

The US Supreme Court's Shift from Neutral Umpire to Political Player in the Post-Trump Era:
Unintended Consequences for Reproductive Rights, Affirmative Action, and Marriage
Equality

تحول المحكمة العليا الأمريكية من حكم محايد إلى لاعب سياسي في حقبة ما بعد ترامب: العواقب غير
المقصودة على حقوق الإنجاب والتميز الإيجابي والمساواة في الزواج

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Abstract: This research examines the evolution of the US Supreme Court's role in American politics and culture. The study hypothesizes that the Court's structure and parameters have undergone significant changes due to various historical precedents, including landmark court cases and partisan and ideological nomination and confirmation processes. This has raised questions about the Court's integrity and legitimacy. The study employs a mixed-method approach using qualitative content and thematic analysis of primary sources, including a selection of landmark cases such as *Helvering v. Davis*, *United States v. Butler*, *Wickard v. Filburn*, and *Whitman v. American Trucking Association, Inc.*, as well as a secondary source, Gallup poll data covering public perceptions of the Court between 2002 and 2022. The study finds that the Court's decisions have had significant implications for public perceptions of the institution, particularly in controversial cases such as *Grutter v. Bollinger*, which codified Affirmative Action into American law. The findings suggest that while the Court's evolving role has increased public scrutiny, it has also demonstrated the importance of ensuring the Court remains independent, impartial, and transparent in its decision-making processes. The study provides a comprehensive understanding of the changing emotions and perceptions of the US Supreme Court among the American public.

- **Keywords:** Equality-Ideology-Legitimacy - Precedent -Supreme Court.

الملخص: يرصد هذا البحث تطور دور المحكمة العليا الأمريكية في السياسة والثقافة الأمريكية. إذ تفترض الدراسة أن هيكل المحكمة ومعاييرها قد خضعت لتغييرات كبيرة بسبب السوابق التاريخية المختلفة، بما في ذلك قضايا المحكمة التاريخية وعمليات الترشيح والتنشيط الحزبية والأيدولوجية. وقد أثار ذلك تساؤلات حول نزاهة المحكمة وشرعيتها. تستخدم الدراسة مقارنة مختلطة باستخدام المحتوى النوعي والتحليل الموضوعي للمصادر الأولية، بما في ذلك مجموعة مختارة من القضايا البارزة مثل *هيلفرينغ ضد دافيس*، الولايات المتحدة ضد *باتلر*، و *يكارد ضد فيلبورن*، و *ويتمان ضد الشركة الأمريكية للشاحنات*، بالإضافة إلى مصدر ثانوي، تتمثل في بيانات استطلاع غالوب التي تغطي التصورات العامة للمحكمة بين عامي 2002 و2022. وجدت الدراسة أن قرارات المحكمة كان لها

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آثار مهمة على التصورات العامة للمؤسسة، لا سيما في القضايا المثيرة للجدل مثل غروتر ضد بولينجر، التي قننت التمييز الإيجابي في القانون الأمريكي. تشير النتائج إلى أنه بينما أدى هذا التطور في دور المحكمة إلى زيادة التدقيق العام، فقد أظهرت أيضاً أهمية ضمان بقاء المحكمة مستقلة وحيادية وشفافة في عمليات صنع القرار. توفر الدراسة فهماً شاملاً للانعكالات والتصورات المتغيرة للمحكمة العليا الأمريكية بين الجمهور الأمريكي.

-الكلمات المفتاحية: المساواة، الأيديولوجيا، الشرعية، سابقة المحكمة العليا

- Introduction:

The US Supreme Court has always played a vital role as the safeguard of American constitutionality. It represented the hedge against the whims of the legislative authority of Congress and a barrier against the tyranny of the White House. What gave the court legitimacy as an arbiter of truth was the fact that its officials stood on neutral grounds in terms of their politics and ideology. Some scholars like (Greenhouse, 2021) and (Chotiner, 2021) believed that the encroachment on the jurisdictions of the highest court in America started with the previous two administrations and two Congresses. For example, Greenhouse believed that the ruling in the *Albertville v. Hodges* case in 2015 ushered in the era of the Supreme Court as a legislative body in American politics. (2021) Others (Biskupic, 2021) believed it started all the way back in 1973 with the *Roe v. Wade* ruling on abortion.

The culmination of public suspicion about the changing role of the US Supreme Court came during the Trump Administration with the appointment of, not one, not two but three conservative justices. However, this paper argued that the nature of the Court's role has undergone a gradual and evolutionary change over time, resulting from a series of rulings that have altered its position as a neutral arbiter of the law. Specifically, this work aims to investigate the historical change to the US Supreme Court's role in American politics and culture, and its implications for reproductive rights, affirmative action, and marriage equality. To achieve this goal, a mixed-methods approach was used, incorporating qualitative analysis of a selection of landmark cases such as *Helvering v. Davis*, *Grutter v. Bollinger*, *United States v. Butler*, *Wickard v. Filburn*, and *Whitman v. American Trucking Association, Inc*, as well as a

secondary source, Gallup poll data covering public perceptions of the Court between 2002 and 2022.

By examining the core issues at stake in each case, and the consequences on public perceptions, this paper sheds light on the unintended consequences of Supreme Court rulings. In the following sections, we provide a brief overview of the existing research on the changing role of the Court, followed by a detailed description of our methodology. We then present our findings and discuss their implications for American politics and culture, concluding with suggestions for future research in this important area.

1- Literature Review: The Evolutionary Changes to the Role and Structure of the Supreme Court

The literature about the attitudes toward the US Supreme Court rarely focused on its legitimacy as an institution. It rather dealt with originalist and textualist interpretations of the court's constitutional role. However, today there are prominent voices insinuating and even demanding to expand and regulate Supreme Court. These voices are coming from the likes of the Democratic Party in the US Congress and the Democrat-led White House (Warren, 2021). Even though calls to expand and increase the number of justices from nine to a higher prime number are not without precedent, as it happened six times before reaching the current number in 1869 (supremecore.gov, 2022). But those were deemed changes of necessity at the time due to the work overload that each Justice had to endure. However, these new calls to crowd and pack the Supreme Court are coming from a place of ideological and partisan convenience. Some political historians like Chotiner and Greenhouse like to believe that it all started with a back-and-forth competition of nominations between Democratic President Barack Obama and Republican President Donald Trump (2021). They argued that the Supreme Court during Obama's term exceeded its judicial jurisdiction described in Article Two of the US Constitution and assumed a legislative role (2021). This can be apparent in the *Albertville v. Hodges* 2015 ruling that

guaranteed the legality of same-sex marriages (2021). They also argued that the highest court in the US entered the legislative domain again with Trump's new nominees when they overturned *Roe v Wade* in 2022 (Greenhouse, 2021). Others believed that the tampering with the constitutional role of the United States Supreme Court far predates these two presidents and these two courts. Tugwell (1968) and Renz (1999) argued that the “trespassing” of the US Supreme Court into the legislative sphere started back in 1936 and 1937 with court cases that prioritized political desirability over constitutional legality. The cases were *United States v. Butler* in 1936 and *Helvering v. Davis* in 1937. In these two cases, the Court ruled that collecting taxes was not exclusively a congressional power but can be extended by judicial judgment (Levy & Mellor, 2009). The reason for this expansion of the Judiciary Authority can be traced to a letter found in the archives of the intergovernmental correspondences. The critical question that was implicitly raised by Tugwell and Renz was: “What then happened to eviscerate the notion of limited Federal power? Much of the harm occurred under the noses and with the encouragement of Roosevelt’s New Deal Administration. The President himself, in a letter promoting a 1935 bill wrote to the chairman of the House Ways and Means Committee: “I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation.” (Levy & Mellor, 2009, p19) The necessities of the circumstances at the time with Great Depression repercussions might have led to these measures by the Court, but it initiated a momentum that would not stop after the economic recovery. After the violation that occurred to the constitutional principle of the separation of powers, another principle was under threat. The issue of state and federal powers and their jurisdictions was one of the shields of the US constitution, and the case of *Wickard v. Filburn* in 1942 put a chink in that armor. The implications of that case were monumental, argues Randy Barnett as he stated that: “Instead of serving as a shield against the interference by the States, the commerce power became a sword wielded by the federal government in pursuit of a boundless array of regulations. And

rather than honor the Federalist idea that the states would serve as fifty experimental Laboratories... The federal government now assumes dominion over all manner of human conduct.” (Barnett, 2001, P40) These two cases shook the public trust in two principles that are enshrined in the American Constitution; however, they did not outsource the legislative powers outside the three main branches of government. The outsourcing came as a result of a case that happened in 2001. The *Whitman v. American Trucking Associations, Inc* case raised the important question: “if the Constitution states that all legislative power vests in Congress how can Congress delegate that power to agencies that are neither elected by the people nor accountable to the people’s representatives?” (Qtd in Levy & Mellor, 2009, p68) This critical question was raised by William Consovoy and a group of legal scholars in an article entitled: “Can Bush Supreme Court appointments lead to a Rollback of the new deal?” The consequences of that case were highlighted by Consovoy when he stated that: “Essentially Congress abdicated its constitutional responsibility to make a fundamental policy choice in a matter that had a significant impact on our health and our economy. Although it could have supplied an intelligible principle to steer the E.P.A (Environmental Protection Agency) Congress opted, unconstitutionally, to delegate its legislative power to the agency. (Qtd in Levy & Mellor, 2009, p76) That infamous case enabled federal agencies, which do not enjoy the legitimacy of being elected to legislate and make laws for the American public. In both the *United States v. Butler* of 1936 and *Helvering v. Davis* of 1937 political desirability was favored over constitutional legality, but there was another choice at stake in the *Grutter v. Bollinger* of 2003. The moral dilemma that was raised during this particular case was related to the correction of past injustices committed against black people by the government of the United States, and in particular, how would that correction take shape? In a working paper published by Yale Law School in 2005 Ayres and Foster argued that leveling the playing field or evening the score was antithetical to the US Constitution and in particular the 14th Amendment, highlighting the fact that one cannot correct a

negative Injustice with a positive Injustice. (Ayres & Foster, 2005) The positive discrimination ruling in favor of quotas was a continuation of an ideological pursuit towards “diversity” by the court argued Mellor and Levy (2009), however, the precedents that were set by that ruling and the immediate repercussions were found in the numbers published by the Grutter case report in 2003: “12 Hispanics who scored between a 159-160 on the LSAT and earn a GPA of 3.00 or higher applied for admission and only 2 were admitted. Meanwhile 12 African Americans with the same range of qualifications applied for admission and all 12 were admitted. Likewise, that same year, 16 Hispanics who scored between 151 and 153 on the LSAT and earned a 3.00 or higher applied for admission and, only 1 of those applicants were admitted. 23 Similarly qualified African Americans applied for admission and 14 were admitted. (Grutter, 2003, p381) The long-term consequences of that case were articulated in the dissent of Justice Powell who was one of the judges in the minority ruling of that case. He stated that: “One should not highly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies a system of allocating benefits and privileges on the basis of skin color and ethnic origin. (Pilon, 2003, p61) He argued in this quote that discrimination is never the way to correct historical injustices and he basically warned of the precedents this case would set. Despite the seriousness of the precedents that were set by the previously mentioned court cases and the alterations that ensued as a result, the core issue of the Court's role that this research work highlight is far more serious. This issue is related to the legitimacy of the court itself in the American public's eyes and its role as an arbiter of truth and umpire of justice and constitutionality. The recent trends by the previous two administrations in the United States and the rhetoric of the current administration under Biden, especially about packing the court for legislative agendas will change the role and the nature of the highest court for decades to come. So, the two questions that this research attempts to answer are: What is the nature of this change to the Court's role and position? And what are the implications of such a change on American politics and culture?

2- Methodology

This research work aimed to investigate the historical change to the US Supreme Court's role in American politics and culture. This work hypothesized that the Court's parameters and structure had an evolutionary change due to a series of historical precedents, varying from landmark court cases and unambiguous partisan and ideological nomination and confirmation processes. These variables combined brought to question the integrity of the Court and even its legitimacy. The data that was collected to confirm these hypotheses and answer the initial research questions varied from primary to secondary sources. The primary sources were a short collection of syllabi and opinions of landmark Supreme Court cases that were chosen based on merits of relevancy to the problem of this research work. The criteria that each case had to meet were based on the enduring constitutional principle that it violated or amended. The *Helvering v. Davis* case in 1936 and *United States v. Butler* in 1937 were chosen because the principle of separation of powers in the US constitutional was at stake. The case of *Wickard v. Filburn* of 1942 was chosen due to the damage it did to the federalism principle that regulated States and federal government relationships. The third case that was analyzed in this work was *Whitman v. American Trucking Association, Inc* in 2001, because of the relevance of the principle of checks and balances and which branch of government gets to make the laws in America. The final case that was chosen was *Grutter v. Bollinger* of 2003. This case represented a major cultural controversy due to the fact that it encoded discrimination into American law by allowing the constitutionality and the legality of Affirmative Action. Another foundational work that was essential for the case choice in this research was a book that was entitled: "The Dirty Dozen: How 12 Supreme Court cases radically expanded government and eroded freedoms." A qualitative approach was used to describe and analyze the collected data based on a mixture of content and thematic analysis. Each case was analyzed based on these assumptions: The core issue under

judgment, how it changed the characteristics of the Court, and the consequences on public perceptions.

The public perceptions and opinions data were collected via a secondary source, Gallup, which is a major polling agency in the United States that conducted a large survey about the Supreme Court that covered the era between 2002 and 2022. This comprehensive study covered questions about public satisfaction with the job of the Supreme Court, trust of the Court, the impartiality of the Court, the degree of confidence towards the court, and finally the most important piece, which is whether a nominee can be voted against merely based on his or her stances on social issues. (Gallup, 2022) This mixed method approach might produce findings and conclusions that may not be very generalizable, but it provided a deep understanding of people's changing emotions and perceptions about the US Supreme Court.

3- Findings and Discussion: The Unintended Consequences of the new Role of the US Supreme Court

This research work found that contrary to public assumptions, tampering with the Court's functionality and structure did not start with President Donald Trump's appointment of three conservative justices that led to the overturning of *Roe v Wade* in 2022. Nor did it start with President Barack Obama's nomination of liberal judge Sonia Sotomayor which tipped the balance of the Court in favor of legalizing same-sex marriages. Even though these two administrations with their clear partisan agendas accelerated an ideological "race to the bottom," they did not instigate or initiate it. This research found that it all started with the Court's "small" deviations from its constitutionally prescribed role in the case of *Helvering versus Davis* in 1936. There are very few constitutions around the world where the Justice system does not utilize the principle of legal precedents and the United States is no exception. This principle not only sets a foundation for future similar cases but it also carves and chips away from originalist interpretations of the constitutional role of the Supreme Court. This will set in motion a dynamic that will enable the Supreme Court to play a different

role. According to Levy and Meller the Supreme Court had already: "...rewritten major parts of our Constitution, including the General Welfare Clause, Commerce Clause, Contracts Clause, Non- Delegation Doctrine, and the First, Second, Fourth, Fifth, and Fourteenth Amendments. Typically, one or two votes have decided the outcome in highly charged cases involving federalism, civil rights, property rights, religion, campaign finance, and more. Without doubt, the composition of the Court has been vital in determining the direction of the country." (2008, p215) The major findings regarding the implications on public opinions and judicial culture were derived from the major polling agency Gallup. The large population, the relatively long period of time that was covered and the recency of the data collected were all determining factors for why this particular study was chosen. Over a period of 20 years from 2002 to 2022, a large randomized population was asked carefully worded questions about the Supreme Court. The list (Gallup, 2022) of questions that were chosen included but was not limited to:

- Do you approve or disapprove of the way the Supreme Court is handling its job?
- How much trust and confidence do you have at this time in the judicial branch headed by the Supreme Court...A great deal, a fair amount, not very much, or none at all?
- In general, do you think the current Supreme Court is too liberal, too conservative, or just about right?
- Suppose a nominee for the U.S. Supreme Court is qualified and has no ethical problems. Do you think U.S. senators would be justified -- or unjustified -- in voting against that nominee if they disagree with the nominee's stance on current issues such as abortion, gun control or affirmative action? (2022)

The resulting numbers for each of the following questions were not statistically insignificant, and when looked upon over the broad era they were collected in, they paint a very dim picture. Concerning the first question, there was an

evolution, a convergence, and ultimately an overtaking in favor of the people who disapprove of the Court's job handling. The number of people who disapprove went from a meager 29% in 2002 and rose to a whopping 58% in 2022 (Gallop, 2022). The approval numbers told an extremely opposite story. These numbers plummeted from 62% in 2002 to a frightening 40% in 2022 (2022). The data regarding the second question that was asked by the pollsters had somewhat of a different trajectory but had a similar culmination. The number of people who had low to no confidence in the Court only grew; combined, they represented 23% in 2002 but in 2022 the number rose to 53% (2022). The third question was related to the ideological leanings of the Supreme Court, which should not have been an issue for an arbiter of the law. There were some other findings prior to this study where the numbers between too conservative and too liberal were very close, reflecting an ideological balance (2022). However, the numbers after 2002 reflect sharp swings from one side to another; for example, 32% and 19% in 2010 in favor of too liberal, and 18% and 42% in 2002 in favor of too conservative (2022). This issue led to the deduction that the American public views the US Supreme Court, which is supposed to be an umpire of the law, as being biased toward one particular ideology over the other. And this view is built on the fact that each of the last two Presidents campaigned publicly on this particular reality (Greenhouse, 2022). The last metric that this research work employed was related to whether the personality of the Justices themselves, irrespective of their qualifications, should affect their nomination and confirmation processes. The findings were somewhat surprising because there is no statistically significant change in percentage points in the period between 2005 and 2018 (Gallup, 2022). Even though a caveat needs to be mentioned, this is that this particular question was only asked to half of the previously sampled population. (2022)

4- Conclusion:

While changing the constitutional role of the US Supreme Court raised all the alarms in academic and media spheres, as it should, political and legal discourse failed

to confront this issue with the urgency it deserves. They even seemed to exacerbate the problem with the aim of, either advancing political agenda or climbing the most prestigious career ladders in the judicial branch. The evidence is clear: when political and ideological agendas drive legal policies through ideological nominations and political pressure whether through necessity or convenience unwelcomed implications will ensue. Returning to originalists' interpretations of the Court's role and separating it from the clutches of partisan and ideological divisiveness will enable it to play its intended part as an arbiter of the law and an umpire of truth.

This research explores the evolution of the role of the US Supreme Court in American politics and culture. The study proposes that various historical precedents, including landmark court cases and partisan and ideological nomination and confirmation processes, have brought significant changes to the Court's structure and parameters, leading to questions about its integrity and legitimacy. The study employs a mixed-method approach, including qualitative content and thematic analysis of primary sources, such as landmark cases like *Helvering v. Davis*, *United States v. Butler*, *Wickard v. Filburn*, and *Whitman v. American Trucking Association, Inc.*, and secondary sources, including Gallup poll data covering public perceptions of the Court between 2002 and 2022. The research finds that the Court's decisions have had significant implications for public perceptions of the institution, particularly in controversial cases like *Grutter v. Bollinger*, which established Affirmative Action into American law. The findings suggest that the Court's evolving role has increased public scrutiny and highlight the importance of ensuring its independence, impartiality, and transparency in decision-making processes.

The research concludes that changing the constitutional role of the US Supreme Court has raised concerns in academic and media spheres, but political and legal discourse has not confronted the issue with the necessary urgency. Political and ideological agendas have influenced legal policies, leading to unwelcome implications. To enable the Court to fulfill its intended role as an arbiter of the law and

an umpire of truth, returning to originalist interpretations of its role and separating it from partisan and ideological divisiveness is crucial. Overall, the research provides a comprehensive understanding of the changing emotions and perceptions of the US Supreme Court among the American public. It contributes to the ongoing discourse on the role of the Court in American society and highlights the importance of maintaining the Court's independence, impartiality, and transparency in decision-making processes.

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