

# A Favorable Court Opinion, *but Not Unanimous*

Marquette Law School Poll finds greater nationwide confidence in the Supreme Court than in the political branches, but substantial interest in structural change.

by Alan J. Borsuk



Illustrations by Robert Neubecker

In the polarized and impassioned proceedings that led to the impeachment of President Donald Trump by the House of Representatives and his acquittal by the Senate, who emerged with some dignity?

Chief Justice John G. Roberts, Jr.—and with him, one might suggest, the Supreme Court and the judiciary.

Consider this a metaphor for the findings of a nationwide Marquette Law School Poll finding that people overall had higher opinions of the Supreme Court than of the presidency or Congress. The poll also found a prevailing assessment of the Court as moderate to somewhat conservative and the justices to be motivated primarily by the law and not politics.

The poll was conducted in September 2019 and thus before and altogether separately from the subsequent impeachment proceedings. But the image of Roberts presiding in a level-headed fashion during the Senate trial, largely not responding to prodding from both the right and the left, symbolized views of the Court. The poll found public opinion to be moderately but generally positive.

Marquette Law School released the poll's results in a conference at Eckstein Hall on October 21, 2019. Charles Franklin, professor of law and public policy and director of the poll, said that while the general public has somewhat limited understanding of the Supreme Court and its workings, public opinion about the Court's work does matter.

"I think the core of the issue, for me, is that the real work of the Court is inaccessible to those not trained in the law," Franklin said in introducing the conference. "Yet a republic rests on the consent and, to some degree, the understanding, rather than blind faith, of the public. And so, odd as it may seem, the public does get to judge the judges. . . . A republic needs citizens who are satisfied with the outcomes."

A total of 1,423 adults were interviewed for the poll, from September 3 to 11, 2019. The margin of error for the results was +/-3.6 percentage points.

#### HIGHLIGHTS OF THE POLL'S FINDINGS:

- While there was broad support for the institution across the political spectrum, political conservatives held more favorable views of the Court than liberals did.
- Majorities supported some decisions or potential decisions involving abortion, gay rights, and bans on semiautomatic rifles that are generally labeled liberal; at the same time, majorities favored decisions or potential decisions of the Court, including a right to possess firearms and allowance of public funds to support students in religious schools, that are generally regarded as conservative.
- Awareness of the individual justices was fairly low. Only 34 percent of those polled offered an opinion on at least five of the nine justices, and 28 percent had no opinion on any of them.
- A majority of the public put a higher priority on decisions that have "a fair outcome" than on decisions that follow the law "even if seemingly unfair" (56 percent to 44 percent).
- A majority (57 percent) said that they support the Court's using "evolving" interpretations of the U.S. Constitution rather than interpretations based solely on the intent of the Constitution's framers.

Speaking at the Eckstein Hall conference, Professor Lawrence Baum of The Ohio State University praised the Marquette Law School Poll concerning the Court. "It is the deepest and broadest analysis of public opinion on the Supreme Court that anyone has done," he said. "And that's of great value simply for our understanding of the Supreme Court and its relationship to the public."

Here is a more-detailed look at the poll results and perspectives that were offered at the Eckstein Hall conference.

## Higher Opinions of the Court Than of Other Branches

A textbook approach might suggest that a president and members of Congress, all elected by voters and serving limited terms, would have a stronger connection with the general public than would Supreme Court justices, who are appointed by presidents and serve unlimited terms.

“If you think of citizen control over the Congress or over the presidency, the direct use of the ballot is surely a greater control than the indirect method of controlling the courts,” Marquette Law School’s Franklin said. “And yet, people don’t see those elected bodies as the ones they have the most confidence in.” Confidence is higher, though not exceptionally so, in the Court.

Overall, the poll found that 37 percent of people nationwide said they had high confidence (a “great deal” or “quite a lot”) in the Supreme Court. Another 43 percent had “some” confidence in the Court, while 20 percent had none or very little.

For the presidency, 28 percent had high confidence, 25 percent some confidence, and 47 percent low confidence. And with Congress, 10 percent had high confidence, 40 percent had some confidence, and 51 percent had low confidence. Franklin quipped at the conference, “I grew up in Alabama, and we were always happy for Mississippi, because it gave us someone to look down on. You might say that of the Court” compared to the Congress or the presidency.

In a separate question, people were asked which of the three branches of government they trust the most. The Supreme Court was the answer of 57 percent, with 22 percent saying Congress and 21 percent the presidency.

Carl Hulse, chief Washington correspondent for *The New York Times*, said at the conference in Milwaukee, “The poor Congress—they always come off so bad in those polls. [That] helped them [the justices] keep a standing above the other branches of government, which has been great. It’s upheld their credibility and legitimacy.” Hulse is author of the recent book, *Confirmation Bias: Inside Washington’s War over the Supreme Court, from Scalia’s Death to Justice Kavanaugh*.

Thomas L. Shriner, Jr., a partner at Foley & Lardner and adjunct professor at Marquette Law School, said, “It’s a good thing to have one of the branches of our government be legitimate, right? Particularly when the other two seem intent on destroying themselves, from the point of view of legitimacy.”

Which of the three branches of government is trusted most?

The Supreme Court

57%

Congress

22%

President

21%

Baum, whose work includes the recent book *The Company They Keep: How Partisan Divisions Came to the Supreme Court* (with Neal Devins), said, “It seems to me, for the most part, that what the public tells us in surveys suggests the Court is not in any particular danger, that there’s a fairly deep reservoir of support for the Court that stands up even during times we might expect the Court to be fragile.”

Not surprisingly, given the current makeup of the Court and recent appointments, the poll found more positive opinions among Republicans and conservatives than among Democrats and liberals. Among those identifying themselves as Republicans, 54 percent had high confidence in the Court. Among Democrats, the figure was only 23 percent. Confidence was higher among those saying they were “very conservative” (52 percent of whom said they had confidence) or “conservative” (46 percent of this group reported confidence) than among those identifying as “very liberal” (31 percent of whom reported confidence) or “liberal” (33 percent of this group).

The large majority of people saw the Court as a relatively middle-of-the-road institution when it comes to ideology. Franklin said that from the positions taken in some political settings, one would think that opinion tends to run toward strong views that the Court is very conservative or (more so in the past) very liberal.

“The public, though, doesn’t see things quite in such stark terms,” Franklin said. He showed results of questions on how conservative or liberal the Court is. “I think the thing that leaps out of this is how few people see an extreme court.” Among respondents, only 6 percent called the Court “extremely conservative” and 3 percent called it “extremely liberal.”

“It’s not simply that people pick the middle of the scale without any further meaning, but it is that whether it’s a centrist Court, as 50 percent see, or a bit conservative, as 33 percent see,” most respondents see a court that stays “in a sort of middle that tilts a bit to the right currently,” said Franklin.

An additional result: Matching results on questions about how much people pay attention to the work of the Court with questions about people’s confidence in the Court found that, in general, the more people know, the more confidence they have. Franklin said, “You might imagine insiders being quite jaundiced, but it’s actually just the opposite. Those who are following and are paying attention generally are pretty confident about what they see, rather than doubtful.”

## Substantial Support for Fundamental Structural Changes

The somewhat positive opinions of the Court do not mean that people are satisfied with the way it operates. Several experts who spoke at the conference were struck by levels of support for fundamental changes in the nature of the Supreme Court, including the setting of term limits for justices and increases in the number of justices. For example, 34 percent of those polled strongly favored setting a fixed term for justices, and another 38 percent favored this idea, which comes to more than two-thirds of those polled.

*The New York Times'* Hulse said, "The majority support for term limits really jumped out at me. That was my big thing when I looked at [the poll]. That tells me that the Court has a problem." He suggested that sentiment for term limits has increased in the light of confirmation fights in recent years and the political wrangling over whether to give Judge Merrick B. Garland a hearing before the Senate after President Barack Obama nominated him for the Court in 2016.

**72%**  
Favored or  
strongly favored  
setting a fixed term  
for justices.

Professor Tara Leigh Grove, the Mills E. Godwin, Jr., Professor of Law and Cabell Research Professor at William and Mary Law School, said, "For me, the most striking number in [the] survey was that 43 percent of Americans now favor or strongly favor packing the United States Supreme Court. I cannot emphasize enough what a sea change that is in the way that people think about Court packing."

Grove, author of a recent essay in the *Harvard Law Review* titled "The Supreme Court's Legitimacy Dilemma," said, "That suggests some not-so-good things for what many of us call the Supreme Court's sociological legitimacy. . . . Without sociological legitimacy, the Supreme Court can't do much of what it does."

Grove cited the way Democratic presidential candidate Al Gore accepted the decision of the Court against him in *Bush v. Gore*, the case that ended legal disputes over who won the 2000 presidential election. "In our society so far, losers view the Supreme Court as a legitimate source of authority, and that's what allowed the Supreme Court to function. But what happens to the Supreme



**“It is the deepest and broadest analysis of public opinion on the Supreme Court that anyone has done.”**

Professor Lawrence Baum

Court’s sociological legitimacy when one group, if this happens, becomes the consistent loser in the most high-profile Supreme Court decisions? I think that is what people are concerned about today. . . .

“Well, one possibility is that if a single political party takes over in 2021, if there would actually be Court packing. . . . [I]t would not stop there, because once that becomes an accessible form of changing Supreme Court decisions, it’s likely that the next political party would also change the number of the Supreme Court justices to go from 9 to 12 to 16 and so on. So that’s not a pretty picture for the Supreme Court. . . . I want to suggest to you that efforts to save the Supreme Court by structurally reforming it are most likely to do the very opposite.”

### **Does Public Opinion Affect Decisions of the Court?**

There was general agreement among speakers at the conference that justices generally do not tailor their opinions to fit public opinion—but that the Court is also not oblivious to public sentiment.

Baum said, “To me, it’s pretty far-fetched to imagine that justices systematically respond to the public in ideological terms. . . .

“Now another possibility gets more attention, and I think deservedly gets more attention. This is that the justices respond selectively to their perceptions of the public—that maybe in the great majority of cases, their perception of public opinion doesn’t matter. But there are those occasional cases in which they perceive that the public is strongly on one side. They feel like, well, maybe we shouldn’t take a position that runs so counter to the views of the public, because, ultimately, doing that kind of thing might erode our legitimacy. . . .

“Maybe [a] justice stands in the ideological center of the Court [and so] would be in particularly good position to determine what the Court does,” Baum continued. “And maybe the justice has a special concern with the public image of the Court, as a chief justice might. So, in fact, we are in a time where it seems to me a little more plausible than it usually is that at least one justice is willing to respond to public opinion.

“And as you’re well aware, there’s at least a widespread perception, correctly or incorrectly, that Chief Justice Roberts has done that twice: first, in his decisive vote to uphold the Affordable Care Act or, more specifically, the individual mandate in 2012 and, second, his decisive vote in the census case on the inclusion of a citizenship question in June 2019.”

### **Putting the Law First**

Robert Barnes, who covers the Court for the *Washington Post*, said at the conference that some people thought the 2000 decision in *Bush v. Gore* “would be seen as the end of the Court as a neutral arbiter. And in fact, it wasn’t that way at all. Their approval went up a little bit after that. And I think that there still is this belief out there that . . . the Court will try to decide things fairly and that the Court’s decisions deserve respect. Now maybe they will decide something that is going to break that, but we haven’t seen it yet.”

Peter D. Keisler, a co-leader of the Supreme Court and appellate practice group at Sidley Austin in Washington, D.C., has extensive experience in the U.S. Department of Justice, including a period as acting attorney general in 2007. He told conference attendees that it was “fascinating that you had a 64 percent to 32 percent breakdown with people believing the Court cares mainly about the law versus mainly about politics.

“I think the question is, where does that come from? Because it’s not intuitive in a country where there’s a whole lot of cynicism about institutions generally and government institutions in particular, and where, if you talk about the Court, most of the public rhetoric is not defending the Court. You have the president speaking often in very political terms about judges and justices. You have a Senate where roughly half of the Senate will pronounce any nominee unqualified and unsuited for the Court.

“So where do people draw this faith from, because it’s not really in the air around them? And I do wonder whether the current chief justice’s focus on the legitimacy of the Court has been a contributor to that.”

Keisler recalled when he was a Supreme Court clerk (to Justice Anthony M. Kennedy), during the chief justiceship of William H. Rehnquist. Rehnquist, Keisler said, “didn’t think about how the public thought about the Court. The current chief justice does, and it’s not just a recent thing. I mean, from his first days on that court, [Roberts] said he wanted the Court to function more like a court—not just an aggregation of nine individuals who vote and reason in a particular way and then you add them up and see who has the majority.

“I don’t believe—it’s not my perception—that he or anyone else [of the justices] has been switching their vote on the outcome of cases in order to

protect the Court's legitimacy. But there are softer ways for a chief justice or other members of the Court to try to be stewards of the public perception of the Court's neutrality."

Judge Diane S. Sykes, L'84, of the United States Court of Appeals for the Seventh Circuit, spoke along similar lines. "I have to first announce disagreement with [any] premise that the Court changes its voting behavior based on concerns about legitimacy," she said. "I don't perceive that that happens very often if at all." She said that, in the poll overall, "those who held the Court in high trust, esteem, and confidence saw it to a greater degree as being mainly a legal institution doing mostly law, and not politics by another means."

Tom Shriner also downplayed the idea that Supreme Court decisions were shaped by public opinion, but he expressed a related concern. "The only kind of perception I've ever had that sometimes federal judges are not as independent as they ought to be doesn't come in the Supreme Court. It comes in the lower courts where some judges are looking for promotion and don't want to annoy the appointing authority." But he said that this was not a big problem overall.

## Opinions of Individual Justices

The poll asked people to rate the individual justices. Poll director Franklin said that, generally, the question is "just a head scratcher for the public."

Two-thirds of people offered no opinion of a majority of members of the Court, and no justice drew opinions from more than 60 percent of those polled.

Justice Stephen Breyer was the least well-known, with 5 percent of people saying they had an unfavorable opinion of him, 11 percent a favorable opinion, and 84 percent having no opinion. Seventy percent or more had no opinion of Justices Elena Kagan, Samuel Alito, and Neil Gorsuch. Even Roberts, the chief justice since 2005, drew no opinion from 66 percent of people, with

**Justices Ruth Bader Ginsburg and Brett Kavanaugh had the highest levels of recognition.**

**Justice Ginsburg**

**41%**

Favorable opinion

**17%**

Unfavorable opinion

**Justice Kavanaugh**

**26%**

Favorable opinion

**32%**

Unfavorable opinion

favorable opinions from 25 percent and unfavorable opinions from 9 percent.

Justices Ruth Bader Ginsburg and Brett Kavanaugh had the highest levels of recognition. For Ginsburg, who has become a high-profile hero to many liberals, especially women, 41 percent said they had a favorable opinion, 17 percent unfavorable, and 41 percent no opinion. For Kavanaugh, 26 percent stated a favorable opinion, 32 percent an unfavorable one, and 42 percent no opinion. Kavanaugh, whose confirmation hearings the previous year created great controversy, was the only justice with higher unfavorable than favorable totals.

Franklin said that even elected officials often have high rates of unfamiliarity, "but with the Court, that's especially strong." He said, "Justice Roberts is, in many ways, the most interesting. If he is the swing justice, he is also sort of the median justice in familiarity and recognition, and party [affiliation of those who were polled] plays almost no role whatsoever in how people perceive him in favorable or unfavorable terms, though ideology does structure that some, with conservatives more favorable."

The prominence of some justices drew concern from several speakers at the conference.

Professor Chad Oldfather of Marquette Law School, who moderated a number of the discussions, said, "It was no surprise to me that Justice Ginsburg was the most widely known, and what that relates to

is a phenomenon that some legal scholars have noticed and remarked, I would say generally unfavorably, upon over the last several years, which is the notion of the celebrity justice. . . . That we have now this world in which Justice Ginsburg has somehow become the Notorious RBG."

Baum said Justice Sonia Sotomayor also has sought celebrity, "but not in a way that really has anything to do with what she does as a justice." He had less concern about her prominence than about Ginsburg's, which he feared might lead to perceptions of her trying to please those who admire her.

Baum added, "I have to confess, my favorite justice

## The low profile of most Supreme Court justices

The Marquette Law School Poll asked people about their awareness and perception of each of the nine justices of the Supreme Court. "Unable to rate" was the majority answer for all but three of them.

JUSTICES	Unfavorable	Unable to rate	Favorable
Breyer	5%	84%	11%
Kagan	7	78	15
Alito	8	78	15
Gorsuch	12	70	18
Roberts	9	66	25
Sotomayor	11	59	30
Thomas	23	49	28
Kavanaugh	32	42	26
Ginsburg	17	41	41

## Views on past decisions

The Marquette Law School Poll gave brief summaries of various past decisions by the Court and asked for the public's opinions; the full summaries can be found online.

	Strongly Oppose	Oppose	Favor	Strongly Favor	Don't Know
Race as factor in admissions	57%	21%	11%	4%	7%
Corporate political spending	53	22	11	3	10
Permitting employers to exclude birth control coverage	44	19	13	14	10
Upholding travel ban for several mostly-Muslim countries	33	16	19	23	10
Not reviewing partisan gerrymanders	26	19	15	11	29
Recognizing right to same-sex marriage	23	13	20	36	9
Recognizing right to own firearm	11	13	27	40	8

is [former] Justice David Souter, who never said anything to anybody and wanted nobody to recognize him.”

Grove said, “I also think Justice Sotomayor has gone out of her way to reach people who don’t normally think about the Supreme Court, including on *Sesame Street*. So my kids enjoy that. And I enjoy saying, ‘Hey, there’s a justice of the Supreme Court. There’s something relevant to what Mommy does for a living.’ And I think that’s powerful.”

Grove said she had mixed emotions about Ginsburg’s celebrity. “It’s hard for me to imagine it’s healthy for any one person to be going out and getting that kind of fame. On the other hand, I wonder, should we really judge [her], because if any one of us were in our 80s and we could fill an entire football stadium with people because of what we had done in the law . . . I mean, that’s pretty cool.

“I might prefer that all the justices live in a bubble—I kind of do—and just think deep thoughts. But I think it’s hard to begrudge someone for enjoying [the attention] in her 80s.”

One question in the poll asked whether more of the justices were appointed by Republican or Democratic presidents. Describing the responses, Franklin said, “First of all, there’s a lot of uncertainty. Four percent are sure that Democrats control the majority, 19 percent are sure the Republicans do.

But that leaves an awful lot of people in these two middle categories who think erroneously it’s probably the Democrats at 25 percent,” while 50 percent say probably the Republicans. The correct answer is that Republican presidents have appointed five of the current justices and Democrats four.

## Opinion on Supreme Court Issues

If large numbers of people don’t have opinions on the individual justices, they do have opinions on some of the major issues addressed in Supreme Court decisions or potentially to be addressed in upcoming decisions. Franklin said that the issues that people use to orient themselves in their political lives in general are often the issues they use in assessing the work of the Supreme Court. That includes abortion, health care, gun rights, gay rights, and affirmative action. “The upshot is that people are making sense of the Court in the terminology, the language, that they’re used to,” Franklin said.

The poll asked people their opinions on 14 cases involving controversial subjects or pending subjects.

In some instances, the majority public opinion could be labeled as being on the liberal side. In others, it was on the conservative side. In some respects, the public was in line with the Court’s rulings, while in others it was in disagreement.



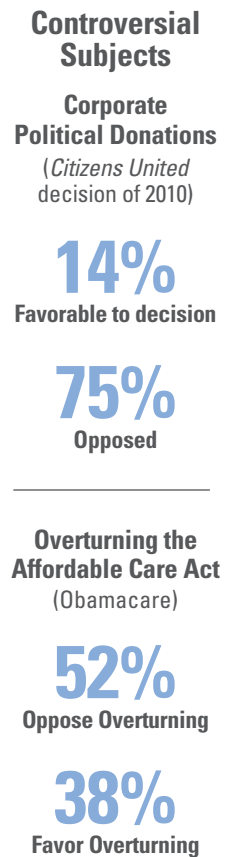


**SEVERAL EXAMPLES:**

**Corporate political donations** (the *Citizens United* decision of 2010). Franklin said that the decision, involving political donations by corporations, drew some of the strongest public disagreement. “This is a very unpopular decision, with only 3 percent strongly in favor and 11 percent somewhat in favor,” he said. “And then you get a total of 75 percent opposed to one degree or another, with some pretty intense opposition.”

**Use of race in college admissions.** Seventy-eight percent strongly opposed or opposed such policies, although the Supreme Court has allowed the policies to continue, with some limits. Franklin said, “This is actually a good example of the Court adopting a position where the public disagrees, [and] staying with that position for decades.”

**Allowing private businesses** to not offer employees coverage for prescription birth control because of the owners’ religious objections. “There’s a lot of opposition to that decision,” which the Court issued in 2014, Franklin said. Sixty-three percent strongly opposed or opposed the Court’s decision, while 24 percent strongly favored or favored it.



**Allowing private possession of firearms** (the *Heller* decision of 2008). “Sixty-seven percent support that decision for personal possession of a firearm,” Franklin said. “It’s opposed by just 24 percent.”

**Abortion rights.** The poll asked people their opinion on whether the Court should strike down the 1973 *Roe v. Wade* decision on abortion. In line with other polls, the result was 61 percent strongly opposing or opposing overturning *Roe* and 29 percent favoring or strongly favoring such overruling.

**Overturning the Affordable Care Act (Obamacare).** Franklin said, “Folks are not in love with Obamacare, but they are not very happy with the idea of overturning it at this point.” In this poll, 52 percent strongly opposed or opposed overturning the law, while 38 percent strongly favored or favored doing so. “There’s still a partisan divide over this,” Franklin said, with Democrats more opposed to overturning the ACA and Republicans more in favor of doing so. (The Supreme Court announced in March that it would hear a case from Texas seeking to overturn the law.)

**Looking forward to possible decisions**

The Marquette Law School Poll gave brief summaries of various possible future decisions by the Court and asked for the public’s opinions; the full summaries can be found online.

	Strongly Oppose	Oppose	Favor	Strongly Favor	Don’t Know
<b>Overturn <i>Roe v. Wade</i></b>	47%	14%	13%	16%	9%
<b>Permit a business to deny service to gay people</b>	40	17	15	19	9
<b>End DACA</b>	37	16	20	17	9
<b>Rule that banning semiautomatic rifles is unconstitutional</b>	36	17	14	25	8
<b>Strike down Affordable Care Act</b>	35	17	15	23	10
<b>Interpret existing statutes as disallowing LGBTQ-based employment discrimination</b>	18	12	22	39	9
<b>Permit use of public funds for religious school students</b>	17	16	31	22	14



## The Law Versus Fairness—Empathy at the Top of Judicial Traits

Which is more important, a decision that leads to “a fair outcome” or one that follows the law even if it is “seemingly unfair”? The poll found that 56 percent of the public favored fairness and 44 percent favored adherence to the law.

Asked about the debate between those who say the original meaning of provisions of the Constitution should control decisions and those who say the meaning of constitutional provisions can evolve over time, a majority (57 percent) said the meaning can evolve and 43 percent favored sticking to the original meaning.

As for the traits a Supreme Court justice should have, empathy drew the most support, with 69 percent saying that it was very important. Sixty-five percent said good judgment was very important, 44 percent said respect for precedent was very important, and 43 percent said judicial philosophy was important.

## The Long-term View

Foley & Lardner’s Shriner expressed dismay with the state of the course of appointments and confirmations involving justices, with “overly political, brazenly political appointment followed by the expected attack by almost the majority of the Senate on whoever is being put forward, and then going out to see what you can find out about their past and

### Interpreting Law

Fairness versus adherence to the law

**56%**

Favored fairness

**44%**

Favored adherence to the law

Original meaning versus meaning can evolve

**57%**

Support meaning can evolve

**43%**

Support retaining original meaning

dragging them through the mud. I mean, it hurts the institution to have that kind of stuff going on.

“But you can’t avoid it because that’s one of the protections in the Constitution, too, that you’ve got to get somebody appointed, and that person has to get a majority of votes in the Senate to become a judge. That isn’t going to change, and, you know, we’ve survived that.” Shriner pointed to a number of related historical examples, including Congress’s increasing the size of the Court during President Abraham Lincoln’s tenure and reducing it during President Andrew Johnson’s. “We’ve survived that for 230 years. And I don’t see any real indication that we’re not going to survive it.” ■

*The Marquette Law School Poll surveying opinions about the U.S. Supreme Court was conducted September 3–11, 2019, surveying 1,423 adults nationwide, with a margin of error of +/-3.6 percentage points. Interviews were conducted by the National Opinion Research Center (NORC) using its AmeriSpeak Panel, a national probability sample, with all surveys conducted online. The detailed methodology statement, complete survey instrument, topline results, and crosstabs are available at <https://law.marquette.edu/poll/2019/10/21/detailed-results-of-the-supreme-court-poll-september-3-13-2019/>.*