

# Class Meeting 26: DPI-505 MQD & Wrap Up!

Maya Sen

Harvard Kennedy School

# Announcements

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- Memo #4 due 12/17/2024 by 5pm on Canvas as a PDF
- I will have OH as usual through next week

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- With Trump elected, EPA replaces this with Affordable Clean Energy (ACE) rule
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  - Reduction of only 1.5% of CO2 emissions from 2005 levels by 2030

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- What standard should apply? Arbitrary & capricious? Chevron? Intelligible principle?

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- For important issues, Congress needs to direct the agency more specifically
- Our “precedent teaches that there are ‘extraordinary cases’ that call for a different approach—cases in which the ‘history and the breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority

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*Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us “reluctant to read into ambiguous statutory text” the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to “clear congressional authorization” for the power it claims.*

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  - But: Chevron overturned
- → Together, suggest that courts will review statutory interpretation by agencies much more closely, significant shift

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  - Arbitrary & capricious standard (process)
  - Loper Bright doctrine (substance) - ????
  - Major questions doctrine (substance) -???

# Facts about the state of SCOTUS

## The Justices, From Left to Right

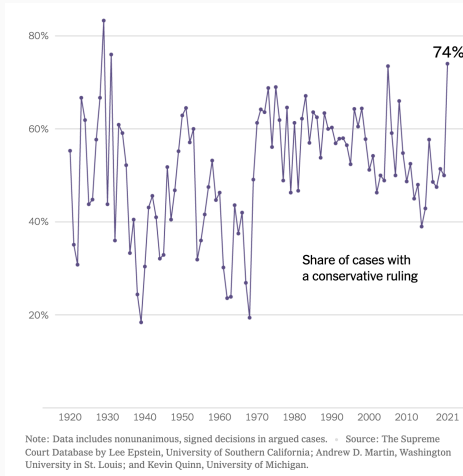
Justices are sorted from left to right by their Martin-Quinn scores, which estimate ideology based on voting patterns.



Source: The Supreme Court Database by Lee Epstein, University of Southern California; Andrew D. Martin, Washington University in St. Louis; and Kevin Quinn, University of Michigan.

Source: NYT

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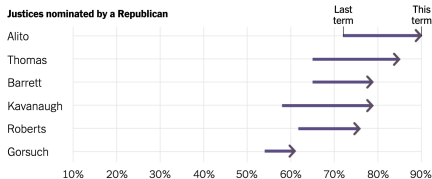
# Facts about the state of SCOTUS

## Change in Conservative Voting

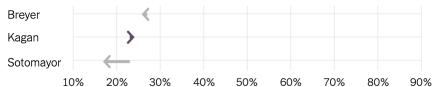
Each of the justices nominated by Republican presidents voted much more conservatively this term, but Justice Brett M. Kavanaugh shifted the most to the right.

### Percentage of votes that were conservative

#### Justices nominated by a Republican



#### Justices nominated by a Democrat



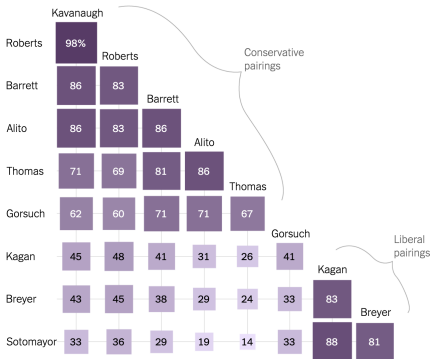
Note: Data includes nonunanimous, signed decisions in argued cases. - Source: The Supreme Court Database by Lee Epstein, University of Southern California; Andrew D. Martin, Washington University in St. Louis; and Kevin Quinn, University of Michigan.

Source: NYT

# Facts about the state of SCOTUS

## How Often the Justices Agree

Chief Justice John G. Roberts Jr. and Justice Brett M. Kavanaugh were the most likely to agree, voting together in 98 percent of nonunanimous cases.

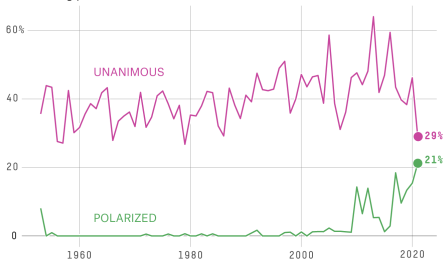


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# Facts about the state of SCOTUS

## Supreme Court decisions are increasingly polarized

Share of Supreme Court decisions that were either unanimous or polarized by party of the nominating president, from 1953 to 2021



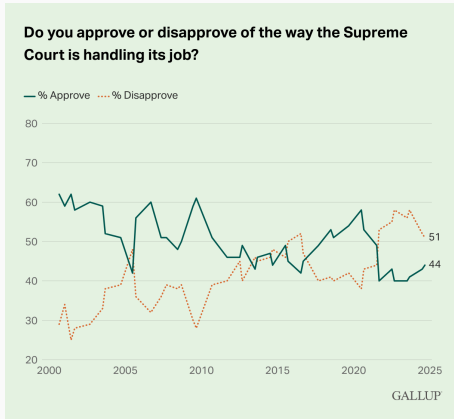
Unanimous decisions are those in which all voting justices are on one side of the issue; polarized decisions are those in which all Republican-appointed voting justices are on one side and all Democratic-appointed voting justices are on the other. Recusals are ignored in both cases.

FiveThirtyEight

SOURCES: SUPREME COURT DATABASE AND SCOTUSBLOG

Source: 538

# Impact on Public Opinion

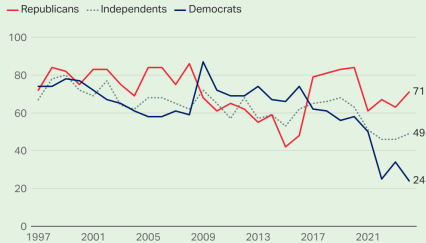


# Impact on Public Opinion

## Partisans' Trust in the Judicial Branch of the Federal Government, 1997-2024

How much trust and confidence do you have at this time in the judicial branch headed by the U.S. Supreme Court?

% Great deal/Fair amount



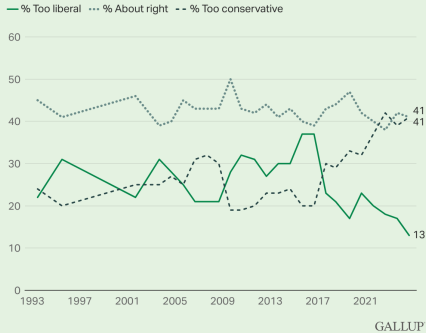
Figures for 1972-1976 not shown

GALLUP

# Impact on Public Opinion

## Americans' Views of the U.S. Supreme Court's Ideological Leanings, 1993-2024

In general, do you think the current Supreme Court is too liberal, too conservative or just about right?



# Types of Court Reforms

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  - Term Limits
- ② Reforms that strip power of the Court
- ③ Ethics Reforms

→ Given polarized opinion of Court approval, all have heavy ideological component, backers, and opponents

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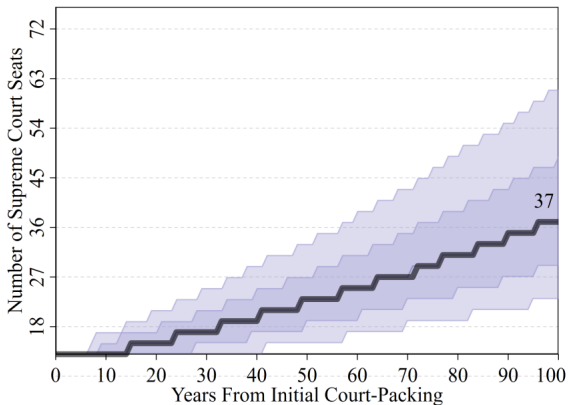
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- Problem: This invites “tit for tat” strategy, where the next president could do the same
- Thus: Not only does this expands the size of the Court beyond 9, but concern is that size of the Court could explode

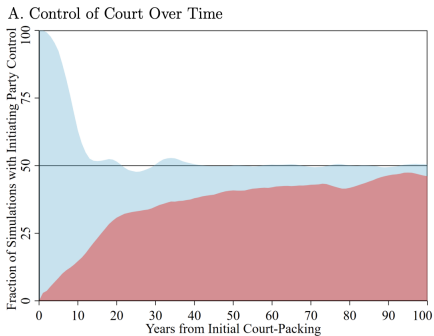
# Reforms that Moderate: #1 Court Packing

## D. Size of the Court



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Figure 7: Incentives for Initiating Court-Packing: Control of the Court



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- Problem: Under Constitution, Article III judges “hold their office during good behavior”
- Who interprets the Constitution? SCOTUS (Marbury v. Madison)

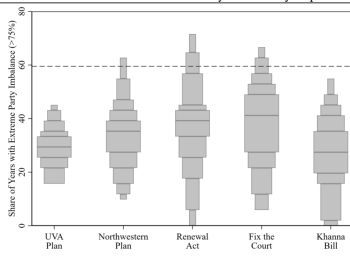
## Reforms that Moderate: #2 Term Limits

Chilton et al:

*[A]ny of the major term-limits proposals are likely to produce similar, dramatic changes in the ideological composition of the Supreme Court. Most significantly, the Supreme Court had extreme ideological imbalance—which we define as seventy-five percent or more of the Justices appointed by presidents of the same party—for sixty percent of the time since President Franklin Roosevelt’s effort to pack the Court. Although there are notable differences between each of the major term-limits proposals, they all would have reduced extreme imbalance over the same time period by almost half. This finding is explained by the fact that term limits prevent Justices from using strategic retirement to maintain their party’s ideological advantages on the Court.*

## Reforms that Moderate: #2 Term Limits

FIGURE 11. Share of Years with Extreme Party Imbalance by Proposal



The results in Figure 11 reveal that all five plans result in less party imbalance than what actually occurred from 1937 to 2020. The reason is simply that all plans decrease the possibility of extreme swings in the appointment of Justices by presidential term by reducing, if not removing, the roles of unexpected vacancies and strategic retirement in shaping the Supreme Court. Instead, the median share of years with extreme party imbalance ranged from 27.5% under the Khanna Bill to 41.2% under the Justices on Deck proposal.

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  - Limit judicial review (Bowie)
- Problem: Subject to Constitutional interpretation

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Bowie:

*Eliminating the power of courts to decline to enforce federal law would be a major step toward bringing federal courts in line with the demands of political equality. Yet so would even more modest proposals, like prohibiting federal courts from declining to apply federal laws absent consensus or a supermajority vote.*

## Reforms that Strip Power

Doefler & Moyn:

*The first type of reform, which we call personnel reforms, includes both aggressive proposals like court packing and more modest (or politically moderate) reforms such as partisan balance requirements or panel systems....What these proposals do is change the partisan or ideological character of the individuals who wield it. The second type, which we call disempowering reforms, include things like jurisdiction stripping and a supermajority requirement for judicial review. These reforms take power away from the Court, redirecting it to the political branches instead. [These] reforms, we argue, advance progressive values systematically. While such reforms would not guarantee advances in social democracy, they would ensure that the battle for such advances takes place in the democratic arena, which for progressives is where they have to occur now—and should occur—if they take place anywhere.*

# Ethics Reforms

The New York Times

GIVE THE 1

## *Supreme Court Adopts Ethics Code After Reports of Undisclosed Gifts and Travel*

The code does not specify how the rules would be enforced or by whom.

 Share full article



 1.8K



# Ethics Reforms

Justice Clarence Thomas has faced particular scrutiny. In part that is because of the political activities of his wife, Virginia Thomas, who worked to overturn the 2020 election results in the weeks leading up to the Capitol riot. That Justice Thomas continued to participate in cases related to the Jan. 6 attack or the outcome of the 2020 election [elicited criticism](#).

In April, ProPublica documented [the justice's years of undisclosed luxury travel](#), including private jets and trips aboard a superyacht at the largess of a Texas real estate magnate and conservative donor, Harlan Crow.

Since then, several news organizations, including The New York Times, have revealed [undisclosed gifts to Justice Thomas by powerful friends](#). Those include [the payment of private school tuition](#) for a grandnephew whom the justice was raising, an undisclosed real estate deal that involved [the purchase of the justice's mother's home](#) and an undisclosed loan for [the purchase of Justice Thomas's motor coach](#).

# Ethics Reforms

## **SUPREME COURT OF THE UNITED STATES**

STATEMENT OF THE COURT

REGARDING THE CODE OF CONDUCT

The undersigned Justices are promulgating this Code of Conduct to set out succinctly and gather in one place the ethics rules and principles that guide the conduct of the Members of the Court. For the most part these rules and principles are not new: The Court has long had the equivalent of common law ethics rules, that is, a body of rules derived from a variety of sources, including statutory provisions, the code that applies to other members of the federal judiciary, ethics advisory opinions issued by the Judicial Conference Committee on Codes of Conduct, and historic practice. The absence of a Code, however, has led in recent years to the misunderstanding that the Justices of this Court, unlike all other jurists in this country, regard themselves as unrestricted by any ethics rules. To dispel this misunderstanding, we are issuing this Code, which largely represents a codification of principles that we have long regarded as governing our conduct.

NOVEMBER 13, 2023

# Ethics Reforms

H. COMPENSATION, REIMBURSEMENT, FINANCIAL REPORTING. A Justice may accept reasonable compensation and reimbursement of expenses for permitted activities if the source of the payments does not give the appearance of influencing the Justice's official duties or otherwise appear improper. Expense reimbursement should be limited to the actual or reasonably estimated costs of travel, food, and lodging reasonably incurred by the Justice and, where appropriate to the occasion, by the Justice's spouse or relative. For some time, all Justices have agreed to comply with the statute governing financial disclosure, and the undersigned Members of the Court each individually reaffirm that commitment.

# Criticisms from Left

The image shows a screenshot of a Vox article. At the top left is the Vox logo. To its right are two buttons: a dark blue 'Give' button and a white 'Newsletters' button. Below these is a navigation bar with three items: 'EXPLAINERS' with a dropdown arrow, 'CROSSWORD', and 'MORE' with a dropdown arrow. Underneath the navigation bar are three category tabs: 'SUPREME COURT' (highlighted in yellow), 'EXPLAINERS', and 'CAMPAIGN FINANCE'. The main headline reads 'The Supreme Court's new ethics code is a joke'. Below the headline is a sub-headline: 'The code is so weak that it serves to legitimize Clarence Thomas's corruption. It is literally worse than nothing.' At the bottom of the article preview, it says 'By Ian Millhiser | Nov 14, 2023, 3:45pm EST'.

**Vox** Give Newsletters

EXPLAINERS ▾ CROSSWORD MORE ▾

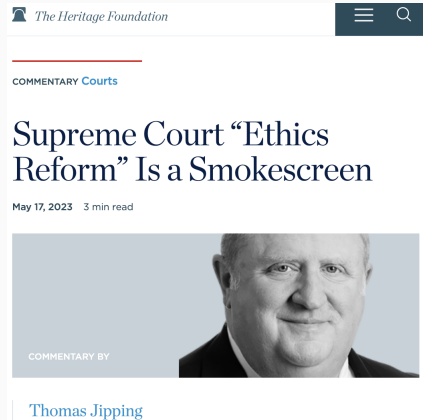
SUPREME COURT EXPLAINERS CAMPAIGN FINANCE

## The Supreme Court's new ethics code is a joke

The code is so weak that it serves to legitimize Clarence Thomas's corruption. It is literally worse than nothing.

By Ian Millhiser | Nov 14, 2023, 3:45pm EST

# Criticisms from Right




The Heritage Foundation

COMMENTARY Courts

## Supreme Court “Ethics Reform” Is a Smokescreen

May 17, 2023 3 min read

COMMENTARY BY



Thomas Jipping

The image is a screenshot of a web article from The Heritage Foundation. At the top left is the organization's logo and name. To the right are navigation icons for a menu and search. Below the logo is a red horizontal line. The article is categorized as 'COMMENTARY Courts'. The main title is 'Supreme Court “Ethics Reform” Is a Smokescreen'. Below the title is the date 'May 17, 2023' and the reading time '3 min read'. A portrait of the author, Thomas Jipping, is shown in a grey box. Below the portrait, it says 'COMMENTARY BY' followed by the author's name 'Thomas Jipping' in blue text.



- Thanks, everybody! Please tell your friends about this class!

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- Please stay in touch!