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US politics

Is reforming the US Supreme Court an impossible task?

This article should be used alongside 'LGBTQ+ rights in the USA: life after *Dobbs*' by Adam Burns (pp. 30–33).

The US Supreme Court historically derived its legitimacy from the perception that it was above party politics. Once appointed by the president and confirmed by the Senate, justices were expected to act independently, staying clear of the partisanship that dominated the other branches of government. Such was its prestige that the court's main power, judicial review, emerged organically from an 1803 court case (*Marbury v Madison*), rather than from a direct passage in the US Constitution. The trust bestowed upon the court allowed it to govern its own internal ethics procedures. Judges were held in such high esteem that it was deemed unthinkable they could ever entertain corrupt practices.

Now, however, public tolerance of the Supreme Court is on the wane, for three main reasons:

1. The highly partisan confirmation fights in the Senate.
2. Divisive court decisions, such as the 2022 *Dobbs v Jackson* ruling that allows state restrictions on abortion.
3. The questionable behaviour of some justices, raising concerns about ethics.

As a result, the court's standing among the public has slipped to record lows. A July 2023 Gallup poll found that just 40% of Americans approve of the Supreme Court – a significant fall compared to 62% approval in 2000.

Reforming the court has moved up the political agenda. Here are three options to consider:

1. changing or limiting the court's powers
2. increasing the number of judges
3. ethics reforms

1. Changing or limiting the court's powers

Background

The power of judicial review is not defined and indeed not even mentioned in the Constitution, which gives the court the ability to wade into pretty much any policy area it so chooses, so long as it relates its decisions back to the text of the Constitution. The Supreme Court has claimed this enormous power to the detriment of lawmakers who were elected on the promises they made to the American public. For instance, President Joe Biden promised to lift the burden of university tuition debt, yet the unelected Supreme Court declared his executive order on this matter to be unconstitutional. Identifying the areas that the Supreme Court can and cannot rule upon could give a rightful advantage to the elected branches of government.

Method

The US Constitution could be amended, perhaps to specify the areas of competence that the Supreme Court may involve itself in. It could, for instance, be excluded from health policy, which would then prevent decisions such as *Dobbs v Jackson*.

Potential problems

Limiting the power of one branch of government could give too much power to the other branches. Presidents would be able to take all kinds of executive actions without being held to account by the judiciary.

Chances of success

Next to zero. For a constitutional amendment to pass, two-thirds of both houses of Congress and three-quarters of state legislatures must ratify the decision, a prospect seemingly impossible in a hyper-partisan environment.

2. Increasing the number of judges

Background

In recent years, the Supreme Court has moved sharply to the right in the decisions that it has taken. For example, in *Students for Fair Admissions v Harvard* (2023), the court effectively banned affirmative action in university or college admissions. This could have a major effect on campus diversity. The court also restricted the Environmental Protection Agency's power to regulate carbon emissions in a 2022 ruling, and struck down New York's restrictive handgun laws to protect the Second Amendment. Furthermore, the Supreme Court ruled that a web designer had a First Amendment right to refuse to create sites for same-sex weddings, despite laws designed to prevent discrimination based on sexual orientation.

Liberals argue that to reverse this assault on civil and political rights, the number of judges on the court could be increased, which might neutralise conservative dominance. This approach is called 'court packing'.

Method

President Biden could nominate justices without waiting for a vacancy, and the Democrat-led Senate could approve them.

Potential problems

Some commentators point out that the so-called conservative takeover of the Supreme Court is overblown and that the nine justices often vote outside of the conservative and liberal blocks with which they are associated. According to the *New York Times*, the percentage of unanimous 9–0 decisions grew in 2023 to 47%, compared to 28% in 2022. The most conservative member of the court, Clarence Thomas, was only in the majority in 55% of cases. The right-wing shift of the court, so feared by liberals after Donald Trump got the opportunity to pick three Supreme Court judges, has arguably not occurred.

Chances of success

Limited. While there is no constitutional limit on the number of judges that can sit on the court, President Biden is an 'institutionalist' who treads carefully with political reform. Conservative Democrats in the Senate have expressed their opposition to court packing. There is also the concern

that court packing opens the floodgates: a conservative successor to Biden could inflate the conservative numbers on the court still further.

3. Ethics reforms

Background

The US Supreme Court has hitherto been trusted to avoid conflicts of interest, bribery and corrupt practices. It was hoped that a generous salary and life tenure would remove the temptations of high office that can befall elected members of Congress, who are constantly on the hunt to refill campaign coffers. Yet recently, the behaviour of justices has been called into question. Justice Clarence Thomas did not recuse himself from a case involving Trump and the 6 January insurrection, even though his wife is a pro-Trump election denier. Thomas has also enjoyed vacations paid for by billionaire Harlan Crow, whose companies have been involved in court proceedings before the Supreme Court. While there is no so-called smoking gun, the perception that Supreme Court justices are overly close to special interests has damaged its reputation for transparency and integrity.

Method

Congress could impose a new code of ethics upon Supreme Court judges, requiring public disclosure of all gifts and hospitality.

Potential problems

Supreme Court justices seem unwilling to reform the institution. In April 2023, Chief Justice John Roberts refused to testify before a Senate hearing on judicial ethics, citing the separation of powers as a cornerstone of the US political system.

Chances of success

Limited to fair. Many members of Congress feel that it is time lawmakers established an enforceable code of ethics for the Supreme Court. The main hurdle, as before, is partisanship. Clarence Thomas, the judge whose behaviour is causing the most controversy, is a darling of the political right. For Republicans, any change in the rules may be seen as a direct attempt by liberals to go after one of their own. Much of the effort to introduce ethics reform will rest on whether a semblance of bipartisanship can be maintained – and also on which party controls Congress after the 2024 elections.

There are several other suggestions for reform, ranging from term limits and a compulsory retirement age for justices to widening the pool of recruitment away from lower courts and towards academia and advocacy groups. Yet in the febrile, hyper-partisan arena of Washington politics, any reform faces immense and perhaps insurmountable challenges.

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