Reshaping the US Judiciary in times of polarization: Biden's Judicial nominations and Supreme Court reform

by Antonia Baraggia

Abstract: Riplasmare il giudiziario americano in tempi di polarizzazione: le nomine giudiziali di Biden e la riforma della Corte Suprema. – The article addresses the relationship between the judiciary in the President in the first part of Biden's term in a context of hyperpolarization. In particular, the article will analyze the Supreme Court's reform proposal sketched by the Presidential Commission on the Supreme Court, established by Executive Order no. 14023 on April 9, 2021.

Keywords: Judicial appointments; Biden; US Supreme Court; Court-packing; Polarization.

1. Introduction

The first part of President Biden's term was marked by tremendous pressure around the Supreme Court: following Justice Amy Coney Barrett's nomination[1] in the final days of the Trump administration, the US Supreme Court was definitively transformed into a partisan battleground. However, this process started before then, with the blocked nomination of Merrick Garland and the confirmations of Neil Gorsuch in 2017 and Brett Kavanaugh in 2018.[2]

As Sitamaran and Epp argue, "several factors—such as increased polarization in society, the development of polarized schools of legal interpretation aligned with political affiliations, and greater interest-group attention to the Supreme Court nomination process—have conspired to create a system in which the Court has become a political football, and in which each nominee can be expected to predictably vote along ideological lines that track partisan affiliation."[3]

Even the Court's spring term, marked by the controversial overruling of *Roe v. Wade* by *Dobbs v. Jackson*,[4] has reinvigorated the debate about the need to reform the US Supreme Court's appointment process

[1] See P. Passaglia, *President Trump's Appointments: A Policy of Activism*, in *DPCE* online, 4/2022.

[2] R. Doerfler-S. Moyn, *Democratizing the Supreme Court*, 109 *California Law Review*, 1703 (2021).

[3] G. Sitaraman-D. Epps, *How to Save the Supreme Court*, 129 *Yale Law Journal*, 148 (2019), Available at: https://scholarship.law.vanderbilt.edu/faculty-publications/1129.

[4] *Dobbs v. Jackson Women's Health Org.*, 597 U.S. ___ (2022)

DPCE online
ISSN: 2037-6677

and, more generally, to free the Court from partisan influence. Polarization[5] – the term that best describes the current US political environment – exacerbated by the Court's jurisprudence has affected the relationship between the President and the judiciary, particularly the Supreme Court.

The dramatic decline in the legitimacy of the US Supreme Court[6] among US citizens is also quite significant: "If Americans lose their faith in the Supreme Court's ability to render impartial justice, the Court might lose its power to resolve important questions in ways that all Americans can live with."[7]

The Biden administration has had the complex task of dealing with these challenges to the future of the US constitutional order. One of the classic tools the President can use to influence the judiciary is judicial appointments. The second interesting tool that has characterized the Biden presidency and specifically aimed at the Supreme Court is the creation of a Presidential Commission on the Supreme Court, established by Executive Order no. 14023 on April 9, 2021. The Commission was tasked with discussing and designing several reform options to address the current crisis faced by the Supreme Court.

In this paper, I will briefly address the main features[8] of Biden's judicial appointments and focus on the Commission's reforms assessment.

Both these profiles of the interplay between the judiciary and the President express what Balkin calls "partisan entrenchment" of the judiciary. This phenomenon is common in US history but quite problematic, especially during the constitutional cycle characterized by polarization and constitutional rot.[9] As Balkin argues, in the US system, "the judiciary is designed to be insulated from constitutional rot, and in ordinary times an independent judiciary is an important safeguard against constitutional rot. But as polarization proceeds and constitutional rot becomes pronounced, it threatens even the federal judiciary. At some point, the federal judiciary stops being a protector of democracy and begins to participate in the forces that produce constitutional rot".[10]

If Balkin's diagnosis is true, analyzing the relations between the judiciary and President and the Supreme Court's reform proposals is even more crucial to reason about the future of US constitutional democracy.

[5] T. Carothers-A. O'Donohue (eds.), *Democracies Divided: The Global Challenge of Political Polarization*, Washington D.C., 2019.

[6] M. Tomasky, *Opinion, The Supreme Court's Legitimacy Crisis*, N.Y. Times (Oct. 5, 2018), https://www.nytimes.com/2018/10/05/opinion/supreme-courts-legitimacy-crisis.html [https://perma.cc/P4RY-8RL4]; B. Ackerman, *Opinion, Trust in the Justices of the Supreme Court Is Waning. Here Are Three Ways to Fortify the Court*, L.A. Times (Dec. 20, 2018, 3:15 AM), https://www.latimes.com/opinion/op-ed/la-oe-ackerman-supreme-court-reconstruction -20181220-story.html.

[7] G. Sitaraman-D.Epps, *How to Save the Supreme Court*, cit., 151.

[8] For a global perspective on Biden's judicial appointments please see Paolo Passaglia's contribution in this collection.

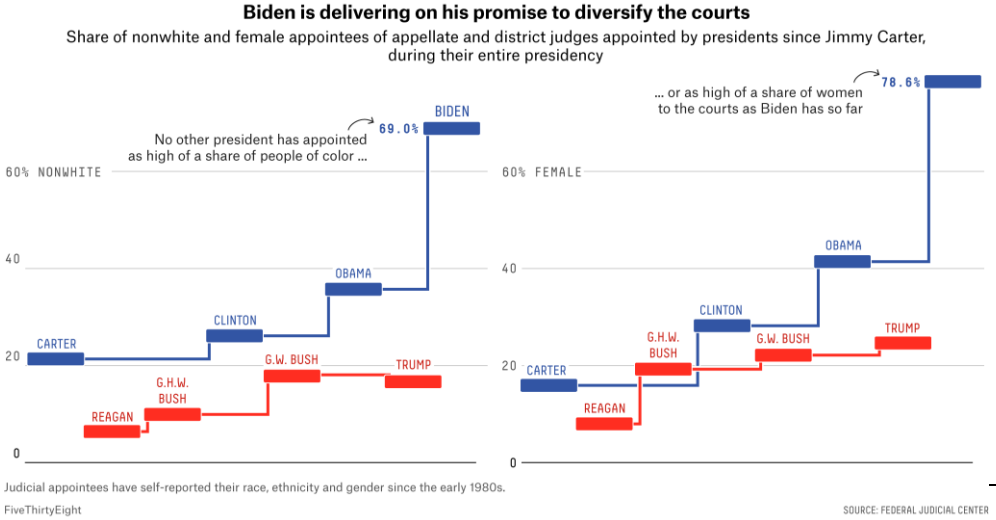
[9] J.M. Balkin, *The cycles of constitutional time*, New York, 2022, 12 ss.

[10] *Ibidem*, 71.

2. Biden's judicial appointments: some trends

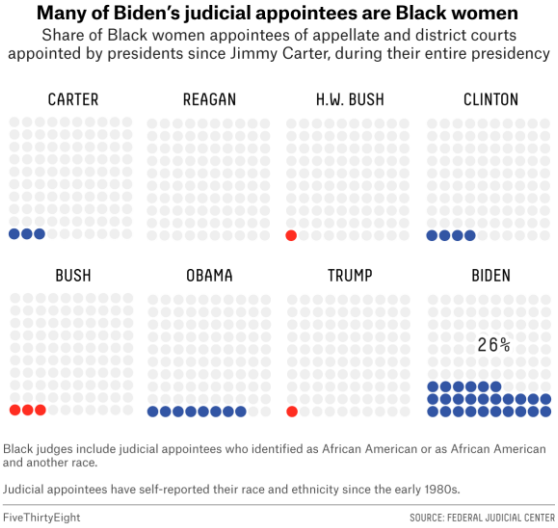
The appointment of judges is one of the most interesting litmus tests for assessing a presidency's key characteristics. This specific issue is addressed in this special issue by Prof. Passaglia, who has identified the main features and trends in Biden's judicial appointments, highlighting Biden's commitment to fostering diversity among the new appointees.

This diversity is particularly evident in the racial and gender make-up of the new appointees. As the chart shows, Biden has appointed more nonwhite and female judges to appellate and district courts than all the other US presidents: 69% nonwhite and 78% female.



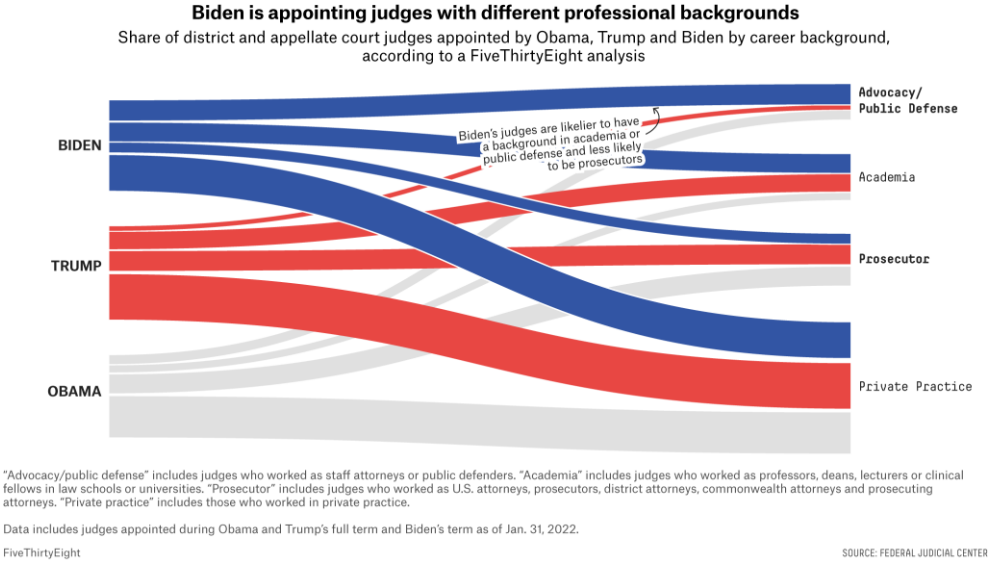
Another interesting aspect is worth highlighting: President Biden has appointed more black women (26%) than any president since Carter. The chart also shows the striking difference between Biden's appointees and his predecessor's, Trump, who only appointed one African-American woman to the bench in his four years in office.

DPCE online
ISSN: 2037-6677



This significant change could affect decisions in sensitive cases involving affirmative action, discrimination and voting rights, which remain polarizing issues in US politics.

Another interesting dataset concerns the professional background of appointed judges. Many of Biden's appointees have a background in advocacy and public defense, in academia and in private practice. Notably, few judges have served as prosecutors, district attorneys or prosecuting attorneys. This marks a difference not only from the Trump administration but also from the Obama administration.



The data analyzed so far seems to clearly suggest Biden's appointments mark a break from the past, perhaps even reflecting profound changes in US society in terms of progressive attention to the inclusion of minorities and underrepresented groups in the judiciary. However, we also need to look at other data that show a different side of the coin.

An examination of the academic backgrounds of Biden's judicial appointees shows that most of them attended elite schools: 28% attended an Ivy League institution (compared to 10% under Trump and 20% under Obama). Among Biden's appointees, 61% attended one of the top 14 law schools (compared to 33% under Trump and 41% under Obama).

Some have argued that having solid academic credentials can be a bonus for candidates from minority groups. These data are quite striking, however, because they tell a different story about the commitment to diversity in Biden's judicial nominations. By this measure, Biden's nominations are much more uniform and elite than those of his predecessors.

3. Reform proposals for the US Supreme Court

The other important feature of Biden's first two years in office is the Commission that studied possible reforms of the US Supreme Court. The President created the Commission in April 2021 and it submitted its report in December 2021. It consisted of a bipartisan group of experts[11] on the US Supreme Court and judicial reform.

The Commission analyzed several possible reform paths for the US Supreme Court, highlighting the pros and cons of each solution, as well as their constitutional basis and legitimacy. It also examined previous attempts to influence the US Supreme Court's composition or procedures, and placed the current proposal in the context of the history of US constitutionalism.

The Commission analyzed four broad areas for potential action: the composition and size of the Court, term limits, changes affecting the role of the Court in the constitutional system and the internal practices and procedures of the Supreme.

3.1 Structural reforms: composition and size of the Court

Structural reforms of the US Supreme Court have often been proposed and sometimes implemented in US constitutional history. The most successful reforms include those of 1801, 1802, 1807, 1837, 1863, 1866 and 1869, which increased or decreased the size of the Supreme Court to the current nine justices. In terms of attempts to introduce structural changes, the famous "Court Packing Plan" proposed by President Roosevelt in the midst of the New Deal and the transition from a liberal model of state to a social-democratic one also deserve mention.

The ability for Congress to change the size of the Court is a widely acknowledged power that even finds backing in the Constitution as Article III recognizes the role of the US Supreme Court, but does not specify the number of justices. The power to change the size of the Court has also typically been based on the Necessary and Proper Clause of

[11] The Commission consisted of 36 experts, including jurists, law and political science professors, former federal judges, and other US Supreme Court experts.

DPCE online
ISSN: 2037-6677

Article I: "The Congress shall have Power [...] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Undoubtedly, the exercise of this power is within the prerogatives of Congress. Much more debatable, however, is the impact such a move might have on an already polarized country.

The idea of packing the Court was never entirely abandoned over time, but it gained new momentum[12] after Justice Ginsburg's death and Donald Trump's controversial nomination of Justice Barrett, especially in light of the Garland precedent.

This idea is carefully considered by the Commission, which discusses the positive and negative aspects of possible court-packing plans without taking a position in favor of one particular solution. One of the arguments for court-packing is to prevent democratic backsliding in the US: "an attempted expansion — or even just the prospect of expansion — could lead the Supreme Court to be restrained in its jurisprudence and more respectful of the role of the political branches, at least in the short term."[13] Among the opponents are those who worry about the threat to the independence of the judiciary and the legitimacy of the Supreme Court.

The use of comparative experiences and scholarship in assessing the impact of court-packing on the future of US constitutional democracy is quite remarkable.[14]

Court-packing - which can be generally defined as "the manipulation of the Supreme Court's size primarily in order to change the ideological composition of the Court"[15] – is a controversial phenomenon.

Indeed, it is often linked to processes of democratic backsliding or democratic retrogression, in countries experiencing illiberal or authoritarian shifts. As Daly argues, "court-packing is itself approached as a strong indicator that the democratic system is undergoing negative transformation".[16]

Despite this negative connotation, some legal scholars have supported the introduction of a court-packing reform in the US, trying to differentiate it from similar reforms introduced in Hungary and Poland. In particular, Müller[17] has considered court-packing in the current US context as a legitimate mean of reaction to the Republican tactic to engage in "constitutional hardball".[18] Similarly, Weill argued that "to safeguard

[12] M. Tushnet, *Court-Packing On the Table in the United States?*, Verfassungsblog (Apr. 3, 2019), https://verfassungsblog.de/court-packing-on-the-table-in-the-united-states.
[13] Presidential Commission on the Supreme Court of the United States, Final report.
[14] See, for example, D. Kosar-K. Sipulova, *How to Fight Court-Packing?*, 6 *Const. Stud.*, 133 (2020); T. Daly, *"Good" Court-Packing? The Paradoxes of Constitutional Repair in Contexts of Democratic Decay*, 23 *German Law Journal* 8, 1071-1103 (2022).
[15] J. Braver, *Court-Packing: An American Tradition?*, 61 *B.C. L. Rev.*, 2749 (2020).
[16] T. Daly, *"Good" Court-Packing? The Paradoxes of Constitutional Repair in Contexts of Democratic Decay*, cit., 1077.
[17] J.-W. Müller, *Democrats Must Finally Play Hardball*, Project Syndicate (Sept. 25, 2020), https://www.projectsyndicate.org.
[18] M. Tushnet, *Constitutional Hardball*, 37 *J. Marshall L. Rev.*, 523-553 (2004).

popular sovereignty, court packing, by constitutional design, is the actual antidote to a partisan Court takeover".[19] In light of these views, it seems possible to distinguish between "good" and "bad" court-packing. But is this really so? How can we distinguish between different types of court-packing? Is the "teleological" aim enough to draw such a distinction?

Within the US debate, other scholars have been much more cautious in promoting court-packing in the present situation, highlighting the negative impact on the legitimacy of the Court and the risks posed by such a practice in the current context of hyper-polarization.[20]

3.2 Changing the term limits

Another relatively popular reform proposal, which the Commission also considered, deals with the reform of the term limits,[21] in particular the introduction of a non-renewable term limit for Court Justices.

Arguments in favor of this reform point to reducing the excessive concentration of power in a single judge for an extended period and to promoting the rotation of judges, thereby also fostering the judicial independence of the Court. By contrast, opponents argue that only life appointments can preserve judicial independence. In particular, "they argue that life tenure is essential to that independence, as evidenced in our longstanding historical practice."[22] Also, opponents reject the comparative argument (which looks at systems where judicial terms are limited and renewable), arguing that "it is perilous to draw conclusions from systems that are so fundamentally different."[23]

Moreover, those who oppose such a proposal argue that it will further polarize and politicize the Court's role in the constitutional system and undermine its legitimacy. This seems very likely to be the case: the Court will become more politically influenced and more tied to the presidential election cycle.

It seems particularly interesting to highlight that the Commission's members expressed contrasting ideas on whether this reform could be implemented by constitutional amendment or statute.

3.3 Reassessing the role of the Court in the US constitutional system

The Commission debated another set of reforms to reduce the Court's power. This goal stems from contrasting views of the Court's role in the US system. No one can deny that the US Supreme Court plays a fundamental role in protecting rights, democracy and federalism. It acts as

[19] R. Weill, *Court Packing as an Antidote*, 42 *Cardozo L. Rev.*, 2705, 2706 (2021).
[20] J. Braver, *Court-Packing: An American Tradition?*, 61 *B.C. L. Rev.*, 2747, 2750, 2773–81, 2781–88 (2020).
[21] See, in particular, Steven G. Calabresi-J. Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 *Harv.J.L. & Pub. Pol'y*, 769 (2006); R.C. Cramton, *Reforming the Supreme Court*, 95 *Calif. L. Rev.*, 1313, 1323-24 (2007);
[22] Presidential Commission on the Supreme Court of the United States, Final report.
[23] *Ibidem.*

DPCE online
ISSN: 2037-6677

a counter-majoritarian institution in charge of protecting the rule of law. However, critics argue the Court has exercised too much power and some members of the Commission share the view that the Supreme Court has gone too far in addressing controversies that could have been better resolved through the political process. One of the most emblematic examples of this judicial approach, which has blocked the democratic process, is the *Roe v. Wade* decision. As Balkin argues, "Roe's most important shortcoming was not its failure to 'get it right' but its relative inattention to the interactions between courts and politics and to how the courts, whether they like it or not, always work in a conversation with the political branches in developing constitutional norms."[24] Or, as Justice Ruth Bader Ginsburg affirmed, in *Roe* the Court "halted a political process that was moving in a reform direction and thereby (…) prolonged divisiveness and stable deferred settlement of the issue."[25]

Here, too, the Commission examined three proposals designed to limit and redefine the Court's power in the constitutional system.

The first aims at stripping the Supreme Court of its jurisdiction to hear certain cases. This proposal has been made periodically over time, but it has never been put forward in a manner that would make it concretely applicable.

The proposal to limit the jurisdiction of the Supreme Court (and/or all the other federal courts) is aimed at specific laws, such as anti-abortion laws, school prayer and bans on pornography. Interestingly, the Commission stated that the specific issues on which this limitation could be imposed are the ones on which the members disagree.

Samuel Moyn clearly expressed a preference for this type of solution over structural changes: "instead of terrorizing the court into moving through various court-packing schemes, it is a much better and bolder choice for the left to stand up for reforms that will take the last word from it. Jurisdiction-stripping statutes, tools to bar the judiciary from considering cases on certain topics such as abortion or affirmative action, are not clearly unconstitutional even under the current legal doctrine.

[24] J.M. Balkin, *Roe v. Wade: An Engine of Controversy*, in J.M. Balkin (ed.), *What Roe v. Wade Should Have Said*, New York, 2005, 23; "Defenders of constitutional rights often argue that the courts exist to protect rights from political interference. But the actual process of constitutional development is much more complicated. Courts do recognize rights and defend them from legislative abridgement. But those right also arise out of politics: they are tested by politics and they are modified by courts as a result of politics. The work of courts, as important as it may be, is always an intermediate and intermediary feature of a much longer process of legal development that stretches back into the past and forward into the future. Despite the attention paid to Roe, the constitutional right to abortion, as it exists today, is not solely the work of the federal judiciary. Like all important constitutional ideas, it is the work of a dialectical process that engages all of the major institutions of American lawmaking, and it has been fashioned through controversy and strife, through trial and error – and with many mistakes and hesitations along the way – out of the raw materials of the American politics..."

[25] R. Bader Ginsburg, *Speaking in a judicial voice*, in 67 *New York Law Review* 6, 1185 (1992).

Indeed, the right has used such statutes for years to limit access to courts for immigrants and prisoners."[26]

The second reform proposal would introduce a supermajority voting requirement for any decision that finds actions of the political branch unconstitutional or, in a milder version, a requirement that the Court apply a deferential approach in constitutional cases. This proposal would take power away from the Court *vis-à-vis* the political branch.

The third proposal considered by the Commission focuses on the so-called congressional overrides of Court decisions striking down federal or state laws on constitutional grounds. Once again, this is not a new proposal. As the report acknowledges, "A constitutional amendment adopting a system of legislative overrides was urged in the Progressive Era and during the New Deal period. More recently, the idea of an override has been floated by advocates on both the right and left of the political spectrum as a way to minimize judicial supremacy — i.e., the system under which the Court is the final and authoritative arbiter of the constitutionality of statutes or executive action."[27]

The report analyzes different ways of implementing this principle, looking particularly at the comparative examples of Canada and Israel.

Such comparative reference becomes particularly important if we look at the current Israeli debate on the overriding clause. In Israel, the Knesset has the power to enact legislation impinging on the rights protected by the basic law only if certain conditions are met and in particular if it complies with the three core parts of the proportionality test: a) rationality, b) necessity and c) balancing. The new right-wing coalition that emerged after the November 2022 elections has proposed introducing an override clause that would limit the powers of the Court and enable the Knesset to infringe constitutional rights with no need to show that proportionality requirements have been respected.[28]

This is a very heated debate in Israel,[29] which should come as a warning to supporters of this solution in the US and spark questioning whether the Canadian model is replicable in highly polarized societies like Israel and the US.

3.4 Reforming the internal procedure of the Court

Last but not least the Commission proposed several seemingly minor reforms of the Court's procedures and internal practices. The two most pressing issues deal with judicial ethics and the Court's openness to civil society.

With respect to the first aspect, it should be recalled that US Supreme Court Justices are the only members of the federal judiciary who

[26] S. Moyn, *Resisting the Juristocracy*, Bos. Rev. (Oct. 5, 2018), http://bostonreview.net/law-justice/samuel-moyn-resisting-juristocracy
[27] Report, p. 186.
[28] R. Weill, *The High Stakes Israeli Debate over the Override*, VerfBlog, 2022/11/25, https://verfassungsblog.de/the-high-stakes-israeli-debate-over-the-override/
[29] See M. Cohen-Eliya-I. Porat, *A New Deal to the Israeli Judicial System*, in *DPCE online*, 2023.

DPCE online
ISSN: 2037-6677

are not subject to the Code of Conduct for United States Judges, which is a set of ethical rules adopted by the Judicial Conference of the United States[30] on April 5, 1973, to promote public confidence in the integrity, independence and impartiality of the federal judiciary.

The Supreme Court is not subject to this code, nor has it adopted its ethical code. The same is true about the disciplinary framework that applies to other federal judges.

There is broad consensus that the Court should adopt a code of conduct in line with all other federal judges. US Supreme Court Justices already rely on and consult the code of conduct, as affirmed by Chief Justice Roberts in 2011.[31]

Two possible paths exist for adopting a code of conduct for the Supreme Court. The first would lead the Court to adopt its code internally; the second would give Congress the task of designing and imposing a code on the Court. Under the second option, Congress could either ask the Judicial Conference to draft a code for the US Supreme Court (although its authority to do so is disputed), or Congress itself could draft a code and impose it on the US Supreme Court.

Last but not least, another new frontier of constitutional adjudication is the openness and the relationship with civil society, a function defined by legal scholars as "constitutional literacy".[32]

The US Supreme Court is already committed to making its work more accessible and fostering public knowledge of its opinions. Indeed, the Court's opinions are available online, freely accessible and, since the Covid-19 pandemic, they are also live-streamed (audio only).

The changes made in response to the Covid-19 pandemic have affected many courts from a comparative perspective, even those that are more reluctant to promote such a fundamental shift. The US Supreme Court – together with the Indian Supreme Court and the Malaysian Federal Court – [33] is among the courts that have introduced this new option, encouraging transparency and constitutional literacy.

4. Conclusions

The first two years of the Biden presidency have been marked by the debate over the role and politicization of the US Supreme Court in the constitutional system.

The controversial nomination of Justice Barrett and the resultant new majority in the Court have exacerbated the persistent tensions faced by the Supreme Court, which is now experiencing an unprecedented crisis of legitimacy and identity.

[30] This is a body composed of the Chief Justice of the United States and selected judges from the lower federal courts.
[31] "All Members of the Court do in fact consult the Code of Conduct in assessing their ethical obligations. In this way, the Code plays the same role for the Justices as it does for other federal judges since . . . the Code 'is designed to provide guidance to judges".
[32] M. De Visser, *Promoting Constitutional Literacy: What Role for Courts?*, 23 *German Law Journal* 8, 1121-1138 (2022).
[33] Ibidem, 1197.

Not surprisingly, one of Biden's first steps was to set up a commission to explore possible solutions to the flaws in the current system and the ongoing tension between antimajoritarian institutions like the Court and the democratic instances expressed by legislators (both at federal and state level).

These tensions, far from expressions of American exceptionalism, are shared by other courts around the world: as argued by Martin Loughlin,[34] "judges have become the arbiters of constitutional meaning. Such power is subject to institutional constraints: courts have no independent power of initiative, must restrict their decisions to the issue at hand, and must conform to the convention of rational argumentation. But judges now have the power to determine the conditions of "political right," and they have arrogated the critical role of overseeing the political process."[35]

This seems to be the conundrum of US constitutionalism today, as Justice Kagan echoes: "When courts become extensions of the political process, when people see them as extensions of the political process, when people see them as trying just to impose personal preferences on a society irrespective of the law, that's when there's a problem — and that's when there ought to be a problem."[36]

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[34] M. Loughlin, *Against Constitutionalism*, Cambridge (MA)-London, (2022).
[35] M. Loughlin, *Against Constitutionalism*, cit., 134.
[36] Opinion, Editorial board, *The Supreme Court Isn't Listening, and It's No Secret Why*, October 1, 2022, The New York Times, https://www.nytimes.com/2022/10/01/opinion/supreme-court-legitimacy.html

DPCE online
ISSN: 2037-6677