

Still Winning in the Court of Public Opinion

VIEWS OF THE U.S. SUPREME COURT REMAIN GENERALLY FAVORABLE, AND THAT MAY HAVE AN IMPACT ON WHAT THE JUSTICES DO IN THE COMING TIMES.

by Alan J. Borsuk

“It’s absolutely true,” Tara Leigh Grove said in a recent interview, “that in order for any court to function, the court needs some level of support from the political branches and from the general public as a whole.”

Grove is an expert on the United States Supreme Court. The “sociological legitimacy” of the Court has been a subject of interest to her for years. In October 2019, at a conference at Marquette Law School on public opinion about the Supreme Court, she said, “In our society, so far the losers [in cases before it] view the Supreme Court as a legitimate source of authority, and that’s what allowed the Supreme Court to function.”

Yet that legitimacy has become an issue of increased concern recently, even as signs emerge that overall deference to the Court and its decisions continues to prevail. Strong reasons for saying that confidence in the Court is steady lie in the results of two consecutive years of national surveys, by the Marquette Law School Poll, of adults on their opinions related to the Court, individual justices, and issues that have come before or may come before the Court. The poll results for both years showed much more respect for the Supreme Court than for the presidency or the Congress. The surveys also showed the majority of Americans believe that the Court makes its decision more on the basis of the law than on the basis of politics.

The first poll was “the deepest and broadest analysis of the Supreme Court that anyone has done,” Professor Lawrence Baum, a prominent political scientist at The Ohio State University, said at the time. The second poll matched the depth of the first—and Marquette Law School intends to make the poll an annual event.

It was the first poll, conducted in September 2019, that brought Grove and other highly regarded observers of the Court to the conference in Eckstein Hall. It was the second poll, with results that were nearly identical, that led to the

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more recent interviews with Grove and other experts on the Court.

But a set of major events involving the Supreme Court unfolded in short order after the fall 2020 polling was completed. The field work on the poll concluded on September 15. Three days later, shortly before the poll results were released, Justice Ruth Bader Ginsburg died. Both years of the Marquette poll showed her to be unusually well known among the justices, and with the most favorable overall standing in the public nationwide.

Ginsburg’s death led to then-President Donald Trump’s appointing Amy Coney Barrett, a judge of the Chicago-based U.S. Court of Appeals for the Seventh Circuit, to the Court and swift confirmation of the nomination by the U.S. Senate, with only one Republican dissenting and no Democrats in support. That increased to six the number of justices on the nine-member Court who are regarded as conservatives.

Then came the election of Joe Biden as president and Trump’s unrelenting effort to get courts—and particularly the Supreme Court—to intervene in the election results. Trump’s effort, of course, did not succeed, and the justices did not accept any of several challenges filed with the Court. That left a Democrat as president and the balance of power in the Senate and House with Democrats, while the Supreme Court, including three Trump appointees, continues with six of nine justices appointed by Republican presidents.

The tumultuous recent events reemphasize questions about the Court’s standing in public opinion, the effect that public opinion has on what the Court does, the strength of the assumption that those who lose major decisions will defer to the Court, and, most broadly, what lies ahead for the Court.

Asked whether the acceptance of Court decisions is changing, Grove said, “Unclear, but not yet.” She said, “The norm seems to have held through the Trump administration.” Although Trump announced at times that he would defy court decisions, in reality, he did not, Grove observed. ▶▶



Views on past decisions

The Marquette Law School Poll gave brief summaries of past decisions by the Court and asked respondents for their opinions; the full summaries are available online.

PAST RULINGS	Strongly Favor	Somewhat Favor	Somewhat Oppose	Strongly Oppose	Don't Know
Permit college use of race in deciding admissions	5%	12%	19%	54%	10%
Allow private employers with religious objections to exclude contraception coverage from health plan	17	17	18	33	13
Public financial aid may include religious schools' students	21	30	16	16	15
Uphold Indian treaty rights limiting reach of Oklahoma's criminal laws	21	25	13	12	27
Strike down certain regulations on abortion providers	27	19	16	20	18
Reject Trump administration effort to end DACA immigration policy	31	19	15	20	14
Hold 1964 anti-discrimination statute to include LGBTQ in its protections	38	25	12	13	11

Looking forward to possible decisions

The Marquette Law School Poll gave brief summaries of possible future decisions by the Court and asked respondents for their opinions; the full summaries are available online.

POTENTIAL RULINGS	Strongly Favor	Somewhat Favor	Somewhat Oppose	Strongly Oppose	Don't Know
Limit federal agency rulemaking	17%	36%	14%	5%	27%
Overturn <i>Roe v. Wade</i>	18	14	15	41	12
Rule religious schools to be substantially exempt from employment discrimination laws	18	23	19	24	14
Strike down limits on gun magazine capacities	20	17	17	33	11
Permit government to exclude from operating a foster-parent program a religious organization not willing to certify same-sex couples as foster parents	21	19	19	24	15
Strike down Affordable Care Act as unconstitutional	22	14	15	37	11
Rule against voting laws that have unequal party impact	30	19	14	15	21

Poll Shows Broad Approval of How the Court Does Its Job

The fall 2020 Marquette Law School Poll found that 66 percent of people nationwide approved of the way the Court was handling its job, while 33 percent disapproved. Overall, 59 percent said that they trusted the Court the most among the three branches of the federal government, with 24 percent trusting the presidency the most and 16 percent trusting Congress the most. Approval of the Court was higher among Republicans and conservatives, but a majority of Democrats (57 percent) also approved of how the Court was doing its job.

And 62 percent of those polled said that the Court decides cases mainly based on the law and not politics. There was little partisan variation in answering that question: 60 percent of Republicans, 61 percent of Democrats, and 65 percent of independents answered, “Mainly the law.”

The poll found that favorable public opinion about past and potential-future judicial decisions included issues where a decision by the Court could be called liberal, such as 63 percent of the public in favor of the ruling in 2020 that extended federal anti-discrimination laws to people who are gay or lesbian and 56 percent opposed to a potential decision overturning *Roe v. Wade*, the 1973 case legalizing abortion. On other issues, public majorities could be called conservative, such as 73 percent opposing the Court’s past decisions allowing use of race as a factor in college admissions. And on still other issues, public opinion was split, without clear majorities for either side.

As the year before, the 2020 poll also found that justices were not widely known by the public overall. More than 50 percent of people offered opinions, favorable or unfavorable, on only three justices: Ginsburg, Brett Kavanaugh, and Clarence Thomas. Fewer than half of those polled offered opinions on the other six justices, including Chief Justice John Roberts. In both years, Justice Stephen Breyer was the least-known member of the Court.

Professor Charles Franklin, director of the Marquette Law School Poll, said that the similar results of the two Marquette polls indicate that “people have limited information about the Court, that they do their best to apply that information when they’re thinking about the Court, but that, outside of the rare blockbuster decision that rivets public opinion, for the most part, people are not moved by day-to-day decisions of the Court very much.”

Which of the three branches of government is trusted most?

The Supreme Court

59%

President

24%

Congress

16%

Fall 2020 national Marquette Law School Poll

But, Franklin said, that stable and favorable standing could shift. “Where there is potential for more change is that a lot of views of the Court are filtered through a partisan lens, and that partisan structuring is pretty strong.” He added, “It’s surprisingly less strong than the way partisanship shapes our views of Congress, state legislatures, governors, and so on.”

Franklin said that it can be argued that justices can have an impact on public opinion of their work by deciding cases in ways to some degree attuned to general public opinion—or, as he put it, by “avoiding counter-majoritarian decisions on a variety of issues.” There is much debate about this among Court experts, with wide agreement that Chief Justice John Roberts is the person on the Court who most keeps an eye on public opinion on hot issues such as the constitutionality of the Affordable Care Act (Obamacare). Roberts is regarded as the member of the Court who is most concerned about losing the “sociological legitimacy” that Grove described.

Substantial Support for Changes in the Court’s Structure

Even with the relatively supportive public opinion of the Court, both years of the Marquette polling found levels of support for changes in the Court’s structure that surprised a number of experts. Among members of the public surveyed in the 2020 poll, 75 percent favored term limits for justices, 46 percent favored increasing the number of justices, and 41 percent favored limiting the ability of the Court to rule whether at least some laws are constitutional.

President Biden has appointed a commission to consider changes in the structure of the Supreme Court, but he has not given much support to substantive proposals along those lines. Term limits probably would require a constitutional amendment, and it is hard to picture that happening. Adding to the size of the Court could be done by Congress, but with an even split between Democrats and Republicans in the Senate, it is hard to see this occurring in the near future.

In an “On the Issues with Mike Gousha” program presented by Marquette Law School in October 2020, Russ Feingold, formerly a U.S. senator from Wisconsin and now president of the American Constitution Society, strongly criticized the appointment of Barrett to the Court. He said that Republicans had “stolen” two seats on the Court, the ones now held by Justice Neil Gorsuch and Barrett. “They are delegitimizing the United States Supreme Court, they are making it look like a kangaroo court in the eyes of the



American people because of this process,” Feingold said. “They’re setting off a situation where progressives and Democrats and others may have no choice but to consider the basic nature of judicial tenure or the number of members on the Supreme Court.”

In a phone interview in March 2021, Feingold stuck by these criticisms and said there needs to be “conversation” on how to change the Court’s structure to reestablish its standing in the eyes of the public as fair and nonpartisan.

But in a separate “On the Issues” program in October 2020, David French, a commentator, warned against trying to alter the Court’s structure. “Every escalation is accompanied by a greater and opposite additional escalation,” he said.

Knowledgeable observers interviewed for this story offered a range of opinions on what is likely to lie ahead for the Court. A few of their expectations:

A quiet period. Thomas W. Merrill, Charles Evans Hughes Professor at Columbia Law School and a former deputy solicitor general of the United States, said, “I have sort of perceived in the past that when the Court begins to be a matter of public controversy . . . , [the justices] tend to sort of draw under their shell like a turtle.” He added, “I should think that should very much be the case now, probably amplified.” If people are alarmed about the way Barrett was appointed and if there is substantial support for structural changes, “that is likely to cause them to be very cautious about provoking the Democrats and the Biden administration.”

A not-so-quiet period. David A. Strauss, Gerald Ratner Distinguished Service Professor of Law at the University of Chicago Law School and also a frequent advocate before the Court, said, “I’d group things into two categories: [first,] a set of high-profile issues that have been with us for a decade or more—abortion, affirmative action, gun rights.” He said, “There is no question what the majority’s inclination is on those issues. It’s really a question of how fast they’ll want to go and how sharply divided they will be.” He said he expected to see continued movement in conservative directions and that fast movement “is not impossible.”

The second category that Strauss described involves emerging issues, such as religious rights. Religion, he said, is “clearly something [the justices] are thinking about a lot and an area where they are willing to be fairly aggressive in recognizing rights of religious groups not to have to comply with laws that apply generally.”

More attention to challenges of administrative powers. Recent presidents, including Trump and Biden, have made extensive use of executive orders and administrative rule-making to accomplish their goals. Strauss said that challenges to such actions “set the stage for a different kind of confrontation between the branches.”

Marquette Law School Professor Chad M. Oldfather said he anticipates that, over time, this court “will try to pare back presidential power in a variety of ways.”

But Merrill suggested that, in the near term at least, the

Court might move cautiously in such cases because justices may not want to look as if they were asserting their power over administrative agencies or to appear to be opposed to Biden.

Uncertainty about the upcoming role of Chief Justice John Roberts. Strauss said, “It is no longer clear that the chief justice is at the center of the Court.”

Sarah Isgur, who works with David French on *The Dispatch* online news organization, said during a Marquette Law School “On the Issues” program that, with Barrett’s joining the Court and adding to the conservative majority, Roberts “just lost his swing vote privileges, if you will.” But, she noted, as the chief justice, Roberts still generally decides who is assigned to write opinions (where he is in the majority). This can be an important factor in shaping the impact of decisions. “I think you’ll see a lot more chief opinions,” Isgur said, because he will give himself more of a role.

Grove said, “It’s hard for justices not to care about the public view of the Supreme Court, and that often is particularly true of the chief justice.” A chief justice is the institutional caretaker, she said, and “when you’re the caretaker of an institution, you do care about that institution being able to go forward.” That could put Roberts in the role of trying to keep at least some of the Court’s decisions somewhat in line with public opinion.

Merrill suggested that Roberts is “hypersensitive” to perceptions of the Court. Some other justices also are concerned about the Court’s reputation if it overrules a lot of steps by the other branches of government, he said.

Lobbying from liberals for Justice Breyer to retire. When a vacancy occurs, appointing younger justices, with the hope that they will stay on the Court for many years, has become important to both Republicans and Democrats. Breyer is one of the Court’s liberals. At 82, he is currently the Court’s oldest member. He was appointed by then-President Bill Clinton in 1994. Breyer is believed to be in good health, but some liberals are suggesting he should step down, perhaps in June at the end of the Court’s current term, so that a younger liberal can be named while Democrats in the Senate have the votes to confirm. Feingold said, “I’d be a little surprised if he didn’t step down.”

A shift of more issues to the states. Marquette Law School’s Oldfather said, “I’m happy to be teaching state constitutional law now because I think state constitutions are going to matter more.” Oldfather suggested that, in coming terms, the Court will be “less inclined to make issues national” and will leave more to states. And, he said, if the Court takes steps to reduce abortion rights, the issue is likely to become important in some states.

In the end, Oldfather said, positive public regard for the Court is tied to people’s thinking that what the justices are doing is about the law and not about politics.

So far, the majority public opinion in the Marquette Law School Poll has been that the Court is more interested in the law. As long as that remains true, the legitimacy of the Court, in the eyes of the public, is likely to keep at bay both proposals for major structural change and calls for paring back the Court’s power. ■