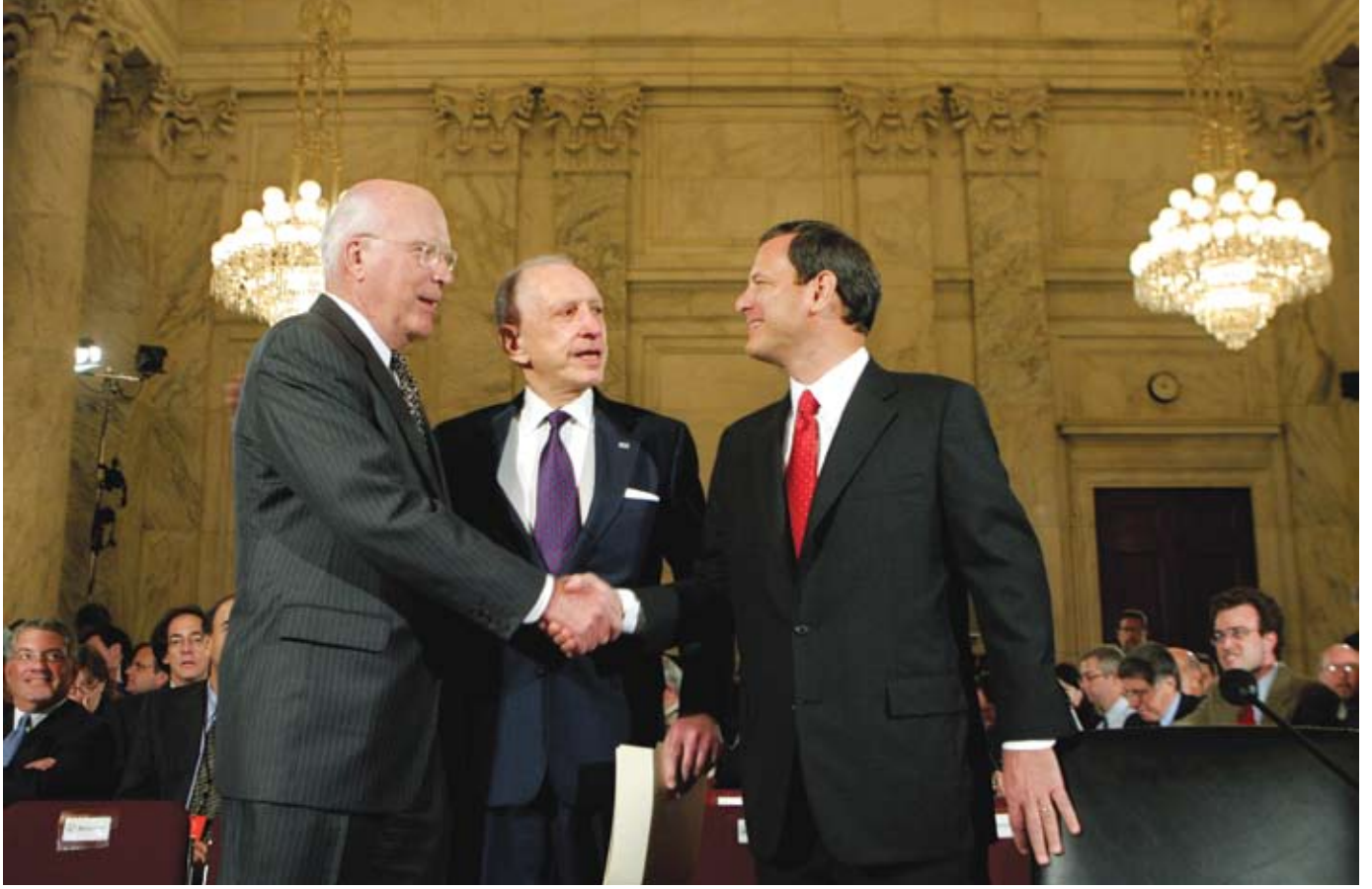
A YEAR AND A HALF LATER, FEIN'S READERS MUST feel pleasantly surprised. During the Court term that ended in June 2006, Roberts voted with Scalia in 77.5 percent of the Court's nonunanimous decisions. He and Alito shared the highest agreement rate of any two justices—a remarkable 88.5 percent. More telling than statistics, though, is the fact that in virtually every politically charged case, Roberts' votes have been starkly at odds with his vows of modesty and democratic deference.

In January 2006, just before Alito's confirmation. Roberts joined Scalia and Thomas in dissent from the Court's 6-to-3 decision to invalidate former Attorney General John Ashcroft's attempt to nullify, by regulation, Oregon's physician-assisted suicide statute. The conservative trio would have short-circuited what Rehnquist had described in a 1997 case as "an earnest and profound debate ... throughout the Nation ... about the morality, legality, and practicality of physician-assisted suicide." Indeed, Roberts himself, commenting just after that 1997 decision to a *NewsHour* audience, had agreed that Rehnquist's restraint properly respected "the right of the people through their legislatures to articulate their own views on policies [about] terminating life and not have the Court interfering in those decisions." Nine years later, voting to invalidate the Oregon legislature's handiwork, Scalia blithely acknowledged that the "legitimacy of physician-assisted suicide ... ultimately rests ... on a naked value judgment." Nevertheless, he saw fit to impose his side of that value judgment on the people of Oregon. Roberts concurred in Scalia's patently activist opinion without expressing any reservations.

Six months later, in two end-of-the-term decisions split along familiar ideological lines, the conservative bloc—now augmented by the addition of Alito—brushed aside traditional federal executive and congressional prerogatives with the same indifference it had shown to states' rights in the Oregon assisted-suicide case. In one case, Scalia scrapped Clean Water Act wetlands-protection rules reaffirmed by five presidents, including George W. Bush, as "entrenched executive error." In the second decision, Alito, on hyper-technical grounds, nullified protections for beneficiaries of federal entitlement programs that, he acknowledged, "a majority of both houses intend."

The chief justice could have seen these fractious cases as golden opportunities to test his consensus-building ambitions. For example, in the Clean Water Act case, he could have joined Kennedy's separate concurring opinion, in which the justice adopted a comparatively moderate approach to checking the U.S. Army Corps of Engineers' environmentalist zeal. (Since the conservative and liberal blocs split 4-to-4, Kennedy's concurring opinion will govern the issue, and preserve effective federal wetlands protection, until and unless one more conservative appointee pushes the balance of power still further to the right.)

Had he joined Kennedy, Roberts would have signaled that he had no hidden agenda to undermine long-standing federal wetlands-protection authority. That tack would have fit his confirmation testimony, in which he reassured Senators Leahy, Charles Schumer, and Dianne Feinstein that he viewed the possibility



Vow of Modesty: John Roberts with Senators Patrick Leahy and Arlen Specter at his 2005 confirmation hearings.

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of plausible constitutional challenges to the Clean Water Act as "remote." Most important, had Roberts thus moved to the center, the four Court liberals—John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer—might well have reciprocated, to forge a broad 6-to-3 position, in order to put wetlands protection on a secure, if more circumscribed, footing. But not only did Roberts cast his vote with the right rather than the center; in both cases, he assigned opinion-drafting responsibility to justices who could be expected to push their rhetoric and legal theorizing as far, and as provocatively, to the right as they could.

The most revealing glimpse yet of Roberts' intentions could come near the end of this term, when the Court decides two public-school race cases that took up an exceptionally tense two hours of oral argument in December of last year. These cases challenge racial-integration programs in Louisville, Kentucky, and Seattle, Washington, that take into account—among other factors—the race of students applying to attend particular schools within the local system. Before the Seattle case reached the U.S. Supreme Court, Judge Alex Kozinski, a Reagan appointee, upheld the school-board plan. An outspoken libertarian no doubt personally troubled by racial criteria, Kozinski nevertheless declined to intervene. He saw nothing in the text or "core principles" of the 14th Amendment that empowers federal judges to second-guess "[e]lected officials, who are much closer to ground zero than we are—and whose political power ebbs and flows with the approval of the voters—[and] understand the realities of the situation far better than we can."

Indeed, it would be hard to conjure a matter in which the result desired by conservatives—overturning local school boards' pro-integration policies—clashes more starkly with conservative judicial philosophy. But in the Supreme Court last December, the emboldened conservative justices seemed unfazed by Kozinski's fidelity to strict construction, original meaning, respect for local autonomy, and deference to democratic decisions. Scalia flaunted disdain, not only for the Louisville and Seattle school officials but for the voters who elected them. He sought to discredit surveys showing widespread local public approval of the plans by questioning whether the favorable votes came from blacks rather than whites. Most startling, Scalia observed that in an "overwhelmingly black" school district, a decision by the elected school board to essentially say "*We would like our race to get into ... better white schools*" would not reflect a "benign" or "compelling" governmental interest (to which courts must accord deference), because the board would be "doing it for a *racially selfish* reason." [Emphasis added.] Civil-rights leaders stunned by Scalia's remark could be excused for hearing in it a chilling echo of Robert Bork's infamous vilification of the 1964 Civil Rights Act for the "surpassing ugliness" of its invasion of the "privacy" of white restaurant customers who preferred to dine with no blacks (except waiters) on the premises.

Scalia's newly appointed colleagues, Roberts and Alito, piled on, both probing for openings to discredit the schools' plans. Roberts let slip a particularly cheap shot—ridiculing Seattle's defense as a "separate but equal" argument equivalent to the infamous rationale for legally mandated segregation that was interred in 1954 by *Brown v. Board of Education*. In response, the school board's attorney deadpanned that the purpose of the pupil-assignment program was to not to keep black students

separate and marginalized but to keep the schools integrated and to enhance opportunities for blacks—in line with the original aims of the Reconstruction-era Congress that drafted the 14th Amendment.

The most noteworthy signal from the Seattle and Louisville oral arguments is not the results they appear to portend in the cases themselves. Rather, it is the ease with which the conservative justices, in order to reach a result that fits their political and policy agendas, blew right past every jurisprudential credo to which they and their comrades in arms have long asserted fidelity. If they will do it in this case, they can—and likely will—do it in any socially or politically important case.

Were Chief Justice Roberts to avoid such adventurism and take seriously his protestations of judicial modesty, he could readily pick off some or all of the liberal justices to build majorities—and a predictable approach to deciding—emphasizing constitutional text, history, precedent, and deference to democratic decision makers. Clinton appointees Ginsburg and Breyer, in particular, consistently emphasize deference to democratic institutions (Ginsburg once famously criticized *Roe v. Wade* for preempting public debate on abortion policy). Roberts may choose this path. He has yet to write a major opinion of his own. But to date, he seems to be gauging whether deft public relations can provide a cover of moderation, while a bloc of four ideological conservatives undermine decades of liberal legislation and case law—and perhaps wait to see if Bush or a Republican successor gets a chance to add a decisive fifth vote to their ranks.

Off the court, surprisingly little attention has been paid to this historic choice confronting Roberts and his justices, nor to his departures from the self-portrait he sketched during his confirmation hearings. Indeed, for decades, apart from a few scattered law-review commentaries, little note has been taken of the strategic selectivity with which conservative justices and judges have applied their various credos. A major reason has been that their most liberal critics have largely shunned this angle of attack. Many liberals are chronically uncomfortable invoking arguments that acknowledge constraints on judicial power, whether derived from constitutional text or history, or from premises of democratic governance. They prefer to stress conservative threats to the protection of (implicitly absolute) "rights," or to particular victimized constituencies like women or blacks, or to "judicial independence." Not infrequently, liberal advocates archly dismiss as merely "moderate" the quartet—Stevens, Souter, Ginsburg, and Breyer—who have battled conservatives on the Rehnquist and Roberts courts. Some of these liberals still yearn for the halcyon 1960s and '70s, when Justice William Brennan proclaimed the "majestic generalities" of the Bill of Rights as carte blanche to read into the Constitution "fundamental values" dictated by late–20th-century liberal ideals.

In short, many liberals have failed to censure John Roberts for breaking the deal he offered during his confirmation proceedings, because they would be disinclined to take that deal in any case. This hesitancy to hoist Roberts and his fellow conservatives on their own philosophical petard, however, is a strategic blunder. Restoring a "truly" liberal (i.e., activist) Court is simply not an option, given the relative youth of current Court conservatives, as well as the broader political realities that likely preclude confirmation of a Brennan-style nominee. Moreover, letting political conservatives monopolize common sense and broadly resonant philosophical nostrums—like judicial restraint, modesty, and original meaning—is bad strategy, from both a political and a legal standpoint.

"Text and history support progressive outcomes," wrote Douglas Kendall and Jennifer Bradley in a recent *New Republic* article, "at least as frequently as they support conservative ones, and these arguments are often the most persuasive available, even to justices that shun the label of originalism." Further, for the foreseeable future, public attitudes, and hence major public policies, will frequently tilt *to the left* of the Court's ideological conservatives. More often than not, lawyers for liberal causes will be asking courts to respect established precedent and defer to legislative outcomes, certainly on economic policy issues and often on social issues as well—such as those involved in the Oregon assisted-suicide case, the Clean Water Act wetlands case, and, most starkly, the pending school-integration cases.

Most important, it misreads history for liberals to fret that they must principally look to courts, not electorates or legislatures, for protection. Take, for example, civil rights. When Chief Justice Earl Warren and his colleagues issued their *Brown v. Board of Education* manifesto, they emblazoned in the mind of the nation the image of a bold Supreme Court, actively pushing the other, "political" branches and the states, in the direction of the justices' comparatively more liberal views. That paradigm has stuck since then, across the political spectrum. Conservatives have made blasts at "judicial activism" a ritual incantation; liberals have urged the Court to stay the course, following Ronald Dworkin's exhortation to "take rights seriously." But, in fact, for at least the past quarter century, this broadly shared picture of an elite federal judiciary to the left of the nation has grown increasingly out of date.

Of course, liberals (and conservatives as well) are not wholly off base to credit the Warren Court with implanting racial equality as a fundamental value of 20th-century U.S. public policy. But the civil-rights movement would never have succeeded in embedding antidiscrimination protections throughout American law and societal practice if Presidents John F. Kennedy and Lyndon Johnson, and the Congresses over which they presided, had not enacted the landmark civil-rights statutes of 1964, 1965, 1967, and 1968.

In the same vein, promoting racial integration today would not be a common feature of education regimes, except for the support of local school districts like Seattle and Louisville—and of such major national constituencies as the business and military groups that persuaded the Court in 2003 to uphold the University of Michigan law school's affirmative-action program. Indeed, since the 1980s, federal-court civil-rights litigation has been almost exclusively about preventing federal judges, especially the Supreme Court's, from undermining or overturning measures adopted by Congress, federal executive agencies, and even state and local bodies. In 1987 and again in 1991, civil-

rights advocates went to Capitol Hill to reenact important guarantees gutted by Rehnquist Court decisions.

Now as then, hopes for reining in the incipient conservative activism of the new Court rests with Congress. And Congress—the Senate in particular—has every reason to react as decisively and effectively as it did two decades ago. It is senators to whom the new chief justice made his earnest vows of restraint, common-sense respect for constitutional text and history, and ideological neutrality. The senators who accepted that commitment have a stake in showing that they will not be snookered by the sort of Jekyll-and-Hyde routine that Roberts seems to be trying out. More broadly, if Congress—a Democratic Congress at that—does not push back hard when its own constitutional turf is violated, as in the blatant 2006 Clean Water Act and in the entitlement-protection judicial turf grabs in which Roberts concurred, what incentive will there be for the Court to pull back?

Many liberals won't attack conservative justices for their judicial activism, as if the return of liberal judicial activism were even a possibility.

It's been awhile since Congress pushed back at all. Prior to the Roberts confirmation hearings, in late summer 2005, senators on both sides of the aisle had uttered nary a peep for a decade, while 5-to-4 Rehnquist-led majorities, purporting to act in the name of "federalism," brazenly gutted significant provisions of such landmark liberal laws as the Civil Rights Act of 1964, the Age Discrimination Act of 1967 (and 1973), the Americans With Disabilities Act of 1990, the Violence Against Women Act of 1994, Medicaid (1965), and the Brady Handgun Violence Prevention Act of 1993, among others.

Academic commentators have observed that between 1995 and 2003, the Court threw out 33 federal statutes (at nearly three times the pace of the previous two centuries), and decried what political scientist Thomas M. Keck called the "most activist Supreme Court in history." But Congress itself kept silent. Finally, in the Roberts hearings themselves, Democrats (led by Leahy) and Republicans (led by then–Judiciary Committee Chairman Arlen Specter) alike frontally attacked the "federalism" campaign as the "hallmark of the judicial activism of the Rehnquist Court."

The new Democratic majority can find numerous ways to try to hold Roberts to his commitments and to reclaim its own turf. It wouldn't be necessary to resort to the sort of dangerous threats to judicial independence favored in recent years by such right-wing critics of the judiciary as former House Leader Tom DeLay and lead House Judiciary Committee Republican James Sensenbrenner, who called for impeaching judges for decisions with which they disagreed, or stripping the courts of jurisdiction over the definition of marriage. In 2002, when the Democrats had a brief Senate majority, the Judiciary Committee held hearings to underscore the appropriateness of taking into account the ideology of Bush's right-leaning judicial nominees before deciding to vote for or against confirmation. Similar hearings today could spotlight the activist itch that the current crop of conservative justices are plainly eager to scratch, and serve as a warning shot to the Court to exercise self-control. Affronts to congressional intent, like Alito's attack on safety-net beneficiaries' rights, should provoke rapid denunciation and legislative correction.

Closer to home, Leahy could give a more nuanced and qualified response than his initial, reflexive embrace of Roberts' January call for a substantial increase in federal judges' salary levels. He could note that, while maintaining the quality of federal judges by keeping their incomes above a certain level helps ensure an independent judiciary, no legislator will leap to reward judges who seem bent on stripping Congress of its constitutional role, or to cancel laws that members worked hard over many years to craft and enact. Finally, Roberts' perfidy, if it continues, should drive Leahy and his Democratic colleagues to make clear that they have no intention of being conned again into confirming a smooth-talking nominee who pledges to check his conservative politics at the courthouse door.

Liberals and moderates, as well as responsible conservatives, share a strong interest in keeping the judiciary, and the Supreme Court in particular, from being widely viewed—as it is now widely viewed—as simply an arena for the pursuit of political ends by other means. Evidently, John Roberts is testing the political waters to gauge whether aggressive public relations will be sufficient to reverse that perception. Will he choose to simultaneously steer the Court toward stretching the law to undermine six decades of liberal reform legislation and decisions and to erect barriers to new reforms? Such a campaign, though audacious, would not lack historical precedent; indeed, it would replicate the mission set by the Supreme Court for itself during the first third of the 20th century, when its right-wing jurists struck down myriad state and federal social and economic reforms. Their efforts succeeded handsomely until the late 1930s, when their reactionary constitutional jurisprudence was finally buried by President Franklin Roosevelt's public attacks, judicial retirements, and lopsided Democratic election victories.

If the new chief justice's public-relations offensive is to be believed, that's not the kind of Court for which Roberts seeks to be remembered. As he told Jeffrey Rosen in the January/February 2007 *Atlantic Monthly*, in Rosen's companion book, *The Supreme Court*, and on public television, he aspires to emulate the consensus-building virtuosity, and consequent historical stature, of the early–19th-century icon Chief Justice John Marshall. It is hardly surprising that a new chief justice with Roberts' exceptional professional skills, longtime involvement with the Court, and presumptive longevity would aim for a verdict of Marshallian "success" in future history books. But as one liberal advocate who had cautiously supported Roberts' confirmation recently observed, "He can be John Marshall or he can be a knee-jerk right-winger—but he can't be both."

Congress must make sure that the chief justice gets that message. **TAP**

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