LEAGUE OF WOMEN VOTERS® OF ROSELLE/BLOOMINGDALE

Quarterly Issue Focus

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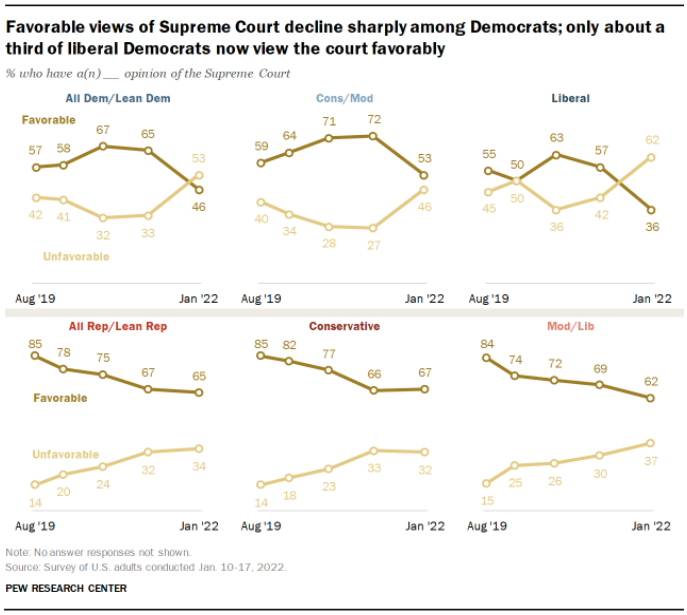
The Supreme Court: Issues, Approval Rating, and Reform

According to a June 2023 Statistica poll, the Supreme Court's approval rating has hit a new low, with just 36 percent of respondents indicating approval of the way the Court is handling its job. Pew Research Center offers additional analysis. The recent decrease in favorability is due in large part to a sharp decline among Democrats, although favorable ratings from Republicans have dropped as well. In addition, larger shares of adults, particularly Democrats, view the Supreme Court as ideologically conservative. Moreover, 84% of adults believe that Supreme Court justices should not bring their political views into their case ruling, but, just 16% said the justices were doing an excellent or good job in doing so.



Background

The Brennan Center's Michael Waldman explains that "Most of the time the Court reflects the public consensus. But a few times the Court has been unduly activist, ideological, or partisan, and that has provoked a fierce backlash. While the public believes courts should be nonpartisan, when the courts do turn partisan they can alter the direction of the country."

The 1857 *Dred Scott* decision that ruled Black people could never be U.S. citizens resulted in Abraham Lincoln becoming president and the rise of the Republican Party. Theodore Roosevelt's progressive Bull Moose presidential campaign was a reaction to Supreme Court decisions that had struck down popular attempts to regulate businesses. He believed the practice of Supreme Court judicial review was un-American and had made the "Constitution a means of thwarting instead of securing the absolute right of the people to rule themselves." To thwart the Supreme Court's power to decide the Constitution could mean whatever nine justices said it means, he proposed the popular recall of judges and their decisions. Constitutional scholars believe incumbent President William Howard Taft's stand against Roosevelt in favor of judicial independence in that election was the beginning of modern constitutional conservatism.[1] The liberal Warren Court was *ahead* of the country and some believe we are living through a conservative backlash to the Warren Court era.

In the 1960s and 70s, the US government undertook a vast regulatory expansion, passing the Consumer Bill of Rights, forming the EPA Environmental Protection Agency, and OSHA the Occupational Safety and Health Association. In 1971, future Supreme Court Justice Lewis Powell wrote a memo that helped galvanize business circles. He stated, "The American economic system is under broad attack and requires mobilization for political combat. Business must learn the lesson . . . that political power is necessary and must be used aggressively . . . in the scale of financing available only through joint effort."

[1] https://americanaffairsjournal.org/2020/08/theodore-roosevelt-and-the-case-for-a-popular-constitution/

Five justices on the current Supreme Court are acting under an originalism interpretation of the Constitution.[2] Originalism is a radically conservative judicial philosophy that asserts the only way to decide constitutional issues is to determine how those issues would have been decided when the Constitution was drafted. This interpretation ignores fundamental changes in our society and can upend over 200 years of precedent developed by prior justices who consistently rejected originalism.

It is interesting to note that conservative control of the Supreme Court is the result of minority rule. Three of the Supreme Court justices were appointed by former President Trump, who lost the popular vote; five of the justices were confirmed by a Senate that held more than 50% of the seats but represented less than 50% of the population. Putting this in perspective, Republicans in the Senate that blocked Obama Supreme Court nominee Merrick Garland's confirmation in 2016 represented about 20 million fewer people than their Democratic counterparts.[3]

Finally, attempts to cement partisan advantage in state Supreme Courts in the face of demographic shifts must be highlighted. In states where state Supreme Court judges are elected, we've seen historic levels of campaign contributions to control the outcomes of these elections.[4] The independence of our state and federal judiciary to decide cases based on law – with an understanding that court decisions should reflect the broad-based, cross-partisan will of the people – is at stake.

Controversial Supreme Court Cases with Implications for Democracy

In the 2010 *Citizens United v. FEC* case, the Supreme Court ruled that the US government cannot ban any political spending by corporations or unions in candidate elections, including money for campaign ads that either support or criticize certain candidates. This decision reversed some key campaign finance regulations, despite concerns that not restricting such spending might compromise democracy.

In the 2013 *Shelby County v Holder* case, citizens of Shelby County, Alabama sued Attorney General Eric Holder, citing that sections of the 1965 Voting Rights Act were no longer necessary because voting discrimination was no longer a problem. In a 5-4 decision, the Supreme Court ruled in favor of the plaintiffs, gutting the Voting Rights Act and making it possible for states to enact new restrictive voting laws. A second case,

In the 2019 *Rucho v Common Cause* case, the Supreme Court greenlit extreme partisan gerrymandering by ruling in a 5-4 decision that partisan gerrymandering claims are not justiciable because they present political issues beyond the reach of the federal courts.

In the 2021 *Americans for Prosperity Foundation v. Bonta* case, the Court handed down a 6-3 decision that created a presumption that the majority of donor disclosure laws are unconstitutional, allowing wealthy donors greater freedom to shape American politics and policy in secret. Not that long ago, there was a broad bipartisan consensus that disclosure laws aren't just permissible but essential in a democracy.

In December 2022, the Supreme Court heard arguments in the *Moore v Harper* case that relied on a once-fringe, widely disputed idea called the "independent state legislature theory" (ISLT).[5] The theory claims that under the U.S. Constitution, state legislatures have special power to determine how federal elections are conducted – without any checks or balances from state constitutions or state courts. A total of 69 amicus briefs were submitted, 48 of which were submitted by organizations across the political spectrum repudiating the theory – including the League of Women Voters of the US. The ISLT, if adopted, would have far-reaching implications for the future of American democracy. In an unprecedented move, the North

[2] https://www.washingtonpost.com/opinions/2022/06/30/supreme-court-originalism-constitution/
[3] https://www.vox.com/2020/9/1/21408512/poll-supreme-court-democrats-republicans-gap-merrick-garland
[4] https://thesupremecourts.org/2022/10/20/state-supreme-court-races-big-issues-big-money/
[5] https://www.npr.org/2023/01/22/1143086690/supreme-court-independent-state-legislature-theory

Carolina Supreme Court reversed its earlier decision on the congressional redistricting lawsuit that led to *Moore v. Harper* before the Supreme Court's ruling. The Supreme Court now may end up throwing out the case.

In a 5-4 decision, the Supreme Court upheld Section 2 of the Voting Rights Act (VRA) in the landmark redistricting case *Allen v Milligan*. Writing for the majority, Chief Justice Roberts noted the court was rejecting Alabama's effort to get it to rewrite its longstanding interpretation of Section 2 of the Voting Rights Act, which outlaws voting practices that discriminate on the basis of race. The ruling will allow pro-voting plaintiffs to continue utilizing this indispensable tool to challenge racially discriminatory maps in court.

Reform Proposals

Campaign Legal Center released a 2022 analysis discussing how "the current Supreme Court led by Chief Justice John Roberts has reversed decades of work by prior Courts that sought to perfect and protect our democracy." The analysis points to selective and inconsistently applied judicial and interpretive principles that eschew judicial restraint, devotion to text, and respect for precedent. Cases that are being brought before the court are increasingly political, and court rulings reflect stark, partisan division.

Many believe that our nation's courts have too much power to affect our social and economic lives without sufficient accountability. Nine unelected government officials serving for a lifetime make decisions on health insurance, reproductive rights, anti-discrimination protections, gun laws, and separation of church and state. As a result, discussions that Supreme Court reform is needed to realize a more equitable and inclusive democracy are receiving much attention.

Some proposed reforms include:

Institute Ethics Rules for the Supreme Court

Supreme Court judges are the only judges not governed by a code of ethics. Ethics rules might include creating a code of conduct, reforming gift and disclosure rules, limiting stock ownership, and instituting guidelines around recusals. Congress has introduced Supreme Court ethics legislation in the past, and this reform could generate bipartisan support since it has no particular partisan advantage. Recent reporting on ethics violations uncovered significant concerns: liberal justices have gone on foreign trips paid for by outside organizations; conservative Justice Thomas has accepted millions of dollars in undisclosed luxury trips from a mega donor. Despite these ethics revelations, Chief Justice Roberts sent a letter to Democratic senator Dick Durbin, refusing to testify before the Senate judiciary committee due to "separation of powers concerns and the importance of preserving judicial independence." However, Congress is meant to serve as a check and balance on judicial power.

Court Packing

Democrats accused Senate Republicans of hypocrisy when they confirmed Trump Supreme Court nominee Amy Coney Barrett the week before election day given that Senate Republicans refused to hold a confirmation vote for Obama nominee Merrick Garland during an election year. As a result "court packing," or adding more justices to the court, has received more attention.

The Constitution does not specify the number of justices who sit on the Supreme Court. Congress has the power to change it. A Democratic House bill, The Judiciary Act of 2021, proposed amending federal law to expand the Supreme Court from 9 to 13 and had 59 co-sponsors. The bill did not pass out of committee. Congressional approval for a court-packing bill would probably require extremely high levels of public anger at the Supreme Court. According to a Slate article on jurisprudence, "President Franklin Roosevelt's proposal to add seats to the Supreme Court as a solution to the Court's sabotage of many of his New Deal policies is widely viewed as one of his greatest blunders. The plan, which called for up to six new justices to be added to the Supreme Court, emboldened Roosevelt's foes and persuaded many lawmakers to become

his foes."[6] However, after Franklin D. Roosevelt threatened to expand the court in 1937, the Supreme Court began reversing its pattern of anti-New-Deal decisions.

In response to progressive calls to expand the court, President Biden created the Commission on the Supreme Court of the United States. The Commission issued a 300-page report amid unprecedented attacks on the independence of the Supreme Court, including a June 2022 visit to Justice Kavanaugh's home by a man with a gun, knife, zip ties, hammer, and a plan to assassinate up to three justices.

Liberal Justice Stephen Breyer and conservative Justice Amy Coney Barrett issued a series of responses against court packing on the grounds it would destroy the independence of the judiciary. Justice Breyer commented, "Well, if one party could do it, I guess another party could do it…On the surface it seems to me you start changing all these things around, and people will lose trust in the court." President Biden has publicly stated he does not support court packing.

Term Limits

U.S. Supreme Court justices serve for life. Interestingly, the United States is the only major constitutional democracy in the world to impose neither term nor age limits. Currently, U.S. Supreme Court justices are being confirmed at younger ages and staying on the bench longer. There is widespread agreement that no one should have that much power over such a long time. In addition, when justices can time their retirements so that presidents of particular parties can replace them and inconsistent arguments that Justice confirmations should wait until after elections, the public can conclude that Supreme Court voting patterns are tied to politics, not law. Given the length of service, perceptions of political machination, and increasingly factious confirmation hearings, instituting term limits for Supreme Court justices is much talked about. A bill introduced by Ro Khanna, a Democratic representative in 2020 proposed that the president appoint a new justice every two years for an 18-year term. If the latest appointment puts the total number of justices over nine, then the longest-serving member would retire. Justices who were already on the court before the enactment of the measure would be grandfathered in and would not have to retire. The bill never got out of committee. Some constitutional scholars believe term limit reform would require a constitutional amendment, others disagree and believe Republicans would approve given the grandfather clause. It should be noted, however, that the grandfather clause would mean that Democrats could not attain a Supreme Court majority for years. In 1951, we capped the number of terms the president may serve at two, recognizing that periodic turnover at the top of the executive branch better served our country.

Given the constitutional wording that justices "shall hold their offices during good behavior," Gabe Roth, executive director of the nonpartisan Fix the Court, proposes senior status to shield the judiciary from political machinations. Senior status is a classification for federal judges who are semi-retired. Senior judges who have met age and service requirement eligibility continue to serve on federal courts – but hear a significantly reduced number of cases. In 1919, Congress created the senior status option for federal district and appellate court judges, so conceivably could do so again.

A Balanced Court

Another form of court-packing called a "balanced" court, would create a Supreme Court where neither party dominates. In a 2019 paper titled, How to Save the Supreme Court, law professors Dan Epps and Ganesh Sitaraman proposed a 15-justice Court made up of five Democrats, five Republicans, and five justices chosen by the other 10. With this composition, the balance of power on the Supreme Court would be held by moderate judges acceptable to both political parties. The chief concern is that the Constitution gives the president the power to appoint new justices – not other justices – so it would likely be declared unconstitutional. The other issue is that a court-packing attempt to create a centrist Supreme Court could provoke Republican retaliation if Republicans regain control of the government. However, if public

6 https://slate.com/news-and-politics/2015/02/fdr-court-packing-plan-obama-and-roosevelts-supreme-court-standoffs.html

sentiment created enough political will to create a Democratic supermajority, Republicans might be willing to negotiate a compromise, and a balanced Court constitutional amendment could feature as that compromise.

Congressional Review of Supreme Court Statutory Decisions

The Congressional Review Act allows Congress to overturn rules issued by federal agencies. Congress could also implement expedited procedures to reconsider the Supreme Court's interpretation of federal law. A quick, majority legislative fix would implement a check and balance on the lopsided politicization of the Court and provide a greater balance of powers between Congress and the federal judiciary.

Jurisdiction-Stripping

Congress also has some power to instruct the Supreme Court that it is not permitted to hear certain cases, but the extent of the power is unclear. But, whether Congress has the power to enact a particular jurisdiction-stripping law would be decided by the Court itself, so the justices are likely to fight any attempt by Congress to limit its jurisdiction. In addition, if federal jurisdiction is removed on issues like abortion or voting rights, that would strip them of their authority to hear a case seeking to reinstate the provision of the Voting Rights Act or *Roe v. Wade*. At the same time, jurisdiction-stripping could prevent a rogue Court from creating new "rights" that implement conservative policy preferences from the bench.

Presidential (or congressional) Resistance to the Supreme Court

Both Abraham Lincoln and Franklin D. Roosevelt resisted the idea that Supreme Court justices should have the final say on constitutional matters by refusing to obey Supreme Court decisions. The Lincoln administration issued a passport to a black man and banned slavery in the territories in defiance of the Dred Scott decision. Fearing a conservative Supreme Court would reinstate "gold clauses'' that Congress had declared null and void, Franklin Roosevelt prepared a Fireside Chat announcing that he would not obey such a decision. The Court never forced him to deliver that speech. The theory that each branch of government may decide on its own how to interpret the Constitution, even in defiance of the Supreme Court, is known as "departmentalism." Departmentalism would not allow the president to completely neutralize such a Court decision, but it would allow the president or Congress to mitigate the harm created by Supreme Court decisions that are broadly unpopular.

Overriding Supreme Court Decisions

Though Congress cannot overrule a Supreme Court decision interpreting the Constitution, Congress may overturn, modify or reverse a federal statute if it disagrees with the Court's reading of that statute. According to a 2012 study between 1975 and 1990, Congress enacted "an average of twelve overrides of Supreme Court cases in each two-year Congressional term." A filibuster-free Congress controlled by a single party could challenge Supreme Court cases.

Omnibus Legislation Overruling Past Supreme Court Decisions

The bipartisan Civil Rights Act of 1991 overruled or modified five Supreme Court decisions that weakened Title VII Civil Rights Act of 1964, which concerned employment discrimination. Similarly, Congress could enact a Civil Rights Act of 2023 that overrides several Supreme Court decisions at once – especially decisions that weakened laws intended to protect our democracy.

League of Women Voters of the US Position

As Congress has grown more and more dysfunctional, the Supreme Court has gained a nearly unchecked power to determine the meaning of federal laws. The framers expected that their constitutional design would be adjusted as our democracy and culture evolved. However, any Supreme Court reform will be challenging to enact in a hyperpartisan America.

While the League has no explicit position on Supreme Court reform, a recent LWVUS blog titled The (Not So) Absolute Power of the Supreme Court concludes, "So long as the power of judicial review is in the hands of

nine justices with lifetime tenure, there is always the risk of it being used to diminish the rights of Americans and the prospect of protecting or expanding them. If there is a limiting principle to this power, it lies in the ability of the elected branches of government, Congress, and the President to pass laws and remedy the Court's rulings. Since 2016, the current US Supreme Court majority has objectively limited Americans' rights in an unprecedented fashion, through its rulings on abortion rights, partisan gerrymandering, and voting rights, among others. But it is important to note that the justices are not immune to public accountability. The Constitution and our history show the American people and their representatives have the power to prevent the Court from overreaching."