Non-Deferential Judicial Checks and Balances and Presidential Policies

di Roberto Toniatti

Abstract: Politiche presidenziali e non-deferenza degli orientamenti giurisprudenziali nel quadro dei checks and balances – The one-term-only Donald J. Trumps's presidency has raised a good many questions involving their consistency with mainstream constitutionalism in substantive areas of rights and freedoms affected by his radical ideological attitudes. Immigration policies and civil rights ranked high in expressing such attitudes through various programmes and regulations that were repeatedly supported by Congress, whenever needed, according to partisan lines. Presidential nominations to the federal judiciary and, in particular, to the Supreme Court showed to what extent Trumpism managed to keep under strict unprincipled control a Republican Congress and, indirectly the Supreme Court, where conservative Justices (three of them appointed by Trump himself and his Senate) established a 6-3 strict majority while liberal Justices promptly reacted through strong dissenting opinions. Presidential policies have met a wide non-deferential judicial activism by lower federal courts that was not coupled by a similar attitude by the Supreme Court. The chapter argues that when mainstream constitutionalism is under political attack by a radical President blindly supported by his majority in Congress, the very system of checks and balances requires the judiciary to adopt a non-deferential attitude as an expression of a constitutional militant priority; and that, during Trump's term, while lower federal courts have shown to be ready to defend the Constitution, the conservative majority of Justices in the Supreme Court has continued supporting presidential aggressive policies rather than the Constitution.

Keywords: Trump, Immigration, Civil rights, Judicial checks and balances, Defence of the Constitution.

1. Introduction

President Donald J. Trump's institutional behaviour as well as many of his main policies - during his first and only term (2016-2020) - were meant to have and did have, to a considerable extent, a crashing impact on consolidated codes of conduct by the Chief Executive, on his careful and consistent distancing from any middle ground pragmatism, on his repeated espousing ideological extremist right wing causes, on his willingness to reach balanced accommodations with Congress and the opposition, on average citizens' expectations of traditional presidential attitudes aimed at enhancing national cohesion, and, not only indirectly, on mainstream US constitutionalism.

A good share of Trump's peculiar, odd and deplorable performance of the presidential role is the proper object of analysis by and through social sciences other than the law: his endless and verbally aggressive 2016 electoral campaign protracted to the end of his term in office, the unprincipled use and misuse of the Republican majority in the Senate for achieving not only partisan legislation but also a hasty ending of the impeachment procedure as well as the advice and consent favourable to the appointment of a member of the Supreme Court just weeks before Election Day, his disgraceful handling of the relations with the press and the media in general whenever they did not support not only his political agenda but also his narcissistic personality, his flirting with extreme right groups advocating racism and white supremacy, his lack of sympathy with the issues and values raised by the movement "black lives matter". And the list could go on. The investigation by social scientists on such issues is likely to eventually include options and trends of future electoral competitions (at least in the short-medium term), considering that a good part of Trump's presidential behaviour is likely to have been directed towards achieving re-election and, hypothetically, to start a dynasty.

Another perspective, on the contrary – although certainly not indifferent to the political, social and cultural context crafted by the President -, provides the proper area of assessment of the 45th Presidency by and through the instruments of analysis of constitutional law. This second perspective – reinforced by useful comments of comparative law - involves to a very large extent a direct examination of the interaction with the judicial system (both at state and federal level) that has plaid a relevant role in contributing to Trump's interpretation of the presidential function, until the very end of and even beyond the second electoral campaign and the voting process, at least until the meeting of the Electoral College (20 December, 2020) and - possibly and not totally unsurprisingly - until the counting of electoral votes in Congress (6 January, 2021) and Inauguration Day (20 January, 2021).

In fact, the Judiciary might well be regarded as worthy of being critically examined *per se* as a main focus of analysis of the 2016-2020 Presidency. This approach may be correct for all Presidencies, although it appears to be especially fit for Trump's term: reference needs being made to the frequent involvement of courts activated by the opposition in important areas of presidential policies, to the visibly partisan exercise of the appointing power to the Federal Judiciary by both the Chief Executive and the Senate, to the previously unexperienced and thoroughly politically motivated resistance by the incumbent President and his campaign and supporters to the electoral defeat through a considerable – although unsuccessful – use of the judicial process.

A legal assessment of the litigation raised by such an attempt at rejecting the electoral defeat, in spite of a substantial difference of votes

received by citizens and transferred to the Electoral College, could not ignore the context in which the judicial weapon has been used by Trump. It is a context of unprecedented and increasing ideological polarisation of the political system, not originally promoted by President Trump but by him noticeably inflated and optimally exploited, to the extent that he did not only increase his share of votes since the 2016 presidential campaign but also managed to raise a resistance movement to the electoral result composed by Republican congressmen and women, states Governors, and a massive number of citizens supposedly sincerely convinced that the defeat had been the result of electoral fraud by the "enemy", Joe Biden's Democrats.

The post-electoral context is thus framed by an incumbent President who is publicly committed to further exacerbate the climate of hostile polarisation and to threat abandoning the due respect for the rules of the democratic electoral game. Such a conduct does reasonably raise shades of a militant anti-system positioning and lead to just as militant reactions motivated by a commitment to democratic and constitutional defence. Furthermore, Trump's latest (and last) attempts at resisting the electoral outcome and challenging the Constitution does also retrospectively cast doubts on the constitutional consistency of his overall conduct as political leader and policy-maker.

An analysis of Trump's Presidency focused on his mutual interaction with the Judiciary cannot avoid evoking features that might be seen as belonging to a scenario of 'militant democracy': in other words, the role plaid by some courts would be classified as functional to an unplanned and extemporary 'militant defence of constitutional democracy' at an early stage of a possible development of a wide phenomenon of systematic challenge to the mainstream system, while another part of the Judiciary may be classified as closer to the Presidency and less sensitive to mainstream constitutionalism.

Reference to the concept of militant democracy is very general and non-specific at the present stage. However, it shouldn't be omitted to recall the image of a "culture war" that is often used to describe the present condition of democracy in the United States and the fear for the current situation to gradually becoming more severe starting from Trump's electoral defeat. Moreover, analogies and convergences with analogous ideological dynamics occurring in other parts of the world – noticeably in the European Union, where a few member states and their domestic majorities are defying the shared understanding of rule of law, democracy, and protection of human rights – might further fuel the cleavages in society as well as in politics.

In the following paragraph an explanation will be provided over the role of a non-deferential Judiciary that is to be reasonably expected in a political context of challenges to the mainstream constitutional system within a framework of checks and balances. Such an explanation intends to

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be not-centred on the reaction to Trump exclusively, although it must be admitted that the underlying empirical evidence is implicitly drawn from this Presidency only, and that the reference is to the contemporary presidential form of the United States government. It is also to be admitted that a European scholar of comparative constitutional law of the post WW2 generation cannot help having high expectations - and, consequently, bitter disappointments - from the notion of a living constitutional democracy in this country and, in particular, on its effective safeguard by the Supreme Court and its jurisprudence – which, sadly, has ceased to be a model of prestige and inspiration for other jurisdictions.

The role of the Federal Judiciary during Trump's Presidency in a context of radical polarisation is going to be examined in the third paragraph through a short survey of recent landmark decisions by the Supreme Court. Such decisions reflect the polarisation within the Court itself – with an almost permanent composition of the majority and the minority -, the frequent delivery of *per curiam* unsigned and unmotivated decisions, a fairly consistent method of interpretation closer to a strategy of upholding a conservative worldview (such as Trump's), and a substantial distance from lower federal courts. These short preliminary remarks allow the suggestion that recourse to the image of a 'non-deferential Judiciary' and of a 'militant constitutional defence' does not apply to the majority of the Supreme Court – as one might think and hope – but is to be reserved to lower federal courts and a minority within the Supreme Court.

The survey of case-law is to be conducted with regard to two main areas of presidential policies and sets of values, such as immigration and civil rights, that show a great potential of representation of the concept of 'culture war' and, consequently, of the need for a strategic judicial commitment to 'militant constitutional democracy', not on policy ground but as an expression of balanced constitutional adjudication.

2. Judicial non-deference in a context of militant defence of constitutional democracy

The law is not value-free nor – decidedly – value-free is and can be the supreme law of the land.

In fact, the federal Constitution is rooted in values: the vertical division of powers and federalism are centred on the values of self-government (somebody would go as far as saying of 'states' sovereignty') and on those of participation to another sphere of government, values such as those stated in the Preamble: establishing Justice, insuring domestic Tranquillity, providing for the common Defense, promoting the general Welfare, and securing the Blessings of Liberty, for whose sake a more perfect Union is to be formed through a Constitution for the United States of America.[1]

[1] See J. Madison, *The Alleged Danger From the Powers of the Union to the State Governments*

According to the Supremacy Clause and the doctrine of incorporation of the Bill of Rights - and notwithstanding the Tenth Amendment - states' participation to the Union does entail sharing a further set of values than their own, as defined in their constitutions and laws.

Rooted in republican values are also the horizontal separation of powers and the complex system of checks and balances that are established within the whole constitutional architecture of the form of government, for the purpose of preserving the values of citizens' rights and freedoms from the ever present dangers of tyranny.[2].

The ideological frame of reference is the one of a late 18th century model of liberal constitutionalism.[3] Citizens' rights and freedoms are the core values also of some of the constitutional amendments, from the traditional common law rights included in the IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"), to the Civil War XIII, XIV, XV Amendments (citizenship, due process, equal protection of the laws), and others (such as voting rights).

The 1789 federal Constitution does not have provisions expressly directing policies – whether legally or only politically binding[4] - and yet the

Considered, in *The Federalist Papers*: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite" (No. 45).

[2] Interesting comparative references to the 18th century British Constitution (through the intermediation of Montesquieu) and to the form of government of other sister-states are used by J. Madison in *The Federalist Papers* No. 47/51; and, specifically: "No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. I persuade myself, however, that it will be made apparent to every one, that the charge cannot be supported, and that the maxim on which it relies has been totally misconceived and misapplied. In order to form correct ideas on this important subject, it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct" (No. 47 - *The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts*).

[3] It is convenient to recall that the judicial decision in *Marbury* v. *Madison* (1803) – although by far better known for the reasoning leading to judicial review – deals with the need to provide a remedy for the protection of an individual right of Mr. William Marbury ("If he has a right, and that right has been violated, do the laws of his country afford him a remedy? The 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. *One of the first duties of government is to afford that protection* [emphasis added]. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court", at 57).

[4] The Irish Constitution of 1937 is an example of a common law constitution bearing non-legally binding provisions of this nature (see art. 45 – "Directive Principles of Social Policy: The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be

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inspiration drawn from constitutional values is to be read in legislation, in administrative regulations and programmes and other sources and practices establishing, shaping and implementing public policies.[5]

It is consequential, therefore, that the very rationale of the supremacy of the constitution mandates federal policy-making institutions – through legislation and administration – to respect and implement constitutional values as well as the Federal Judiciary to oversee such consistency and to guarantee the higher status of those values whenever a political will is acknowledged of infringing them.

A constitutional democracy relies to a large extent on judicial review of constitutional consistency of all public actions, on the assumption of courts' independence and impartiality. Judicial independence and impartiality do not apply to the bias in favour of the Constitution and its values, that courts are bound to enforce, even against a majority in Congress or the President when either one of them or both act counter-constitutionally.

In several jurisdictions there is a judicially declared presumption in favour of the constitutional conformity of legislative or administrative action. It is a form of judicial self-restraint. The same presumption – seldom openly stated - ought to be applicable to judicial upholding the supremacy clause and opposing a political majority that goes beyond due limits. Judicial neutrality in front of constitutional supremacy is not conceivable.

Judicial self-restraint is not always commendable and judicial activism may be praiseworthy, in both cases the evaluation depending on the merits of an individual decision and also on the context of the interaction between the Judiciary, on one side, and Congress and the President on the other. Methods of interpretation and a reasoned motivation of the ruling are the object of such a critical evaluation.

All such elements are crucial factors in showing the judicial philosophy of candidates for presidential nomination and, following the Senate's advice and consent, for their actual appointment. In fact, the performance of their respective roles by the President and the Senate is inspired by a partisan motivation that does not always anticipate the role effectively plaid by

cognisable by any Court under any of the provisions of this Constitution". The 1997 common law Constitution of South Africa, on the contrary, is an example of a "supreme law of the land" whereby "law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled" (art. 2), thus ensuring justiciable social rights and policies as regulated by its Bill of Rights.

[5] Reference to constitutional values can be read also in the text of *Marbury* as the content of "principles functional to citizens' happiness" ("That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent" at 133).

individual judges and justices, who may have more ambitious personal purposes than flaunting their faithful gratitude to the President who appointed them.

Criticism of the Judiciary's record of self-restraint or activism depends, at least in part, on the scenario of such interaction, that includes the appointment process. The more the political branches of government challenge the constitutional architecture and set of values, the more the contribution of the Judiciary and especially of the Supreme Court is expected to interpret responsibly their role of safeguard of the supreme law of the land.[6]

The Judiciary, in conformity to its role interpreted according to the context and under the guidance of the principle of proportionality, ought to manage a constitutional malaise when the political branches are unable or unwilling to do so or – as in the present situation – are the very source of the constitutional malaise itself. This holds true whatever the non-mainstream ideological leaning might be, whether conservative or progressive.

It has been authoritatively suggested and demonstrated that American democracy has been and currently still is in a condition of 'degradation'.[7]

The United States, in spite of having "the longest-standing constitution in the world, a strong middle class, high levels of wealth and education, and deeply entrenched democratic institutions and mores [...] is not immune from world trends of declining democratization".[8]

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[6] See: "Majority rule creates the opportunity for deformation of democracy and the imposition of a concept of good life that does not allow for alternative forms and autonomous definition of the good life. Within the framework of the democratic process, using the mechanisms of democracy (free speech, assembly, elections), a regime may be established that dissolves democracy", in A. Sajó, *From Militant Democracy to the* Preventive State, in *Constitutional Law Review* (a publication of the Georgian Constitutional Court), 63.

[7] See M. J. Klarman, *The Degradation of American Democracy, The Supreme Court 2019 Term, Foreword*, in *Harvard Law Review*, 2020, 1. The impressive detailed and motivated analysis of the evidence of such degradation of democracy is conducted with regard to (i) President Trump's Authoritarian Bent (indicated by attacks on freedom of the press and freedom of speech, on attacks on an independent judiciary, by politicizing law enforcement, by politicizing the rest of the government, by using government office for private gain, by encouraging violence, by racism, by lies, by eroding transparency, by admiration of foreign autocrats, by delegitimizing elections and the political opposition); (ii) the Republican party's assault on democracy, on partisan gerrymandering; on voter identification laws; on purging the voter rolls; on other methods of impeding voter registration; on suppressing the youth vote; on other barriers to voting; on undoing election results (a) eviscerating the powers of democratic governors, (b) circumventing inconvenient referenda results, (c) delaying or canceling elections, (d) subjecting voters to the risk of death for political advantage; (iii) the Republican party's complicity with President Trump; 1. the Republican presidential primaries; 2. the general election; 3. the early Trump Administration; 4. the 2018 midterm elections; 5. the Mueller Report; 6. Impeachment; 7. post-impeachment 8. explanations for Republican complicity and the end of bureaucratic constraint; 9. the costs of complicity; (a) President Trump's unfitness for office; (b) The coronavirus pandemic.

[8] See M. J. Klarman, *The Degradation of American Democracy*, 8.

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Reference is realistically made to some physiological partisan (but transparent) features of the judicial process: "for much of American history, for a judge to be political did not necessarily mean to be ideological or even partisan, because the parties were not ideologically sorted". And "yet, over the last half century, the parties have sorted ideologically and have polarized, albeit asymmetrically. The Justices have also polarized asymmetrically".[9]

Realistically, it has been also stated that "when the Court confronts a case involving abortion or race-based affirmative action, the Justices naturally divide along ideological lines. Liberal and conservative Justices think differently about these issues as policy matters, and constitutional law is malleable enough to enable them to legally rationalize the outcomes they prefer. This is probably inevitable and thus difficult to criticize"; and that "parties that win elections are entitled to have their policy agendas enacted into law. The political party that has won enough recent Senate and presidential elections to appoint Justices who share the party's worldview is entitled to victories in court".[10]

But the same realism ought to allow expecting that "basic principles of democracy do not permit parties to stack the political deck in their favor by suppressing votes, purging voter rolls, gerrymandering legislative districts, and so forth. It would be nice if Supreme Court Justices, regardless of ideology or partisan affiliation, would defend democracy when it is threatened in such a fashion". [11]

This is precisely the core content of what is meant here for a militant defence of constitutional democracy and a judicial non-deferential system of checks and balances.

It may be suggested that, eventually, a good example of such non-deferential attitude in defence of constitutional democracy is the Order in pending case (592) in *Texas* v. *Pennsylvania* (December 11, 2020) when the Supreme Court denied the state of Texas's motion for leave to file a bill of complaint under the allegation that Georgia, Michigan, Pennsylvania, and Wisconsin violated the United States Constitution by changing election procedures through non-legislative means.[12] The motion was denied "for lack of standing under Article III of the Constitution. Texas has not demonstrated a judicially cognizable interest in the manner in which another

[9] See M. J. Klarman, *The Degradation of American Democracy*, 229.
[10] See M. J. Klarman, *The Degradation of American Democracy*, 230.
[11] See M. J. Klarman, *The Degradation of American Democracy*, 231.
[12] Texas' challenge received the support by 17 states introducing amicus curiae briefs, by over 100 Republican Congressmen and women, and by President Trump himself, "in his personal capacity as a candidate for re-election to the Office of President". The motion has been defined as "a press release masquerading as a lawsuit" and as "what utter garbage. Dangerous garbage, but garbage", in R. Hasen, *Texas Asks Supreme Court for Permission to Sue Georgia, Pennsylvania, Michigan, and Wisconsin Over How They Conducted the Election, To Disenfranchise Voters in These States and Let State Legislators Choose Electors. It Won't Work*, in Election Law Blob, available at electionlawblog.org/?p=119395.

State conducts its elections".[13]

3. Some of President Trump's Main Policies through the Supreme Court

The judicial record of the Supreme Court on some of President Trump's policies confirms a scenario that was described as a comment to the first two years of his term: in fact, also at the end of the full term, "we are facing, on the one hand, a very active lower Federal Judiciary – certainly an *activist* Federal Judiciary in the Administration's perception – and, on the other hand, a Supreme Court that is likely to be unable to perform a balancing function because of its own internal cleavages between (more) liberal and (more) conservative Justices".[14]

In conformity with the theoretical scenario described above, lower federal courts have therefore adopted a more systematic attitude of non-deferential check on the presidential policies whereas a divided Supreme Court has plaid a more deferential role. Considering the nature and the impact of some of those policies on mainstream constitutionalism, an assessment of the Supreme Court's performance is consequently very critical.

3.1 Immigration policy

Since the 2016 electoral campaign, hostility to immigration has been one of the priorities of President Trump's policies, based on a set of motivations, spacing from requirements of national security to "Americans first" in the perspective of more jobs to be made available for citizens only. It is, by the way, a typical tenet of contemporary populism in other parts of the world as well, that in Trump's view is often tainted with clear support for Christian white nationalist groups and a more or less dissimulated ostracism to non-traditional religions and, specifically, Islam.[15]

Immigration has proved to be an area of fairly intense litigation, lower federal courts often challenging Presidential policies and the Supreme Court upholding them, at least indirectly – through *per curiam* decisions, often with motivated dissent -, in a number of cases having high political visibility.[16]

[13] Still, Justice Alito, with whom Justice Thomas joins, wrote: "in my view, we do not have discretion to deny the filing of a bill of complaint in a case that falls within our original jurisdiction". And Justice Thomas, dissenting, stated: "I would therefore grant the motion to file the bill of complaint but would not grant other relief, and I express no view on any other issue".

[14] See R. Toniatti, *President Trump's Political Agenda Vis-À-Viz the Supreme Court*, in G. F. Ferrari (ed), *The American Presidency Under Trump. The first Two Years*, The Hague, 2020, 81.

[15] See *Advancing Immigrant, Muslim, and Refugee Justice In A Period Of Ascendant White Nationalism*, and *The Future of the U.S. "Populist Radical Right" and White Nationalism*, Political Research Associates, 2018, available at www.politicalresearch.org/research.

[16] For an earlier and more detailed analysis see R. Toniatti, *President Trump's Political Agenda Vis-À-Vis the Supreme Court*, in G. F. Ferrari (ed), *The American Presidency Under*

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Reference needs to be made here to the "travel ban" (known also as the "Muslim ban") [17], to the use of a declaration of emergency for building a wall at the border with Mexico, to Obama's DACA and DAPA programmes and to the issues concerning the organisation of the 2020 census of the population.

3.1.1 Immigration policy: the travel ban

At an early stage of his term, President Trump issued two Executive Orders (No. 13769 and No. 13780, respectively, in January and in March 2017) and a Presidential Proclamation (No. 9645, in September 2017) with the purpose of suspending temporarily the granting of visas for entry into the United States to nationals of seven countries with a Muslim majority (Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen. Iraq was eventually cancelled from the list).[18] The religious discrimination factor (animus toward Islam in violation of the Establishment Clause of the First Amendment, rather than national security) prevailed in judicial assessment of the order by several federal courts and courts of appeal; a nationwide preliminary injunction barring the Government from enforcing the order was eventually granted.

In *Trump v. International Refugee Assistance Project* (2017), the Supreme Court supported the presidential policy on national security ground, acknowledging that the interest in preserving it is "an urgent objective of the highest order", although at the same time safeguarding foreign nationals enjoying a bona fide relationship with a person or entity in the United States from enforcement of the order.[19]

In *Trump* v. *Hawaii* (June 2018), in a 5-4 decision[20], the Supreme Court reversed, affirming the President's broad discretion to suspend the entry of aliens, in conformity with constitutional and, expressly, legislative ground (reference is to the United States Immigration and Nationality Act, INA).[21]

3.1.2 Immigration policy: national emergency and the anti-immigrants wall

Another controversial issue in immigration policy was the proclamation of

Trump. The First Two Years, The Hague, 2020, 65.

[17] See S. Mansoor, *President-Elect Biden Joe Biden Has Promised to End Trump's Muslim and African 'Travel Ban.' But Its Legacy Will Be Felt for Years*, Time, December 1, 2020, available at time.com/5907628/muslim-african-ban/.

[18] In the second Executive Order the list of countries changed (Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela and Yemen). Chad was eventually deleted from the list.

[19] Decision *per curiam*. A separate opinion is given by Justice Thomas, with whom Justice Alito and Justice Gorsuch join, concurring in part and dissenting in part. For comments, related cases and docket materials see www.scotusblog.com/case-files/cases/trump-v-international-refugee-assistance-project/.

[20] Chief Justice Roberts delivered the opinion of the Court, in which Justices Kennedy, Thomas, Alito, and Gorsuch joined. Justices Kennedy, and Thomas filed concurring opinions. Justice Breyer filed a dissenting opinion, in which Justice Kagan joined. Justice Sotomayor filed a dissenting opinion, in which Justice Ginsburg joined.

[21] For comments, related cases and docket materials see www.scotusblog.com/case-files/cases/trump-v-hawaii-3/.

a national emergency as a measure that would allow the Chief Executive to divert billions of federal funds from their original destination to the building of a wall on the border with Mexico. The proclamation was adopted by the President in order to bypass the opposition of a Democratic majority in the House of Representatives, a political consequence resulting from the mid-term elections in 2018. Congress did adopt a Joint Resolution against the proclamation but was unable to raise a two-thirds qualified majority required for overturning President Trump's veto.

Opposition to the policy raised litigation in court as well. In particular, a group of 17 states, led by California, filed a suit challenging the proclamation.[22]

In *D. J.* Trump, et al., v. *Sierra* Club, at al. (2019), the majority of the Supreme Court decided in favour of the Executive on procedural ground, stating that "among the reasons is that the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review".[23] In a final unsigned and non-motivated decision (5-4) - *D. J.* Trump, et al., v. *Sierra* Club, at al. (2020), - the majority of the Court, by a single sentence ("the motion to lift stay is denied") - denied to reconsider the case.[24]

3.1.3 Immigration policy: the 2020 Census and the Exclusion of Irregular Immigrants

- The Constitution requires a national census to be made every ten

[22] Besides the states (Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Virginia and Michigan), other actors went to court. The plaintiffs included quite a varied group, from an association of landowners from Texas, to environmentalist movements (Sierra Club, Audubon Society) and the American Civil Liberties Union, see R. D. O'Brien and S. Gurman, *States File Suit Against Trump Administration Over Wall Emergency*, in *The Wall Street Journal*, February 18, 2019, available at www.wsj.com/articles/california-lawsuit-is-expected-on-wall-emergency-11550535544. It is worth mentioning as well a brief of former members of Congress introduced as amicus curiae in support of the states by a qualified bipartisan group that defines and motivates itself as follows: "Amici curiae are a bipartisan group of more than 100 former Members of the House of Representatives, both Republicans and Democrats. Amici have served an aggregate of approximately 1,500 years in Congress, hail from 36 States, and include 21 former Members from the states of the Ninth Circuit. Amici disagree on many issues of policy and politics. Some amici believe that a wall along the Southern Border is in the national interest. Others do not. But all amici agree that the Executive Branch is undermining the separation of powers by proposing to spend tax dollars to build a border wall that Congress repeatedly and emphatically refused to fund". The whole text is available at oag.ca.gov/system/files/attachments/press-docs/amicus-brief-bipartisan-group.pdf.

[23] Justices Ginsburg, Sotomayor and Kagan would have denied the application and Justice Breyer, concurring in part and dissenting in part from grant of stay observed, in particular, that "this case raises novel and important questions about the ability of private. parties to enforce Congress' appropriations power".

1.1.1 [24] Dissent was expressed by Justices Breyer, Ginsburg, Sotomayor and Kagan. See www.scotusblog.com/case-files/cases/trump-v-sierra-club/

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years to the purpose of updating the apportionment of the states' seats in the House of Representatives (and, consequently, in the Electoral College) to the respective growth and the spatial mobility of the population (Art. I, par. 3, clause 3). The periodic conduct of the Census serves further purposes than the one determined by the Constitution, such as drawing up electoral districts, and allocating funds to local government under several federal programmes according to the size of the population.

- The regulation of the 2020 Census has been affected by a new policy aiming at introducing a question concerning citizenship in the Census form that is sent to all households and excluding "from the apportionment base aliens who are not in a lawful immigration status". The immediate consequences of such an innovation was feared to be making immigrants reluctant to participate - as answers to each and all items are mandatory – and to produce an undercount of the population, with a further negative consequence on the interest of some states and cities that would seriously suffer from a census not faithfully reflective of the population, including immigrants.

- This normative setting and the alleged underlying political aims of the 2020 Census were challenged in court by 18 states, several cities a coalition composed of both 18 states and some larger cities (including Washington, D.C.) as well as immigrants' rights groups and the challenges were upheld by lower federal courts finding that the Department of Commerce has violated the Enumeration clause of the Constitution and the Census Act.

- In a first 5-4 decision - Department of Commerce v. New York (2019)[25] -, the Supreme Court denied that, in reinstating a citizenship question on the 2020 census questionnaire, the Administration had violated the law.

- However, the majority admitted that "we are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process" and that "the evidence tells a story that does not match the Secretary's explanation for his decision". Therefore, on the ground of the general rule according to which "the reasoned explanation requirement of administrative law is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the

[25] Roberts, C. J., 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, and IV–C, in which Thomas, Alito, Gorsuch, and Kavanaugh, JJ., joined; with respect to Part IV–A, in which Thomas, Ginsburg, Breyer, Sotomayor, Kagan, and Kavanaugh, JJ., joined; and with respect to Part V, in which Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Thomas, J., filed an opinion concurring in part and dissenting in part, in which Gorsuch and Kavanaugh, JJ., joined. Breyer, J., filed an opinion concurring in part and dissenting in part, in which Ginsburg, Sotomayor, and Kagan, JJ., joined. Alito, J., filed an opinion concurring in part and dissenting in part. For comments, related cases and docket materials see www.scotusblog.com/case-files/cases/department-of-commerce-v-new-york/www.scotusblog.com/case-files/cases/department-of-commerce-v-new-york/.

interested public" –, the Court requested further explanations ("the explanation provided here was more of a distraction").[26]

In its recent final 6-3 *per curiam* decision on the issue - *Trump v. New York (December 2020)*[27] – the majority of Supreme Court found the issue to be not suitable as yet for adjudication and dismissed the case for a lack of jurisdiction. [28] Thus, the Court allowed the Administration to defer to the sources of President Trump's policy concerning the exclusion of irregular immigrants from the 2020 Census but indirectly left the door open to future legal challenges depending on the actual implementation of the new apportionment policy.

The dissenting opinion (by Justice Breyer joined by Justices Sotomayor and Kagan), on the contrary, acknowledged that "plaintiffs have alleged a justiciable controversy, and that controversy is ripe for resolution" with regard to both ""representational and funding injuries", considering that "the Government's current plans suggest it will be able to exclude a significant number of people under its policy".[29]

1.1.2 [26] At the end of his opinion, Justice Thomas makes reference to the *presumption of regularity* as the resolutive paradigm of the controversy: "finally, if there could be any doubt about this conclusion, the presumption of regularity resolves it", stating that "where there are equally plausible views of the evidence, one of which involves attributing bad faith to an officer of a coordinate branch of Government, the presumption compels giving the benefit of the doubt to that officer" (italics added).

1.1.3 On the front of the dissenters, in Justice Breyer's opinion, "the Secretary's decision to add a citizenship question created a severe risk of harmful consequences, yet he did not adequately consider whether the question was necessary or whether it was an appropriate means of achieving his stated goal". Consequently, "these failures, in my view, risked undermining public confidence in the integrity of our democratic system itself. I would therefore hold that the Secretary's decision—whether pretextual or not—was arbitrary, capricious, and an abuse of discretion".

[27] For comments, related cases and docket materials see www.scotusblog.com/case-files/cases/trump-v-new-york/.

1.1.4 [28] The majority opinion states that "at present, this case is riddled with contingencies and speculation that impede judicial review. The President, to be sure, has made clear his desire to exclude aliens without lawful status from the apportionment base. But the President qualified his directive by providing that the Secretary should gather information "to the extent practicable" and that aliens should be excluded "to the extent feasible." [...] Any prediction how the Executive Branch might eventually implement this general statement of policy is "no more than conjecture" at this time". Furthermore, it added that "everyone agrees by now that the Government cannot feasibly implement the memorandum by excluding the estimated 10.5 million aliens without lawful status. The policy may not prove feasible to implement in any manner whatsoever, let alone in a manner substantially likely to harm any of the plaintiffs here". As to the second claim advanced by the plaintiffs, the Court ruled that "the impact on funding is no more certain. According to the Government, federal funds are tied to data derived from the census, but not necessarily to the apportionment counts addressed by the memorandum". Therefore, "at the end of the day, the standing and ripeness inquiries both lead to the conclusion that judicial resolution of this is premature. Consistent with our determination that standing has not been shown and that the case is not ripe, we express no view on the merits of the constitutional and related statutory claims presented. We hold only that they are not suitable for adjudication at this time".

[29] Furthermore, at the end of a historical survey of practice, the dissent concludes that "thus, the touchstone for counting persons in the decennial census is their usual residence, not their immigration status. That alone is enough to resolve this case,

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3.1.4 Immigration policy: The DACA and DAPA Programmes

In 2012 President Obama started a policy known as Deferred Action for Childhood Arrivals (DACA). It allowed delaying for a period of two years the deportation of minors who, although illegally present on the territory, had a clean criminal record and would be eligible to receive a regular work permit.[30] DACA as well as its expansion through a new programme of the Obama Administration (known as Deferred Action for Parents of Americans and Lawful Permanent Residents, DAPA) were challenged in court by the state of Texas and other 25 other states suing the Department of Homeland Security (DHS). The Fifth Circuit barred the implementation of both programmes – on the ground that the Immigration and Nationality Act (INA), which carefully defines eligibility for benefits, had been violated - and the Supreme Court upheld the decision by an "equally divided vote".[31]

President Trump discontinued the programme: no new applications would be accepted but recipients of the benefits for still less than six months were allowed a two-year renewal. However, litigation continued until it reached the Supreme Court that – far from arriving at a unanimous verdict[32] - gave a judgement deciding three cases.[33]

In the decision, the Court states that "the dispute before the Court is not whether DHS may rescind DACA. All parties agree that it may. The dispute is instead primarily about the procedure the agency followed in

because the memorandum seeks to exclude anywhere between tens of thousands and millions of persons from the census count based solely on their immigration status, and it does so for the stated goal of changing the apportionment total at the expense of the plaintiffs".

[30] The DACA approach was the result of the failure of a previous distinct policy proposed by the Development, Relief, and Education for Alien Minors Act (so called DREAM Act), leading individuals under more or less the same conditions to obtaining permanent residency. The legislative proposal – although introduced several times in Congress since 2001 - never passed a majority vote. It started a social movement called the "Dreamers" that eventually supported the DACA. See Y. Lee, (2006). *To dream or not to dream: a cost-benefit analysis of the development, relief, and education for undocumented minors (DREAM) act*, in *Cornell Journal of Law and Public Policy*, 2016, 231. For a useful survey of the legislative process and bibliography see Georgetown Law Library, A Brief History of Civil Rights in the United States, available at guides.ll.georgetown.edu/c.php?g=592919&p=4170929.

[31] United States, et al., v. Texas, et al., on writ of certiorari, per curiam (2016).

[32] Roberts, C. J., delivered the opinion of the Court, except as to Part IV. Ginsburg, Breyer, and Kagan, JJ., joined that opinion in full, and Sotomayor, J., joined as to all but Part IV. Sotomayor, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part. Thomas, J., filed an opinion concurring in the judgment in part and dissenting in part, in which Alito and Gorsuch, JJ., joined. Alito, J., and Kavanaugh, J., filed opinions concurring in the judgment in part and dissenting in part.

[33] See Department of Homeland Security, et al. v. Regents of the University of California et al., Certiorari to the United States Court of Appeals for the Ninth Circuit; Donald J. Trump, President of the United States, et al. v. National Association for the Advancement of Colored People, on Writ of Certiorari Before Judgement to the United States Court of Appeals for the District of Columbia Circuit; Chad Wolf, Acting Secretary of Homeland Security, et al. v. Martin Jonathan Batalla Vidal, et al., on writ of Certiorari Before Judgement to the United States Court of Appeals for the Second Circuit (2020).

doing so" (II, at 9); and that "We do not decide whether DACA or its rescission are sound policies. "The wisdom" of those decisions "is none of our concern"; we address only whether the agency complied with the procedural requirement that it provide a reasoned explanation for its action. (IV, at 29). The majority opinion – frequently interacting with the concurring and dissenting ones - determines that the rescission of the programme by the DHS was "arbitrary and capricious" as in violation of the Administrative Procedure Act (APA)[34] but it rejects the second ground of the plaintiffs' claim, namely that the rescission violates the equal protection guarantee of the Fifth Amendment.[35]

The consequence of the decision is that the three cases are remanded to their respective lower courts. The termination of the programme is therefore simply delayed, until the Department of Homeland Security will rescind it in conformity with the procedural requirements specified by the Court's majority decision.[36] Needless to say, the Court confirmed its

[34] In Justice Thomas' partly dissenting opinion, it is said that "today the majority makes the mystifying determination that this rescission of DACA was unlawful. In reaching that conclusion, the majority acts as though it is engaging in the routine application of standard principles of administrative law. On the contrary, this is anything but a standard administrative law case. DHS created DACA during the Obama administration without any statutory authorization and without going through the requisite rulemaking process. As a result, the program was unlawful from its inception" (at 2). Furthermore, "today's decision must be recognized for what it is: an effort to avoid a politically controversial but legally correct decision. The Court could have made clear that the solution respondents seek must come from the Legislative Branch" (at 3). And, "under the auspices of today's decision, administrations can bind their successors by unlawfully adopting significant legal changes through Executive Branch agency memoranda [...] In other words, the majority erroneously holds that the agency is not only permitted, but required, to continue administering unlawful programs that it inherited from a previous administration" (at 3).

[35] The partly dissenting opinion of Justice Sotomayor stresses the inadequacy of the space allowed to the claim that the rescission did not violate the equal protection clause, motivating the dissent on a plurality of reasons, among which the President's campaign statements: "Nor did any of the statements arise in unrelated contexts. They bear on unlawful migration from Mexico—a keystone of President Trump's campaign and a policy priority of his administration—and, according to respondents, were an animating force behind the rescission of DACA. [...] Taken together, "the words of the President" help to "create the strong perception" that the rescission decision was "contaminated by impermissible discriminatory animus." 585 U. S., (opinion of SOTOMAYOR, J.) (slip op., at 13). This perception provides respondents with grounds to litigate their equal protection claims further" [...] "Next, the plurality minimizes the disproportionate impact of the rescission decision on Latinos after considering this point in isolation ("Were this fact sufficient to state a claim, virtually any generally applicable immigration policy could be challenged on equal protection grounds"). But the impact of the policy decision must be viewed in the context of the President's public statements on and off the campaign trail. At the motion-to-dismiss stage, I would not so readily dismiss the allegation that an executive decision disproportionately harms the same racial group that the President branded as less desirable mere months earlier" (at 3-4).

[36] In fact, as stated by Justice Kavanaugh in his partial dissent, the legislative process proves its inefficiency, thus encouraging decision-making by the Executive: "for the last 20 years, the country has engaged in consequential policy, religious, and moral debates about the legal status of millions of young immigrants who, as children, were brought to the United States and have lived here ever since. Those young immigrants do not

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expected division – Justices Ruth Bader Ginsburg, Stephen Breyer, and Elena Kagan in full and by Sonia Sotomayor in part, on one side, Justices Clarence Thomas, Samuel Alito, Neil Gorsuch and Brett Kavanaugh – although with distinctions - on the other, with Chief Justice John Roberts joining this time the "progressive" side.

3.2.1 Civil Rights: the scope of religious exemptions

In *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania* (consolidated with *Trump* v. *Pennsylvania*, 2020), a 7-2 majority of the Supreme Court acknowledged the authority of the Departments of Health and Human Services, Labour and the Treasury - under the Affordable Care Act - to promulgate rules exempting employers with religious or moral objections from providing contraceptive coverage to their employees.[37]

Specifically, the Trump Administration issued two interim final rules (IFRs) in 2017 that allowed any employer with a religious or moral objection to contraceptives to claim an exemption and thus not provide contraceptive coverage for its employees.[38]

In her strong dissent, Justice Ginsburg criticised the "blanket exemption for religious and moral objectors to contraception" introduced under the impulse of the Executive and endorsed by the Court as "inconsistent with the text of, and Congress' intent for, both the ACA and RFRA", recalling also "Congress' staunch determination to afford women employees equal access to preventive services, thereby advancing public health and welfare and women's well-being".

The judgement has been criticised, in particular, as a "serious blow to the contraceptive mandate, once a landmark victory for gender equality" and as entailing "a massive shift in how the Court treats religious accommodations".[39]

have legal status in the United States under current statutory law. They live, go to school, and work here with uncertainty about their futures. Despite many attempts over the last two decades, Congress has not yet enacted legislation to afford legal status to those immigrants".

[37] Justice Thomas delivered the opinion of the Court, in which Chief Justice Roberts and Justices Alito, Gorsuch, and Kavanaugh joined. Justice Alito filed a concurring opinion, in which Justice Gorsuch joined. Justice Kagan filed an opinion concurring in the judgment, in which Justice Breyer joined. Justice Ginsburg filed a dissenting opinion, in which Justice Sotomayor joined. For comments, related cases and docket materials see www.scotusblog.com/case-files/cases/trump-v-pennsylvania/.

[38] See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792 (Oct. 13, 2017); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838 (Oct. 13, 2017).

[39] The comment continues by recognising that "by allowing the exemptions to stand without even a discussion of negative externalities, the Court retreated from the understanding, crucial to its earlier decisions, that religious accommodations would not endanger access to contraceptives, and implicitly undermined a doctrine of third-party harms that has long provided a limiting principle in cases where religious freedom and other rights clash. If the Court is no longer required to consider the harm done to third parties by religious exemptions, then numerous civil rights protections may be under

3.2.2 Civil Rights: expanding the definition of 'religious minister'

Another decision by a 7-2 majority – *Our Lady of Guadalupe School* v. *Morrissey-Berru*, *consolidated with St. James School* v. *Biel* (August 2020) – allowed the conservative Supreme Court to refrain from adopting a clear standard for determining who is a 'religious minister', thus indirectly expanding the notion of ministerial exemption under the religion clauses of the First Amendment and to eventually apply it to Catholic school teachers, thus foreclosing judicial adjudication of employment-discrimination claims.[40]

Writing for the Court and quoting the relevant case-law – such as *Kedroff* v. *Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U. S. 94, 116 (1952); and *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171 (2012) - Justice Alito recalls that the First Amendment protects the right of religious institutions "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine". Therefore, "the First Amendment barred a court from entertaining an employment discrimination claim".

The opinion further specifies that "the religious education and formation of students is the very reason for the existence of most private religious schools, and therefore the selection and supervision of the teachers upon whom the schools rely to do this work lie at the core of their mission. Judicial review of the way in which religious schools discharge those responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate". A short survey (through Catholic tradition, Protestant churches, Judaism, Islam, the Church of Jesus Christ of Latter-day Saints, and Seventh-day Adventists) that "does not do justice to the rich diversity of religious education in this country" allows to show "the close connection that religious institutions draw between their central purpose and educating the young in the faith".

The distinct premise of Justice Sotomayor's dissenting opinion is that

threat". More in general, the same comment states that "a pluralistic society depends for its survival on balancing competing interests. Until recently, the Court had at least claimed to respect this need for compromise, even as it granted more extreme accommodations and exemptions. What matters about Little Sisters is that the government and religious objectors flatly rejected compromise, instead asking the Court to bow entirely to religious interests at the expense of employees. In yielding to this position, the Court shook the balanced approach that has long undergirded American pluralism, deepening the cracks in the foundation of America's religious settlement", in Leading Cases, *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania*, in *Harvard Law Review*, 2020, 560.

[40] Justice Alito delivered the opinion of the Court, in which Chief Justice Roberts and Justices Thomas, Breyer, Kagan, Gorsuch and Kavanaugh joined. Justice Thomas filed a concurring opinion, in which Justice Gorsuch joined. Justice Sotomayor filed a dissenting opinion, in which Justice Ginsburg joined. For comments, related cases and docket materials see www.scotusblog.com/case-files/cases/our-lady-of-guadalupe-school-v-morrissey-berru/.

"our pluralistic society requires religious entities to abide by generally applicable laws". Legislation provides for "statutory exceptions [in order to] protect a religious entity's ability to make employment decisions - hiring or firing - for religious reasons. The "ministerial exception," by contrast, is a judge-made doctrine" that bears with it a remarkable "potential for abuse" that suggests a "case-by-case" approach "in determining which employees are ministers exposed to discrimination without recourse". Such an approach recognized that "a religious entity's ability to choose its faith leaders—rabbis, priests, nuns, imams, ministers, to name a few—should be free from government interference, but that generally applicable laws still protected most employees". Therefore, "the ministerial exception applies to a circumscribed sub-category of faith leaders".[41]

3.2.3 Civil Rights: discrimination against gay and transgender

Off the main track of its recent judicial conservatism, the Supreme Court, in a 6-3 decision resulting from an unusual majority[42] - *Bostock* v. *Clayton County, Georgia* (2020)[43] - held that an employer who fires an individual merely for being gay or transgender violates the law.

As to the merits of the case, Justice Gorsuch - speaking for the majority - very clearly clarifies the focus of the decision: in Title VII [of the Civil Rights Act of 1964] "Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender". The legal reasoning continues: "the answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex". And the logical conclusion is that "sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids".

The three opinions offer quite a distinct approach to their respective method of interpretation of the law as well as of the proper role for the Judiciary.

Justice Gorsuch and the majority focus on the method of textual interpretation of the relevant legislation[44] without indulging to neither any

[41] Further comments in Leading Cases, *Our Lady of Guadalupe Schoo*l v. *Morrissey-Berru*, in *Harvard Law Review*, 2020, 460.

[42] Justice Gorsuch delivered the opinion of the Court, in which Chief Justice Roberts, and Justices Ginsburg, Breyer, Sotomayor and Kagan joined; Justice Alito filed a dissenting opinion, in which Justice Thomas joined. Justice Kavanaugh filed a dissenting opinion.

[43] For comments, related cases and docket materials see www.scotusblog.com/case-files/cases/bostock-v-clayton-county-georgia/

[44] The priority to the literal interpretation is reinforced by another statement: "This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual

sensitivity to the evolutionary dynamics of societal values, labelled as "policy ground" and unavailable for the Court, nor even to the historical intent of the lawmaker.[45]

In the harsh dissent of Justices Alito and Thomas, "there is only one word for what the Court has done today: legislation. The document that the Court releases is in the form of a judicial opinion interpreting a statute, but that is deceptive". The evidence is provided by the failure of legislative attempts (H. R. 5) to amend Title VII by defining sex discrimination to include both "sexual orientation" and "gender identity": "because no such amendment of Title VII has been enacted in accordance with the requirements in the Constitution (passage in both Houses and presentment to the President,) discrimination because of "sex" still means what it has always meant".

The criticism of the Court continues ("but the Court is not deterred by these constitutional niceties. Usurping the constitutional authority of the other branches, the Court has essentially taken H. R. 5's provision on employment discrimination and issued it under the guise of statutory interpretation. A more brazen abuse of our authority to interpret statutes is hard to recall") and openly affects both the method of interpretation ("the Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled") and the improper role plaid by the Court ("many will applaud today's decision because they agree on policy grounds with the Court's updating of Title VII. But the question in these cases is not whether discrimination because of sexual orientation or gender identity should be outlawed. The question is whether Congress did that in 1964. It indisputably did not").[46]

sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations". Moreover, "we agree that homosexuality and transgender status are distinct concepts from sex. But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second". And, "there's no authoritative evidence explaining why later Congresses adopted other laws referencing sexual orientation but didn't amend this one".

[45] In fact, the opinion is quite clear on the point: "those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit".

[46] A very effective image is suggested to further criticise the Court: "the Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should "update" old statutes so that they better reflect the current values of society.

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In his distinct dissent, Justice Kavanaugh distances himself from the dissenters' understanding of interpretation, claiming that courts are expected "to follow ordinary meaning, not literal meaning, and to adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase". Therefore, the answer to the question whether 'ordinary meaning of discriminate because of sex' encompass discrimination because of sexual orientation "is plainly no".[47]

4. Final remarks

The January 6, 2021 events may happen to result being a turning point in the saga of the 2020 46th presidential election: the facts are that an incumbent President - after indirectly challenging in court the outcome of the ballots, after achieving the result that more or less fifty states and federal courts (including a conservative Supreme Court for one third of its members shaped by him) denied any wrong doing by the winner and rejected his unfounded claims – incited a mob of frustrated electoral supporters that included a good number of armed 'American patriots', 'white suprematists', 'QAnon believers', 'proud boys' to assault and occupy the Capitol.

Such event not only breaks a tradition of civil religious respect for electoral democracy and democracy *tout court*, but contributes also to producing a retroactive qualification of Trump's presidential term: in doubt between an assessment of 'business-as-usual' and one of 'aggressive erosion' of mainstream constitutionalism, any analysis will more likely than not choose the second alternative.

The scenario of 'degradation of democracy', in other words, will inevitably be reflected on the constitutional dimension and just as inevitably will solicit an investigation on if, and how the system of checks and balances succeeded – if, at all, it did – in containing Trump's impulses against and out of the system. And the investigation will – as it should – include the Judiciary and its promptness to react and monitor both individual cases but also the trends resulting from a plurality of individual cases.

Lower federal courts and states' courts - within the limits of their jurisdiction, as indicated also by litigation conducted under their electoral law and yet bearing a heavy impact on vital federal issues – show a record of militant defence of constitutional democracy that the (majority of the)

[47] Evidence of the foundation of Kavanaugh's interpretation is provided by the fact that "all of the statutes covering sexual orientation discrimination", showing that Congress knows how to prohibit sexual orientation discrimination. So courts should not read that specific concept into the general words "discriminate because of sex." We cannot close our eyes to the indisputable fact that Congress—for several decades in a large number of statutes—has identified sex discrimination and sexual orientation discrimination as two distinct categories".

Supreme Court is unable to exhibit.[48]

The notion of 'judicial deference' is referred to the twofold attitude of the Judiciary to acknowledge the exclusive propriety of decision-making by the Legislative or Executive branches of government over some matters and to avoid replacing the latter's normative or administrative will and action with their own independent assessment and decision-making with regard to those same matters.

The notion originally belongs to the common law world, regardless of the entrenched nature of the constitution of the polity: in fact, it applies to the United Kingdom as well as to Canada and the United States according to the respective basic features of the legal system and institutional setting.

In the United States, the 'political question doctrine' is a typical expression of judicial deference, reducing the scope of enforcement of the supremacy clause of the federal Constitution. Its origins are thoroughly rooted in the case-law of the Supreme Court and, as such, they contribute to making up a wider attitude of judicial self-restraint. The political branches of government rely on judicial deference and, indeed, have an expectation that the constitutional limits to their residual political discretion will be subject to a deferential interpretation.

The Judiciary, on its part, often chooses to compensate its strict scrutiny – openly stated – in some areas of the law with a broader construction in others. Such balancing attitude is traditionally kept in the hands of the Supreme Court, whose historical record, on the one hand, does not seem to confirm the original anticipation that it would be 'the least dangerous branch' of the federal government and, on the other, has greatly contributed to making the system of checks and balances effective, thus shaping mainstream constitutionalism in the United States.[49]

Judicial deference has traditionally been part of the checks and of the balances that the mainstream constitutional setting needs, whereas an inspiration of non-deferential judicial checks and balances is the appropriate attitude of judicial activism in times of challenged mainstream

[48] It is in this context that, since before the electoral campaign, suggestions have been put forward to re-enact a Court-packing plan. See R. Weill, *Court Packing as an Antidote*, in *Cardozo Law Review*, 2021, 101 ss.; and M. Tushnet *Court-Packing On the Table in the United States?*, *in VerfBlog*, 2019/4/03, available at verfassungsblog.de/court-packing-on-the-table-in-the-united-states/ ("the case for Court-packing is basically instrumental. The Democratic Party will be in a position to pack the Court only if they win control of Congress and the Presidency. If they do *that*, they are going to have an ambitious substantive agenda – the so-called Green New Deal, health care reform, and a so-called democracy agenda that includes expanded voter registration, limits on gerrymandering, and more. Yet, the conservative Supreme Court is in a position to – and, proponents of Court-packing fear, is likely to – find substantial parts of that substantive agenda unconstitutional. Court-packing is insurance against that possibility").

[49] It is to be acknowledged, in fact, that "the quest for stability is a defining feature of constitutions": see G. Dalledonne , *Crises, emergencies and constitutional change*, in X. Contiades and A. Fotiadou (eds), *Routledge Handbook of Comparative Constitutional Change*, Oxford, 2021, 245.

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constitutionalism and it may concern more specifically all the levels of the federal and the Supreme Court.

A judicial non-deferential attitude and a militant Judiciary are not, *per se*, a healthy general principle applicable in all circumstances. Yet, when necessary for the preservation of mainstream constitutionalism from radical populism it is an acceptable feature of a healthy constitutional system that knows how to protect itself.[50]

It is to be considered that, apart from the personal and political role of Donald J. Trump, constitutionalism in the United States will have to deal with Trump's legacy and the electoral support he was able to achieve (millions of votes more that in 2016) is a symptom of a movement that may last for an indefinite time (only the midterm elections in 2022 will give a first answer to the endurance of Trumpism after Trump).

The system has experienced how a determined and ideological Presidency in a radically polarised context is able to achieve – not only through the actual use of the appointing power - the result of transforming 'judicial deference' into some sort of judicial 'obsequious compliance. An experience that badly needs to be overcome and judicial non-deference may be necessary and proper in the near future.

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[50] It is a vital part of constitutional law, that European scholarship – if nothing else, because of political circumstances of history - is more accustomed to deal with under various headings as 'protection of the constitution', of 'streitbare (or wehrhafte) Demokratie', of 'defensive democracy', of 'constitutional emergency', of 'substantive limits to the revision of the constitution', of 'eternity clauses' and, more recently, of 'constitutional identity'. See W. Müller, *Militant Democracy*, in M. Rosenfeld, A. Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012, 1253.