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THE POLITICAL ROLE OF THE SUPREME COURT OF THE UNITED STATES UNDER THE SEPARATION OF POWERS AND ITS MODEL OF CHECKS AND BALANCES

ABSTRACT

The role of the judicial branch in the US checks and balances model of the separation of powers has never been univocal; An analysis of the epochs reveals that this branch of government has come together in an interesting and complex way of evolution. The following paper briefly discusses the basic essence of the US constitutional model, the development of constitutional review within its framework, key characteristics of the Supreme Court control, along with several case-law decisions and the contemporary challenges of the American Supreme Court in a polarized political climate.

1. THE FIRST WRITTEN CONSTITUTION

"We the People of the United States, in Order to form a more perfect Union,"[1] - with these words begins the first written constitution in the history of mankind, its preamble, this document, dated 1787, is one of the shortest and oldest basic laws. It takes into account and is based on the principles of republicanism, separation of powers and federalism.[2]

The text of the Constitution along with the Declaration of Independence of 1776 is infused with the ideas of Thomas Hobbes, John Locke, Charles Louis de Montesquieu and others. The new state was developed from the colonies of England in accordance with the inevitable values of life, liberty and property by the American nation. Locke argued that these natural God-given individual rights were substantially inviolable, therefore depriving of these rights by any gov-

[1] See the preamble to the Constitution of the United States., available at: https://www.senate.gov/civics/constitution_item/constitution.htm [last accessed on November 26, 2019].
[2] "Constitutional Law of Foreign Countries", Edited by Melkadze O., Tbilisi, 2013, 13.

ernment was not acceptable, he called such a corrupted arrangement despotic and did not necessarily consider obedience to the hegemonic government.[3]

After the American Revolution and the secession from England, the colonies were left without a central government. It was soon discovered that a weak central government, lacking economic and military power, could not maintain internal order, this inability was especially noticeable in the wake of the farmers uprising of 1786 and 1787 (referred to as "Shays Rebellion").[4] The "Founding Fathers" and the authorities of the individual states absolutely understood this; During the Philadelphia Convention of 1787, which had only to revise the Articles of the Confederation, following Edmund Randolph and James Madison's proposed amendments (the "Virginia Plan"), they rejected the original purpose of the convention and began working on a constitution.[5] This impetuous, panic-ridden decision is called by some thinkers two steps ahead and one behind it, "a counter-revolution against popular democratic ideals."[6]

The developments in Massachusetts turned out to be a truistic argument for the creation of a strong central government, taming turbulent democracy. The Philadelphia Convention sought to establish a direct connection between citizens and the central government without the interposition of the authorities of the states, which the symbolic, nominal central government could not do under the confederation, consequently, the constitution of 1787 actually created a new nation and gave rise to a solid and more or less consensual sense of unity between the states.[7] The centralization of political power gradually became legally justified and even legalized by the US Supreme Court.[8]

2. AMERICAN NOVATION

The American model of governance was a novelty in its form, defined primarily as an alternative to British rule.[9] The "founding fathers" did not trust the principle of "unity of power", viewing it as a remnant of the monolithic state and sharing Montesquieu's view that human nature was prone to the abuse of power, and that is why the system of government had to be institutional-barrier to control political authority.[10] James Madison, in his 51st Federalist Letter, develops a similar concept in which he writes that an interest must be challenged by the opposing

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[3] Locke J., "Second Treatise of Government, Introduction to Modern Thought", Book One, Tbilisi, 2014, 247-276.
[4] Janda K., Berry J., Goldman J., "American Democracy", Tbilisi, 1995, 50.
[5] Ibid.
[6] Elster J., *Constitution-Making and Violence*, Journal of Constitutional Law, Second Volume, 2018, 27, See citation: Bouton T., Taming Democracy, New York, 2007.
[7] Khubua G., "Federalism as a Normative Principle and Political Order", Tbilisi, 2000, 281.
[8] Ibid 282, See citation: Hesse J., Benz A., *New Federalism unter Präsident Reagan*, Speyer, 1987, 3.
[9] William Henry Hirst. "Constitutional Government in the Spotlight: The Origin, Vicissitudes, Problems and Trend of the American System", 1935, 16.
[10] Sajó A., "Limiting Government", Tbilisi, 2003, Note 4, 89, See citation: Montesquieu C., "The Spirit of the Laws", trans. and ed. Cohler A., Miller B. and Stone H., 1992, 4.

interest, that the system of governance and control devices should be a reflection of the human nature.[11]

According to the "Founding Fathers", Government institutions, bodies had to have antagonistic interest to one another and a permanent desire for constant subjugation of power, their strengthening and weakening should have been dependent only on each other, though the confrontation should not have put the branches in front of politically imbalanced deadlocks, in that case, the governance system would be technically unsound.[12] On the other hand, if the branches of government were to gain too much independence, they would have lost contact with each other, so interconnection and mutual control are an integral element of the American system.[13]

Although the provisions of the constitution of the United States are not hierarchical in their meaning, not even within the framework of the Bill of Rights, the structure of the first written constitution is the vital foundation, this innovative model of power-sharing is a primal mechanism for the subsequent exercise of various socio-political rights, and hence the formula of American Exceptionalism.

The governance system of the United States is based on the "seesaw" principle, comparability is dynamic, and after each election, the balance of power is shifted depending on which forces will enter the Senate and which party the president will represent, as the court strives to maintain balance and fluctuates back and forth in order not to lose public esteem.[14] In this regard, the court should adjust the function of a more or less neutral center of gravity on this political arena.

3. The Case of Marbury v. Madison and the Genesis of Constitutional Review

The epic decision of the Supreme Court in 1803 established a completely unprecedented understanding of judicial power, in accordance with the earlier view, judicial power could not go beyond traditional litigation disputes between parties and the constitutional justice and oversight of other branches was an uncommon standard. The labor dispute between the employer and the employee that began in 1800 forever altered the model of American governance and the balance between the branches of government.[15]

John Adams and the Federalists, supporters of a strong central government, lost in the tense election of 1800, the ruling party was first replaced, and Thomas Jefferson, the great admirer of Russo's ideas, became president, who in each case regarded the exercise of the people's direct

[11] Madison J., 51st Federalist Paper, see http://www.federalistpapers.ge/federali51.php [last accessed on November 26, 2019].
[12] Sajó A., supra 10, 92.
[13] Honore T., "About Law: An Introduction", Tbilisi, 2018, 44.
[14] Supra 12, 96-97.
[15] Mountjoy, Shane. *Marbury v. Madison: establishing Supreme Court power*, 2009, p. 8.

common will as primacy; He considered indirectly "elected" judiciary, including indefinitely appointed judges of the Supreme Court in the country as the retained representation of the English aristocracy and treachery for the sake of American democracy.[16]

Just two days before John Adams left the office, he appointed, along with about 60 others ("Midnight Judges"), former Secretary of State John Marshall as a Chief Justice of the Supreme Court, and William Marbury, a Justice of the Peace in the District of Columbia, the commissions could not be timely delivered to the latter. Jefferson, as the third president of the country, instructed his new Secretary of State and one of the "Founding Father" James Madison to withhold the undelivered appointments, based on which Madison repeatedly refused to deliver Marbury's commissions, the latter appealed directly to the Supreme Court with a petition asking the court to issue a writ of mandamus forcing executive government to complete the appointment procedure.[17]

There was a dilemma before the Supreme Court and its Chief, the Court had no army and did not autonomously own the finances.[18] On the opposite side were President Jefferson, the influential Secretary of State, and the entire Congress with a majority of opposition forces, so it would be impossible to execute the decision in this perspective; John Marshall nevertheless considered Marbury's petition[19] and ruled *per se* miscellaneous decision:

1. Firstly, no one, not even the President, is above the law and the Secretary of State's refusal to issue commissions was clearly unlawful by the executive branch. Accordingly, where the right is infringed, there must be *a priori* remedy. It is a separate matter whose discretionary power is to provide a remedy for the person whose rights had been violated.[20]
2. The Court according to the "Judiciary Act of 1789" could have required with a writ of mandamus the executive authority to issue commissions.[21] Marshall saw that the Jeffersonian government explicitly would not enforce such a decision and, in such a case, the Court would be seen incapable in front of the public sight, consequently, not only a legally valid solution was needed, but also a political one. Accordingly, section 13 of the Judiciary Act was regarded by John Marshall as unconstitutional because it, unlike Article 3 of the Constitution, was unreasonably expanding the jurisdiction of the judiciary. It

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[16] Supra 12, 278.
[17] Hartman, Gary R., Roy M. Mersky, and Cindy L. Tate. "Landmark Supreme Court cases: the most influential decisions of the Supreme Court of the United States". 2014, p. 467.
[18] "The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society", Federalist Papers #78, Hamilton A., available at: http://federalistpapers.ge/federali78.php [last accessed on November 26, 2019].
[19] Supra 10, 280.
[20] Ibid.
[21] See the relevant part of the act: https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=203 [last accessed on November 26, 2019].

is stated in the text of the decision that the judiciary could not and would not interfere with the discretionary powers of the executive branch laid down in the text of the Constitution.[22] The Court stated that it was not going to disregard the spirit of the Separation of Powers and its model of checks and balances and therefore self-restrained from the writ of mandamus.

3. This last part of the adjudication is an unparalleled example of reasonable self-restraint, self-control by the judiciary. However, Article 2 (2) of the Constitution does not explicitly state the role of the negative legislator as well. Nonetheless, John Marshall believed that the sole authority of the judiciary was to interpret the constitution, oversee the legislation and Congress, and watch over it.[23] Accordingly, the Court broadly defined the judicial jurisdiction of the dispute settlement and thereby astute enough incorporated, *inter alia,* constitutional review.

John Marshall was by no means a philosopher, he went to the office of the Supreme Court with the malicious intent to balance the radical tendencies of the Jefferson Party, in parallel with the strengthening of the federal court's role; He was characterized as a result-oriented, tactical politician with no flawless knowledge of jurisprudential theories; In fact, for a judge to be considered an influential figure, he must be able to change an established practice and fill the vacuum of the law, that is, be a pragmatist; *vice versa* legal formalism is not inherently innovative; The purpose of formalism as a method is simply to apply and adhere to the principles, that is by nature rhetorical.[24] Consequently, just as the personality of George Washington transformed the American form of executive power, the third Chief Justice, John Marshall similarly defined the future role of the judiciary.[25]

For its part, the institution of the judiciary wisely walked this narrow, dangerous political path in the years of 1800-1803, did not rely on the *status quo* and thus did not put up with actual stagnation-capitulation, upheld the spirit of balance and winner came out of the deadlock, its independence as a constitutional arbiter has been sharply affirmed, all this under the condition that until 1935 the Supreme Court did not even have an independent building. Following one proactive move, it gained authority of control of the legislature and self-restricted from usurping power. At the time, John Marshall, along with several Justices at the federal level considering the insignificant status of the court, tried not to directly oppose to the high legitimacy branches of executive and legislative authorities but strengthened judicial control in exchange for reason-

[22] Marbury v. Madison, 5 U.S. 137, (1803), paragraph 75, 99, See https://openjurist.org/5/us/137 [last accessed on November 26, 2019].
[23] Ibid.
[24] Richard A. Posner, "Law, Pragmatism and Democracy", 2003, p. 86.
[25] Basic Readings in U.S Democracy, edited by Melvin I. Urofsky, p. 53.

able self-restraint.[26] More than 200 years later, this case remains a unique example of rationalized compromise in the history of the practice of the Separation of Powers.

4. The Control Paradigm And Couple of Landmark Decisions of the Supreme Court

The Supreme Court justices are policy-makers in the United States, their decisions are precedent and affect legislative regulation not only for the sake of specific cases but also for similar ones in the future.[27] However, the judiciary was particularly weak in the early years of the republic, the Supreme Court was assembling for only a few weeks for a term, its independence and legitimacy was dubious, thus it avoided confrontation with other branches; For illustration, John Jay, the first Chief Justice, refused to extend his authority in 1801, claiming that the Supreme Court had not obtained the proper energy, weight and dignity to serve a national cause.[28]

Article 3, section 2 of the Constitution literally only provided for appellate and, in some cases, original jurisdiction, not the control of congressional and executive authorities, which, as already noted, is the result of many years of judicial practice. More than 200 years have elapsed since the Marbury case, but throughout history, the Supreme Court has often not applied control authority in order to prevent usurpation of powers acquired. Nevertheless, a few cases in the history of the Supreme Court of the United States can be noticed, in which the Freedom Guard institute[29] acted as the supreme arbiter and created the country's social, economic and political weather.

In the modern state governance systems, the domestic and foreign policies are determined by the highest representative bodies, that is conditioned by popular democratic legitimacy. In the American system, the Senate has a similar set of powers under Article 1, section 8 of the Constitution as well. Nevertheless, a number of cases can be recalled when Justices of the Federal Supreme Court set the policy. Whether or not they have abolished the black rob of justices in this process, which has been reduced to the symbolism of restraint, and whether they have become indirectly quasi-rulers, the answer to this question, because of ideological preferences, cannot be unambiguous.

It would probably not be an exaggeration to say that the Dred Scott case and the decision of the Supreme Court in 1857[30] actually accelerated the American Civil War, exacerbating the mental

[26] Supra 15, 11.
[27] Supra 4, 397.
[28] Ibid 358, See citation McCloskey, 1960, 31.
[29] The following words are cut out on the east side of the Supreme Court building: "Justice, the Guardian of Liberty".
[30] Dred Scott v. Sandford, 60 U.S 393 (1857).

and physical strife between States of the North and the South.[31] The Supreme Court ruled that a "Negro whose ancestors were imported into this country and sold as slaves" could not be an American citizen, whether or not he was freed, therefore, the Supreme Court had no jurisdiction to hear the Dred Scott petition because of procedural grounds.[32] Moreover, the Court struck down the Missouri Compromise of 1820 prohibiting slavery in several states and ruled it unconstitutional; This was the first case of the use of judicial review since the Marbury case, and to the general public sight, it remains as the embarrassment of judicial activism.[33]

The Court held that slaves under the Fifth Amendment were considered the property of their owner and any act depriving the slave owner's property right should be regarded as unconstitutional. [34] The Supreme Court's ruling stoked the wave of protest, abolitionism intensified, and the situation became so tense that it led to a civil war between the southern and northern states. (1861-1865).[35] More than 150 years passed after Dred Scott v. Stanford and it still remains as the most inappropriate decision within the Supreme Court history, Chief justice Charles Evans Hughes later called it "the Court's greatest self-inflicted wound".[36]

The Dred Scott case really damaged the authority of the federal court, its institutional reputation as a body that was meant to protect freedom and prosperity, constantly had to find a balance between freedom, order, and equality, in the case of Dred Scott, the freedom of slave-owners was fatally understood; One of the reason, in turn, was that the will of the majority in America at that time was not explicitly against slavery. Such polarization between the groups was exacerbated by the Court decision, that culminated into a civil war, following the end of the war, Congress changed the Constitution of the United States with the 13th, 14th and 15th amendments, and the decision "Dred Scott v. Stanford" was directly superseded. Slavery was abolished by the Constitution. It is in the light of such resonant decisions that the extent of the Court's substantive role and responsibility can be seen.

In the sense of changing the social weather, we should also mention the landmark case of "Brown v. Board of Education,"[37] the ruling of the Supreme Court's decision, which prohibited *de jure* segregation in the public schools and had a significant positive impact on American governance from today's perspective. A class-action suit handed down before the Supreme Court in 1951 could not be resolved until 1954, the hearing was postponed several times, moreover, after the first hearing the opinions were radically divided between the justices, they were faced with real danger and choice, either they could not consider the case or they had to find a

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[31] Karichashvili I., *Dred Scott Case*, Methods of Law, Second Issue, 2018,117, See citation: Linderman G.E., "Embattled Courage: The Experience of Combat in the American Civil War", New York, 1987.
[32] See Oyez, Dred Scott v. Sandford, available at: https://www.oyez.org/cases/1850-1900/60us393 [last accessed on November 26, 2019].
[33] Supra 4, 38.
[34] Karichashvili I., *Dred Scott Case*, Methods of Law, Second Issue, 2018, 121.
[35] Ibid.
[36] Hughes C. E., "The Supreme Court of the United States", 1928, 50–51
[37] Brown v. Board of Education, 347 U.S. 483 (1954)

consensus because a decision of such social weight that would divide their opinions would result in a fiasco for the judiciary and a cause of inevitable confrontation within the community.[38] In a situation like this, the former California governor, Earl Warren, was appointed as Chief Justice after being nominated by the Republican President but appeared to have a liberal outlook on a number of issues, among them, he believed that segregation in public schools was violating the 13th, 14th (Equal Protection Clause) and 15th Amendments. Warren, as the administrative leader of the federal courts, managed to create unity among the justices, and in 1954 the Supreme Court issued a nine-vote unanimous decision on prohibiting segregation in the public schools.[39]

With this judgment, the Court changed its "separate but equal" approach and has overruled the precedent of *Plessy v. Ferguson*,[40] whereby the public racial segregation was deemed legal insofar as the conditions were equally applicable. This judgment of 1954 was not followed by homogenous reactions and assessments, - for instance, one of the most heavily-cited judges of the Appellate Court - Judge Learned Hand claimed that through its *Brown* judgment, the Supreme Court has assumed the role of a third legislative chamber.[41] Similarly, an originalist Raoul Berger notes in his book "Government by Judiciary" that the decision taken by the court under the 14th Amendment was not correct, because the original purpose of 1875 Civil Right Act and that of the 14th Amendment was not the prohibition of segregation. In addition, the future Chief Justice of the Supreme Court - William Rehnquist considered that *Brown* was not democratic and that the Court should have adhered to *Plessy v. Ferguson* under the *stare decisis* doctrine,[42] with due respect to majoritarianism.[43]

Was the American society ready for a change and who should have responded to this question? Who should have changed the political climate on a federal level - was it the Senate or the Court? What did the country's main law say in this regard? Whether or not did the federal government have the legitimate right to intervene within the independence of States and whether or not should the Court have overruled the precedent - these questions will have different answers depending on who is responding - whether it is a supporter of judicial activism, a supporter of judicial self-restraint, a conservative or a liberal. However, the fact remains as follows: the Federal Supreme Court has made a political decision in 1954, when the Senate was abstaining

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[38] Karlan P., "What Can Brown Do For You?" (2008), cited Kluger R., "Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality", 1975, 614.
[39] Supra 4, 355-357.
[40] Plessy v. Ferguson, 163 U.S. 537 (1896)
[41] Klarman M., T*he Supreme Court 2012 Term – Comment: Windsor and Brown: Marriage Equality and Racial Equality*, 127 Harv. L. Rev. 127, 142 (2013) cited Learned Hand, The Bill of Rights at 55 (Oliver Wendell Holmes Lecture, 1958).
[42] (lat. "stand by things decided") this principle reflects self-restraint and is unknown to other branches of the government.
[43] Rehnquist W., *A Random Thought on the Segregation Cases*, available at: https://web.archive.org/web/20070615154055/http://a255.g.akamaitech.net/7/255/2422/26sep20051215/www.gpoaccess.gov/congress/senate/judiciary/sh99-1067/324-325.pdf [last accessed on November 26, 2019].

from doing so, and it became a part of the Civil Rights Movement (1896-1954), which was culminated by the adoption of the Civil Rights Act after 10 years, in 1964.

Regardless of the fact that moral correctness of *Brown* is not disputed today, the US in the 50-ies, like in the case of *Dred Scott*, was at the verge of starting a civil war and political crisis, and after the judgment was announced, the southern states commenced disobedience and demanded to put Earl Warren and other "traitors" on trial.[44]

Felix Frankfurter, who was one out of nine judges participating in the hearing of *Brown*, stated that if he had to adjudicate upon the issue of racial segregation in schools before 1950, he would have upheld the *Plessy* precedent because it was "not evident that the opposing public view existed".[45] We can see the scare of *Brown* in this quote by Frankfurter, its paradigm and the phenomenon of cautiousness of the judicial branch in the American model of separation of powers. It should also be noted that throughout its history the Federal Supreme Court has not invoked judicial activism frequently, - whenever it assumed the role of a secondary legislator, it has been doing so with precaution. According to one report, where 146 judgments of the Supreme Court were compared to relevant public opinion surveys of that time, the latter was apparently coinciding with the judgments of the Court in 60% of cases.[46] This statistics indicate the extent to which the Court respects national laws and policies. One the other hand, the relationship cannot be too qualified, since pluralistic democracy is characterized by antagonism of interests, and judges should represent not only the values of the majority, but also those of the entire population and in doing so, they create policies.

The doctrine of "living constitutionalism" which was evoked by the Court in *Brown* and according to which the teleological purpose of constitutional norms changes with the passage of time, is one of the mechanisms for judicial control, which serves as the means for demonstrating its powers.[47] This method of interpretation is justified for pragmatic purposes, since the interest and motives that existed in 18th century cannot be relevant to modern times. On the other hand, however, the interpreters of "living constitutionalism" are blamed for being manipulative and using their own political preferences in judicial proceedings,[48] which casts doubt on the stability of constitutionalism and constant principles.[49]

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[44] Michele J. Klarman, *Brow v. The Board of Education and Civil Rights Movement* (2007), 149.
[45] Supra 41, 130, cited William O. Douglas, Memorandum (Jan. 25, 1960), in THE DOUGLAS LETTERS 169, 169 (Melvin L. Urofsky ed., 1987) (quoting Justice Frankfurter) (internal quotation marks omitted).
[46] Supra 4, 383.
[47] For example, a well-known precedent of *Roe v. Wade* (1973) is the reflection of "living constitutionalism", which brought upon a huge social impact according to different studies, during the presidency of Reagan and George Bush, and according to the opinion of economists, even on the rate of crime. In this judgment, the Court, while adjudicating the case regarding abortion, relied on the 9th Amendment of the Constitution, which does not explicitly mention this right and made a reference to private life, about which, similarly, the Constitution is silent and which has previously been deemed to exist under the 14th Amendment through the case Griswold v. Connecticut (1965).
[48] Originalist Justice of the Supreme Court Antonin Scalia was one of the biggest opponents of the "living constitutionalism" until the end of his life. In his opinion, although the Constitution was 200 years old and the society has

The US Federal Supreme Court is structurally anachronistic. This is a body creating policies, which has not been elected by the people. Furthermore, there is no time limitation for appointed judges, there are no legal provisions regarding the retirement age and, as long as they act in good faith and in accordance with the law, they can enjoy the highest degree of liberty. Nevertheless, the Supreme Court does not act in a vacuum and it is perfectly aware of the fact that public support and respect is what they can rely on during the confrontation with other branches of the government, which is also where the judicial self-restraint comes from.[50]

It is the very judgment of *Brown* that is to be marked as a momentum for creation of modern, robust and bold Court, whereby all nine judges unanimously stood against political and social conjuncture, against elected representatives of states, against half of the population and ignored obstacles, went beyond the scope of classical limited model of judicial proceedings, appeared beyond the consensual legitimacy and assumed the role of the healer of social disease. Based on this step as well as several other similar controversial judgments, we can now probably say that the judiciary is no more the weakest or the least dangerous branch of the government.[51]

5. MODERN POLITICAL DRAMA

For a long time, politicians have regarded the Supreme Court as a calm, untroubled and weak institution. However, the reality has changed in the political arena and, in the light of legislative nominality of the Congress, the role of executive and judiciary branches becomes more and more extensive. For instance, politically sensitive decisions such as the one regarding gay marriage, abortion, drug-policy or the gun control are taken by the nine appointed Justices.[52]

Taking into account that with the passage of time, concurrently with civil and world wars on one hand and economic crises and social challenges on the other hand, the central government has been growing, so has been the Federal Supreme Court. With *Brown*, the Court not only kept getting bigger, but it also has substantially changed - the myth of tranquil and trivial institution has become weaker during the times of Warren (1953-1969) and then completely disappeared. Bearing this in mind, the largest legate of the ruling political power is appointing judges for indefinite term.

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been changing throughout this time, judges should not have turned the Constitution into a living organism. He believed that people who were relying on this doctrine had malintentions and wanted to enact changes while bypassing the democratic regime. See Washington Times, Scalia jeers fans of 'living' charter, Tuesday, February 14, 2006, available at: https://www.washingtontimes.com/news/2006/feb/14/20060214-110917-5396r/ [last accessed on November 26, 2019].

[49] David A. Strauss, "The Living Constitution", 2010, 2.

[50] Richard L. Pacelle Jr., "The Supreme Court in a separation of powers system", Routledge, 2015, 134-136.

[51] Supra 50, 253-254.

[52] The Economist, Sept. 14th 2018, 17-18.

With the growth of the Court's importance, the times when republican presidents were appointing liberal or "swing" justices, or when democrat presidents were appointing conservative justices have come to an end. This politically cautious approach has been developed through the 1980ies, after both politicians and the people saw the real influence the Court could have had and did in fact have while the decision-making process in Congress has been becoming more and more complicated.[53] After Antonin Scalia's death in February 2016, Barack Obama nominated his candidate, but the republican block in the Senate rejected to hold the confirmation hearings, which became one of the tangible chances for Donald Trump during the campaign to assure the electorate to vote for him. [54]

It would be naïve to believe that the Court has ever been or will be an apolitical branch. Even Tocqueville was pointing out that no such political issue could have been found in the US, which sooner or later would not become an issue of dispute before the Court.[55] Nevertheless, it is undeniable that political polarization of the US Supreme Court has become a major challenge.

2019-2020 will be the first term after many years when conservative judges hold the majority in the Supreme Court; the balance has changed after Donald Trump appointed two unequivocally conservative judges. During this year, the Court will have to consider such sensitive issues as labor rights of transgender people, immigration, abortion, religion and gun control.[56] In addition to such a crowded list of cases, since the impeachment proceedings have recently moved to the Senate, John Roberts will unluckily be in the epicenter of the political battle, since it is him who, under Article 1.3 of the Constitution should preside over the impeachment procedures of the President and Vice-president, which for him, as for the "moderate mediator" would be difficult and might also be fatal for the reputation of the Court.[57]

Judgments regarding these cases should be delivered by the end of June 2020, which coincides with the period of elections, when political campaigns will be especially polarized between two

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[53] Supra 52, 24-26.

[54] A statement made by Donald Trump in July 2016 during his campaign in Iowa: "If you really like Donald Trump, that's great, but if you don't, you have to vote for me anyway[.] "You know why? Supreme Court judges, Supreme Court judges. Have no choice, sorry, sorry, sorry. You have no choice. See Jacob Pramuk, *Trump has packed federal courts in his first year, pleasing once-wary conservatives*, CNBC, January 22, 2018, available at: https://www.cnbc.com/2018/01/22/trump-news-trump-makes-mark-with-judge-confirmations-in-first-year.html [last accessed on November 26, 2019].

[55] Jeffrey A. Segal, Harold J. Spaeth and Sara C. Benesh, The Supreme Court in American Legal System, 364, See citation Alexis de Toequeville, Democracy in America (Garden City, NY: Anchor, 1969), 270.

[56] See Ian Millhiser, *The new Supreme Court term starts today. Expect fireworks on abortion, LGBTQ rights, and immigration*, VOX, Updated Oct 7, 2019, available at: https://www.vox.com/2019/10/4/20869206/supreme-court-abortion-immigration-guns-lgbtq-obamacare [last accessed on November 26, 2019].

[57] See Tessa Berenson, *Why Impeachment Could Be a Nightmare for Chief Justice John Roberts*, TIME, October 31 2019, available at: https://time.com/5713951/john-roberts-impeachment-oversee/ [last accessed on November 26, 2019]; Also see: Noah Feldman, *Trump Impeachment Trial is Chief Justice Roberts' Nightmare*, Bloomberg, December 27, 2019, available at: https://www.bloomberg.com/opinion/articles/2019-12-27/trump-impeachment-trial-is-chief-justice-roberts-nightmare [last accessed on December 28, 2019].

candidates and two parties. This will put the Court in the tornado of public interest.[58] In the society where ideological differences between two political parties grow more and more before the elections, the destiny of the Court is horrendous.

Naturally, we could not demand from the highest instance court to heal the society from the disease as the role of the arbiter should not be equated to that of the oracle. Besides, before science fiction becomes the reality and we give up the role of judges either voluntarily or involuntarily to "perfect" Artificial Intelligence, we will have to tolerate the human nature, which is described by Aristotelian formula of a political animal;[59] a human being is essentially either political or a hermit, and so are judges. What matters the most is for this process to be as transparent as possible and therefore accountable, on one hand, and institutionalized, on the other hand. In addition, an arbiter should not prescribe a counter majoritarian or a majoritarian agenda, - the main task of the Supreme Court of the US is to decide legal disputes in accordance with the Constitution and the law, and in doing so, judges ought to follow the Marshallian pragmatism.

6. CONCLUSION

Today, just like in 1800, the Court is standing at the edge of a strong and turbulent whirlpool, and, for this time, it is John Robert's lot to find the way out of this political crisis. It is him, who, after appointment of Brett Kavanaugh as a SC justice in 2018, assumed Anthony Kennedy's role of "Swing justice"[60] and he switched from a conservative to *de facto* centrist position. Accordingly, at least for as long as the balance remains the same, John Roberts will be in the middle of "gravitational center" and will try to balance the pace in order to preserve the public confidence for the institution as well as the status of a neutral arbiter, and will try not to intensify the skepticism regarding the Court's politization.[61]

It is more likely that in the highest court of the US, justices have always been politicized and were taking decisions based on their beliefs and ideological preferences, which was further masked by various jurisprudential theories, including originalism and textualism.[62] There is a bias based on values that hides behind this deception: liberals put liberty higher than order and

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[58] See, Adam Liptak, *As the Supreme Court Gets Back to Work, Five Big Cases to Watch*, The New York Times, Published Oct. 6, 2019, Updated Nov. 11, 2019, available at: https://www.nytimes.com/2019/10/06/us/as-the-supreme-court-gets-back-to-work-five-big-cases-to-watch.html [last accessed on November 26, 2019].
[59] Aristotle, "Politics", Book 1, section 1253a.
[60] „Swing Justice". Since 5 votes are required for the Supreme Court to make a decision, whenever there are 4 liberal and 4 conservative judges, the role of the ninth most centrist justice involuntarily becomes decisive on vectoral conservative issues.
[61] See Lawrence Hurley, *U.S. chief justice's 'swing' role shown in census, gerrymandering rulings*, Reuters, June 28, 2019. available at: https://www.reuters.com/article/us-usa-court-chiefjustice/u-s-chief-justices-swing-role-shown-in-census-gerrymandering-rulings-idUSKCN1TS3A4 [last accessed on November 26, 2019].
[62] Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. Rev. 519 (2012).

equality higher than liberty, while conservative put order higher than liberty, and liberty - higher than equality.[63]

Does such kind of premeditation harm the reputation and legitimacy of the US Supreme Court, which directly affects its importance on the American seesaw of separation of powers?! According to recent studies, only 51% of respondents trust this institution.[64] Today, the highest instance of the Federal Supreme Court is criticized for biased judicial activism both by liberals (*Bush v. Gore*)[65] and by conservatives (*Obergefell v. Hodges*).[66] In order to find a relevant answer to the critique, it is necessary to consolidate judges, which, given the current American political polarization, is impossible, especially taking into account that one of the most famous judges - Oliver Wendell Holmes has characterized the Federal Supreme Court as "nine scorpions in a bottle".[67].

[63] Supra 4, 375.
[64] See Gallup, Supreme Court, available at: https://news.gallup.com/poll/4732/supreme-court.aspx [last accessed on November 26, 2019].
[65] By the end of his dissenting opinion Justice John Paul Stevens joined by Justices Ginsburg and Breyer noted with criticism that one may never know with complete certainty the identity of the winner of the 2000 Presidential elections, but the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law (Justice Stevens, dissenting, Bush v. Gore, 531 U.S 98 (2000), 128-129).
[66] John Roberts noted that the idea behind his dissenting opinion was not the refusal to expand the institution of marriage but to underline that in a democratic republic, such decisions should be taken by representatives of the people, and not 5 lawyers. Appropriating such a mechanism would cast a shadow on gay marriage and would make tolerance towards such a drastic social change even harder. (Justice Roberts, dissenting Obergefell v. Hodges, 576 U.S (2015), 2-3).
[67] Supra 4, 347, cited Linda Greenhouse "At the Bar", 21.