Eroding Voting Rights as a Threat to Judicial Independence and Impartiality

ROLLAND GIBERSON*

INTRODUCTION

On June 25, 2013, the United States Supreme Court handed down a five-to-four ruling in what has become one of the most consequential cases of the twenty-first century: *Shelby County v. Holder*.[1] *Shelby County*'s holding invalidated key provisions of the Voting Rights Act (VRA) of 1965, enabling the now-widespread use of voter suppression.[2] Justice Ruth Bader Ginsberg, one of the dissenting four, criticized the decision by claiming it was akin to "throwing away your umbrella in a shower because you are not getting wet."[3] The Majority Decision was delivered by Chief Justice John Roberts, joined by Justices Anthony Kennedy, Clarence Thomas, Antonin Scalia, and Samuel Alito.[4] Notably, Presidents who failed to win the popular vote appointed two of the Justices sitting on the Court that handed down *Shelby County*.

Seven years and over 1,688 polling place closures[5] later, on October 27, 2020, the United States Senate confirmed Justice Amy Coney Barrett's appointment to the Supreme Court.[6] This date marked the first time in United States history that Presidents who lost the popular vote had appointed a majority of sitting Supreme Court Justices.[7] It took only seven years after *Shelby County* for the number of Justices appointed by presidents who lost the popular vote to expand to five, with Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett joining Chief

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* J.D., Georgetown University Law Center (expected May 2022); B.A., Oakland University (2018).

1. *Shelby Cty v. Holder*, 570 U.S. 529, 557 (2013).

2. *See id.*

3. Nina Totenberg, *As Concerns About Voting Build, The Supreme Court Refuses To Step In*, NPR (July 25, 2020), https://www.npr.org/2020/07/25/895185355/as-concerns-about-voting-build-the-supreme-court-refuses-to-step-in [https://perma.cc/L2NB-C6D4].

4. *See id.*

5. *Democracy Diverted: Polling Place Closures and the Right to Vote*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (Sept. 2019), https://civilrights.org/democracy-diverted/ [https://perma.cc/WB3T-4ARB] [hereinafter *Democracy Diverted*].

6. *See* Joan Biskupic, *Amy Coney Barrett Joins the Supreme Court in Unprecedented Times*, CNN (Oct. 27, 2020), https://www.cnn.com/2020/10/27/politics/amy-coney-barrett-joins-supreme-court-unprecedented/index.html [https://perma.cc/PJ9T-FCER].

7. *See 50% of Supreme Court Justices Appointed by Presidents Who Lost the Popular Vote*, FACTPAC, https://factpac.org/50-of-supreme-court-justices-appointed-by-presidents-that-lost-the-popular-vote/ [https://perma.cc/DP9Z-UTZ2] (last visited Nov. 15, 2020).

Justice Roberts and Justice Alito.[8] While *Shelby County* may not be the direct cause of this imbalance, it is symptomatic of one of the American Judiciary's most significant failures: its refusal to act on the threat that the erosion of voting rights poses to the independence and impartiality of the Judiciary.

Part I of this Note will explore sources of judicial responsibility to maintain judicial independence and impartiality and discuss the mechanisms that protect judicial independence. This Note will then discuss the threat that voting rights' erosion poses to judicial independence and impartiality. Part II will provide background into recent Supreme Court voting rights cases, including *Shelby County v. Holder, Crawford v. Marion County,* and *Rucho v. Common Cause*. Part III will discuss mechanisms of federal judicial appointments and how the Legislative and Executive branches of government have obtained influence over members of the federal judiciary. Part IV will propose two potential steps towards resolving the threat the erosion of voting rights poses to judicial independence, including expanding the *Model Code of Judicial Conduct* to cover Supreme Court Justices and extending strict scrutiny protection to voting rights cases by either elevating voting rights to the status of fundamental rights, or by treating voting rights as a proxy for another fundamental right, such as free speech. This Note will then conclude that the erosion of voting rights not only threatens judicial independence and impartiality but American democracy as a whole. As such, members of the federal judiciary have an ethical duty to actively combat the erosion of voting rights to fulfill their responsibilities to protect the independence and impartiality of the Judiciary.

I. JUDICIAL INDEPENDENCE AND IMPARTIALITY

A. DEFINITIONS

Judicial impartiality is defined as "the lack of bias for or against either *party* to the proceeding."[9] Judicial impartiality is also "essential" for due process.[10] Judicial independence is a less precise concept, one which often eluded definition in the past.[11] However, courts have approximated judicial independence as "a Judiciary free from control by the Executive and the Legislature . . . "[12] Further, the freedom from the "control" that threatens Judicial independence is the freedom from penalty.[13] This narrows the definition of judicial independence from judicial freedom from external control to the Judiciary being free to conduct its professional duties without fear of retribution from public officials.[14] As this

8. *Id.* (noting that George W. Bush won the popular vote for his second term).
9. *Republican Party of Minn. v. White*, 536 U.S. 765, 776 (2002).
10. *Id.*
11. *See* Michael D. Gilbert, *Judicial Independence and Social Welfare*, 112 MICH. L. REV. 575, 582 (2014).
12. *United States v. Will*, 449 U.S. 200, 217–18 (1980).
13. *See id.*; *see also* M. GILBERT, *supra* note 11, at 582.
14. *See* M. GILBERT, *supra* note 11, at 582.

Note will discuss in the next section, the makeup of the constitutional and legislative mechanisms intended to protect judicial independence supports this narrowed definition.

B. MECHANISMS PRESERVING JUDICIAL INDEPENDENCE

Numerous mechanisms play a part in protecting judicial independence; however, this section will explore four: three constitutional and one legislative. The first mechanism protecting judicial independence is the practice of federal judges being appointed rather than elected.[15] This process is designed to prevent Judiciary members from concerning themselves with reelection and fundraising and supposedly prevents judges from taking partisan stands to appeal to the electorate.[16] The second mechanism is the life term that federal judges serve.[17] This "bulwark" of judicial independence isolates members of the Judiciary from the prospect of job loss for an unpopular opinion.[18] The third mechanism prevents federal judges' salaries from being reduced, freeing them from fear of monetary retribution for unpopular opinions.[19] The fourth and final mechanism protecting judicial independence and the Judiciary's self-regulation is a legislative mechanism.[20] While the Executive and Legislative branches share the power to appoint federal judges, Congress has granted the judiciary the power to craft its own rules of practice and procedure,[21] further isolating the Judiciary from the other branches' whims by allowing them to regulate court conduct internally.[22]

As mentioned earlier in this Note, these mechanisms, except for powers granted to the Judiciary by Congress, track closely with the narrowed definition of judicial independence. However, both the definition and mechanisms that equate judicial independence to isolating members of the federal judiciary from negative consequences are insufficient, as they fail to account for the influence that the Executive and Legislative branches may obtain through positive consequences.

C. SOURCES OF JUDICIAL RESPONSIBILITY

Members of the Judiciary are also responsible for protecting its independence. For example, the first Canon of the Model Code of Judicial Conduct requires that

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15. *Judicial Independence*, JUDICIAL LEARNING CENTER, https://judiciallearningcenter.org/judicial-independence/ [https://perma.cc/5346-5TY7] (last visited Nov. 10, 2020) [hereinafter *Judicial Independence*].

16. *See* Anthony J. Scirica, *Judicial Governance and Judicial Independence*, 90 N.Y.U. L. REV. 779, 782 (2015); Judicial Independence, *supra* note 15.

17. *See* U.S. CONST. art. III, § 1.

18. *McBryde v. Comm. to Rev. Cir. Council Conduct & Disability Orders of Jud. Conf. of U.S.*, 264 F.3d 52, 64 (D.C. Cir. 2001); see SCIRICA, *supra* note 16, at 782–83.

19. *See* U.S. CONST. art. III, § 1.

20. *See* 28 U.S.C. § 2072 (1990).

21. *See* SCIRICA, *supra* note 16, at 781, 785.

22. *See id.*

judges, with the notable exception of Supreme Court Justices,[23] "uphold and promote the independence, integrity, and impartiality of the judiciary."[24] In addition, all judges, including Supreme Court Justices, take The Judicial Oath, swearing to "faithfully and impartially discharge and perform" their duties.[25] The Supreme Court too has suggested that judicial actions must stay within the "constitutional requirement of judicial independence."[26]

Members of the federal judiciary also have a responsibility to maintain its impartiality.[27] This responsibility extends to the image of the impartiality of the Judiciary.[28] The Judiciary relies upon public trust to give force to their opinions, as they have no means to enforce their decisions.[29] As such, the public must "*perceive*" that the Judiciary is "fair and impartial if the rule of law is to survive."[30]

D. THREATS TO JUDICIAL INDEPENDENCE AND IMPARTIALITY

This Note argues that the main threat that the erosion of voting rights poses to judicial independence is the influence that politicians can obtain over members of the Judiciary through positive consequences or judicial enrichment. This is enabled in part by politicians' ability to utilize voter suppression tactics to seize control of judicial appointments. For example, when using voter ID legislation to suppress voters, politicians can reduce the votes of certain groups of voters likely to be opposed to their positions.[31] Suppressing opposing party votes can lead to the election of politicians who are not representative of their electorate,[32] granting the party that suppresses the most votes outsized power in upcoming judicial appointments. Partisan gerrymandering practices further perpetuate this power, allowing a minority party to entrench itself in power through the use of voter suppression laws and partisan map drawing.[33]

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23. Kevin M. Lewis, *A Code of Conduct for the Supreme Court? Legal Questions and Considerations*, CONG. RES. SERV. 2 (Feb. 6, 2019), https://crsreports.congress.gov/product/pdf/LSB/LSB10255 [https://perma.cc/ZK43-34VB].

24. MODEL CODE OF JUD'L CONDUCT CANON 1 (2019).

25. 28 U.S.C. § 453 (1990).

26. *Chandler v. Jud'l Council*, 398 U.S. 74, 84 (1970).

27. *See* 28 U.S.C. § 453 (1990); MODEL CODE OF JUD'L CONDUCT CANON 1 (2019); SCIRICA, *supra* note 16, at 797.

28. *See Republican Party of Minn. v. White*, 536 U.S. 765, 776 (2002).

29. *See* Paul L. Friedman, *Threats to Judicial Independence and the Rule of Law*, ABA (Nov. 18, 2019), https://www.americanbar.org/groups/litigation/initiatives/committee-on-american-judicial-system/in-the-news/threats-to-judicial-independence-and-rule-of-law/ [https://perma.cc/AJ3H-3Z3T].

30. *Id.*

31. *See N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016) (noting North Carolina voter ID laws target African Americans with "surgical precision").

32. *See* Craig Gilbert, *New Election Data Highlights the Ongoing Impact of 2011 GOP Redistricting in Wisconsin*, MILW. J. SENTINEL (Dec. 6, 2018), https://www.jsonline.com/story/news/blogs/wisconsin-voter/2018/12/06/wisconsin-gerrymandering-data-shows-stark-impact-redistricting/2219092002/ [https://perma.cc/NZ4N-B2KQ] (noting Wisconsin state Republicans enjoy a 29-seat advantage in a hypothetical 50-50 election).

33. *See id.*

Members of the Legislative and Executive branches then use positive benefits, such as prestigious appointments, to obtain influence over the Judiciary. As discussed previously, the mechanisms that protect judicial independence do so by isolating members of the federal judiciary from negative consequences for unpopular rulings. These, however, fail to protect members of the federal judiciary from the threats posed by *positive* consequences of rulings. Examples of positive consequences include politicians offering opportunistic or ideologically driven individuals the chance to obtain powerful positions on the federal bench in exchange for favorable rulings or requiring formerly moderate judges to align and rule more in step with the entrenched party. In Part III, this Note will posit that judges are incentivized to support and comply with the ideologies of politicians seeking to maintain power earned through Supreme Court-enabled voter suppression and gerrymandering. In turn, this incentivizes ambitious judges to rule in ways favorable to these politicians. By failing to protect voting rights, the federal judiciary as a whole, and in particular the Supreme Court, has produced—or at least threatens to produce—a judiciary in the image of the politician who suppresses the most votes and who draws the most aggressively disproportionate district, rather than the representative electorate.

II. VOTING RIGHTS

The two decades following 2000 have not been kind to the voting rights of American citizens. In a series of Supreme Court decisions, which ran parallel to a conservative ideological shift on the Supreme Court,[34] protections of voting rights afforded to American voters, some nearly half a century old, were stripped away. The most significant of these cases was *Shelby County v. Holder*, a case that gutted the Voting Rights Act of 1965.[35] However, cases like *Crawford v. Marion County Election Board*, in which the Supreme Court declared Voter ID laws constitutional,[36] and *Rucho v. Common Cause*, where the Supreme Court refused to rule on partisan gerrymandering,[37] have provided politicians with tools to suppress voters. This process threatens the federal judiciary's independence by giving politicians the means and incentive to appoint sympathetic judges.

A. *SHELBY COUNTY V. HOLDER* – VOTING RIGHTS ACT OF 1965

Shelby County was handed down in 2013 and considered the constitutionality of the Voting Rights Act of 1965. Congress passed the Voting Rights Act of 1965

34. *See* Amelia Thomson-DeVeaux, *How A Conservative 6-3 Majority Would Reshape The Supreme Court*, FIVETHIRTYEIGHT (Sept. 28, 2020), https://fivethirtyeight.com/features/how-a-conservative-6-3-majority-would-reshape-the-supreme-court/ [https://perma.cc/B3NS-53NF].

35. *See Shelby Cty. v. Holder*, 570 U.S. 529, 557 (2013) (holding preclearance formula of VRA unconstitutional).

36. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 204 (2008).

37. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019) (holding partisan gerrymandering a nonjusticiable political question).

to combat efforts to suppress minority votes, particularly in the South.[38] In the 1950s, the rate of African Americans registered to vote in the South was less than 25 percent, and in some states, such as Mississippi, that rate was less than five percent.[39] Between 1965 and 1967, the two years following the Voting Rights Act's passage, the percentage of registered non-white voters in southern states increased between 5 and fifty-two percent.[40] Much of the VRA's success in increasing rates of registered voters resulted from the preclearance requirement found in Section 5 of the Act.[41] Preclearance required states with histories of rampant voter suppression to submit any changes in laws governing voting, polling places, or voting districts' drawing to the Justice Department or a Washington D.C. federal court for preapproval.[42] For example, if Mississippi tried to change its voter registration system, the State would first have to obtain preclearance.[43] Preclearance, however, was effectively gutted by the Court in *Shelby County*.[44] While Section 5 itself was not found unconstitutional, the Supreme Court found that Section 4(b) of the VRA—containing the formula that determined which states and counties were required to submit changes for preclearance—was unconstitutional.[45] Without the formula provided in Section 4(b), preclearance and much of the VRA were rendered toothless.[46]

Politicians wasted no time introducing voter restricting laws after *Shelby County*, and the results of the Supreme Court's gutting of the Voting Rights Act are as unfortunate as they are predictable. Between the 2012 and 2018 elections, over 1,688 polling locations, predominantly located in areas with large minority populations, were closed.[47] Fewer polling places have resulted in disproportionately increasing wait times for minority populations, with some polling places reporting wait times over five hours.[48] Because Election Day is no longer a public holiday, significant waiting times often require potential voters to choose between work and voting.[49] While the effect of the Supreme Court's gutting of the VRA

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38. *See An Assessment of Minority Voting Rights Access in the United States: 2018 Statutory Report*, U.S. COMM'N ON C.R. 7–8, https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf [https://perma.cc/DBX6-57VM] [hereinafter *Minority Access*] (last visited Nov. 15, 2020).

39. *See id.* at 19.

40. *See id.* at 24.

41. *See Voting Rights Act,* BRENNAN CENTER, https://www.brennancenter.org/issues/ensure-every-american-can-vote/voting-reform/voting-rights-act [https://perma.cc/RSE9-QECJ] (last visited Feb. 25, 2021).

42. *See id.*

43. *See Young v. Fordice*, 520 U.S. 273, 276 (1997).

44. *See Shelby Cty. v. Holder*, 570 U.S. 529, 557 (2013).

45. *Id.*

46. *See Minority Access*, *supra* note 38, at 57-59.

47. *See Democracy Diverted*, *supra* note 5, at 2.

48. *See* Christopher Famighetti, *Long Voting Lines: Explained*, BRENNAN CTR., 1-2, https://www.brennancenter.org/sites/default/files/analysis/Long_Voting__Explained.pdf [https://perma.cc/6E94-BC9V] (last visited Nov. 10, 2020).

49. Cara Korte, *Why not make Election Day a National Holiday?*, CBS NEWS (Oct. 26, 2020), https://www.cbsnews.com/news/election-day-national-holiday/ [https://perma.cc/EMC9-RJJM].

was primarily concentrated in the historically worst offending states, the Supreme Court cleared the use of a different voter suppressing tool in 2008.

B. *CRAWFORD V. MARION COUNTY* - VOTER ID LAWS

In *Crawford v. Marion County Election Board*, the Supreme Court considered the constitutionality of an Indiana election law, which required all citizens to present government-issued photo identification in order to cast their ballot.[50] Despite noting that the sort of election fraud Voter ID laws claimed to prevent had never "actually occur[ed] in Indiana at any time in its history," the Supreme Court held that the laws did not unconstitutionally burden the right to vote.[51]

While legitimate reasons exist for these laws other than intentional voter suppression, politicians have used Voter ID laws to suppress voters with great effect. Twelve years after *Marion County* was handed down, 36 states now have some form of Voter ID law.[52] Voter ID laws disproportionately suppress the votes of particular demographics, notably minority[53] and lower-income populations.[54] The laws also lead to a 2-3% reduction in total voter turnout during elections.[55] Voter ID laws are also often "enforced in a discriminatory manner."[56] For example, Voter ID laws in Texas allow concealed weapons permits to be used as identification at the polls, but not student ID cards.[57] Federal courts are not ignorant to the effects of these laws, nor their discriminatory intent,[58] however, these laws are continually upheld.

C. GERRYMANDERING

Gerrymandering is "the practice of dividing or arranging a territorial unit into election districts in a way that gives one political party an unfair advantage in elections."[59] It is not always so straightforward, however. Several historic challenges to gerrymanders often centered on maps drawn using race or population as

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50. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 185 (2008).

51. *Id.* at 194, 204.

52. *See Voter Identification Requirements: Voter ID Laws*, NCSL (Aug. 25, 2020), https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx [https://perma.cc/A3YY-LDSR].

53. *See Oppose Voter ID Legislation – Fact Sheet*, ACLU, (May 2017), https://www.aclu.org/other/oppose-voter-id-legislation-fact-sheet [https://perma.cc/9QYQ-6DP9] (noting up to twenty-five percent of African-American voters, as opposed to eight percent of white voters, lack required photo ID).

54. *See id.* (noting eleven percent of all Americans lack a requisite ID and obtaining one can cost up to $175).

55. *See id.*

56. *See id.*

57. *See id.*

58. *See, e.g.*, *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016) (noting North Carolina voter ID laws target African Americans with "surgical precision"); *Veasey v. Abbott*, 830 F.3d 216, 272 (5th Cir. 2016) (affirming SB 14 had racially disparate effects).

59. MERRIAM-WEBSTER DICTIONARY (2nd ed. 2011).

the primary characteristics, aiming to provide historically underrepresented populations with consistent Congressional representatives.[60]

1. RACIAL GERRYMANDERING

This practice culminated in two 1990s Supreme Court cases: *Shaw v. Reno*,[61] and *Miller v. Johnson*.[62] *Shaw v. Reno*, which came before the Supreme Court in 1990, presented a challenge to a North Carolina reapportionment plan, which created two majority-black districts.[63] These two majority-black districts sent African American representatives to Congress from North Carolina for the first time since Reconstruction.[64] After a three-judge panel dismissed the initial challenge, the Supreme Court accepted the appeal.[65] The Court held that, though the plan was facially racially neutral, the bizarre shapes of the districts were sufficient to suggest that it could only have been done to unconstitutionally separate voters based on race.[66] Two years later, in *Miller v. Johnson*, considering a gerrymander similar to the one drawn in *Reno*, the Supreme Court held that racial gerrymandering was an unconstitutional violation of the Equal Protection Clause of the Fourteenth Amendment.[67] Partisan gerrymandering, the subject of Gerrymandering challenges in recent years, has, however, not received the same skeptical treatment from the Supreme Court.

2. PARTISAN GERRYMANDERING

Partisan gerrymandering is perhaps best understood through what has become an infamous quote by State Representative David Lewis, then a Republican member of North Carolina's general assembly's redistricting committee: "[W]e . . . are going to use political data in drawing this map . . . to gain partisan advantage on the map."[68] In other words, by drawing a map in a particular way, politicians can earn fewer votes than their opponents but still win more seats.

Wisconsin is an excellent example of how effective partisan gerrymandering can be. After state Republicans took control of the Wisconsin legislature and governor's office, they drew and passed voting district maps that would shape state

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60. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 924–25 (1995) (holding legislative districts may not be drawn with racially discriminatory purposes); *Reynolds v. Sims*, 377 U.S. 533, 581. (1964) (holding legislative districts be comprised of roughly equal populations).

61. *Shaw v. Reno*, 509 U.S. 630 (1993).

62. *Miller v. Johnson*, 515 U.S. 900 (1995).

63. *See Reno*, 509 U.S. at 630.

64. *See id.* at 659 (White, J. dissenting).

65. *See id.* at 630.

66. *See id.* at 644, 649.

67. *See Miller*, 515 U.S. at 924, 927–28.

68. Jim Morrill, *Common Cause Challenges Partisan Gerrymandering in NC*, THE CHARLOTTE OBSERVER (August 5, 2016), https://www.charlotteobserver.com/news/politics-government/election/article93903767.html [https://perma.cc/J96C-2CT6].

elections from 2011 to 2020.[69] These maps favored state Republicans so heavily that, even assuming a perfect split in vote share between state Democrats and Republicans during the 2018 election, Republicans would *still* have claimed a 29-seat advantage over Democrats.[70] As it happened, Wisconsin Republicans won only 48 percent of the vote share but left the 2018 elections with 63 out of 99 possible state-house seats,[71] allowing them to retain the power to draw the voting district maps, and control the voting laws, for the next decade.[72] Having been so heavily defeated by statistical analysis, voters turned to the courts, hoping the Supreme Court would treat partisan gerrymandering as they had racial gerrymandering in *Miller v. Johnson*.

The Supreme Court heard the challenge to the Wisconsin partisan gerrymander in *Gill v. Whitford* in 2017.[73] The Court vacated and remanded the case, holding that plaintiffs had failed to demonstrate Article III standing, as political party is not a protected class, unlike race.[74] *Whitford* was then placed on hold in anticipation of *Rucho v. Common Cause*. In *Rucho*, the Court considered challenges to both a Republican gerrymander in North Carolina and a Democrat gerrymander in Maryland.[75] In a five-to-four decision, the Court held, despite admitting that the practice of partisan gerrymandering undercuts democracy that, unlike in racial gerrymandering cases like *Reno* or *Miller*, federal courts lack standing to hear partisan gerrymandering challenges, as they involve nonjusticiable political questions.[76] This overturned a six-to-three Supreme Court decision in *Davis v. Bandemer*, which held that partisan gerrymandering was justiciable.[77]

Gerrymandering, in conjunction with voter suppressing efforts like Voter ID laws, places voters between the proverbial rock and a hard place—for instance, the plight of the Wisconsin voter. After a decade of conservative governance, Wisconsin voters turned out, and a majority cast their ballots for Democrats in 2018.[78] However, state Republicans still managed to win a near supermajority and retained not only control of the maps for the next decade but also the ability to enact voter suppressing measures to accompany the Voter ID law they passed in 2011.[79] Aggrieved voters have already been rebuffed by the federal courts,

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69. *See C. Gilbert*, *supra* note 32.
70. *See id.*
71. *See id.*
72. *See id.*
73. *Gill v. Whitford*, 138 S. Ct. 1916 (2018).
74. *See id.* at 1931.
75. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019).
76. *See id.* at 2506–07.
77. *See Davis v. Bandemer*, 478 U.S. 109, 143 (1986), *abrogated by Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).
78. *C. Gilbert*, *supra* note 32.
79. *See id.*; *State Redistricting Deadlines,* NCSL (Mar. 3, 2021), https://www.ncsl.org/research/redistricting/state-redistricting-deadlines637224581.aspx. [https://perma.cc/8P32-YMQZ]; *Wisconsin Voter Identification Requirements and History*, BALLOTPEDIA, https://ballotpedia.org/Wisconsin_judicial_elections [https://perma.cc/TU9V-JMCT] (last visited Feb. 20, 2021).

potentially leaving them with only the Wisconsin state judiciary as a viable path to seek redress. However, this path is complicated by the Wisconsin state judiciary's appointment system: members of the Wisconsin judiciary are elected by popular vote,[80] meaning they too are vulnerable to voter suppression tactics.

Gerrymandering also has a remarkable impact on federal elections. For example, gerrymandered districts in Michigan meant that, despite receiving the majority of the vote from 2012 to 2016, Democrats only received 35 percent of the State's delegation to the House of Representatives.[81] In Maryland, Republicans received 37 percent of votes between 2012 and 2016 but only received 13 percent of the congressional seats.[82] Gerrymandering's impact is estimated to have artificially flipped an average of 59 seats to the opposing political party during the 2012, 2014, and 2016 elections.[83] While the House may not play a direct part in federal judicial appointments, the Senate does, and voter suppression tactics affect individuals attempting to vote for the Senator of their choice. Legislative and Executive branch members who have gained influence over federal judges by packing the courts with judges loyal to their agendas exacerbate this issue.

III. EXECUTIVE AND LEGISLATIVE INFLUENCE OVER THE JUDICIARY

Much of the threat the erosion of voting rights poses to the federal judiciary's independence is due to the federal judicial appointment system. Much like other mechanisms protecting judicial independence, the appointment system attempts to isolate judges from the Legislative and Executive branches' influence. Like other mechanisms, it possesses a distinct flaw, which can render it vulnerable to manipulation: members of the federal judiciary are appointed by the President, then confirmed by the Senate.[84] This appointment system relies upon politicians being representative of their constituents. It is, therefore, vulnerable to manipulation by politicians using tools like voter suppression and gerrymandering. Further, judicial appointment processes have been altered significantly by both parties in recent years, making them even easier to manipulate. For example, in 2013, Senate Democrats opted to use the "nuclear option," lowering the filibuster hurdle for non-judicial presidential appointments.[85] In 2019, Senate Republicans retaliated by cutting the debate time for district court federal judges'

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80. *See Wisconsin Judicial Elections*, BALLOTPEDIA, https://ballotpedia.org/Wisconsin_judicial_elections [https://perma.cc/9B2H-HMZ2] (last visited Feb. 20).

81. *See* Alex Tausanovitch, *Voter-Determined Districts*, AMERICAN PROGRESS (May 9, 2019), https://www.americanprogress.org/issues/democracy/reports/2019/05/09/468916/voter-determined-districts/ [https://perma.cc/59GD-KBQM].

82. *See id.*

83. *See id.*

84. *See* U.S. CONST. art. II, § 2, cl. 2.

85. *See* Paul Kane, *Republicans Change Senate Rules to Speed Nominations as Leaders Trade Charges of Hypocrisy* (Apr. 3, 2019), https://www.washingtonpost.com/politics/republicans-change-senate-rules-to-speed-nominations-as-leaders-trade-charges-of-hypocrisy/2019/04/03/86ec635a-5615-11e9-aa83-504f086bf5d6_story.html [https://perma.cc/6BGM-4D4R].

appointments from thirty hours to two hours and lowered the voting threshold for judicial candidates from two-thirds to a simple majority.[86] Each of these changes means smaller groups of politicians can have a greater impact on the appointment of judicial candidates, as appointment requires only open judicial seats and a simple majority.[87]

These changes have also incentivized politicians to refuse to fill judicial seats so that they might have the opportunity to fill them after the next election cycle. Perhaps the highest-profile example of this tactic was in 2016, when then-Senate Majority Leader Mitch McConnell refused to hold hearings for Obama Supreme Court nominee Merrick Garland, citing proximity to an upcoming Presidential election.[88] Four years later, McConnell pushed through current Supreme Court Justice Amy Coney Barrett's appointment, despite even shorter proximity to the next election.[89] And this tactic was arguably more effective in the lower courts. When Donald Trump took office in 2017, he inherited 88 open district court seats and 17 open court of appeals seats.[90] When asked why Barack Obama left so many seats open, Mitch McConnell was quoted as laughing and saying it was because "I was in charge of what we did the last two years of the Obama administration."[91] The judicial appointment numbers prove this practice's efficacy: President Donald Trump successfully appointed 234 federal judges in his single four-year term.[92] In contrast, President Barack Obama only managed 334 appointments in eight years.[93] The partisan nature of judicial appointment hearings and candidates tapped under Trump show how members of the Legislative and Executive branches identify individuals willing to embrace political ideologies to obtain promotion.

Trump and Senate Republicans prioritized appointing ideologically sympathetic candidates, even those once considered too conservative to hold a federal post. One such appointee bragged about his intention to build such a "fiercely

86. *See id.*

87. *See id.*

88. Amita Kelly, *McConnell: Blocking Supreme Court Nomination 'About A Principle, Not A Person'*, NPR (Mar. 16, 2021), https://www.npr.org/2016/03/16/470664561/mcconnell-blocking-supreme-court-nomination-about-a-principle-not-a-person [https://perma.cc/GBT4-SXVY].

89. *See Damage to the Federal Judiciary During the Trump Administration*, LEADERSHIP CONF. EDUC. FUND 2, http://civilrightsdocs.info/pdf/judicial-nominations/2021/Brief-Damage-to-Judiciary-During-Trump.pdf [https://perma.cc/PVZ3-8LYX] (last accessed Feb. 25, 2021).

90. Russell Wheeler, *Senate Obstructionism Handed a Raft of Judicial Vacancies to Trump- what has he done with them?*, BROOKINGS (Jun. 4, 2018), https://www.brookings.edu/blog/fixgov/2018/06/04/senate-obstructionism-handed-judicial-vacancies-to-trump/ [https://perma.cc/8DWN-XXD6].

91. Alex Woodward, *Mitch McConnell laughs about Stopping Obama Hiring Judges, Allowing Trump to Fill Courts with Conservatives*, THE INDEPENDENT (Dec. 13, 2019), https://www.independent.co.uk/news/world/americas/us-politics/mitch-mcconnell-obama-trump-judges-supreme-court-conservative-biden-impeachment-a9245781.html [https://perma.cc/36UM-J228].

92. *See Federal Judges Nominated by Donald Trump*, BALLOTPEDIA, https://ballotpedia.org/Federal_judges_nominated_by_Donald_Trump [https://perma.cc/WB3A-SNC7] (last accessed Feb. 20, 2021).

93. *See Federal Judges Nominated by Barack Obama*, BALLOTPEDIA https://ballotpedia.org/Federal_judges_nominated_by_Barack_Obama [https://perma.cc/MY4Z-6XAJ] (last accessed Feb. 20, 2021).

conservative record on the court" that he would be "unconfirmable for any federal judicial post."[94] However, the more significant threat to judicial independence than promoting proudly partisan judges is the response of other, less blatantly partisan candidates. Lacking sufficiently conservative records, more moderate candidates sought appointment by expressing their loyalty to conservative causes during their appointment hearings.[95] One such nominee, Halil Ozerden, was accused by conservative Senators of lacking sufficient conservative credentials to be appointed.[96] Ozerden responded by informing the Senators that he had been on the board of a "County Republican Club," and that their accusations "misunderstand" his record.[97]

Rather than obtaining seats by displaying a commitment to neutrality and judicial independence, some current federal judiciary members received their positions by bending their knee to the political and ideological agendas of politicians in the Legislative and Executive branches. Filling the federal judiciary with judges who have incurred positive consequences from their deference to politicians is a direct threat to judicial independence. It also makes the federal judiciary less impartial.

Members of the Judiciary also have a responsibility to maintain its trust and image of impartiality.[98] The Judiciary relies upon public trust to give force to their opinions, as they have no means with which to enforce their decisions, so the public must "perceive" that the Judiciary is "fair and impartial if the rule of law is to survive."[99] A recent poll suggests that over half of Americans do not believe that Supreme Court Justices set aside politics or their personal beliefs and that the Court "gets too mixed up in politics."[100] Justice Sandra Day O'Connor once wrote, "If I knew that I was litigating before a judge who received that kind of money from my opponent, I would not think I was getting a fair shake."[101] Similarly, why should a member of the public, challenging legislation used to suppress their vote, have faith they will receive a fair trial when in front of a judge whom they know obtained their seat by declaring their faith in the agenda of the politician who supports the voter suppressing legislation? Or even benefits from it? While no judge will always rule in favor of the politicians who appointed them, a judiciary of partisans is far from impartial.

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94. Rebecca R. Ruiz, Robert Gebeloff, Steve Eder & Ben Protess, *A Conservative Agenda Unleashed on the Federal Courts*, NY TIMES, (Mar. 14, 2020), https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html [https://perma.cc/48KU-LPQE].

95. *See* Lena Zwarensteyn, *Trump's Takeover of the Courts*, 16 U. ST. THOMAS L.J. 146, 164–65 (2020).

96. *See id.* at 164.

97. *Id.* at 164–65.

98. *See* MODEL CODE OF JUD'L CONDUCT CANON 1 (2019); 28 U.S.C. § 453 (1990).

99. *See* Friedman, note 30, at 9.

100. *Most Americans Trust the Supreme Court, But Think It Is 'Too Mixed Up in Politics*,' ANNENBERG PUB. POL'Y. CTR., (Oct. 16, 2019), https://www.annenbergpublicpolicycenter.org/most-americans-trust-the-supreme-court-but-think-it-is-too-mixed-up-in-politics/ [https://perma.cc/9LAD-QC6F].

101. Friedman, *supra* note 29, at 4.

To fulfill their ethical and constitutional obligations to maintain the independence and impartiality of the Judiciary, members of the federal judiciary must combat both the rising influence of the Legislative and Executive branches and the falling faith in the Judiciary's impartiality, caused in part by the recent erosion of voting rights.

IV. POTENTIAL SOLUTIONS

The answer to the threats posed by the erosion of voting rights to judicial independence and impartiality is to reverse the erosion's effects. To fulfill their ethical obligations, members of the federal judiciary must take steps to ensure that those who are appointing them are representative of the electorate. This Note proposes two possible solutions: first, applying a code of ethics to the Supreme Court. Second, extending strict scrutiny protection to voting rights.

As mentioned in Part I of this Note, members of the Judiciary have a responsibility to maintain the independence and impartiality of the Judiciary.[102] However, one of the preeminent sources of this responsibility, the *Model Code of Judicial Conduct*, does not apply to members of the Supreme Court.[103] While the Supreme Court may be the final arbiter of law in the United States, they are by no means free from ethical failings or responsibilities. By extending the *Model Code of Judicial Conduct* to members of the Supreme Court or creating a separate one specifically for the Justices, both the Justices and the American people will have a better idea of the ethical framework from which they operate. This increased transparency and guidance might help to improve the falling public trust in the Court. Additionally, the asymmetry in ethical responsibilities between the Supreme Court and other federal courts could undermine lower courts' steps to protect judicial independence.

The second potential solution this Note proposes is the extension of strict scrutiny to voting rights. The *Marion County* opinion provided a glimpse into whether the Supreme Court views the right to vote as a fundamental right. Typically, when considering legislation that may burden a fundamental right, the Court will apply a strict scrutiny test. This requires the law responsible for burdening the right to serve a compelling governmental interest and be narrowly tailored to achieve that interest.[104] However, the Court did not appear to have applied strict scrutiny in *Marion County*.[105] Instead, the Court appears to have applied a test closer to intermediate scrutiny, only requiring that the state show "sufficient justification" or "neutral and sufficiently strong" state interests.[106] The Court's admission that the type of voter fraud the Voter ID law hoped to combat had never

102. *See id.*; MODEL CODE OF JUD'L CONDUCT CANON 1 (2019); 28 U.S.C. § 453 (1990).

103. *See* Lewis, *supra* note 23, at 2.

104. *See* Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143, 188 (2008).

105. *See id.* at 153–54.

106. *Id.* at 155.

actually happened in the State of Indiana's history supports this view. One potential solution to the threat the erosion of voting rights poses to judicial independence, which already exists within the structure of the Judiciary, is for the federal judiciary to treat the right to vote as a fundamental right deserving of strict scrutiny protection. It seems odd that the right to vote does not already receive strict scrutiny protection. Like other rights considered fundamental, such as speech, association, or religious practice, the right to vote is enumerated in the constitution. Further, perhaps more than any other right, the right to vote has historically been the recipient of countless laws attempting to suppress it, usually in relation to the race of the individual trying to vote.

Rather than expanding the category of fundamental rights, perhaps the right to vote could be considered under another right already receiving strict scrutiny protections, such as freedom of speech. Though Chief Justice Roberts expressed his doubts about the viability of such an argument in *Rucho* when he opined that there were "no restrictions" on any "First Amendment activities" present in partisan gerrymandering,[107] this comment appears to be dicta rather than part of the holding. Perhaps his skepticism will change in time.

CONCLUSION

Members of the federal judiciary have ethical and constitutional responsibilities to protect the independence and impartiality of the Judiciary. However, recent judicial actions have created threats to both. The Supreme Court rulings since 2000 have led to the erosion of voting rights due to the gutting of the Voting Rights Act of 1965 and permitting politicians to use voter suppressing tactics like Voter ID laws and gerrymandering. These tactics have allowed politicians to create artificially large representation in political bodies. In part, to maintain their ill-gotten political gains and gain influence over the Judiciary, politicians have packed the court with ideologically sympathetic judges and enticed more centrist nominees to embrace their political agendas in exchange for an appointment to prestigious positions.

The influence possessed by the Legislative and Executive politicians over the Judiciary directly threatens the independence and impartiality of the federal judiciary. To combat these threats, the federal judiciary should expand or create a Model Code to cover the Supreme Court. Additionally, the federal judiciary should provide strict scrutiny protections for voting rights, either by recognizing the right to vote as fundamental or incorporating it under another fundamental right, such as recognizing voting as a protected form of speech.

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107. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2504 (2019).