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The Supreme Court and American Politics: Symposium Introduction

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The Supreme Court
and American Politics

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THE SUPREME COURT AND AMERICAN POLITICS:
SYMPOSIUM INTRODUCTION

CHRISTOPHER W. SCHMIDT & CAROLYN SHAPIRO

The Supreme Court and its Justices have a conflicted relationship with American politics. The Justices like to see themselves as above the political fray, making their decisions on the basis of principle, not politics—and certainly not partisanship. They extol the value of judicial deference to the democratic process. Politicians too invoke this idealized vision of an apolitical Court when it serves their political interests. Yet the Court frequently decides cases involving politics—often with clear partisan implications. The Justices strike down democratically enacted laws. And politicians regularly place the Court and its decisions at the heart of political debates. The contributions in this Symposium issue provide new insights into this conflicted relationship. They diagnose how these conflicts arose, critique their consequences, and suggest ways in which the relationship might be improved.

America's elected officials, from the first days of the Republic through today, have debated, denounced, and praised the Supreme Court and particular Justices. When the Court hands down a controversial decision, politicians make speeches and issue statements of condemnation or praise. When the Court constrains elected officials' authority, they warn of the tyranny of unelected judges. Sometimes they are moved to action, calling for constitutional amendments, passing corrective statutes, or issuing defiant resolutions.¹ Sometimes they tack in the other direction, calling on the Court to resolve controversial issues—perhaps because they would prefer to avoid those issues themselves. In these instances, politicians demand, in essence, that the Court relieve them of politically difficult choices.²

1. See, e.g., Jason Mazzone, *Above Politics: Congress and the Supreme Court in 2017*, 93 CHI-KENT L. REV. ___ (2018) (discussing congressional responses to Court decisions).

2. See generally KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* (2007); Mark Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993).

The political process also periodically places the Court at center stage. During the modern multi-day, televised confirmation hearings, the American people hear senators talk, often at length, about the Court.³ At election time, the future of the Court is a perennial if sporadic issue, particularly in presidential campaigns.⁴ Politicians, in short, have ample opportunity to comment on, fight with, and sing the praises of the Supreme Court.

The Justices play their own role in this on-again, off-again relationship between the Court and American politics. To start their career on the high court, all of the Justices must navigate the political gauntlet of nomination and confirmation. Some Justices continue to engage with political actors after they are confirmed, through extrajudicial appearances and statements. Such activities have long been controversial, especially when they have a ideological or partisan valence.⁵ Justice Ginsburg's comments deriding Donald Trump in the midst of the 2016 campaign, for example, were met with widespread condemnation.⁶ And Justice Gorsuch has already been criticized for his appearances at Republican events.⁷

By far the most direct way in which the Court engages with American politics, however, is in the form of cases in which litigants call on the Justices to decide questions that implicate politics. Indeed, some scholars and lawyers argue that overseeing the democratic process—"reinforcing" the representative system⁸—is the most important role the Court plays. Since the 1960s, the Justices have taken up the call to extend judicial oversight over electoral politics with increasing frequency, expanding the right to vote,⁹ requiring legislatures to redraw electoral district lines,¹⁰ striking down campaign finance regulations.¹¹ In 2000, the Court played a critical

3. See Carolyn Shapiro, *What Members of Congress Say About the Supreme Court and Why It Matters*, 93 CHI.-KENT L. REV. ____ (2018).

4. See Christopher W. Schmidt, *The Forgotten Issue? The Supreme Court and the 2016 Presidential Campaign*, 93 CHI.-KENT L. REV. ____ (2018).

5. See Richard L. Hasen, *Celebrity Justice: Supreme Court Edition*, 19 GREEN BAG 2D 157 (2016); Christopher W. Schmidt, *Beyond the Opinion: Supreme Court Justices and Extrajudicial Speech*, 88 CHI.-KENT L. REV. 487 (2013).

6. See Christopher W. Schmidt, *How to Think About Justice Ginsburg's Trump Comments*, ISCOTUSNOW (July 14, 2016), <http://blogs.kentlaw.iit.edu/iscotus/think-justice-ginsburgs-trump-comments/> [https://perma.cc/N58R-XUCV].

7. See Garrett Epps, *America's Red and Blue Judges*, ATLANTIC (Sept. 25, 2017), <https://www.theatlantic.com/politics/archive/2017/09/americas-red-and-blue-judges/540924/> [https://perma.cc/7L2F-V9BJ].

8. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (offering the seminal articulation of the "representation-reinforcing" theory of judicial review).

9. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966).

10. *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964).

11. *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

role in deciding a presidential election.¹² More recently, a sharply divided Court struck down a key provision of the 1965 Voting Rights Act¹³ and the Justices are now considering whether to venture back into the “political thicket”¹⁴ of partisan gerrymandering.¹⁵

Recent political developments underscore the timeliness of this Symposium’s examination of the relationship between the Supreme Court and American politics. Justice Scalia’s death in February 2016 and the refusal of Senate Republicans to hold confirmation hearings for Judge Merrick Garland, President Obama’s nominee to fill the vacancy, meant that the Supreme Court loomed particularly large over the 2016 election.¹⁶ Trump took the unprecedented step of releasing a list of proposed nominees,¹⁷ and advocacy groups pushed the future of the Court as a central issue of the election.¹⁸ In the end, nearly a quarter of all voters identified the Supreme Court as the most important issue in the election, and such voters were more likely to vote for Donald Trump than for Hillary Clinton.¹⁹ Indeed, many conservatives who were wary about Trump justified their vote for him by citing the Court.²⁰

To the satisfaction of these wary conservatives, one of President Trump’s first major actions was nominating Neil Gorsuch to fill Justice Scalia’s seat on the Court. The Senate confirmation battle that followed reflected the fraught political landscape of the Supreme Court and American politics. Democrats solidly opposed Gorsuch’s nomination. Republicans responded by changing Senate rules to eliminate the filibuster for Supreme Court confirmations, thus allowing confirmation with only a bare majority of Senate support.²¹

Trump’s election has brought other changes to the relationship between the Supreme Court and American politics. As a candidate and now as President, Trump has vigorously attacked judges and courts. During his

12. *Bush v. Gore*, 531 U.S. 98 (2000).

13. *Shelby Cty. v. Holder*, 570 U.S. 529 (2013).

14. *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion).

15. *Gill v. Whitford*, 137 S. Ct. 2268 (2017) (mem.).

16. *See generally* Schmidt, *supra* note 4.

17. *See id.* at [123–24].

18. *See id.* at [134].

19. *NBC News Exit Poll: Future Supreme Court Appointments Important Factor in Presidential Voting*, NBC NEWS (Nov. 8, 2016, 6:12 PM), <https://www.nbcnews.com/card/nbc-news-exit-poll-future-supreme-court-appointments-important-factor-n680381> [<https://perma.cc/STB7-GCCJ>].

20. *See* Schmidt, *supra* note 4, at [135–36] & nn. 205–07.

21. Matt Flegenheimer, *Senate Republicans Deploy ‘Nuclear Option’ to Clear Path for Gorsuch*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html> [<https://perma.cc/XGC8-F65E>].

campaign, he accused a federal judge who ruled against him of being biased, calling this American-born judge a “Mexican.”²² In office, he has denounced judges who ruled against him as “so-called judges.”²³ Trump also deploys the Court as a political lever. He used ex-Supreme Court Justice John Paul Stevens’s proposal to repeal the Second Amendment²⁴ as an opportunity to issue a partisan call to arms: “We need more Republicans in 2018 and must ALWAYS hold the Supreme Court!”²⁵

Although there is nothing new about politicians using the Court for political advantage,²⁶ it may have new implications in our current moment of hyperpolarization of public life. Political debates about the Court have become harsher, blunter, and more partisan. In this context, it is more important than ever to have a clear picture of the past and present status of this relationship. It is more important than ever to better understand the risks and opportunities of the current moment. This is precisely what the contributors to this Symposium seek to do.

Several Symposium contributors focus on the politicians’ side of the relationship and the impact of political actors on the Court. Kevin McMahon identifies and analyzes the novel phenomenon of the “minority Justice”: a Justice produced by a nomination and confirmation process in institutions that do not actually represent national majorities.²⁷ A Justice can be appointed by a President who did not win the popular vote; Justice Gorsuch is the most recent example. But also sitting on the current Court are the only three Justices in history confirmed by such narrow margins that the senators who voted to confirm them collectively received fewer votes than the senators who voted against them. The Senate’s abandonment of the filibuster for Supreme Court nominations makes it even more likely that future Justices will be approved by senators whose constituencies make up less

22. Maureen Groppe, *What Trump Has Said About Judge Curiel*, INDIANAPOLIS STAR (June 11, 2016, 11:53 AM), <https://www.indystar.com/story/news/2016/06/11/what-trump-has-said-judge-curiel/85641242/> [<https://perma.cc/6FXZ-JATH>].

23. Amy B. Wang, *Trump Lashes Out at ‘So-Called Judge’ Who Temporarily Blocked Travel Ban*, WASH. POST (Feb. 4, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/02/04/trump-lashes-out-at-federal-judge-who-temporarily-blocked-travel-ban/>? [<http://perma.cc/3TD5-CGYZ>]; Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 5:12 AM), <https://twitter.com/realDonaldTrump/status/827867311054974976> [<http://perma.cc/ZU67-KSAR>].

24. John Paul Stevens, Opinion, *Repeal the Second Amendment*, N.Y. TIMES (Mar. 27, 2018), <https://www.nytimes.com/2018/03/27/opinion/john-paul-stevens-repeal-second-amendment.html> [<http://perma.cc/759Y-3TMQ>].

25. Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 28, 2018, 2:52 AM), <https://twitter.com/realDonaldTrump/status/978932860307505153> [<https://perma.cc/4BPK-XEC2>].

26. See, e.g., KEVIN J. MCMAHON, NIXON’S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES (2011).

27. Kevin J. McMahon, *Will the Supreme Court Still “Seldom Stray Very Far”? : Regime Politics in a Polarized America*, 93 CHL.-KENT L. REV. ____ (2018).

than half the nation. The legitimacy of the Court has always been vulnerable to accusations that having nine unelected judges overriding elected legislatures compromises basic democratic principles. McMahon asks whether the increasing incidence of these minority Justices might exacerbate this vulnerability.

Jason Mazzone likewise considers the Supreme Court's institutional vulnerability and resilience, focusing on what happens when the Court becomes the target of partisan attacks. Looking at recent congressional responses to Court rulings, he finds that even as the politicians turn up the rhetorical heat on the Court, they are frequently unable or unwilling to do much about it.²⁸ Actual legislation aimed at the Court or its decisions, whether overrides of statutory rulings, attempts to limit the impact of constitutional rulings, or regulation of the Court itself, is rarely successful. Congress, in other words, has more bark than bite when it comes to reigning in the power of the Court. Mazzone's analysis suggests that, even as attacks on the Court or individual Justices are prevalent in our political debates, the Court remains largely insulated from political checks.

Similarly, in his contribution to the Symposium, Christopher Schmidt argues that once we cut through the partisan rhetoric and drama of the 2016 election, the way the candidates used the Supreme Court as a campaign issue remains largely unchanged from recent past elections.²⁹ For all the extraordinary features of the 2016 presidential election, including the outsized role the Supreme Court appeared to have in the minds of many voters, possibly affecting the outcome of the election, the major party candidates themselves did relatively little to elevate the Court as a campaign issue. Trump issued his list of potential Court nominees, the first presidential candidate to do so, and he regularly identified the Court as a reason to vote for him, but he showed little interest in talking about the Court at any length. Clinton did even less, than Trump, mentioning the Court only occasionally and usually only when prompted. Schmidt suggests that one of the lessons of history that 2016 did not rewrite is that the Court as an issue can be a difficult fit for overt presidential campaigning.

Carolyn Shapiro looks at Supreme Court confirmation hearings, specifically at the senators questioning the nominees, and she finds reason for concern about the senators' rhetoric.³⁰ She identifies a growing disparity between how Democrats and Republicans talk about the Court. Republicans favor "process language," which Shapiro describes as "focus[ing] on

28. Mazzone, *supra* note 1.

29. Schmidt, *supra* note 4.

30. Shapiro, *supra* note 3.

what judges are supposed to do, how they are supposed to be constrained, and how the constitutional separation of powers is supposed to work.”³¹ Democrats, on the other hand, particularly during Justice Gorsuch’s confirmation hearing, focus largely on the outcomes of judicial decisions, generally without addressing process. Shapiro argues that by failing to discuss the Court and the Constitution in process terms, Democrats have ceded critical ground, too often leaving unanswered Republicans claims that conservative constitutional jurisprudence is the only principled approach to judging.

Other contributors focus on the Justices’ role in the relationship between the Court and American politics. In their assessment of Justice Gorsuch’s confirmation hearings, Lori Ringhand and Paul Collins challenge Gorsuch’s defense of his refusal to discuss practically any Supreme Court precedents at his confirmation hearings as following the “rule” Justice Ginsburg articulated at her own confirmation hearings in 1993.³² Using quantitative analysis, they demonstrate that Gorsuch’s unresponsiveness went well beyond Ginsburg’s and most previous nominees’. His refusal to meaningfully discuss not only those Court holdings that remain contested but also rulings that most assume to be firmly established canonical fixtures of the constitutional firmament, they warn, threatens the value of the confirmation hearing as a “high-profile public forum in which we as a nation affirm our shared constitutional commitments.”³³ Ringhand and Collins also warn that if future nominees follow Gorsuch’s lead—and recent confirmation hearings of federal court judges indicate that this resistance to discussing any precedents may be trending³⁴—then the people will have lost “an important tool in ensuring that the individuals selected to serve on the Supreme Court accept the constitutional settlements reached by each generation of Americans.”³⁵

Other contributors focus on how the Justices decide cases involving political issues. In his keynote address, Rick Hasen dissects Justice Scalia’s views on when the political process malfunctions.³⁶ He concludes that Scalia’s assessments of political self-dealing and incumbency protection

31. *Id.* at [102].

32. Lori A. Ringhand & Paul M. Collins, Jr., *Neil Gorsuch and the Ginsburg Rules*, 93 CHI.-KENT L. REV. ____ (2018).

33. *Id.* at [103].

34. See Christopher W. Schmidt, *Dancing Away from Brown*, ISCOTUSNOW (Apr. 15, 2018), <http://blogs.kentlaw.iit.edu/iscotus/dancing-away-brown/> [https://perma.cc/MN3B-4EDA].

35. Ringhand & Collins, *supra* note 32, at [103].

36. Richard L. Hasen, Keynote Address, *Judging the Political and Political Judging: Justice Scalia as Case Study*, 93 CHI.-KENT L. REV. ____ (2018).

are too contradictory to explain his jurisprudence. Scalia is driven not by any consistent theory of democracy, Hasen argues, but instead by his ideological and partisan commitments—what Hasen terms his “conservative-libertarian impulses.”³⁷ Although there is nothing new about Justices’ ideology playing a role in deciding cases,³⁸ what is new is that today on the Court ideology correlates with partisan affiliation: the most consistently liberal Justices were appointed by Democratic presidents, the most consistently conservative by Republican presidents. This presents a new risk, Hasen warns. “Before long, if not already, voters likely will think of the Justices in more partisan terms, and of the Supreme Court as a Democratic Party or Republican Party-dominated institution.”³⁹

Luis Fuentes-Rohwer also identifies a disconnect between what the Justices say and what they do in cases involving the political process.⁴⁰ When explaining why they sometimes refuse to intervene in electoral politics, Justices regularly reference a concern with protecting the Court’s legitimacy.⁴¹ Citing a robust empirical literature on the resilience of the Court’s legitimacy despite controversial rulings, Fuentes-Rohwer argues that this expressed concern is, more often than not, simply a tool of judicial misdirection. Justices plead legitimacy when they are really moved by their substantive opposition to the claim at issue.⁴² He warns of the costs when Justices deploy neutral principles to hide the ideological grounds of judicial decision making.⁴³

In her contribution, Ann Southworth examines the aftermath of one of the most politically significant cases of recent decades, *Citizens United*.⁴⁴ Like Hasen, she sees a polarized judiciary in a polarized country as cause for concern. In her interviews of lawyers who took different positions on the regulations struck down in *Citizens United*, she finds that opposing sides seem to inhabit different constitutional worlds when it comes to their views on the decision and its long-term consequences. In this way, lawyers

37. *Id.* at [113] (citing Steven J. Heyman, *The Conservative-Libertarian Turn in First Amendment Jurisprudence*, 117 W. VA. L. REV. 231, 298 (2014)).

38. See, e.g., Carolyn Shapiro, *The Context of Ideology: Law, Politics, and Empirical Legal Scholarship*, 75 MO. L. REV. 79, 126–28 (2010).

39. Hasen, *supra* note 36, at [117].

40. Luis Fuentes-Rohwer, *Taking Judicial Legitimacy Seriously*, 93 CHI.-KENT L. REV. ____ (2018).

41. *Id.* at [116] (citing Dion Farganis, *Do Reasons Matter? The Impact of Opinion Content on Supreme Court Legitimacy*, 65 POL. RES. Q. 206, 207 (2012) (noting increasing Court references to judicial legitimacy in the years since *Brown*)).

42. *Id.* at [115–16].

43. *Id.* at [117–19].

44. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010); Ann Southworth, *The Consequences of Citizens United: What Do the Lawyers Say?*, 93 CHI.-KENT L. REV. ____ (2018).

mirror the Justices wrote the decision itself.⁴⁵ An ideologically polarized nation produces both a polarized bar and a polarized High Court.

What can be done? Some of the contributors who diagnose a dysfunction in the relationship between the Court and the American political system propose a variety of fixes. Before long there will undoubtedly be another Supreme Court confirmation battle. If it is to replace Justice Kennedy, the swing vote in many of the most controversial cases in recent years, or any of the more liberal Justices, then we will be witnesses to what could be the most contentious confirmation battle in American history.⁴⁶ Perhaps counterintuitively, several contributors urge us to think of this looming battle as an opportunity, as a public moment for explicit discussion of shared constitutional commitments. Thinking ahead to future hearings, for example, Ringhand and Collins urge nominees to retain the approach that has characterized most past hearings: avoid talking about currently unsettled Court precedents but identify and accept canonical precedents. Nominees would avoid precommitting to issues they have not fully thought through in the context of adjudication, thus protecting judicial independence while also affirming “our shared constitutional commitments.”⁴⁷

Shapiro urges Democratic senators to contextualize the Court and its work in constitutional structure and principles.⁴⁸ If, for example, as Mazzone suggests, overriding the Court’s statutory holdings is difficult, even impossible, as a practical matter, it may be particularly important for senators to focus on whether a nominee’s approach to statutory interpretation is likely to undermine or support congressional enactments. “Democrats should not cede process language,” she argues. They “should insist on the political and legal left’s vision of the Constitution tied to its text, history, and principles.”⁴⁹

Other contributors are less sanguine. Even if the relationship between the Court and the political system is dysfunctional, we might consider

45. See ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 4 (2014) (describing the majority and minority in *Citizens United* as “seem[ing] to inhabit entirely different constitutional universes”).

46. See Ruth Marcus, Opinion, *The Terrifying and Terrible Prospect of Justice Kennedy Retiring*, WASH. POST (June 23, 2017), https://www.washingtonpost.com/opinions/the-terrifying-and-terrible-prospect-of-justice-kennedy-retiring/2017/06/23/bc73ff9a-5830-11e7-a204-ad706461fa4f_story.html?http://perma.cc/LY3F-PJVE (warning that Justice Kennedy’s retirement would “unleash nomination Armageddon”).

47. Ringhand & Collins, *supra* note 32, at [103].

48. Shapiro, *supra* note 3; see also Carolyn Shapiro, *The Language of Neutrality in Supreme Court Confirmation Hearings*, 122 DICKINSON L. REV. (forthcoming 2018).

49. Shapiro, *supra* note 3, at [103].

whether attempting to fix it would improve the situation. As Rick Hasen memorably puts it in his keynote address: “When all else fails, lower your expectations.”⁵⁰ Hasen shows that in their election law jurisprudence, the Justices appear to be moved less by a coherent principle of electoral politics and the courts than by ideological commitments. Every time the Court delves into election law issues, it simply highlights the “political”—and even partisan—appearance of its rulings. The more involved the Justices are, the more “the public and other political branches will begin to see the Court as a more partisan institution, and less sophisticated individuals will believe, and cynical politicians across the aisle will push the argument, that these Justices are in fact engaged in tribal partisanship.”⁵¹ As a result, the political branches will treat the Court increasingly as simply another partisan lever, resulting in the loss of long-established norms in the political sphere respecting judicial independence.

Schmidt offers his own version of Hasen’s “lower your expectations” recommendation. After assessing the less-than-inspiring history of how presidential candidates have used the Supreme Court as a campaign issue, he questions whether we really want presidential candidates to talk more about the Court on the campaign trail.

What’s the next chapter in this unfolding relationship between the Court and the American political system? How the Court and individual Justices act, rule, and write can affect how members of the public and other political actors view it. Politicians will continue to talk about and respond to the Court in our hyperpartisan times. Exploring the relationship between the Supreme Court and American politics is thus as necessary—and as interesting—as ever. The Articles in this symposium offer a range of perspectives on the topic, illuminating, critiquing, and contextualizing what often appears chaotic and unprecedented. Each makes a valuable contribution to our national conversation about the place of the Supreme Court in American politics.

50. Hasen, *supra* note 36, at 114 (emphasis omitted).

51. *Id.* at [116].