István Stumpf – Boglárka Borbély

THE POWER OF THE COURTS, THE COURT OF THE POWERFUL – REFORMING THE U.S. SUPREME COURT?

INTRODUCTION

In recent decades, the courts have played an increasingly prominent role in both European and American politics. The merging of the legislative and executive powers has enhanced the role of the high courts as a constitutional counterweight. After the Second World War, Europe's political elites felt a deep sense of remorse about the spread of communism and fascism, and for that reason post-war constitutions all regulated human rights in detail and set up constitutional courts with considerable powers to protect them. Over the years, the constitutional courts in many cases not only defended and interpreted constitutions, but also overstepped their powers and usurped part of the powers of the legislative and executive branches. Judicial activism has become the dominant trend in European constitutional interpretation. Alongside the critique of the "judicial state", interpretations that envisaged the rise of the "juristocratic state", the emergence of a global juristocracy and a kind of constitutional oligarchy, became increasingly prominent.[1] The struggle between legal and political constitutionalism in the European political arena, and in particular in the Polish and Hungarian public law arena, has been intensifying over the last ten years.[2]

As early as the 1960s, critical works were published in the United States criticising the interpretation of the law by the courts which was getting more and more divorced from the text of the law, as a process that threatened

[1] Stone Sweet 2000; and most notably in Hungary, Varga Zs. 2019 and Pokol 2017.

[2] Stumpf 2020.

https://orcid.org/0000-0003-2690-7711 (IS)
DOI: https://doi.org/10.36250/01276_07 · ORCID: https://orcid.org/0000-0001-6668-7034 (BB)

constitutional democracy.[3] The practice of basing judicial decisions on the interpretation of fundamental rights, as a result of the Supreme Court Justices appointed by President Roosevelt, had long defined constitutional thought and judicial practice in the United States. The liberal-progressivist trend, by invoking principles, fundamental rights and constitutional objectives extracted from the Constitution itself, often deviating from the text of the Constitution and the laws, had extremely broadened the application and interpretation of the law by the judiciary. Through the popular doctrine of the "living constitution", law professors and judges had argued that the constitution must be constantly adapted to the changing needs of society, and that this was the task of the judges.

The overwhelming progressive wave in American public law thinking was broken by the appointment of Antonin Scalia to the Supreme Court. He and his Irish-born wife raised nine children and 36 grandchildren, and his nomination was confirmed by a 98–0 vote in the Senate. It was Ronald Reagan who appointed this notoriously conservative, textualist and originalist lawyer, a graduate of Harvard and Georgetown Universities, as Supreme Court Justice in 1986. The arrival of Scalia and the departure of the liberal Justice Brennan marked a conservative turn for the Supreme Court. Scalia's arguments and legal thinking had a huge impact on the entire American legal profession and also on public opinion. Opposing the fundamental rights revolution and the progressive decisions of the "enlightened judges", Scalia consistently insisted on textualism and the ordinary meaning of words and expressions. His approach to law had been disputed by many conservative law professors, but his work has undoubtedly led to an increase in the number of judicial decisions that are more faithful to the text of the law over the past three decades. However, the debate about the U.S. Supreme Court has intensified not only in professional circles, but also at the political level. The successful Republican governor of Texas discussed at length in his book published in 2010 why are nine judges, elected by no one, telling us how to live?[4] The 2010 presidential election, according to the Democrats, was

[3] Shapiro 1964.

[4] Perry 2010.

decided in favour of Bush over Gore by the conservative-majority Supreme Court. Perhaps it is because of this history that, prior to Obama's re-election, conservative Chief Justice Roberts voted to save Obamacare from being declared unconstitutional. Chief Justice Roberts was presumably motivated by the intention of taking the court out of the electoral fray, avoiding a repeat of 2010. There may have been similar reasons for the Supreme Court's refusal to deal urgently with the electoral fraud in the 2020 presidential election. Despite this, the convincing (6–3) conservative majority in the Supreme Court is a thorn in the side of President Biden's people and the Democrats who won the majority in the House of Representatives. In Congress, they wanted to pass a law to expand the Supreme Court by adding four justices, but they could not get the support of a majority of the Senate (60) and thus the law failed. They have not given up their intention, as President Biden has set up a 36-member commission to propose a reform of the Supreme Court. The battle for judicial supremacy continues. This paper takes stock of the most important historical milestones in the debate on the restructuring and status of the Supreme Court and reviews the most interesting proposals that emerged from the Presidential Commission.

THE ROOSEVELT PLAN – "I PLEDGE YOU, I PLEDGE MYSELF, TO A NEW DEAL FOR THE AMERICAN PEOPLE"[5]

Roosevelt's campaign for a New Deal economic policy, promising a new direction for the American people, won him the fourth presidential nomination vote at the Democratic National Convention against Speaker John N. Garner of Texas (later Vice President). In an unusual move at the time, he travelled in person to the Chicago convention to accept the nomination.

[5] "I pledge you, I pledge myself, to a new deal for the American people" is a quote from Franklin D. Roosevelt's speech, accepting the presidential nomination at the Democratic National Convention in Chicago delivered on 2 July 1932 (Roosevelt 1932).

In his speech,[6] he anticipated that the party must serve the greatest good through liberal thinking, planned action and an enlightened international outlook. In November 1932, the fourth year of the Great Depression, the presidential election was won by a landslide by New York State Governor Franklin D. Roosevelt. It was the first time since 1916 that a Democratic candidate won, following four terms of Republican rule, thanks to a majority of Americans blaming outgoing President Herbert Hoover for the crisis. The Democrats, who gained control of the executive and the legislature, saw a greater central government role as the solution to the crisis. The objective of the New Deal policy was to create a welfare state. Roosevelt, in his inaugural speech[7] blamed the global financial and economic crisis on bankers' speculation and announced strict government control of banking, credit and investment operations. The first phase (1933–1934) of the program, also known as the 3Rs *(relief, recovery, reform),* focused on the recovery of financial institutions and the banking sector, agriculture and industry, while the second phase (1935–1936) concentrated on social policy measures (public works programs, social security). The only counterweight to the Roosevelt policy was the Supreme Court. In addition, the president was able to reach almost every household through the new technological achievement of radio, being able to "talk" to the American people through his famous fireside chats, which also proved to be a way of exerting pressure on Congress.[8] The Supreme Court did not support the President's New Deal program, and in 1935 and 1936 it struck down a number of economic laws, in many cases through unanimous votes.[9] In the nine-judge panel, Justices Pierce Butler, James McReynolds, George Sutherland and Willis Van Devanter were fierce critics of Roosevelt's policies, and were dubbed

6 Roosevelt: "Ours must be a party of liberal thought, of planned action, of enlightened international outlook, and of the greatest good to the greatest number of our citizens" (Roosevelt 1932).

7 Roosevelt 2006: 160–164.

8 Peterecz 2017: 15.

9 For example, the National Industrial Recovery Act with a decision of 9:0, the Agricultural Adjustment Act with 6:3 or the Municipal Bankruptcy Act with 5:4 (Mogyorósi 2012: 53–59).

the Four Horsemen after the Horsemen of the Apocalypse. Justices Louis Brandeis, Harlan Fiske Stone and Benjamin Cardozo were in support of the New Deal and were dubbed the Three Musketeers.[10] Chief Justice Charles Evans Hughes and Justice Owen Roberts, appointed by Hoover, took a swing position, although the latter tended to lean towards the Four Horsemen. At that time, the polarisation of the Supreme Court could not be clearly explained by a conservative–liberal split; the two groupings were rather based on the different types of legal theory approaches, namely classical legal formalism and legal realism.[11] Roosevelt saw a solution in reforming the obstructionist judiciary, and after his re-election, on 5 February 1937, he submitted his reform bill to Congress to increase the size of the Supreme Court (the court-packing bill). Roosevelt placed his initiative of adding more justices to the Supreme Court in a comprehensive bill aimed to modernise and increase the efficiency of the judicial system (the Judicial Procedures Reform Bill of 1937). This would have allowed the President to appoint a young Associate Judge with 10 years' service for each member of the court over the age of seventy years. The President's powers would have been limited to appointing up to six Supreme Court Justices and two justices per federal court. In increasing the size of the Supreme Court, Roosevelt's undisguised goal was to ensure that the rejuvenated court would treat the New Deal program favourably. In his infamous 9 March fireside chat, he tried to win the American public to his cause, arguing that the judiciary had overstepped the bounds of the Constitution and therefore the nation "must take action to save the Constitution from the Court and the Court from itself".[12] The reform plan, however, met with fierce opposition, failed to win the support of either civil society or professional organisations, and even led to the formation of the *National Committee to Uphold Constitutional Government* in February 1937, which waged a massive countercampaign against the New Deal. The Senate Judiciary Committee was still willing to discuss the proposal, but the majority of senators did not support it. On the basis of a report dated 14 June 1937, the Committee considered the reform

[10] Leuchtenburg 2005.

[11] Pokol 2005: 291–293.

[12] Roosevelt 1937.

of increasing the number of Supreme Court Justices to be a dangerous and unprecedented interference with the constitutional principles.[13] This part of the court-packing plan failed in the Senate by a vote of 70 to 20, and the court reform that was subsequently adopted was limited to provisions for lower courts.

However, as a result of these events, the attitude of the judiciary changed, and on White Monday it passed decisions upholding New Deal policies. Soon the ideological reorganisation of the Supreme Court also began. With the resignation of 78-year-old Devanter, President Roosevelt had the opportunity to appoint a new Supreme Court Justice. The position was originally intended for his confidant, 65-year-old Senate Majority Leader Joseph T. Robinson, but his appointment would not have been compatible with the concept of rejuvenation. Robinson's unexpected death finally settled the issue, and the appointment of 51-year-old Senator Hugo Black, who had been an active supporter of the New Deal and the court-packing plan, was proposed to the Judiciary Committee to replace Robinson. Black's appointment sparked heated controversy over his religious fanaticism and suspected membership of the Ku Klux Klan, but his appointment was approved by the Judiciary Committee and later by the Senate. President Roosevelt had the opportunity to appoint a Supreme Court Justice a total of eight times during his presidency until 1945, setting the composition and ideological direction of the judiciary according to his own preference for decades. By 1939 the Supreme Court had become strongly liberal with the appointment of Justices Black, William O. Douglas and Frank Murphy. By the early 1950s, there was some shift toward a conservative outlook with the change in President Harlan F. Stone's views and the appointment of Justice Fred M. Vinson, but the liberal predominance persisted until the 1970s. The ideological balance was restored as a result of the conservative Supreme Court appointments made by Presidents Nixon, Reagan and

[13] According to the Committee report, the reform was a "needless, futile and utterly dangerous abandonment of constitutional principle". *Report of the Senate Judiciary Committee,* 14 June 1937.

George W. Bush.[14] The experiences from Roosevelt's era gradually became integrated into the practice of judicial appointments. After 1945, presidents began to follow different strategies in judicial appointments, potentially identifying their nominee for the Supreme Court Justice position before the vacancy even occurred, choosing the person deemed most suitable for achieving their political objectives.[15]

THE OBAMA ADMINISTRATION

Upon his appointment by George W. Bush in 2005, John Roberts assumed the role of Chief Justice of the Supreme Court, a position he has continued to hold to this day. Chief Justice Roberts initially espoused such a conservative outlook that the media made specific mention of his involvement with the Federalist Society, a conservative organisation.[16] However, since 2018, he has tended to adopt a more fluctuating stance, leaning towards the liberal bloc in certain cases.[17] Barack Obama began his two-term presidency under the Roberts court, during the global economic crisis of 2008–2009. In looking at the relationship between the President and the Supreme Court, there are three landmark events in the evolution of the Supreme Court: the first Obamacare decision, the decision in favour of same-sex marriage, and the nomination of Merrick Garland to an Associate Justice position.

14 President Richard Nixon appointed Justice Warren Burger as Chief Justice of SCOTUS, and Lewis Powell, William Rehnquist, Harry Blackmun as Associate Justices, among others, with strong conservative leanings. Following this, Ronald Reagan appointed William Rehnquist as Chief Justice, and Antonin Scalia received an Associate Justice seat. Justices Clarence Thomas, Samuel Alito and John Roberts were appointed under George W. Bush.

15 Zétényi 2004.

16 Lane 2005.

17 Roeder 2018.

Taxed enough already[18]

President Obama signed into law the major U.S. health care reform *(Patient Protection and Affordable Care Act,* hereinafter: *ACA* or *Obamacare)* on 23 March 2010. A few months after the law came into effect, the National Federation of Independent Business and the majority of states objected to the new law's requirement for general insurance coverage and the expansion of the national health insurance program (Medicaid). Obamacare raised the question of whether Congress exceeded its authority under Article I of the Constitution, which enumerates powers to levy taxes and regulate interstate commerce, by mandating that the majority of Americans obtain minimal health insurance coverage under penalty of a fine *(minimum coverage provision or individual mandate).* Furthermore, another question was, whether the legislature unduly coerced states voluntarily participating in the Medicaid program to increase their contributions to the health insurance fund, stemming from the expansion of the eligible population.[19] The Supreme Court's decision in *National Federation of Independent Business v. Sebelius* approached the weight of the Roosevelt New Deal decisions, and had a decisive impact on the outcome of the 2012 elections and the powers of the federal legislature. Opponents of Obama's policies were united in one camp, arguing that the ACA had manifested an overreach of federal power. The radical Tea Party movement, made up of conservatives and libertarians who opposed the President's election and his health care reform plans, advocated a return to constitutional roots and rejected the overreach of the federal government, had grown rapidly in political power.[20] The President's base of support was made up of moderate and liberal forces who argued for the constitutionality of the reform bill and called for affordable health care for millions of uninsured Americans. The Supreme Court's task was therefore to interpret the so-called 'dormant commerce clause' in Article

[18] One possible origin of the name of the ultra-conservative Tea Party movement is that the word tea is an acronym for the slogan "taxed enough already". The name, however, may also refer to the Boston Tea Party of 1773 (Pa ár 2013: 24).

[19] SCOTUS 2012: 2–6.

[20] Meckler–Martin 2012: 12–13.

I of the Constitution. This constitutional provision authorises Congress to regulate interstate commerce to prevent individual state regulations from unduly burdening or discriminating against interstate commerce.[21] In a landmark decision, the Supreme Court ruled in favour of the ACA program, upholding its constitutionality. The liberal quartet of the court (Sonia Sotomayor, Stephen G. Breyer, Elena Kagan and Ruth Bader Ginsburg), joined by Justice Roberts, decided by a 5:4 majority that Congress can impose a penalty for failure to comply with the individual mandate under the commerce clause. The Court also deemed the expansion of Medicaid not unconstitutional; however, by a 7:2 margin (Roberts, Kagan, Breyer, as well as the four conservative justices, Antonin Scalia, Anthony Kennedy, Clarence Thomas and Samuel Alito), it found that Congress had exceeded its authority. The legislature could not, therefore, penalise individual states by withholding full Medicaid funding simply because they might be unwilling to participate in the expansion of the health insurance program. The decision reached offered a compromise, leaving each state free to decide whether to join the government initiative, thus leaving the matter of expansion to the discretion of each state government.[22] Following the Roberts Court's favourable decision, Obama won the presidential election five months later, and the Republicans and the Tea Party movement's bid for the presidency failed. Roberts, the Chief Justice, was likely led by the desire to keep the Supreme Court out of the 2012 election fray in his efforts to salvage Obamacare. In the case of Bush v. Gore,[23] adjudicated in 2000, the Rehnquist-led Court, with its Republican majority, rejected the manual recount of Florida's votes and awarded the electoral votes to President Bush, effectively deciding the outcome of the election. The Democratic press and public opinion made a big fuss over the simple decision on election regulation, seeing the panel's decision as pure political partisanship, which in their view showed the over-politicised role of the Supreme Court.[24]

21 ArtI.S8.C3.1.4.1 Dormant Commerce Power: Overview, Constitution of the United States of America, Article 1, Section 8.

22 Perlstadt–Balázs 2013: 29–42.

23 SCOTUS 2000: 114.

24 Toobin 2012: 123; Dershowitz 2001: 174–198.

"But what really astounds is the hubris reflected in today's judicial Putsch"[25]

The Supreme Court, in a 5–4 decision in June 2015, ruled in Obergefell v. Hodges that under the Fourteenth Amendment to the Constitution, same-sex marriage is legalised and recognised uniformly across all fifty states. The judicial body reviewed the decision of the United States Court of Appeals for the Sixth Circuit, which consolidated several cases from the states of Michigan, Kentucky, Ohio and Tennessee and upheld the constitutional obligation to recognise and allow same-sex marriages. In the four listed states, the institution of marriage was defined as a union between one man and one woman. According to their argument, recognising marriage in any other sense would violate the timeless nature of marriage as they understood it.[26] The majority opinion of the Supreme Court held that the fundamental freedoms outlined in the Fourteenth Amendment's Due Process Clause and Equal Protection Clause require the legalisation and interstate recognition of same-sex marriage. In formulating the majority opinion, Justice Anthony Kennedy played a significant role, aligning with the views of the liberal-leaning justices Ginsburg, Breyer, Sotomayor and Kagan. Appointed by President Reagan in 1988, the conservative Kennedy exhibited a more fluctuating stance within the Roberts Court, joining the liberal bloc in several decisions. Kennedy's increasing divergence from conservative circles contributed to his eventual resignation (see our analysis of the Trump era). The Court justified its decision by emphasising the dynamic historical evolution and essential transformation of the timeless institution of marriage.[27] According to the Due Process clause, no state shall deprive any person of life, liberty, or property without due process of law, which extends to the intimate realm of individual dignity and autonomy, including the choice of personal identity and convictions. The Equal

25 "But what really astounds is the hubris reflected in today's judicial Putsch" – quote from Justice Antonin Scalia's dissenting opinion to the Supreme Court's decision in Obergefell v. Hodges (SCOTUS 2015: 6).

26 Mátyás 2015: 31–37.

27 SCOTUS 2015: 1.

Protection Clause, ensuring equality before the law, is closely related to this. Conservative Justices Roberts, Scalia, Thomas and Alito, attached several critical dissenting opinions to the decision. Scalia struck the sharpest tone, outright labelling the majority opinion of the five justices as a judicial Putsch,[28] intervening unjustifiably and without sufficient legal basis in the societal debates surrounding the institution of marriage.

"Mr. President, you will not fill the Supreme Court vacancy"[29]

Two of President Obama's Supreme Court Justice nominations (Sotomayor and Kagan) were successful, while Merrick Garland's 2016 nomination failed. The unexpected death of Justice Antonin Scalia occurred in the last year of the Obama Administration. The political landscape had already shifted, with Republicans winning a majority in Congress in the 2014 by-elections and taking control of the legislature. Senate Republican Leader Mitch McConnell announced within hours of Scalia's death that the Republicans would reject President Obama's nomination in view of the election year, as the right to appoint a Supreme Court Justice already belonged to the new President. To fill the seat of Scalia, who represented a conservative, originalist-textualist stance, Obama nominated Merrick Garland, who represented a centrist, neutral stance. Garland's appointment would have resulted in the first ideological shift towards a liberal majority in the court since the 1970s. However, the Judiciary Committee, which had a Republican majority, consistently declined to schedule a hearing for Garland, a prerequisite for advancing the nomination to a Senate vote. As a result, the nomination lapsed in January 2017 at the conclusion of the congressional term. The Republican argument opposing the appointment asserted that the new Supreme Court Justice should be nominated following the 2016 elections. The Republicans partly referred to the Biden Rule, according to which the current nominee, Joe Biden, as a senator and chairman of the Judiciary

28 SCOTUS 2015: 74–75.

29 "Mr. President, you will not fill the Supreme Court vacancy" – quote from Senator Mitch McConnell's speech in Kentucky on 6 August 2016.

Committee in June 1992, urged then-President George H. W. Bush not to nominate a candidate for the potentially vacant Supreme Court Justice position (due to the retirement of Justice Blackmun) before the upcoming presidential election. Additionally, they referred to the so-called Thurmond rule, considered a myth by some, which suggests that the Senate should not confirm a Supreme Court nomination during a presidential election year.[30] Meanwhile, Democrats speculated that Hillary Clinton would win the presidential election, and the Congress would be compelled to urgently confirm Obama's centrist nominee during the lame-duck session to avoid a more extreme nominee from the new 'Clinton Administration'.[31] However, the 2016 presidential election resulted in the victory of Republican Donald Trump, Garland's nomination expired with the end of the 114th congressional term, and the appointment of the new Supreme Court Justice was left to the new president.

THE TRUMP ADMINISTRATION

During his 2016 election campaign, Donald J. Trump released two lists[32] of potential nominees to fill the late Scalia's seat. The campaigning presidential candidate aimed to nominate a conservative Supreme Court Justice who would follow Scalia's judicial philosophy. Trump introduced a new practice by having multiple candidates for each vacant position. Leonard Leo, perhaps the most influential conservative lawyer in the United States and the Federalist Society, which was founded in 1982 and now has over 60,000 registered members, played crucial roles in compiling the lists. The Federalist Society, comprising conservatives and libertarians, advocates for a textualist and originalist interpretation of the U.S. Constitution. Leonard Leo joined the Federalist Society in 1989 by founding a local student chapter during his student years. He served as the Society's vice president for many

30 Borbély 2020.

31 Cassella–Morgan 2016.

32 Trump lists: 2016, 2017, 2017 addendum, 2020 aggregate list, 9 September 2020.

years and is currently the co-chair of its board of directors. Leonard Leo aimed to establish an absolute conservative majority in the federal judiciary and the Supreme Court. He actively participated in the appointments of Justices Roberts, Alito, Gorsuch, Kavanaugh and Barrett. Leonard Leo and the Federalist Society's activities were highly successful, assisting in the appointments of three Supreme Court Justices and 234 federal judges during the Trump Administration. According to an article published by *The Washington Post Magazine* in January 2019, the organisation's significant influence is evident as six out of the nine Supreme Court Justices were or are members of the Society.[33] Undeniably, the Trump Administration's greatest success was ensuring conservative dominance in both the federal and Supreme Court appointments.

"I'm a judge [...] I speak for myself"[34]

One of the first tasks of the presidential term beginning in January 2017 was to fill Justice Scalia's vacant seat. President Trump nominated conservative Judge Neil Gorsuch for the position, whose name appeared on the second list released during the election campaign with Leonard Leo's influence.[35] President Trump's formal announcement was a surprise, as the nominee's name was kept entirely secret from the media, unlike the future cabinet members' list, which had previously leaked. Even Gorsuch himself only learned of his nomination the day before.[36] The Senate Judiciary Committee's reaction was predictable, with views divided along party lines. The Democrats' rejection was a direct result of the Garland coup. While the committee members supported Gorsuch's nomination by an 11–9

[33] The Supreme Court Justices concerned: Brett Kavanaugh, Neil Gorsuch, Clarence Thomas, John Roberts, Samuel Alito and Amy Coney Barrett (Montgomery 2019).

[34] "I am a judge [...] I speak for myself" – quote from Supreme Court Justice nominee Neil Gorsuch from his Senate Judiciary Committee hearing on 21 March 2017.

[35] Lipton–Peters 2017.

[36] Greenya 2018: 1–5.

vote, the Democrats' frustration and political resistance were palpable throughout the hearings and the first 100 days of the new administration. No one questioned the nominee's professional qualifications, as he received a unanimous "well-qualified" rating from the American Bar Association.[37] The confirmation of the appointment was the Trump Administration's first significant political battle. The Democrats attempted to block the Senate's approval through filibuster, effectively a minority veto. However, the Republicans used the "nuclear option" to secure the necessary 50 + 1 senatorial votes for approval. The nuclear option was first employed in 2013 during President Obama's tenure, when the then-Democratic-majority Senate altered the parliamentary rules for presidential appointments, reducing the required approval from a supermajority to a simple majority. Although the Democrats intentionally did not apply this to Supreme Court appointments, it set a precedent for the Republican-majority Senate under Mitch McConnell's leadership to extend the nuclear option in 2017, facilitating Gorsuch's confirmation.[38] The simple majority approval set a precedent, and from then on it was to be applied as the general rule governing the appointment of Supreme Court Justices. Gorsuch took his seat as a Supreme Court Justice in April 2017.

"I'm not a pro-prosecution or pro-defence judge. I am a pro-law judge"[39]

Conservative circles had viewed Justice Kennedy's activities unfavourably since the Obergefell case. For a lasting ideological shift in the Supreme Court, a personnel change was necessary, and thus Justice Kennedy had to leave. In 2018, Kennedy decided to retire, and President Trump nominated

37 American Bar Association 2018.

38 Berger 2017.

39 "I'm not a pro-prosecution or pro-defence judge. I am a pro-law judge" – quote from Supreme Court Justice nominee Brett Kanavaugh from his Senate Judiciary Committee hearing on 4 September 2018.

Judge Brett Kavanaugh to replace him. Interestingly, Kavanaugh's name was not on the initial lists released during Trump's campaign but appeared on the 2017 list. Kavanaugh had previously clerked for Kennedy, and some believe his presence significantly influenced Kennedy's resignation.[40] However, Kavanaugh's Senate confirmation process was turbulent, with several accusations of sexual harassment emerging after his hearings. The Democrats used all means to block his appointment. The progressive group 'Demand Justice' launched a multi-million-dollar campaign against Kavanaugh.[41] According to Gallup polls, Kavanaugh's unpopularity rating rose to 42%, unprecedented for Supreme Court nominees since 1987.[42] The intense opposition stemmed from the fact that Kavanaugh's appointment would give conservative, originalist constitutional interpreters a majority for the first time since Franklin D. Roosevelt's presidency, increasing their number to five. The originalist conception, in contrast to the "living constitution" doctrine of progressives who support judicial activism, examines the original content of the constitution as an objective yardstick, validating the meaning of the text at the time of its adoption by exploring the legislature's intent.[43] Trump's second Supreme Court appointment was significant as it led to a long-term ideological shift in public policy thinking, favouring conservative circles. The events had a "Kavanaugh effect" on the outcome of the November 2018 midterm elections, with Republicans gaining more Senate seats, while Democrats gained a majority in the House of Representatives, breaking the previous trifecta. Undoubtedly, during 2016–2018, President Trump effectively seized the historic opportunity favourable to Republicans.

40 Sonmez et al. 2018.
41 Caldwell – Thorp V. 2018.
42 Jones 2018.
43 Szente 2013: 151–161.

"I have no mission and no agenda. Judges don't have campaign promises"[44]

During the 2020 U.S. presidential election campaign, Justice Ruth Bader Ginsburg's death on 18 September 2020, brought an unexpected twist. Republican and Democratic forces immediately clashed over the appointment of the new Supreme Court Justice. Exercising his constitutional authority, President Trump announced the nomination of deeply Catholic, conservative, seven-child mother Amy Coney Barrett for Ginsburg's vacant Associate Justice seat on 26 September, 35 days before the election. Barrett had already been a potential candidate on Trump's lists and was placed at the top of the 2017 list after her appointment to the 7th Circuit Court of Appeals. The nomination just before the election sparked outrage among Democrats, as Republicans had blocked Merrick Garland's appointment in 2016, citing the proximity of the presidential election. Liberal forces also saw Barrett's pro-life stance on abortion as a threat. Conservative circles, on the other hand, advocated for a further strengthening of the ideological power relations settled with the appointment of Kavanaugh. Finally, on 26 October, President Trump succeeded with his third Supreme Court nomination, confirmed by the Senate with a 52–48 majority. The appointment of Justice Barrett, representing the Scalian textualist-originalist interpretation of the Constitution, cemented a 6–3 conservative majority on the Supreme Court for decades.

[44] "I have no mission and no agenda. Judges don't have campaign promises" – quote from nominee Amy Coney Barrett from her Senate Judiciary Committee hearing on 13 October 2020.

THE BIDEN ADMINISTRATION – "NOTHING IS OFF THE TABLE FOR NEXT YEAR"[45]

Barrett's nomination occurred just before the November 2020 presidential election, intensifying Democratic reform ideas to 'depoliticise' the Supreme Court by increasing its size. During the campaign, however, neither presidential candidate Joe Biden nor vice presidential candidate Kamala Harris took a clear stance on the initiative. Nor was there a list of potential Supreme Court nominees for the new term. Meanwhile, the activist group 'Demand Justice' released a list of 32, later expanded to 42, potential progressive nominees. Biden, the former chairman of the Senate Judiciary Committee, stated in December 2019 that, in case of a vacancy, he would appoint a Supreme Court Justice who embraced the "living constitution" doctrine. In a May 2020 campaign speech, he promised to appoint an African American woman.[46] Based on the autumn developments, maximum one Supreme Court Justice appointment could be expected during Biden's term. Amid questions about increasing the court's size, presidential candidate Biden announced in late September that if he would win, he would initiate a bipartisan commission to discuss the comprehensive reform of the Supreme Court. The highly controversial 2020 elections, held during the coronavirus pandemic, ultimately favoured Biden. Regarding election fraud related to new mail-in voting rules in various states, the Roberts Court maintained a restrained stance. For example, in the Pennsylvania case, the newly appointed Justice Barrett's abstention led to a 4–4 tie, resulting in the rejection of the emergency election motion.[47] Beginning his term in January 2021, Biden issued an executive order on 9 April to set up a 180-day commission to study the ideas of law professors, experts, retired lawyers and judges. According to the order published on the White House website, the 36-member commission's examination included discussing proposals

[45] "Nothing is off the table for next year" – quote from Senator Chuck Schumer at the Democratic Party Convention on 19 September 2020.

[46] Shapiro 2021.

[47] Justice Roberts voted against the emergency admission (SCOTUS 2020: 1).

related to increasing the number of Supreme Court Justices, reducing the Supreme Court's political influence, increasing its transparency and limiting judges' terms.[48]

Following the executive order, on 14 April, Democrats introduced to Congress a bill (Judiciary Act of 2021) to increase the court's size, but the initiative failed due to a lack of Senate support.[49] The Democrats did not give up on their plan to reform the Supreme Court. Although the White House defined the commission as bipartisan, the conservative think tank The Heritage Foundation's vice president calculated that liberals dominated conservatives by a 4–1 ratio. Conservatives believed that the presidential commission was set up because Donald Trump was able to appoint three Supreme Court Justices during his presidency, changing the ratio of conservatives to progressives on the Supreme Court to 6–3. At the same time, there are more active judges appointed by Democratic presidents than Republicans on the federal Circuit Courts. Many prominent law professors supporting the Democrats believed that if the Supreme Court's size could be increased, Republicans would never win another election. Hundreds of pages of opinions, sometimes containing political considerations, were prepared by the invited professors and experts for the commission. Several Democrat-leaning professors also found increasing the court's size problematic, while there was more consensus on limiting judges' terms to 18 years. The commission finally unanimously approved the final version of the report on 7 December 2021. Shortly after, following the January retirement announcement of 83-year-old Justice Stephen Breyer, President Biden fulfilled his promise by appointing Ketanji Brown Jackson, a nomination symbolically significant in two ways in the court's history.[50] On the one hand, Jackson became the first black woman to serve as a Supreme Court Justice; on the other hand, all justices appointed by Democratic presidents are women. Beyond her symbolic role, Ketanji Brown Jackson's judicial philosophy, as presented during her Senate confirmation hearings in the spring, is also noteworthy. During her hearing, she acknowledged

48 The White House 2021.

49 Geraghty 2021.

50 Sándor 2022b.

multiple times that she applies the originalist method of interpretation while explicitly rejecting the doctrine of the "living Constitution". This may indicate that over the past three decades, originalism has become the dominant method of legal interpretation.[51] Justice Jackson took the oath of office on 30 June 2022.

SUMMARY

The Supreme Court is the strongest yet least accountable institution in the American political system. Its popularity is higher than that of Congress, though it has significantly declined in recent decades. The complete politicisation of judicial appointments has eroded the institution's political legitimacy and societal acceptance.[52] An intense identity war is also taking place in America, affecting political institutions and electoral battles. The Supreme Court's decisions are binding on everyone and often involve highly divisive issues such as the legality of abortion, state recognition of same-sex marriage, gun rights, climate regulations, the limits of free speech on campuses, and the legality of election procedures. With control of the presidency and a majority in the House of Representatives, Democrats saw an opportunity to take control of the Supreme Court as well. Unable to achieve their goal in Congress, they turned to the presidential commission. Analysing the completed report, the partisan fault line is evident. The National Constitution Center, which builds on the collaboration of three groups – progressives, libertarians and conservatives – with the aim of drafting a new constitution for the United States, agrees on introducing an 18-year term limit for justices. Since the completion of the presidential report, the appointment of Justice Jackson and the 2022 mid-term elections, the debates around Supreme Court reform have somewhat subsided, however, it has only temporarily fallen off the political agenda. Considering the outcome of the midterm elections, the Republican victory in the House of Representatives significantly complicated President Biden's and Congress's

[51] Sándor 2022a.

[52] Epstein–Segal 2005.

judicial reform efforts. Nevertheless, the 2024 elections have given new impetus to the debates on reshaping the Supreme Court. In October 2023, the dedicated working group of the American Academy of Arts and Sciences published its recommendations on the Supreme Court term limits[53] that aim to take forward key reform proposals from the Bipartisan Commission. In November 2023, the Supreme Court adopted its first Code of Ethics in its history after the bribery scandals involving Justices Alito and Thomas. In the 2024 election dump, the Supreme Court became a political battlefield as the court issued a decision by ruling that presidential candidate Donald Trump and other ex-presidents have wide (but not absolute) immunity from criminal prosecution for their actions in office. We believe that the Supreme Court is steady for the time being and has successfully resisted attempts to reform its institution. However, the 2024 elections raise the question of whether the conversation about how and why to reform the Court will continue or whether such debates fall off the political agenda.

REFERENCES

American Academy of Arts & Sciences (2023): *The Case for Supreme Court Term Limits.* A Paper by the U.S. Supreme Court Working Group. Online: https://www.amacad.org/sites/default/files/publication/downloads/2023_SCOTUS-Term-Limits.pdf

American Bar Association (2018): *Standing Committee on the Federal Judiciary. Ratings of Article III and Article IV Judicial Nominees.* 115th Congress. Online: https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/web-rating-chart-trump-115.pdf

Berger, Judson (2017): Republicans Go 'Nuclear,' Bust Through Democratic Filibuster on Gorsuch. *Fox News,* 6 April 2017. Online: https://www.foxnews.com/politics/republicans-go-nuclear-bust-through-democratic-filibuster-on-gorsuch

Borbély, Boglárka (2020): The Appointment of Supreme Court Justice Amy Coney Barrett. *Ludovika Frontier Blog,* 28 October 2020. Online: https://www.ludovika.hu/blogok/frontierblog/2020/10/28/amy-coney-barrett-fobiro-kinevezese/

53 American Academy of Arts & Sciences 2023.

CALDWELL, Leigh Ann – THORP V., Frank: Progressive Group Launches Ad Campaign Urging Democrats to Oppose Kavanaugh. *NBC News,* 13 July 2018. Online: https://www.nbcnews.com/politics/congress/progressive-group-launches-ad-campaign-urging-democrats-oppose-kavanaugh-n891021

CASSELLA, Megan – MORGAN, David (2016): Senators Say They Might Confirm Obama's High Court Pick after Election. *Reuters,* 17 March 2016. Online: https://www.reuters.com/article/us-usa-court-garland-idUSKCN0WJ251

DERSHOWITZ, Alan (2001): *Supreme Injustice. How the High Court Hijacked Election 2000.* Oxford: Oxford University Press.

EPSTEIN, Lee – SEGAL, Jeffrey A. (2005): *Advice and Consent. The Politics of Judicial Appointments.* New York: Oxford University Press.

ERICKSON, Bo – QUINN, Melissa – O'KEEFE, Ed (2021): Biden's Supreme Court Commission Nears End with Reviews of Court Packing, Term Limits, Shadow Docket. Progressives May Be Disappointed. *CBS News,* 14 October 2021. Online: https://www.cbsnews.com/news/supreme-court-commission-report-court-packing-term-limits/

GERAGHTY, Jim (2021): Democrats Dishonor RBG's Wishes with Court-Packing Drive. *National Review,* 15 April 2021. Online: https://www.nationalreview.com/the-morning-jolt/democrats-dishonor-rbgs-wishes-with-court-packing-drive/?utm_source=Sailthru&utm_medium=email&utm_campaign=MJ_20210415&utm_term=Jolt-Smart

GREENYA, John (2018): *Gorsuch. The Judge Who Speaks for Himself.* New York: Threshold Editions.

JONES, Jeffrey M. (2018): Opposition to Kavanaugh Had Been Rising Before Accusation. *Gallup,* 18 September 2018. Online: https://news.gallup.com/poll/242300/opposition-kavanaugh-rising-accusation.aspx

KRUZEL, John (2021): Court Watchers Buzz about Breyer's Possible Retirement. *The Hill,* 1 May 2021. Online: https://thehill.com/homenews/administration/551196-court-watchers-buzz-about-breyers-possible-retirement

LANE, Charles (2005): Roberts Listed in Federalist Society '97–98 Directory. *The Washington Post,* 24 July 2005. Online: https://www.washingtonpost.com/wp-dyn/content/article/2005/07/24/AR2005072401201.html

LEUCHTENBURG, William E. (2005): When Franklin Roosevelt Clashed with the Supreme Court – and Lost. *Smithsonian Magazine,* May 2005. Online: https://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/

LIPTON, Eric – PETERS, Jeremy W. (2017): In Gorsuch, Conservative Activist Sees Test Case for Reshaping the Judiciary. *The New York Times,* 18 March 2017. Online: https://www.nytimes.com/2017/03/18/us/politics/neil-gorsuch-supreme-court-conservatives.html

MÁTYÁS, Ferenc (2015): „A méltóságon esett sebeket nem mindig lehet gyógyítani egy tollvonással". *Ars Boni,* (3)2, 31–37. Online: http://epa.oszk.hu/02700/02769/00007/pdf/EPA02769_ArsBoni_2015_2_31-37.pdf

Meckler, Mark – Martin, Jenny Beth (2012): *Tea Party Patriots. The Second American Revolution.* New York: Henry Holt and Company.

Mogyorósi, András (2012): Roosevelt és a Legfelsőbb Bíróság küzdelme a New Deal fölött. *Jogelméleti Szemle,* (3), 53–59. Online: http://jesz.ajk.elte.hu/2012_3.pdf

Montgomery, David (2019): Conquerors of the Courts. *The Washington Post,* 2 January 2019. Online: https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerors-of-the-courts/

Paár, Ádám (2013): (Ellen)forradalmi mozgalom az Egyesült Államokban? A Tea Party eszmetörténeti és politikatörténeti gyökerei. *Kül-Világ,* 10(1), 20–38. Online: http://epa.oszk.hu/00000/00039/00030/pdf/EPA00039_kul_vilag_2013_01_20-38.pdf

Perlstadt, Harry – Balázs, Péter (2013): Egészségügyi reform az USA-ban. Obamacare, vagyis a Méltányosan Elérhető Ellátásról Szóló Törvény legújabb fejleményei. *Egészségügyi Gazdasági Szemle,* 51(2), 29–42. Online: https://weborvos.hu/adat/files/2013_december/egsz34.pdf

Perry, Rick (2010): *Fed Up! Our Fight to Save America from Washington.* New York – Boston – London: Little, Brown and Company.

Peterecz, Zoltán (2017): Az amerikai elnöki retorika a beiktatási beszédek tükrében. *Külügyi Szemle,* 16(1), 3–19. Online: https://kki.hu/assets/upload/Peterecz.pdf

Pokol, Béla (2005): *Jogelmélet. Társadalomtudományi trilógia II.* Budapest: Századvég Kiadó.

Pokol, Béla (2017): *The Juristocratic State. Its Victory and the Possibility of Taming.* Budapest: Dialóg Campus.

Report of the Senate Judiciary Committee (1937). Online: http://www.fdrlibrary.marist.edu/daybyday/event/june-1937/

Roeder, Oliver (2018): John Roberts Has Cast a Pivotal Liberal Vote only 5 Times. *FiveThirtyEight,* 5 July 2018. Online: https://fivethirtyeight.com/features/john-roberts-has-cast-a-pivotal-liberal-vote-only-5-times/

Roosevelt, Franklin D. (1932): *Address Accepting the Presidential Nomination at the Democratic National Convention in Chicago.* Democratic National Convention, 2 July 1932. Online: https://www.presidency.ucsb.edu/documents/address-accepting-the-presidential-nomination-the-democratic-national-convention-chicago-1

Roosevelt, Franklin D. (1937): *Ninth Fireside Chat on the Judiciary Reorganization Bill.* 9 March 1937. Online: https://millercenter.org/the-presidency/presidential-speeches/march-9-1937-fireside-chat-9-court-packing

Roosevelt, Franklin D. (2006): First Inaugural Address, March 4. In Lloyd, Gordon (ed.): *The Two Faces of Liberalism. How the Hoover–Roosevelt Debate Shapes the 21st Century.* Salem, Mass.: M&M Scrivener Press, 160–164.

Sándor, Lénárd (2022a): Mára már mindannyian „originalisták" lettünk? *Ludovika Frontier Blog,* 31 March 2022. Online: https://www.ludovika.hu/blogok/frontier-blog/2022/03/31/mara-mar-mindannyian-originalistak-lettunk/

SÁNDOR, Lénárd (2022b): Veszélyes szakma ma bírónak lenni a tengerentúlon. *Ludovika Frontier Blog*, 16 June 2022. Online: https://www.ludovika.hu/blogok/frontierblog/2022/06/16/veszelyes-szakma-ma-bironak-lenni-a-tengerentulon/

SCOTUS (2000): *Bush et al. v. Gore et al. Certiorari to the Supreme Court of Florida No. 00-949.* Online: https://supreme.justia.com/cases/federal/us/531/98/case.pdf

SCOTUS (2012): *National Federation of Independent Business et al. v. Sebelius, Secretary of Health and Human Services, et al.* (2012). Online: https://www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf

SCOTUS (2015): *Obergefell v. Hodges* (2015). Online: https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf

SCOTUS (2020): *Republican Party of Pennsylvania v. Kathy Boockvar, Secretary of Pennsylvania, et al., No. 20–542.* Online: https://www.supremecourt.gov/opinions/20pdf/20-542_i3dj.pdf?utm_source=mandiner&utm_medium=link&utm_campaign=mandiner_202110?utm_source=mandiner&utm_medium=link&utm_campaign=mandiner_202110

SHAPIRO, Ilya (2021): Judging Biden. *Cato Institute*, 14 January 2021. Online: https://www.cato.org/publications/commentary/judging-biden

SHAPIRO, Martin (1964): *Law and Politics in the Supreme Court. New Approaches to Political Jurisprudence.* New York: The Free Press of Glencoe.

SONMEZ, Felicia – BARRETT, Devlin – PHILLIPS, Amber – BARNES, Robert (2018): Who's on President Trump's List to Replace Justice Kennedy? *The Washington Post*, 27 June 2018. Online: https://www.washingtonpost.com/politics/whos-on-president-trumps-list-to-replace-justice-kennedy/2018/06/27/7010f67a-7a36-11e8-93cc-6d3beccdd7a3_story.html

STONE SWEET, Alec (2000): *Governing with Judges. Constitutional Politics in Europe.* New York: Oxford University Press. Online: https://doi.org/10.1093/0198297718.001.0001

STUMPF, István (2020): *Alkotmányos hatalomgyakorlás és alkotmányos identitás* [Constitutional Exercise of Power and Constitutional Identity]. Budapest: Gondolat.

SZENTE, Zoltán (2013): *Érvelés és értelmezés az alkotmányjogban* [Reasoning and Interpretation in Constitutional Law]. Budapest–Pécs: Dialóg Campus.

The White House (2021): *Executive Order on the Establishment of the Presidential Commission on the Supreme Court of the United States.* 9 April 2021. Online: https://www.whitehouse.gov/briefing-room/presidential-actions/2021/04/09/executive-order-on-the-establishment-of-the-presidential-commission-on-the-supreme-court-of-the-united-states/

TOOBIN, Jeffrey (2012): *The Oath. The Obama White House and the Supreme Court.* New York: Anchor Books.

VARGA Zs., András (2019): *From Ideal to Idol? The Concept of the Rule of Law.* Budapest: Dialóg Campus.

ZÉTÉNYI, András (2004): Az amerikai Legfelsőbb Bíróság tagjainak kinevezése [Appointments to the U.S. Supreme Court]. *Jogelméleti Szemle*, 4. Online: http://jesz.ajk.elte.hu/zetenyi20.html