FEATURE ARTICLES

THE SUPREME COURT AND POLITICS IN THE TRUMP ERA

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The interference of politics in the judicial sphere provides an environment for a constant and lively debate. Like parties or governments, courts are considered the target of interest group strategies. It is by this prism of political jurisprudence and the deployment of a political glance on the jurisprudence of the Supreme Court in the United States that this article revolves. This article will therefore be articulated in the corollary of American constitutional law by its incarnation—the constitutional judge—because the Judiciary Act of 1869, which defined the number nine as the optimal composition, questions the political anchoring of the constitutional judge. First, this article focuses on the jurisprudential activism of the Supreme Court as an adjunct to politics. The question of the independent neutrality of judges will be addressed by a binary prism, its historical evolution perspective and a contextualized contemporary questioning. The second part of the analysis will question the jurisprudential activism of the contemporary constitutional judge as a bulwark in politics. The difficulty of limited rationality and the need to maintain legitimacy through the least unpopular decisions engender a prospect of seeking social support, giving judges both decision maker and policy maker positions.

The interference of politics in the judicial sphere provides an environment for a constant and lively debate. Political analysis of the judicial system has a long tradition in the United States. For example, Alexis de Tocqueville devoted two chapters of his book, Democracy in America, to the political import of the courts.[1] *The American judiciary is political not only because of what it is but because of what it judges.*

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[1] *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 94–102 (Henry Reeve trans., Borzoi 1st ed. 1945).

In a critique of Martin Shapiro's political jurisprudence, Charles Herman Pritchett intended to remind him that law and politics are not systematically corollary, and the constitutional interpretative exercise of the judge was devoid of political elements: "'political jurisprudence'. . . is still 'jurisprudence.' It is judging in a political context, but it is still judging; and judging is something different from legislating or administering."[2] *Admittedly, the analysis includes many attributes, but it omits the implicit political gaze from its tools and method of interpretation of the constitutional judge. Clearly, politics is in the very essence of the interpretative methods of the Constitution by judges. Indeed, The Federalist, which is used as an interpretative legal support that is inherent to the will of the founders, was a political propaganda tool used by Hamilton, Madison, and John Jay, whose initial goal was not to document the debates but to convince New Yorkers to vote for Federalist delegates at the New York Convention, with a view to ratification of the Constitution.*[3]

From this perspective, the judicial system is considered part of the political system.[4] *Judicial action is described as a subtype of political action and as part of broader political processes.*[5] *Judges are considered decision-makers who are motivated by party affiliations or political preferences. Like parties or governments, courts are considered the target of interest group strategies.*[6] *It is by this prism of political jurisprudence and the deployment of a political glance on the jurisprudence of the Supreme Court in the United States that this article revolves. "Judicial policy making" is put forward as the fact that the courts, and more precisely the Supreme Court, have full power in the political system.*[7]

This article will therefore be articulated in the corollary of American constitutional law by its incarnation—the constitutional judge—because the Judiciary Act of 1869, which defined the number nine as the optimal composition,[8] *questions the political anchoring of the constitutional judge and is currently a burning issue in the Trump era discussed by both Democrats and Republicans. This article focuses firstly on the current jurisprudential activism of the Supreme Court as an adjunct to politics. The question of the independent neutrality of judges will be addressed by a binary prism, its historical evolution perspective and a contextualized contemporary questioning. The second part of the analysis will question the jurisprudential activism of the contemporary constitutional judge as a bulwark in politics. The difficulty of limited rationality and the need to maintain legitimacy through the least unpopular decisions engender a prospect of seeking social support, giving judges both decision maker and*

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[2] C. Herman Pritchett, *The Development of Judicial Research*, *in* FRONTIERS OF JUDICIAL RESEARCH 27, 42 (Joel B. Grossman & Joseph Tanenhaus eds., 1969).

[3] THE FEDERALIST (James Madison, John Jay & Alexander Hamilton) (George W. Carey & James McClellan eds., 2001); *Primary Documents in American History: The Federalist Papers*, LIBRARY OF CONGRESS, http://www.loc.gov/rr//program/bib/ourdocs/federalist.html (last visited Dec. 9, 2019).

[4] *See* Martin Shapiro, *Political Jurisprudence*, 52 KY. L.J. 294 (1964).

[5] *Id.* at 310–11.

[6] *Id.* at 335.

[7] *Id.* at 303–02.

[8] Judiciary Act of 1869, ch. 22, 16 Stat. 44.

policy maker positions.

I. THE ROBERTS COURT AND POLITICS: AT THE CROSSROADS OF JUDICIAL RESTRAINT AND SUPREMACY

In 1788, Alexander Hamilton argued in the *Federalist No.* 78, "[t]he independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society."[9] It is through the last jurisprudential prism inherent in partisanship correlated to the political question doctrine that it is necessary to comprehend the rulings in *Rucho v. Common Cause*[10] and the census citizenship question case, *Department of Commerce v. New York*,[11] both illustrating one major aspect of relations between the Supreme Court and politics in the Trump era.[12]

A. The Crafting of the Doctrine of the Political Question Through Its Major Jurisprudence

The premise of the political question doctrine is that when the central issue of a case turns out to be political, this case should not be conducted and dealt with by the federal courts.[13] The political question doctrine highlights the apolitical aspect of the federal courts in opposition to the other two branches of government, referred to as political branches. It raises questions regarding the justiciability of a case. First, there must be a clear distinction, on the one hand, between the jurisdiction to rule on a case and the notion of justiciability on the other. The jurisdiction of a court is not correlated to the issue of justiciability or non-justiciability, which in turn is correlated to the conclusion of a question by a political actor that is binding on the judiciary.[14] "The difficulty posed by political question

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[9] THE FEDERALIST NO. 78, at 406 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

[10] 139 S. Ct. 2484, 2506–07 (2019).

[11] 139 S. Ct. 2560 (2019).

[12] *Id.* at 2561; *Rucho*, 139 S. Ct. at 2491.

[13] *See, e.g.*, Japan Whaling Ass'n v. Am. Cetacean Soc., 478 U.S. 221, 230 (1986) ("The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.").

[14] *See* John Harrison, *The Political Question Doctrines*, 67 AM. U. L. REV. 457, 485–504 (2017).

jurisprudence is not that the court has sometimes politicized law, but that it has never successfully legalized politics."[15]

At least one scholar has traced its antecedents to antiquity.[16] However, it is *Marbury v. Madison*[17] that introduced the notion of political question by also excluding from the scope of control any act that would be essentially political; thus, determining the federal courts as the inappropriate body to answer this question.[18] The assertion of the judgment rests indeed on an oxymoron—the judgment that introduced the judicial review corresponds to a political question, similar to the decision that apprehends this problematic. This contradiction has since animated the debate between politics and law.

Chief Justice Marshall asserted "[i]f some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction. . . . Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."[19] He declared that the cases should be examined only to see if they conform with the rule of law since "[t]he province of the court is, solely, to decide on the rights of individuals[.]"[20] For decades, redistricting has been a prerogative of state sovereignty through their legislatures.[21] It is only from the second half of the twentieth century that the Supreme Court initiated jurisprudence on this theme. In its case law on redistricting, the Supreme Court articulated case law on the issue of a person's vote,[22] racial gerrymandering in electoral districts and thus the issue of the Equal Protection Clause,[23] the conformity of redistricting under the Constitution and the Voting Rights Act of 1965,[24] and partisan gerrymandering.[25]

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[15] Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 MARSHALL L. REV. 441, 442 (2004).

[16] *See* Maurice Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338 (1924).

[17] 5 U.S. (1 Cranch) 137, 166, 170 (1803).

[18] *Id.*

[19] *Id.* at 165, 170.

[20] *Id.* at 170.

[21] *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2494–96 (2019).

[22] *See, e.g.*, Reynolds v. Smith, 377 U.S. 533, 576 (1964).

[23] *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 927–28 (1995).

[24] *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30 (1986).

[25] *See, e.g.*, *Rucho*, 139 S. Ct. at 2491.

The electoral territories in the United States benefit from a political existence because the system of electoral representation gives them a visibility, a defense of their own interests, but also allows the attribution of subsidies inherent in the various federal and state programs.[26] The division of constituencies and the resulting local policies have a strong impact on the daily lives of U.S. citizens beyond elections. Elections are the emergent and identifiable part of the mechanism operated by redistricting. The electoral system affects the outcome of elections, but that is the same for the division of constituencies. As Justice Byron White pointed out, redistricting "is intended to have substantial political consequences."[27] Partisan gerrymandering is named after Gerry Elbridge, then Massachusetts Governor, who in 1802 redrew the map of a district after taking office.[28] Even though, at that time, the fact that this redistribution map resembled a salamander (as noticed by a cartoonist in the Boston Gazette),[29] both the practice and the term have remained part of U.S. politics ever since.

The landmark case regarding gerrymandering and the political question doctrine is *Colegrove v. Green*.[30] In *Colegrove*, the Supreme Court was not headed by a Chief Justice due to the recent Chief Justice Stone's death.[31] Thus, writing for a 4-3 plurality[32] in which Justice Jackson took no part in the consideration or decision of this case,[33] Justice Felix Frankfurter held that the federal judiciary had no power to interfere with issues regarding apportionment of state

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[26] Note, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 HARV. L. REV. 2526, 2544–45 (2001).

[27] Gaffney v. Cummings, 412 U.S. 735, 753 (1973).

[28] *Cartoon, "The Gerry-Mander", 1813*, NAT'L MUSEUM OF AM. HIST., https://americanhistory.si.edu/collections/search/object/nmah_509530 (last visited Dec. 9, 2019) [hereinafter *Cartoon*].

[29] *Id.*

[30] 328 U.S. 549, 556 (1946)

[31] *See Harlan Fiske Stone*, OYEZ, https://www.oyez.org/justices/harlan_fiske_stone_(last visited Jan. 12, 2020) (noting Harlan died on April 22, 1946); *Colegrove*, *supra* note 30, was argued on March 7 and 8 of 1946 and decided on June 10 1946.

[32] Justices Frankfurter, Reed and Burton affirmed that action, with Justice Rutledge concurring in the result, while Justice Hugo Black, joined by William Douglas and Frank Murphy, dissented. *Id.* at 550, 564, 566, 574.

[33] *Id.* at 556. Justice Jackson was serving as Chief Prosecutor in the Nuremberg trials. *See Justice Robert H. Jackson's Opening Statement*, ROBERT H. JACKSON CTR., https://www.roberthjackson.org/nuremberg-event/justice-robert-h-jacksons-opening-statement/ (last visited Dec. 9, 2019).

legislatures, stating that "[t]he remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress."[34]

The Court deemed it inappropriate to interfere in politics on thorny issues and used the argument of political doctrine not to rule on the possible unconstitutionality in the state of Illinois' division of constituencies in 1941, according to the data of the decennial census of 1901.[35] The Court considered it antinomic to a democratic system involving the judiciary in the questions which, according to them, belong to the sphere of direct accountability;[36] that is to say of the direct popular sovereignty by the prism of its representatives and not the sphere of the abstract incarnated by the judiciary. "It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law."[37]

Indeed, the Court deliberated on whether it was the role of the judiciary to deal with such cases, emphasizing that "[c]ourts ought not to enter this political thicket."[38] According to the Court's interpretation of the Constitution, the remedy was to be found in other branches: "[t]he Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights."[39] "The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action."[40] On the other side of the spectrum, while dissenting, Justice Hugo Black argued that the Constitution required each citizen's vote to carry equal weight,[41] a vision that the majority shared some years later in the landmark case, *Baker v. Carr*, which overruled *Colegrove v. Green* and clearly defined the political question doctrine.[42] Indeed,

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[34] *Colegrove*, 328 U.S. at 556.

[35] *Id.* at 555–56.

[36] *Id.* at 556.

[37] *Id.* at 553–54.

[38] *Id.* at 556.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 566, 569–70 (Black, J., dissenting).

[42] 369 U.S. 186, 208–10 (1962).

as Martin Shapiro said, courts often find themselves "in a position to identify a wrong without being able to define the right. Finding themselves in this position, they are ethically entitled to, and in fact do, intervene against the wrong."[43]

Given this perspective, the decision of the US Supreme Court in *Baker v. Carr*[44] is a major turning point and a fundamental decision in American constitutional jurisprudence. At the end of his service, Chief Justice Warren, who retired from the Supreme Court in June 1969,[45] concluded that his most important ruling in all his years on the bench was his opinion in the reapportionment cases, namely *Baker v. Carr* and its companion, *Reynolds v. Sims*.[46] These cases entered the judiciary's jurisprudence in the "political thicket" in an unprecedented way. They linked the principle of equal voting and the distribution of seats in state legislatures,[47] a question previously left unresolved for decades because the Court invoked the political question doctrine instead.[48]

In *Baker v. Carr*, a group of Tennessee voters alleged that the distribution of the state legislature had not taken into account the demographic changes between the districts, which in their view violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[49] In a 6–2 decision for Baker, in which Justice Whittaker did not participate,[50] the Supreme Court answered the question of its jurisdiction over majority opinion on legislative apportionment, written by William J. Brennan, Jr.[51] Indeed, the Court reaffirmed that "[a] citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by

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[43] Martin Shapiro, *Gerrymandering, Unfairness, and the Supreme Court*, 33 UCLA L. REV. 227, 228 (1985).

[44] 369 U.S. at 186.

[45] *Earl Warren*, OYEZ, https://www.oyez.org/justices/earl_warren (last visited Dec. 9, 2019).

[46] 377 U.S. 533 (1964); *Supreme Court Landmark Case* Baker v. Carr, C-SPAN (Dec. 7, 2015), https://www.c-span.org/video/?327719-1/supreme-court-landmark-case-baker-v-carr (including a clip from a 1969 interview with Chief Justice Warren, at 02:55, in which he discusses the importance of the apportionment cases); *see also Earl Warren*, *supra* note 45.

[47] *Baker*, 369 U.S. at 234–37; *Reynolds*, 377 U.S. at 586–87.

[48] *Baker*, 369 U.S. at 234–35.

[49] *Id.* at 187–88.

[50] *Id.* at 237.

[51] *Id.* at 187.

a false tally."[52] The Court recalled the principle introduced in the *Marbury* ruling, which stated that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[53] The Court reviewed caselaw with respect to the political question doctrine and declared that "the complaint's allegations of a denial of equal protection present[ed] a justiciable constitutional cause of action upon which appellants [were] entitled to a trial and a decision."[54] Thus, the Court held the political question doctrine did not apply.[55]

In his dissenting opinion, and in accordance with his previous position, Justice Felix Frankfurter asserted that the Court had exceeded its scope in the role of the judiciary, stating that he believed it was up to the politicians to determine this issue. In the wake of the *Baker* decision, the Warren Court decided, in an 8-1 decision, *Reynolds v. Sims*.[56] With Justice Harlan dissenting, the majority held that the state legislatures were to be divided according to the population "no less than substantially equal state legislature representation for all citizens[.]"[57]

The interference of the judiciary to its climax in politics by a redefinition of its field of competence and the question of political doctrine generated, through the subsequent redistributions by the state legislatures, a shift in political power from rural to urban areas.[58] These precedents also enshrined the one-person, one-vote rule in American constitutional law[59] and altered the allocation of political power in the United States.[60]

This trend of the judiciary interfering in an area once considered relegated to the states was slowed in *Gaffney v. Cummings*,[61] where, in a 6-3 decision, Justice White declared:

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[52] *Id.* at 208 (citing United States v. Classic, 313 U.S. 299, 309–10, 328–29 (1941)).

[53] *Id.* (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)).

[54] *Id.* at 237.

[55] *Id.*

[56] 377 U.S. 533 (1964).

[57] *Id.* at 568.

[58] *See id.* at 548–49, 567; *Baker*, 369 U.S. at 254–57 (Clark, J., concurring).

[59] *See, e.g.*, *Reynolds*, 377 U.S. at 557–61.

[60] *See, e.g.*, *Baker*, 369 U.S. at 277–80.

[61] 412 U.S. 735 (1973).

> Beyond this, we have not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States. Even more plainly, judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so.[62]

Then, in *Davis v. Bandemer*[63] in 1982, in a 7-2 decision by Justice White, the Court had to decide two elements: first, whether political gerrymandering was justiciable, and secondly, the question of jurisdiction.[64] The Court stated that "[h]ere, none of the identifying characteristics of a nonjusticiable political question are present. Disposition of the case does not involve this Court in a matter more properly decided by a coequal branch of the Government[,]"[65] The Court went on to say that "the claim is that each political group in a State should have the same chance to elect representatives of its choice as any other political group. Nevertheless, the issue is one of representation, and we decline to hold that such claims are never justiciable."[66] The Court recognized the law's discriminatory impact on the Indiana Democrats, but found that the discrimination was not sufficiently substantial to violate the Equal Protection Clause under the Fourteenth Amendment.[67] The Court reasoned that:

> even if a state legislature redistricts with the specific intention of disadvantaging one political party's election prospects, we do not believe that there has been an unconstitutional discrimination against members of that party unless the redistricting does in fact disadvantage it at the polls. . . . [A] mere lack of proportionate results in one election cannot suffice in this regard.[68]

This judgment puts a brake on *Baker*'s legacy on the point inherent in the notion of discrimination, which must be more concrete and effective by relying on elements beyond an electoral result. On the other hand, it consolidates the aspect of justiciability and thus of the jurisdiction of the Court with regard to questions relating to the electoral law. "Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness—

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[62] *Id.* at 754.

[63] 478 U.S. 109 (1986).

[64] *Id.* at 118, 127.

[65] *Id.* at 110.

[66] *Id.* at 124.

[67] *See id.* at 127–37.

[68] *Id.* at 111, 139.

because the question is entrusted to one of the political branches or involves no judicially enforceable rights."[69]

The 2004 case *Vieth v. Jubelirer*[70] involved a Pennsylvania plan that resulted in a split 5–4 decision that, with a plurality opinion by Antonin Scalia, demonstrated the division of the Court regarding political gerrymandering. Four Justices said it was not the Court's prerogative to decide[71] while four others, even though they disagreed on the method to determine when the equal protection clause was violated, thought that such challenges could be heard by the Court.[72] The fifth vote was provided by Justice Kennedy.[73] The plurality opinion thought political gerrymandering was non-justiciable and thus, would overturn prior caselaw holding otherwise.[74] The plurality argued that, because no workable test to determine when a gerrymander violated the Equal Protection Clause had developed, the matter was a political question and not for the Judiciary to decide.[75] Yet, while concurring, Justice Kennedy stated "[i]f workable standards do emerge to measure these burdens, however, courts should be prepared to order relief."[76]

More recently, in 2006, the Roberts Court opted for an approach involving the guaranty clause from the perspective of strengthening the prerogatives of states and their sovereignty, an approach that is reflected in the case law of the Court.[77] So, in the ruling *League of United Latin American Citizens v. Perry*[78] with a 5–4 decision for Rick Perry, the Governor of Texas, the Court delivered, in a plurality opinion by Anthony M. Kennedy, the Guaranty Clause,[79] which declares that states must provide their citizens "a republican form of government."[80] It held that the apportionment plan from the Texas

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[69] Vieth v. Jubelirer, 541 U.S. 267, 277 (2004).

[70] *Id.* at 267.

[71] *Id.* at 270 (plurality opinion).

[72] *Id.* at 317 (Stevens, J., dissenting); *id.* at 342 (Souter, J., dissenting); *id.* at 355 (Breyer, J., dissenting).

[73] *Id.* at 306 (Kennedy, J., concurring).

[74] *See id.* at 270 (plurality opinion).

[75] *Id.*

[76] *Id.* at 317 (Kennedy, J., concurring).

[77] League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006).

[78] *Id.*

[79] *Id.* (plurality opinion).

[80] U.S. CONST. art. IV, § 4.

legislature was in conformity with the Constitution but not with the Voting Rights Act, as it discriminated against Latino voters.[81]

Following *Baker*, the Court used its political question cases to assert its supremacy toward the other branches of the federal government, a position that it had started to adapt in *Cooper v. Aaron*[82] when it referred to its "supremacy" over states and local governments but the recent jurisprudence has underlined the unaccountability of appointed judges to democratic processes, and has raised the difficulty of establishing legal standards to apply to the political sphere.[83]

In 2013, in *Shelby County v. Holder*,[84] the Supreme Court indicated that section 4b of the Voting Rights Act,[85] which imposed federal control over discrimination that local voting rules could generate, was unconstitutional.[86] Section 5, which derives directly from section 4, is thus lost in its application.[87] The latter's conservative approach to the law created difficulties inherent in the organization of the separation of powers and corresponded to a period of activism in order to extend the field of control of the federal state, placing the issue at stake. The sovereignty of states and equality between the federated states lies at the heart of the system. "Our country has changed," Chief Justice John G. Roberts Jr. wrote for the majority, "while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."[88] Returning the political question to Congress, paradoxically in *Shelby*, the Court seemed to have extended its control of constitutionality in the issue of political doctrine by opting for enhanced protection of state sovereignty, posing questions of coherence in its jurisprudence on the political issue but displaying a consistency in the approach previously initiated by the Rehnquist Court.

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[81] *Perry*, 548 U.S. at 453–54.

[82] 358 U.S. 1, 18 (1958).

[83] *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 183–98 (2d ed. 1986).

[84] 570 U.S. 529 (2013).

[85] 52 U.S.C. § 10303 (2014).

[86] *Id.*; *see Holder*, 570 U.S. at 587.

[87] *Holder*, 570 U.S. at 558–59.

[88] *Id.*

B. The Roberts Court and Partisan Gerrymandering

In the most recent case, *Rucho v. Common Cause*,[89] in 5–4 decision for Rucho, Chief Justice Roberts delivered the majority opinion of the Court,[90] in which Justices Thomas, Alito, Gorsuch, and Kavanaugh joined, while Justices Kagan, Ginsburg, Breyer, Sotomayor dissented, on partisan gerrymandering and the political doctrine in the Trump era.[91] This decision is of major significance because the Court deliberately chose to rule at the same time on two complaints about gerrymandering, both issued by Democrats regarding the state of North Carolina,[92] and by Republicans in the *Benisek v. Lamone*[93] case, relating to gerrymandering in the state of Maryland. By this common decision, the court intended to demonstrate its overall distance from political parties and not to deliberately favor a political party.[94] This is significant in the current context of partisan quarrels and attacks on the independence of the judiciary *vis-a-vis* the policy.

The Court first of all noted that the practice, as well as the feeling of injustice that it generates, are not novel. "Partisan gerrymandering is nothing new. Nor is frustration with it. The practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution."[95] The Court also traced this practice back before the term was generated by the practices of Massachusetts Governor Eldridge Gerry.[96] "During the very first congressional elections, George Washington and his Federalist allies accused Patrick Henry of trying to gerrymander Virginia's districts against their candidates–in particular James Madison, who ultimately prevailed over fellow future President James Monroe."[97]

The Court based its decision on the political question doctrine, finding there was not a viable standard that could be administered by the courts to determine when a political gerrymander violated the

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[89] 139 S. Ct. 2484 (2019).

[90] *Id.* at 2491, 2508–09.

[91] *Id.* at 2508–09.

[92] *Id.* at 2491.

[93] 138 S. Ct. 1942 (2019).

[94] *See id.*

[95] *Rucho*, 139 S. Ct. at 2494.

[96] *Cartoon*, *supra* note 28.

[97] *Rucho*, 139 S. Ct. at 2494.

Equal Protection Clause.[98] As the Court recalled in its conclusion: "We have never struck down a partisan gerrymander as unconstitutional–despite various requests over the past 45 years."[99]

The court returned the resolution of this problem to the state level which, according to its judgment, did not fall within its competence.[100] Thus, the Court held that partisan gerrymandering claims were not justiciable at the federal judiciary because they presented a political question:

> We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions.[101]

What Justice Kagan's dissenting opinion recognized that state courts did not have a solution that the Supreme Court would not be able to find, indicating "[b]ut what do those courts know that this Court does not?"[102] Thus, in the *Rucho* decision, the Supreme Court held that political gerrymandering claims did not concern the federal Judiciary.[103] The majority considered that, in the absence of generally applicable and politically neutral tests, the issue of redistricting was a matter of politics.[104] The court followed its precedent while going further in its reasoning with respect to its previous ratio decidendi since it found that it had no jurisdiction in the absence of a test.[105] Nevertheless, the majority indicated its lack of agreement with such practices, claiming that it "does not condone excessive partisan gerrymandering."[106]

Paradoxically, the majority and dissenting opinion, although inevitably different at first sight, merge on their assessment of the current situation concerning the judicial institution and political discourse. This decision represents an important issue in light of this crisis of confidence and the independence of the Court. For the Chief

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[98] *See id.* at 2493–94.

[99] *Id.* at 2507.

[100] *Id.*

[101] *Id.* at 2506–07.

[102] *Id.* at 2524 (Kagan, J., dissenting).

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.* at 2507 (majority opinion).

Justice, it is not necessary to make the mistake of extending the jurisdiction and prerogatives of the Supreme Court in areas reserved for other branches of government or under the sovereignty of the people by the principle of elections: "No one can accuse this Court of having a crabbed view of the reach of its competence."[107]

A contrary holding could jeopardize the independence of the Court by bringing it into the political sphere whose partisan aspect is at its peak today. As the Chief Justice observed:

> The expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life. That intervention would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting, for state as well as federal representatives. Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role.[108]

Opinions cluster around the importance of the decision in light of the current situation. Take Justice Kagan's response to the Chief Justice:

> Of all times to abandon the Court's duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government. Part of the Court's role in that system is to defend its foundations. None is more important than free and fair elections.[109]

> The majority's abdication comes just when courts across the country, including those below, have coalesced around manageable judicial standards to resolve partisan gerrymandering claims.[110]

The dissenting opinion of Justice Kagan considers that the inaction of the Court in the political field generates this polarization: "[Partisan gerrymandering] encourage[s] a politics of polarization and dysfunction. If left unchecked, gerrymanders like the ones here may irreparably damage our system of government. And checking them is *not* beyond the courts."[111]

In Justice Kagan's view, the Court would not fulfill its role and prerogatives by adopting a position to let go. The role of the Supreme

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[107] *Id.* at 2508.

[108] *Id.* at 2507.

[109] *Id.* at 2525 (Kagan, J., dissenting).

[110] *Id.* at 2509.

[111] *Id.*

Court is, according to her, to directly intervene through the principle of constitutionality and to read Constitutional law, stating that this decision is a first in such inaction of the court: "For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities."[112] Further, Kagan notes that the Court did not take much trouble to find a solution: "For the first time in this Nation's history, the majority declares that it can do nothing about an acknowledged constitutional violation because it has searched high and low and cannot find a workable legal standard to apply."[113]

This decision corresponds to a comprehensive approach of the Court that began in the Reagan era, the advent of Neoliberalism,[114] with a desire to reduce the interventions of the Supreme Court to a minimum in order to reduce the federal constraints on the states.[115] This fundamental neoliberal movement is reflected in the direction taken by this decision while presenting a duality in its reading that must be correlated with the decision made by the Court on the question of citizenship–the two decisions potentially could have affected the political landscape structurally and irreversibly. The Court's refusal to change the rules, while the majority of the legislatures are under the Republican control, underlines the distinction between law and politics and reinforces the independence of the judiciary, which did not wish to inflict a crushing blow on the Democratic Party, a position reasserted on the issue of the 2020 census citizenship question.

C. The Census Citizenship Question at the Intersection of Law and Politics

In *Department of Commerce v. New York*,[116] a coalition of sixteen states, and seven cities and mayors led by the State of New York,

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[112] *Id.*

[113] *Id.* at 2515.

[114] *See generally* David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100 (2018).

[115] *See, e.g.*, RACHEL S. TURNER, NEO-LIBERAL IDEOLOGY: HISTORY, CONCEPTS AND POLICIES 132 (2008) (stating that "a massive programme of deregulation was pursued by the Thatcher and Reagan administrations in an attempt to enhance the forces of the market and reduce government intervention in the economy"); *see also* Aaron Samsel, Note, *Toward a Synthesis: Law As Organizing*, 18 CUNY L. REV. 375, 380 (2015) (explaining that "rights secured through . . . impact litigation have been narrowed" as a result of the "advent of neoliberalism . . . .").

[116] Dep't of Commerce v. New York, 139 S. Ct. 2551 (2019).

alleged that the Department of Commerce's decision to put a citizenship question on the upcoming 2020 census violated the Constitution.[117] Chief Justice Roberts delivered the opinion for a unanimous Court with respect to Parts I and II, and the opinion of the Court with respect to Parts III, IV-B.[118] The Court ultimately blocked the citizenship question.[119]

The Roberts Court is currently positioning itself as a guarantor of institutions, be it the separation of powers, the independence of the judiciary, or institutional integrity. The legitimacy and independence of the Supreme Court from politics are central elements that help better understand the positioning of the Roberts Court. The difficulty of the exercise of the decision which is articulated around the difficult balance between the judicial control and the just freedom necessary to the governmental practice constitutes a central element.

In the decision, the majority opinion states it is not generally for the judiciary to deliberate and question mental processes.[120] Indeed, as the Court recalled: "Finally, we have recognized a narrow exception to the general rule against inquiring into 'the mental processes of administrative decisionmakers.' On a 'strong showing of bad faith or improper behavior,' such an inquiry may be warranted and may justify extra-record discovery."[121]

The Chief Justice found, taken as a whole, that such a discrepancy between the decision made and the explanation given was present: "But having done so for the sufficient reasons we have explained, we cannot ignore the disconnect between the decision made and the explanation given."[122] Reaffirming the lower court's holding, he stated, "[t]he District Court invoked that exception in ordering extra-record discovery here. Although that order was premature, we thought it was ultimately justified in light of the expanded administrative record."[123]

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[117] *Id.*

[118] *Id.* at 2555.

[119] *Id.*

[120] *Id.*

[121] *Id.* at 2573–74 (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971)).

[122] *Id.* at 2575.

[123] *Id.* at 2574.

It is fundamental to evoke certain aspects of the presidential election with regard to the political impact of the decision and to measure the position of the Supreme Court in relation to the Democratic or Republican parties. Article 1, Section 2, Clause 3 of the United States Constitution,[124] along with Amendment XIV, establish that Representatives and direct taxes shall be apportioned among states respective of their population Amendment.[125] Section 2 requires counting the whole number of persons in each state in connection with the election presidential U.S. for the composition of the college election and Congress.[126] Clause 2 of Article II of the United States Constitution states that the President and Vice-President shall be chosen by electors.[127]

The electoral college is made up of 538 electors.[128] To be elected president, a candidate must obtain the votes of at least 270 of them.[129] Each State is allocated a number of electors equal to the number of its representatives in Congress: two senators, regardless of its demographic weight, plus elected representatives to the House of Representatives, whose number is determined according to its population.[130] Thus, the accounting must be fixed by law and the census must take place every 10 years.[131] The Constitution refers to people so it is therefore vague on this issue.

However, in the absence of a nationality-related question in the decennial census and as a reference for the distribution of representation to all political bodies, including the Electoral College, all persons residing in the United States are included in this calculation, whether they are legal or illegal, citizen or non-citizen.[132] Thus, there is an unequal situation among the States in terms of representativeness since the States that have a high level of legal or undocumented

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[124] U.S. CONST. art. I, § 2, cl. 3.

[125] U.S. CONST. amend. XIV.

[126] U.S. CONST. art. I, § 2.

[127] U.S. CONST. art. II, § 1, cl. 2.

[128] *What is the Electoral College?*, NAT'L ARCHIVES & RECS. ADMIN., https://www.archives.gov/federal-register/electoral-college/about.html (last visited Dec. 9, 2019).

[129] *Id.*

[130] U.S. CONST. art. I, § 2, cl. 3.

[131] *Id.*

[132] *See Congressional Apportionment*, U.S. CENSUS BUREAU, https://www.census.gov/population/apportionment/about/faq.html (last visited Dec. 9, 2019) (explaining "[w]ho is included in the apportionment population counts").

immigrant populations have a more important voting weight at the federal bodies, including the presidential election than a state with a higher number of citizens but fewer non-citizens.[133] This situation generates overrepresentation of citizens in these former states whose vote is more counted for federal elections. The table below measures the difference between the population and the citizen population in the various states, this difference being measured in several millions, as it is the case, for example, in California:[134]

STATE	Total population[135]	Total citizen population[136]	Difference[137]
UNITED STATES	249,748	228,832	20,916
ALABAMA	3,753	3,609	144
ALASKA	523	497	26
ARIZONA	5,361	4,757	604
ARKANSAS	2,261	2,158	103
CALIFORNIA	30,243	25,525	4,718
COLORADO	4,353	4,029	324
CONNECTICUT	2,834	2,539	295
DELAWARE	756	713	43
DISTRICT OF COLUMBIA	567	512	55
FLORIDA	16,845	15,047	1,798
GEORGIA	7,850	7,311	539
HAWAII	1,057	971	86
IDAHO	1,299	1,226	73
ILLINOIS	9,732	8,947	785
INDIANA	5,006	4,792	214
IOWA	2,376	2,239	137
KANSAS	2,149	2,026	123

[133] *See, e.g.*, Dennis L. Murphy, *The Exclusion of Illegal Aliens from the Reapportionment Base: A Question of Representation*, 41 CASE W. L. REV. 969, 971–73 (1991).

[134] *Voting and Registration in the Election of November 2018*, U.S. CENSUS BUREAU (Apr. 23, 2019), https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-583.html (Table 4a, available for download here, reports the voting and registration for States in November 2018, reproduced below).

[135] In thousands.

[136] In thousands.

[137] In thousands.

KENTUCKY	3,370	3,249	121
LOUISIANA	3,458	3,326	132
MAINE	1,074	1,056	18
MARYLAND	4,666	4,281	385
MASSACHUSETTS	5,460	4,919	541
MICHIGAN	7,657	7,430	227
MINNESOTA	4,238	4,006	232
MISSISSIPPI	2,194	2,178	16
MISSOURI	4,676	4,564	112
MONTANA	822	812	10
NEBRASKA	1,428	1,332	96
NEVADA	2,324	2,067	257
NEW HAMPSHIRE	1,080	1,025	55
NEW JERSEY	7,009	6,267	742
NEW MEXICO	1,576	1,485	91
NEW YORK	15,478	13,684	1,794
NORTH CAROLINA	7,911	7,444	467
NORTH DAKOTA	560	541	19
OHIO	8,873	8,640	233
OKLAHOMA	2,868	2,732	136
OREGON	3,293	3,138	155
PENNSYLVANIA	9,928	9,475	453
RHODE ISLAND	828	782	46
SOUTH CAROLINA	3,914	3,769	145
SOUTH DAKOTA	648	637	11
TENNESSEE	5,202	5,016	186
TEXAS	21,064	18,374	2,690
UTAH	2,247	2,109	138
VERMONT	503	497	6
VIRGINIA	6,386	5,773	613
WASHINGTON	5,775	5,228	547
WEST VIRGINIA	1,406	1,384	22
WISCONSIN	4,436	4,296	140
WYOMING	430	422	8

This creates a major problem in terms of the one-citizen, one-vote doctrine because the voice of a citizen residing in a state where the non-citizen population is more present is, in fact, more represented.

This is a major electoral issue. It is essential to exclude from the debate the allocation of a budget to a state and the different programs or grants whose attribution is not linked to nationality. Per the Constitution, the only element regarding federal representativeness that correlates nationality to the population is the right to vote.

Regarding the issue of the immigrant population, in particular in illegal situations and the discriminating major disparities between the states, the State of Alabama has filed a complaint against the Department of Commerce introducing the method of calculation discussed under the Obama presidency;[138] on May 20, 2015, the Census Bureau published a document in the Federal Register asking for public comment on the Proposed 2020 Census Residence Criteria and Residence Situations.[139] The different comments led the Bureau to decide the situation of residence, which is now contested by the State of Alabama. This case is being reviewed by the U.S. District Court for the Northern District of Alabama.[140] On. August 12, 2019, Massachusetts Attorney General Maura Healey joined a coalition of 26 states, cities, and counties, as well as the U.S. Conference of Mayors, in opposing the state of Alabama's attempt to refuse to count undocumented immigrants in the 2020 census.[141]

California is the state where the standard deviation is the highest and where they would lose electoral votes if its population is based solely on citizenship, and not on residence–which has had some inclination to allocate its votes mainly to the Democratic candidate in recent elections.[142] A reorganization of the representation of states in Congress and for the formation of the Electoral College would weaken the urban states in favor of the states with rural domination, which would positively impact the Republican candidatures.[143] Thus, the Court

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[138] Alabama v. U.S. Dep't of Commerce, No. 2:18-CV-772-RDP, 2019 WL 4260171 (N.D. Ala. Sept. 9, 2019).

[139] 83 Fed. Reg. 5,525, 5,526 (Feb. 8, 2018).

[140] *Alabama*, No. 2.18-CV-772-RDP, slip op. at 1 (N.D. Ala. Sept. 9, 2019).

[141] Chloe Gotsis, *AG Healey Fights Efforts to Block Census Count*, MASS.GOV (Aug. 12, 2019), https://www.mass.gov/news/ag-healey-fights-efforts-to-block-census-count.

[142] *California*, 270 TO WIN, https://www.270towin.com/states/California (last visited Dec. 9, 2019).

[143] *See* Paul Boudreaux, *The Electoral College and Its Meager Federalism*, 88 MARQ. L. REV. 195, 224 (2004); Emily Badger, *How the Rural-Urban Divide Became America's Political Fault Line*, N.Y. TIMES (May 21, 2019), https://www.nytimes.com/2019/05/21/upshot/america-political-divide-urban-rural.html; Rahsaan Maxwell, *Why Are Urban and Rural Areas So*

did not agree with the question of citizenship and refused to interfere in the practice of political gerrymandering, opting for the neutral status quo position signifying the independence of the judiciary that the Court wishes to be strengthened, in public opinion, in particular.[144] The interference of the Court in this area would have affected the entire political system for several years, particularly regarding the strategies deployed by the political parties. Without necessarily going in the direction of a change in the procedure of accounting for the representation of the states in the federal elections and the Electoral College, it is obvious that the addition of a question of citizenship would dissuade *a priori* the participation in the census.[145] Thus, *de facto*, it would have an impact on the representation of each of the states in the elections and their allocated budget since it would self-censor illegal residents for fear of the consequences on their illegal status to take part in this accounting. There would, therefore, necessarily be a change that would take place without altering the electoral rules.

Nonetheless, instead of campaigning strategies, political parties should focus on the conviction of each voter instead of campaigning strategies that bring them closer to power while distancing them from voters. The rise of populism is a major symptom. The U.S. situation has a specificity concerning the ratio of population to non-voter representation, particularly with regard to the U.S. presidential election, which places it in a democratic weakness with regard to comparative law with other Western countries where only voters have an impact on the result of the vote.

In defining the scope of the Supreme Court's jurisdiction and clearly separating it from the realm of politics, the Roberts Court intends to strengthen the institution's independence but also the court's own prerogatives by using the judicial review. At first glance, this might seem somewhat inappropriate in the absence of contextualizing elements. The Court has amputated its own judicial review of politics and seems to allow the discretion of the executive to be amply

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Politically Divided?, WASH. POST (Mar. 5, 2019, 7:45 AM), https://www.washingtonpost.com/politics/2019/03/05/why-are-urban-rural-areas-so-politically-divided/.

[144] Dep't of Commerce v. New York, 139 S. Ct. 2551, 2575–76 (2019).

[145] *See, e.g.*, Justin Levitt, *Citizenship and the Census*, 119 COLUM. L. REV. 1355, 1362–68 (2019); Timothy Williams, *What You Need to Know About the Census Citizenship Question*, N.Y. TIMES (June 27, 2019), https://www.nytimes.com/2019/06/27/us/citizenship-question-census.html.

operate. Only by looking at it more closely, by pointing out the area where it does not go, the Court reaffirms the principle of its own reading of the law and prerogatives of each of the institutional constituent entities. Since the beginning of the 20th century, the American doctrine seems to agree on the fact that there is a tendency to expand the powers of the executive of the United States, which was characterized as imperial presidency.[146] One of the illustrative elements of this phenomenon is in the recurrent recourse and in the frequent use by the President of the United States of *executive orders* as an independent normative tool and competitor of the legislation passed by the Congress.[147] This action has changed the fields of practice of the various branches to which the Court gives a framework for these two decisions that directly affect the policy. Its institutional independence and competence are thus reaffirmed with a view to perpetuating the court beyond the Trump era by working in a perspective of institutional integrity.

Legal process theorists, such as Henry Hart and Herbert Wechsler, have had a substantial influence on the legal community and the framing of a political question doctrine.[148] Their approaches, in the wake of Felix Frankfurter's quest for judicial restraint, crafted the "pedagogic canon" of the field for generations.[149]

Yet, the Roberts Court's posture on the political question, via the prism of partisan gerrymandering and the census question, differs from the Supreme Court's jurisprudence in the current context and is particularly meaningful. The fact that the Court expresses its supremacy by this mechanism, and not its reverence *vis-a-vis* the other two institutions, seems to correspond to the current situation with

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[146] *See* Tom Head, *History of the Imperial Presidency*, THOUGHTCO., https://www.thoughtco.com/history-of-the-imperial-presidency-721446 (last updated Apr. 4, 2019); Kevin M. Kruse & Julian E. Zelizer, *Have We Had Enough of the Imperial Presidency Yet?*, N.Y. TIMES (Jan. 9, 2019), https://www.nytimes.com/2019/01/09/opinion/president-trump-border-wall-weak.html.

[147] *See Executive Orders*, FED. REG., https://www.federalregister.gov/presidential-documents/executive-orders (last visited Dec. 9, 2019) (including President Trump's executive orders); *Executive Orders Disposition Tables Index*, NAT'L ARCHIVES: FED. REG., https://www.archives.gov/federal-register/executive-orders/disposition (last visited Dec. 9, 2019) (including executive orders from 1929 to 2017).

[148] Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 690 (1989) (reviewing PAUL M. BATOR ET. AL., HART AND WECHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (3d ed. 1988)).

[149] *Id.*

regard to the legitimacy that the Court seeks to obtain because it is undermined by a multitude of voices from all sides, dissatisfied because the Court is in this non-partisan position. It seems important to disconnect elements that come under the interpretation of law that include different approaches, as any discipline with a partisan desire, to favor the deployment of political parties. Indeed, in recent years and since the mid-1990s, there has been a fervent and ever-growing bipolarization of American political life, but one of the founding features of American constitutional democracy is this non-partisan capacity or satisfactory consensus. This allowed the country to advance in history without a systematic questioning of the past period, sometimes sadly, and this is the case since the advances concerning the rights of individuals: fortunately, in which case, systematic back pedaling would have led American power to a fragile destination.

II. THE ROBERTS COURT AND THE EXECUTIVE: A CANTANKEROUS RELATIONSHIP

The reinforcement of its independence by the prism of the control of constitutionality through the political doctrine is intrinsically related to the various attacks to which the Court has been subjected in the Trump era. The Court may fear retaliation for the increase in the number of judges that could follow in the face of the election of a Democratic president. This is a difficult context for the Court being at the core of political debate. The position of Democrats is problematic in the issue of the separation of powers and the independence of the Supreme Court and the judiciary because, faced with such arguments, the Court is paradoxically suffering from a bipartisan consensus in the attacks. On the one hand, the integrity of the judiciary and the Supreme Court is being undermined by the Trump Presidency. On the other, the candidates for the Democratic primary have already considered this possibility because of their disagreement with the Roberts Court jurisprudence.[150]

A. Paving the Way to Trump's Dissatisfaction: Obama 'State of the Union Against the Roberts Court'

[150] *See, e.g.*, Danielle Root & Sam Berger, *Structural Reforms to the Federal Judiciary: Restoring Independence and Fairness to the Courts*, CTR. FOR AM. PROGRESS (May 8, 2019, 12:01 AM), https://www.americanprogress.org/issues/courts/reports/2019/05/08/469504/structural-reforms-federal-judiciary/.

Presidents often comment on court decisions or criticize the judiciary.[151] Tensions between the executive and the Roberts Court are not exclusive to the Trump presidency. Under the Obama presidency, the Supreme Court was the subject of sharp criticism and attacks on the independence of its decisions.[152] The State of the Union address has a constitutional basis requiring 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[.]"[153] The Constitution does not provide guidance on the form of the message.

In a State of the Union speech in January 2010, in the presence of six of the nine Supreme Court justices, President Obama criticized the 5-4 U.S. Supreme Court decision in the campaign finance case, *Citizen United v. Federal Election Commission*[154] declaring, "[w]ith all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates[.]"[155] The White House issued a fact sheet defending Obama's statements, noting that the four Justices who dissented from the decision had raised concerns that it would open the door to unchecked spending by foreign-owned corporations.[156] A few days later, Chief Justice Roberts commented on the inappropriate aspect of such criticism in such a context:[157] this was a particularly important comment in the sense that Supreme Court members rarely comment on the State of the Union. Indeed, although they are present, at their convenience, at the State of the Union addresses, the members of the Supreme Court do not respond in accordance to the requirements of the protocol that they have to sit emotionless.

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[151] Jonathan R. Nash, *Trump Is Not the First President to Criticize Judiciary*, HILL (Feb. 9, 2017, 5:00 PM), https://thehill.com/blogs/pundits-blog/the-judiciary/318783-trump-is-not-the-first-president-to-criticize-judiciary.

[152] *Id.*

[153] U.S. CONST. art. II, § 3.

[154] 558 U.S. 310 (2010).

[155] *Text: Obama's State of the Union Address*, N.Y. TIMES (Jan. 27, 2010), https://www.nytimes.com/2010/01/28/us/politics/28obama.text.html.

[156] David Alexander, *White House Defends Obama's Court Ruling Criticism*, REUTERS (Jan. 28, 2010, 10:30 PM), https://www.reuters.com/article/us-obama-court/white-house-defends-obamas-court-ruling-criticism-idUSTRE60S0JO20100129.

[157] *See* David G. Savage, *Chief Justice Unsettled by Obama's Criticism of Supreme Court*, L.A. TIMES (Mar. 10, 2010, 12:00 AM), https://www.latimes.com/archives/la-xpm-2010-mar-10-la-na-roberts-speech10-2010mar10-story.html.

Chief Justice Roberts, while speaking to law students at the University of Alabama, stated, in response to a student's question, that he did not disagree with criticism, recognizing that criticism remains important: "Anybody can criticize the Supreme Court without any qualm" and "[s]ome people I think have an obligation to criticize what we do, given their office, if they think we've done something wrong."[158] Yet Chief Justice Roberts disagreed on the context the criticism occurred stating that:

> On the other hand, as you said, there is the issue of the setting, the circumstances and the decorum. The image of having the members of one branch of government standing up, literally surrounding the Supreme Court, cheering and hollering while the Court, according to the requirements of protocol, has to sit there expressionless, I think is very troubling. And it does cause you to think whether or not it makes sense for us to be there. To the extent the State of the Union has degenerated into a political pep rally, I'm not sure why we're there.[159]

"Politicization of the Court," in other words, "is dangerous because it primes the public for a power grab by the political branches."[160]

B. The Trump Presidency and the Independence of the Judiciary

Two hundred years after the Philadelphia Convention, Hamilton said the judiciary was the "least dangerous" branch because it would have "no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever."[161] This "had come to occupy so important a place in the nation's political life that the question of its future course was capable of generating a controversy more intense and more divisive than all but a very few contests for political office."[162]

The composition of the Court was at the heart of the political debate of the 2016 presidential election, in particular by the then candidate Donald Trump, who—for the first time in the history of

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[158] *Chief Justice Roberts Remarks on State of the Union*, YOUTUBE (Mar. 10, 2010), https://youtu.be/ARV_eHsyaHo.

[159] *Id.*

[160] Eric Hamilton, *Politicizing the Supreme Court*, 65 STAN. L. REV. ONLINE 35, 39 (2012).

[161] THE FEDERALIST NO. 78, at 522–23 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

[162] Terrance Sandalow, *The Supreme Court in Politics*, 88 MICH L. REV. 1300, 13011 (1990).

presidential campaigns—published a list of potential judges to replace Justice Scalia, who had not been replaced yet.[163]

In may 2016, the Republican party primary candidate published a list of potential Supreme Court candidates he would choose for vacant seats in the US Supreme Court.[164] This unprecedented publication during a presidential campaign in both a party's primary and post-nomination state was intended to dispel any fears surrounding Donald Trump's candidacy and to rally Conservative voters in support of his campaign.[165] The campaign strategy put in place by then candidate Trump, by the publication of the list which included only Conservative jurists, was followed by a clarification in an interview he gave in June 2016: "[w]e're going to have great judges, conservative, all picked by the Federalist Society."[166] This publication had the effect of revitalizing the electoral base and voters, including undecided Conservatives to mobilize and vote. It also made the 2016 election a societal issue beyond the stake of the executive branch, but much more that of a generation impacted by the decisions of the highest authority of the federal judicial system. Indeed, contemporary presidents pay more attention to ideology when selecting Supreme Court Justices than their predecessors. Harry Truman appointed friends as Supreme Court Justices while George W. Bush appointed movement Conservatives.[167] Post inauguration, President Trump adopted the same position in order to place judges at the heart of the political debate and as a matter of interest to the voters, with a view to the finality of a reelection.

Donald Trump has strongly contributed to the public perception of the partisan aspect of the judiciary and has made this a major

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[163] Alan Rappeport & Charlie Savage, *Donald Trump Releases List of Possible Supreme Court Picks*, N.Y. TIMES (May 18, 2016), https://www.nytimes.com/2016/05/19/us/politics/donald-trump-supreme-court-nominees.html; *see also* Andrew Rafferty, *Trump Releases List of Potential Supreme Court Nominees*, NBC NEWS (May 19, 2016, 2:56 AM), https://www.nbcnews.com/politics/2016-election/trump-releases-list-potential-supreme-court-nominees-n576271.

[164] *See* Rappeport & Savage, *supra* note 163.

[165] Jackie Calmes, *Donald Trump: Campaigns and Elections*, MILLER CTR., https://millercenter.org/president/trump/campaigns-and-elections (last visited Jan. 12, 2020).

[166] *Breitbart News Daily - Donald J. Trump - June 13, 2016*, SOUNDCLOUD (June 13, 2016), https://soundcloud.com/breitbart/breitbart-news-daily-donald-j-trump-june-13-2016?in=breitbart/sets/breitbart-news-daily-june-13.

[167] NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 78, 123 (2019).

theme of the 2020 presidential election: "I have long heard that the appointment of Supreme Court Justices is a President's most important decision. SO TRUE!"[168] He perceives the Court as an obstacle, instead of an independent neutral institution, whenever the Court operates and settles in opposition to his own views; his attacks against the absence of independence in the judiciary had started while he was campaigning for the Republican nomination.[169] Indeed, while running for president, candidate Donald Trump attacked the impartiality of the federal judiciary embodied then by Judge Gonzalo Curiel, asserting that he was biased because of Trump's Conservative immigration ideas, including the Mexican wall proposal.[170] District Judge Gonzalo P. Curiel, an Indiana native, was targeted by Donald Trump while he was the judge of a class-action lawsuit against Trump University.[171] In an eleven minute speech at a rally in San Diego in May 2016, Donald Trump accused Judge Curiel of being "hostile" because of his Mexican heritage, asserting that he should "recuse" himself because he was appointed by President Obama.[172]

In the fall of 2018, President Trump engaged in a conflict with the Supreme Court Chief Justice.[173] Certainly, the rejection of a decree provoked Trump's ire leading to intense exchanges with Chief Justice Roberts.[174] In a confusion over the jurisdiction giving rise to the decree, since it was not the Ninth Circuit but the United States District Court for the Northern District of California in *East Bay*

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[168] Donald J. Trump (@realDonaldTrump), TWITTER (July 9, 2019, 10:31 AM), https://twitter.com/realdonaldtrump/status/1148600596502589441?lang=en.

[169] *In His Own Words: The President's Attacks on the Courts*, BRENNAN CTR. FOR JUST. (June 5, 2017), https://www.brennancenter.org/our-work/analysis-opinion/his-own-words-presidents-attacks-courts.

[170] Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict'*, WALL STREET J. (June 3, 2016, 10:03 AM), https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442.

[171] Nina Totenberg, *Who Is Judge Gonzalo Curiel, the Man Trump Attacked for His Mexican Ancestry?*, NPR (June 7, 2016, 7:20 PM), https://www.npr.org/2016/06/07/481140881/who-is-judge-gonzalo-curiel-the-man-trump-attacked-for-his-mexican-ancestry.

[172] *Donald Trump Holds Rally in San Diego*, YOUTUBE (May 27, 2016), https://www.youtube.com/watch?time_continue=1368&v=aRPGTWIrnZo.

[173] Brian Naylor & Nina Totenberg, *Chief Justice Roberts Issues Rare Rebuke to Trump; Trump Fires Back*, NPR (Nov. 21, 2018, 3:05 PM), https://www.npr.org/2018/11/21/670079601/chief-justice-roberts-issues-rare-rebuke-to-trump.

[174] *Id.*

Sanctuary Covenant et al. v. Donald J. Trump et al.,[175] the President lamented the outcome, blaming District Judge Jon Tigar for a shocking decision.[176] The decision, dated December 19, 2018, issued a nationwide restraining order barring enforcement of the policy which the Administration had announced on November 9, 2018, therefore obstructing the immigration policy of the Trump administration.[177] President Trump consequently declared, through his Twitter account, "[why] are so many opposing view (on Border and Safety) cases filed there, and why are a vast number of those cases overturned. Please study the numbers, they are shocking. We need protection and security - these rulings are making our country unsafe! Very dangerous and unwise!"[178]

White House Press Secretary, Sarah Sanders, attacked the decision as "yet another example of activist judges imposing their open borders policy preferences," and stated that the administration would "take all necessary action to defend the executive branch's lawful response to the crisis at our southern border."[179]

It is not unusual for presidents to publicly disagree with Supreme Court decisions. President George W. Bush, for instance, did not hesitate to criticize a 2008 decision[180] which recognized the rights of prisoners held at Guantánamo Bay, Cuba, but acknowledged the supremacy of the court, suggesting new legislation: "We'll abide by the court's decision[,]" President Bush said during a news conference in Rome, "[but t]hat doesn't mean I have to agree with it."[181]

Regarding the political orientation of the decisions, for example, Ronald Reagan also criticized the independence of the judiciary asserting, in a 1986 radio address, the "scales of justice ha[ve] become

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[175] 354 F. Supp. 3d 1094 (N.D. Cal. 2018).

[176] *See* Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 22, 2018, 7:21 AM), https://twitter.com/realDonaldTrump/status/1065581119242940416.

[177] *E. Bay Sanctuary Covenant*, 354 F. Supp. 3d at 1101–02.

[178] Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 21, 2018, 4:09 PM), https://twitter.com/realDonaldTrump/status/1065351478347530241.

[179] White House, *Statement from the Press Secretary* (Nov. 20, 2018), https://www.whitehouse.gov/briefings-statements/statement-press-secretary-41/.

[180] Boumediene v. Bush, 553 U.S. 723 (2008).

[181] Ari Shapiro, *Supreme Court Backs Rights for Terror Detainees*, NPR (June 12, 2008, 11:02 AM), https://www.npr.org/templates/story/story.php?storyId=91425261.

seriously unbalanced."[182] Some months later, on the nomination of Robert Bork, he stressed that the federal judiciary suffered from the control of "old-time liberals," whose orientation led to "interpreting the Constitution to please the special interests . . . ."[183] On the other hand, the highlight is the unusual exchange between the Chief Justice of the Court and Donald Trump, via his twitter account, on the independence of the judiciary that President Trump blasted. In October 2018, Chief Justice Roberts had already stressed the importance of an independent judiciary at the University of Minnesota Law School.[184] The Supreme Court, he said, is not a political body and its members collaborate to apply the law:

> We do not sit on opposite sides of an aisle. We do not caucus in separate rooms. We do not serve one party or one interest. We serve one nation. And I want to assure all of you that we will continue to do that to the best of our abilities whether times are calm or contentious.[185]

Donald Trump broke the traditional Thanksgiving political truce by attacking the judges, whom he accused of putting the United States in danger due to their decisions on his migration policy.[186] A public quarrel between the chief executive and the highest magistrate of the U.S. federal judicial system is an extremely rare event in the United States. Trump denounced this in his criticism of Judge Jon Tigar, appointed by former president Barack Obama, berating the existence of "pro-Obama judges," thus engaging in an extraordinary controversy with the Chief Justice of the Supreme Court, John Roberts.[187] Roberts fired back at the President asserting, again, the impartiality of judges.[188] The response from Trump read:

> Sorry Chief Justice John Roberts, but you do indeed have 'Obama judges,' and they have a much different point of view than the people who are

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[182] President Ronald Reagan, Radio Address to the Nation on the Federal Judiciary (June 21, 1986) (transcript available with the Ronald Reagan Presidential Library).

[183] President Ronald Reagan, Radio Address to the Nation on Voluntarism and the Supreme Court Nomination of Robert H. Bork (Oct. 3, 1987) (transcript available with the Ronald Reagan Presidential Library).

[184] *Chief Justice Roberts Remarks at University of Minnesota Law School*, C-SPAN (Oct. 16, 2018), https://www.c-span.org/video/?451977-1/chief-justice-roberts-stresses-supreme-courts-independence-contentious-kavanaugh-hearings.

[185] *Id.*

[186] *See* Trump, *supra* note 176.

[187] Mark Sherman, *Roberts, Trump Spar in Extraordinary Scrap over Judges*, ASSOCIATED PRESS (Nov. 21, 2018), https://www.apnews.com/c4b34f9639e141069c08cf1e3deb6b84.

[188] *Id.*

> charged with the safety of our country. It would be great if the 9th Circuit was indeed an 'independent judiciary,' but if it is why . . . .[189]

This was the first time the Chief Justice had spoken against Donald Trump: he had previously refused to comment on President Trump's attacks on judges, including himself, the Chief Justice of the Supreme Court.[190] Following a query from The Associated Press, he made a statement defending the independence of the federal judiciary and emphasized it by ardently rejecting that judges are loyal to the presidents who appoint them: "We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them," concluding that an "independent judiciary is something we should all be thankful for."[191] The final word from the head of the judiciary did not deter the president, who was having a break in his property in Florida and tweeted:

> Justice Roberts can say what he wants, but the 9th Circuit is a complete & total disaster. It is out of control, has a horrible reputation, is overturned more than any Circuit in the Country, 79%, & is used to get an almost guaranteed result. Judges must not legislate Security…[192]

This is paradoxical because, in recent years, ideological oppositions intrinsic to the court, that are reflected in the opinions, are aligned with the political party of the president who was behind the appointment.[193] This was not so apparent previously, where consensus could emerge even in difficult cases. For example, bipartisan majorities and bipartisan dissents occurred in every major case decided by a fractured Court during the nineteenth and much of the twentieth centuries.[194] Republican appointee Harry Blackmun and Democratic appointee Thurgood Marshall joined hands in the *Roe v. Wade* majority,[195] as did

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[189] Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 21, 2018, 3:51 PM), https://twitter.com/realDonaldTrump/status/1065346909362143232.

[190] Sherman, *supra* note 187; *see, e.g.*, Donald J. Trump, (@realDonaldTrump), TWITTER (June 26, 2015, 10:07 AM), https://twitter.com/realDonaldTrump/status/614434531861512193 ("Once again the Bush appointed Supreme Court Justice John Roberts has let us down. Jeb pushed him hard! Remember!").

[191] Sherman, *supra* note 187.

[192] Trump, *supra* note 176.

[193] DEVINS & BAUM, *supra* note 167, at 2.

[194] *See id.* at 75, 101.

[195] 410 U.S. 113, 116 (1973).

Republican appointee William Rehnquist and Democratic appointee Byron White in the dissent.[196]

The importance of federal judicial appointments and confirmations is fundamental in American constitutional history. Each member of the Supreme Court, individually and collectively, is an integral part of the judicial heritage. This judicial heritage is expressed beyond any policy or decision: it is part of a perspective of direction and evolution of a society in the course of a future beyond any presidential term. The partisan aspect did not increase so much during the twentieth century, as most of the elite belonged to the same moderate group.[197] The elite Republicans and the elite Democrats of the New Deal era and the Great Society were in a consensus initiated by the Warren Court.[198] This is no longer the case now.[199]

The lack of high-profile cases has had a consequence on the relatively small number of ideologically divided outcomes the Court has had in its 2018 term.[200] Ideological lines were crossed on many occasions,[201] indicating the Court desired to distance itself from controversy, especially due to the difficulty surrounding now-Justice Kavanaugh's confirmation. It clearly stresses a message from the Court to focus on law, which is reinforced by President Trump appointees' position, who were on opposing sides in 19 decisions.[202]

III. DEMOCRATS' PRESSURE ON THE ROBERTS COURT IN THE TRUMP ERA

Liberal Justice Ruth Bader Ginsburg has also spoken out against court packing, telling NPR in July that "nine seems to be a good number. It's been that way for a long time," she said, adding, "I think

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[196] *Id.* at 171 (Rehnquist, J., and White, J., dissenting)

[197] *See* DEVINS & BAUM, *supra* note 167, at 101.

[198] *See* Mark A. Graber, *The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making*, 56 HOW. L.J. 661, 661–719 (2013).

[199] *See* DEVINS & BAUM, *supra* note 167, at 102.

[200] *See* Adam Feldman, *Empirical SCOTUS: Changes Are Afoot – 5-4 Decisions During October Term 2018*, SCOTUSBLOG (July 8, 2019, 12:24 PM), https://www.scotusblog.com/2019/07/empirical-scotus-changes-are-afoot-5-4-decisions-during-october-term-2018/.

[201] *See id.*

[202] *See* Feldman, *supra* note 200; *Voting Alignment – All Cases*, SCOTUSBLOG, https://www.scotusblog.com/wp-content/uploads/2019/07/StatPack_OT18-7_30_19-35-43.pdf (last visited Dec. 9, 2019).

that was a bad idea when President Franklin Delano Roosevelt tried to pack the court."[203] The term-limits proposal seems unrealistic, according to Justice Ginsburg, because the Constitution specifies life terms for federal judges and due to the fact that the "Constitution is powerfully hard to amend."[204]

A. Democratic Senators

High-profile Senate Democrats, Sheldon Whitehouse, Richard Blumenthal, Mazie Hirono. Richard Durbin, and Kirsten Gillibrand, warned the Supreme Court that it could face a fundamental restructuring if Justices did not take steps to "heal" the Court in the near future, that is to say, changing its orientations in that they consider favoring the Republican party.[205] Indeed, in an amici curia brief in support of respondents in *New York State Rifle & Pistol Association, Inc. v. City of New York*,[206] which deals with New York City gun laws and, more precisely, with legal limitations on where gun owners could transport their licensed, locked, and unloaded firearms, they pressed the Court to "heal," thus requiring the judiciary to immediately change its orientation.[207]

This is a very unusual warning from Congresspersons, pressing to change the orientation. They claim that the Court Conservative majority's ruling has suffered from some sort of affliction which must be remedied.[208] This assertion is a harsh attack on the independence of the judiciary and leads to its integrity being questioned. Senators use the people as a key element in the articulation of their words in wishing that the court obeys by bowing to the popular sovereignty of which they are speaking. Indeed, they asserted that it was required, "[p]articularly in an environment where a growing majority of Americans believes this Court is 'motivated mainly by

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[203] *Justice Ginsburg: On Changing the Court's Makeup*, NPR, https://jwp.io/s/LHqFEKpO (last visited Jan. 5, 2020).

[204] *Id.*

[205] Brief for Senators Sheldon Whitehouse et al. as Amici Curiae Supporting Respondents at 18, N.Y. State Rifle & Pistol Ass'n v. N.Y.C., 883 F.3d 45 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 939 (2019) (No. 18-280), *available at* https://www.supremecourt.gov/DocketPDF/18/18-280/112010/20190812151259076_18-280bsacSenatorSheldonWhitehouse.pdf.

[206] *Id.*

[207] *Id.*

[208] *See id.*

politics,' rather than by adherence to the law[.]"[209] On the part of representatives of the legislative branch, this interference in the work and the reserved area of the court testifies to an unprecedented polarization, which goes beyond the spheres of institutional respect between the different branches and raises questions as to the conception of the independence of justice in a state of law based on the foundation of the separation of powers.

B. Democratic Candidates for Presidential Nomination

As Democratic Senator Burton K. Wheeler, in 1937, observed:

> Create now a political court to echo the ideas of the Executive and you have created a weapon. A weapon which, in the hands of another President in times of war or other hysteria, could well be an instrument of destruction. A weapon that can cut down those guarantees of liberty written into your great document by the blood of your forefathers and that can extinguish your right of liberty, of speech, of thought, of action, and of religion. A weapon whose use is only dictated by the conscience of the wielder.[210]

The same postulate resounds among current democrats. Indeed, they are divided but using the same arguments between the opposition and support to a court packing that Senator Wheeler denounced; some desire to modify the number of Justices and put an end to the Judiciary Act of 1869 or change the duration of the exercise of the function.[211] The arguments advanced by the Democrats in favor of this latter proposition are also embodied in the senator's argument: that is to say, 'to echo the ideas of the executive' but in a contrary postulate as a weapon of defense or attack against the camp opponent.[212] Besides, the candidate Seth Moulton, a Congressman from Massachusetts, said "Republicans have played hardball with us, and we haven't played hardball in return."[213] Jay Inslee, Governor of Washington State, referring to Judge Garland's failed nomination,

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[209] *Id.* at 2.

[210] Burton K. Wheeler, *"First Member of the Senate to Back the President in '32–"*, (Mar. 10, 1937), *available at* http://academic.brooklyn.cuny.edu/history/johnson/wheeler.htm.

[211] *Are You Open to Expanding the Size of the Supreme Court?*, N.Y. TIMES (June 26, 2019), https://www.nytimes.com/interactive/2019/us/politics/supreme-court-democratic-candidates.html.

[212] *Id.*

[213] *Id.*

accused the Republican party of having committed a "a theft from the American people."[214]

Dramatic changes to the Supreme Court have been proposed by several Democrats vying for their party's 2020 presidential nomination, with "court-packing" being a common–though highly controversial–suggestion.[215] Increasing the number of Justices on the Court would allow the President to shift the balance on the bench by appointing Justices of his or her preference. A little more than half of the Democratic Party's primary candidates (that is, 12 Democrats), are in favor of a reform of the Supreme Court.[216] There is, therefore, a real majority movement on the part of the Democratic candidates in favor of such a reform with, as a central argument, the will to put an end to the politicization of the Supreme Court. In this regard, Steve Bullock, Governor of Montana, 53, supports court-packing or other possibilities so that "that court isn't reflective of politics[.]"[217] The proposals for reform are broadly based on increasing the number and time limit for the exercise of their function and rotation of judges.[218] Both Kamala Harris, Senator from California, and Elizabeth Warren, Senator from Massachusetts, support court-packing but they do not provide explanations or precision on their current views, apart from expressing their openness to it.[219] This a position also shared by Amy Klobuchar, Senator from Minnesota and Kirsten Gillibrand, Senator from New York,[220] the latter being cautious about the impact, stating that she wants to "think more about it and do more research."[221]

South Bend Mayor, Pete Buttigieg, suggests increasing the number of Justices to 15.[222] Indeed, the presidential contender states on his official platform:

> We need to reform the Supreme Court in a way that will strengthen its independence and restore the American people's trust in it as a check to the Presidency and the Congress. One promising idea is to restructure the Court so that ten members are confirmed in the normal political fashion,

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[214] *Id.*

[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] *Id.*

> with the other five promoted from the lower courts by unanimous agreement of the other ten.[223]

As president, Pete Buttigieg would also create a bipartisan Reform Commission for the purpose of recommending structural improvements to protect the Supreme Court from further politicization.[224]

Andrew Yang would increase the number and limit the exercise of the function to 18 years.[225] The argument, based on a progressive reading of the Constitution, is that, at the time, life expectancy was different; i.e. lower, so judges did not have the same impact on society through several decades.[226] Caution is required for any change, according to John Hickenlooper, former Governor of Colorado, who is not hostile to changes but warns that "[w]e've had the size of the Supreme Court for a long time, and expanding the size of it, I think, would require a national discussion."[227]

There is a shared opinion on the limit by other candidates, although not in favor of court-packing, such as Beto O'Rourke, former congressman from Texas, who considered "I think the appropriate way to address this is to have fixed term limits for Supreme Court justices."[228] Like Julión Castro, Former Housing Secretary, who is "more interested in proposals that have suggested, for instance, term limits on justices."[229]

In the Democratic presidential television debate on June 27, 2019, Senator Bernie Sanders declared his opposition to court-packing, saying, "I do not believe in packing the court" and proposed another option to change Justices; that is to say, to establish a system based on rotation.[230] He stated "I do believe that constitutionally we have the power to rotate judges to other courts. And that brings in new blood into the Supreme Court and a majority, I hope, that will understand

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[223] *Issues*, PETE FOR AMERICA, https://peteforamerica.com/issues/#Democracy (last visited Dec. 9, 2019) (presenting his view on depoliticizing the Supreme Court).

[224] *Id.*

[225] *Are You Open to Expanding the Size of the Supreme Court?*, *supra* note 211.

[226] *Id.*

[227] *Id.*

[228] *Id.*

[229] *Id.*

[230] Jeremia Kimelman, *Full Transcript: 2019 Democratic Debate Night Two, Sortable by Topic*, NBC NEWS (June 28, 2019, 12:15 AM), https://www.nbcnews.com/politics/2020-election/full-transcript-2019-democratic-debate-night-two-sortable-topic-n1023601.

that a woman has the right to control her own body and the corporations cannot run the United States of America."[231] This proposition would require a constitutional amendment.[232] It would also expand the Imperial Executive by enabling the President to remove Justices whenever it pleases him; that is to say, whenever they offer a counter power to the Executive.[233]

In the Republican camp, a riposte occurred on the same day as the debate between Democratic nominees on June 27, 2019.[234] In a letter to his colleagues, Senator Rubio considered that the Democrat's project was based "with the explicit goal of ensuring an enduring liberal majority on the court."[235] Thus, on the other side of the political spectrum, the politicization of the Court is a major concern, with a relatively similar argument on the political relationship and Supreme Court in the Trump era, but diametrically opposed positions. On the day of the debate between the Democratic candidates, the Senator and former candidate for President in 2016, Marco Rubio, sent a letter to his colleagues in the Senate to propose introducing an amendment to the Constitution to set the number of members of the Supreme Court to nine.[236] Given that it is necessary to obtain a two-thirds majority in the Congress,[237] his proposal is not realistic since the Democrats control a majority in the House of Representatives.[238] All of this highlights the increasingly complex relationship between political parties and the Supreme Court, involving think tanks.

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[231] *Id.*

[232] Thomas Jipping, *"Rotating" Supreme Court Justices Would Be Unconstitutional*, HERITAGE FOUND. (July 2, 2019), https://www.heritage.org/courts/commentary/rotating-supreme-court-justices-would-be-unconstitutional. *But see* Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 185 (2019) (asserting a plan similar to Bernie Sander's proposal "could be implemented by statute, without a constitutional amendment.").

[233] *See generally* Jipping, *supra* note 232.

[234] Jason Lemon, *Donald Trump Claims Democrats' Response to One Debate Question Just Cost Them the Election*, NEWSWEEK (June 27, 2019, 11:08 PM), https://www.newsweek.com/donald-trump-election-democratic-debate-2020-1446426.

[235] Letter from Marco Rubio, U.S. Senator from Florida, to Colleague (June 27, 2019) (on file with Elon University School of Law Library).

[236] *Id.*

[237] U.S. CONST. art. 5.

[238] *See 116th Congress House Lineup*, U.S. HOUSE REPRESENTATIVES PRESS GALLERY, https://pressgallery.house.gov/member-data/party-breakdown (last visited Jan. 12, 2020). As of January 12, 2020, there are 232 Democrats and 198 Republicans.

Liberal political activists claim the Federalist Society has long pursued an ambitious–and extremely conservative–political agenda,[239] and thus, the group Demand Justice now aims to craft the Judiciary with a progressive touch in partnership with the Democrats.[240] The group Demand Justice, formed by former Clinton campaign national press secretary Brian Fallon, and co-founder Christopher Kang,[241] on August 21 2019, declared in *The Atlantic* that "[i]n the coming weeks, Demand Justice will propose a list of potential judicial selections whom the next Democratic president should consider."[242] The group wishes to exclude corporate lawyers from the Federal Bench: "The next Democratic president should try nominating judges who haven't been partners at big law firms."[243] This position is questionable since when a lawyer represents a client, he is paid for it. There is no intellectual posture or connection between the client's business and his or her interests and representation in a lawsuit. The amalgam of the field of practice of a lawyer and his approach to the interpretation of law poses a profound problem on the perception of the judiciary by politics.

"At a time of low public trust in the federal government, a majority of Americans (62%) say they have a favorable view of the Supreme Court."[244] The public's view of the Court, however, is "increasingly" influenced by their political affiliation.[245] On the part of the Democrats, there is indeed a strong resentment towards the Republicans due to the situation in 2016, when the latter had refused the nomination of Merrick Garland by President Obama, in that it was the last year's mandate and that *de facto* this appointment was

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[239] Nancy Scherer & Banks Miller, *The Federalist Society's Influence on the Federal Judiciary*, 62 POL. RES. Q. 366, 366 (2009).

[240] Alex Thompson, *Progressive Activists Push 2020 Dems to Pack Supreme Court*, POLITICO, https://www.politico.com/story/2019/02/25/progressive-activists-pack-supreme-court-1182792 (last updated Feb. 27, 2019, 12:03 AM).

[241] *See Why We Fight*, DEMAND JUST., https://demandjustice.org/about/ (last visited Jan. 12, 2020).

[242] Brian Fallon & Christopher Kang, *No More Corporate Lawyers on the Federal Bench*, ATLANTIC (Aug. 21, 2019), https://www.theatlantic.com/ideas/archive/2019/08/no-more-corporate-judges/596383/.

[243] *Id.*

[244] Claire Brockway & Bradley Jones, *Partisan Gap Widens in Views of the Supreme Court*, PEW RESEARCH CTR. (Aug. 7, 2019), https://www.pewresearch.org/fact-tank/2019/08/07/partisan-gap-widens-in-views-of-the-supreme-court/.

[245] *Id.*

not receivable.[246] In the process, the Republicans have changed the 60% of votes needed in the Senate to confirm a nomination by a simple majority, based on the precedent set by the Democrats for the appointment of federal judges.[247] The position of Senate majority leader Mitch McConnell, in favor of a confirmation in case of a vacancy in 2020 concerning a nominee by Trump, ignited an already tense relationship and put the Supreme Court as a major theme in the campaign to the Democrats' primary.[248] The major problem is generated by both the presidential speech and the Democratic Party. For the executive who attacks the independence of judges, criticism is not unusual, but the Twitter communication tool generates immediate sensitive positions also from the side of the Democratic opposition, with the theme of court-packing that appears in the campaign at the primary. This unusual consensus questions the American population with regard to the independence of the Judiciary, but also removes it from policy considerations. As James Madison pointed out:

> No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity… It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm.[249]

This tendency generally weakens the credibility of the institutions and further stretches the electorate in the political debate. It also polarizes the judges by tending to exploit them and inevitably has an impact on their discretion, such as judicial restraint, because the legitimacy of the Court depends on it for its sustainability. The moderation inherent in slow structural changes by Chief Justice Roberts allows the Court to maintain its course, despite strong currents.[250] The fundamental question of the political debate should focus more on the issue of equality of voters in universal suffrage in the

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[246] Carl Hulse, *Democrats, with Garland on Mind, Mobilize for Supreme Court Fight*, N.Y. TIMES (Jan. 24, 2017), https://www.nytimes.com/2017/01/24/us/politics/donald-trump-supreme-court-democrats.html.

[247] Jane C. Timm, *McConnell Went "Nuclear" to Confirm Gorsuch. But Democrats Changed Senate Filibuster Rules First.*, NBC NEWS (June 28, 2018, 3:15 PM), https://www.nbcnews.com/politics/donald-trump/mcconnell-went-nuclear-confirm-gorsuch-democrats-changed-senate-filibuster-rules-n887271.

[248] Daniel Victor, *McConnell Says Republicans Would Fill a Supreme Court Vacancy in 2020, Drawing Claims of Hypocrisy*, N.Y. TIMES (May 29, 2019), https://www.nytimes.com/2019/05/29/us/politics/mitch-mcconnell-supreme-court.html.

[249] THE FEDERALIST NO. 10, at 59 (James Madison) (Jacob E. Cooke ed., 1961).

[250] *See, e.g.*, Root & Berger, *supra* note 150.

presidential election by putting in place a direct vote. This would solve the problem of the electoral division and the census question by considering only voters. It would take the political aspect away from court decisions and allow the United States to fully participate in a non-discriminatory egalitarian democratic practice at the geographic level or regarding minorities' vote.