

Ethics and the Power of the United States Supreme Court

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Introduction

The United States Supreme Court, as established by the US Constitution, is part of the third branch of the federal government, the judicial branch. Its main roles are to guarantee Americans equal justice under law and to interpret and defend the Constitution (Supreme Court of the United States, n.d.). Should disputes and cases be controversial enough, they can work their way up from lower courts in states to the Supreme Court. Throughout American history, the Court's rulings on cases have had widespread and lasting impacts on the country, as they often involve asserting constitutional interpretations and therefore determining how a law works. Given this power held by the Court, in recent years there have been concerns about how ethical circumstances affect that power.

There are many interrelated principles under which the Court was established, and those guiding principles that trace back to the founding and early development of the country might be considered the "moral" principles, as they played a role in upholding checks and balances and efficiency of the government. One such principle is judicial independence, which is the concept of nonpartisanship of the Court justices and the independence of the judicial branch from the other two branches of federal government (Sharman, 1996). This principle, however, has been shown to be in jeopardy especially in the Supreme Court due to the apparent influence of presidents who have appointed justices and the actions of the justices themselves. Furthermore, these justices are the only federal judges to not be bound to an ethical code of conduct, restrained by little more than tradition (Kalb & Bannon, 2019). All these complications bring up the question of how this potential for breaches of morals overflows into the wide-reaching power of this institution.

Reach of the Supreme Court

It is up to the Supreme Court of the United States (SCOTUS) to enforce interpretations of the Constitution, which can have various wide-ranging effects since it can involve editing or overturning laws deemed unconstitutional. As illustrated by Levine et al. (1999) in the American Journal of Public Health, after the Court decision on the 1973 case *Roe v. Wade* in which abortion was legalized across the country, states--even ones in which abortion had been illegal before the case--experienced drops in fertility rate, especially among teens, women older than 35, non-white women, and unmarried women. This authorization of nationwide freedom of choice for women in accordance with the Constitution, along with the resulting decrease in US birth rates, exemplify the numerous instances in which a Supreme Court case had a noticeable impact on the whole country.

Supreme Court cases can also have more subtle (but equally significant) impacts that are not necessarily direct results of the ruling like in *Roe v. Wade*. In a 2017 study by Tankard and Paluck in the journal Psychological Science, participants were surveyed about the 2015 Supreme Court case *Obergefell v. Hodges*, which legalized gay marriage. Though the Court's decision in this case was not shown to have affected Americans' personal beliefs about gay marriage, it did appear to help update Americans' perceptions of social norms in the country in support of gay marriage. As shown by *Roe v. Wade* and *Obergefell v. Hodges*, the highest court in the land affects the American people and how they live their lives in a multifaceted way, and therefore, it treads moral ground.

The Supreme Court Justices and Ethics

This influence of the SCOTUS is directed by the nine justices who sit on it for life and discuss, vote on, and issue the rulings on cases that reach the Court. Many of the ethical concerns

tied to this institution derive from these justices, especially because the Supreme Court justices do not have to adhere to an ethical code of conduct.

As explained by Sharman (1996) in his essay sponsored by the Inter-American Development Bank, judicial independence means that judges are to make decisions solely based on the Constitution and their experience, not in accordance with the beliefs of the president, the congresspeople, or the American public. This might be considered a virtuous principle to which the government should adhere to today; it aligns completely with the role of the Court as the defender of the Constitution and the harbinger of equal justice under law. However, it is challenged by this lack of an ethical code of conduct for the justices.

Kalb and Bannon (2019), professors from the Brennan Center for Justice, point out that in the past 20 years, almost all the SCOTUS justices have “[participated] in partisan convenings or fundraisers, [accepted] expensive gifts or travel, [made] partisan comments at public events or in the media, or [failed] to recuse themselves from cases involving apparent conflicts of interest, either financial or personal”; all of these are forbidden by the code of conduct that other federal judges follow. Though justices might be criticized by the public for these actions--which run counter to judicial independence--they do not currently face governmental consequences like other federal judges would have for committing these acts.

While Kalb and Bannon indicate why a code of conduct for SCOTUS justices should be adopted, Alfini (2012), in *The Professional Lawyer* periodical, shows the opposing argument by analyzing Chief Justice John Roberts’ reasoning behind such a code of conduct being unnecessary. Alfini’s discussion of this issue comes years before that of Kalb and Bannon, who mention how the Chief Justice moderately changed his attitude on the subject. Despite this, Justice Roberts’ older explanation can still be applied. Justice Roberts argued that the justices use

the ethical code of conduct other federal judges are bound to as “guidance,” and that since the Supreme Court is the highest court in the land, recusals from cases could result in a tied vote on decisions among an even number of justices, validating a lower court’s decisions by default.

Alfini points out that while this does make a case for excluding recusal from a SCOTUS code of conduct, it does not address justices’ breach of ethics in terms of apparent partisanship.

The Justices and the Other Governmental Branches

Further in accordance with this lack of an ethical code of conduct, judicial independence has also been encroached on in more obvious ways. Especially in recent years, justices--meant to be moral, impartial harbingers of equal justice under law for Americans--have been seen as political pawns, as they are appointed by presidents with political agendas. In a data analysis from the Journal of Legal Studies done by Epstein and Posner (2016), a “loyalty effect” among SCOTUS justices--relative loyalty to the administration and agenda of the president who appointed them rather than those of other presidents--was found; presidents, without a doubt, appoint justices who would not stand in the way of their agenda. This loyalty effect (again, unhindered by any ethical code of conduct) indicates a lack of objectivity by justices in deciding on potentially impactful cases--a bias in favor of a political ideology, not necessarily that of the people nor the Constitution.

McKeever (2020), a senior writer at National Geographic, adds onto the evidence provided by Epstein and Posner by describing how judicial independence is encroached on by the legislative branch of federal government as well. She delineates how there have been nine justice seats on the Court since the early 20th century, but before then, that number had been changed multiple times by Congress. This, as McKeever describes, is “court packing”--the changing of the number of judges who can sit on a court so as to appoint more judges and favor a

political party. McKeever indicates the resurgence of this topic in modern times by recounting how in the past few years, the Republican president filled three justice seats with conservative judges, changing the previous delicate liberal-conservative balance that had existed in the Court and causing Democrats to discuss court packing. This politicization by the executive and legislative branches overshadows the role of justices as impartial and independent defenders of the Constitution and instead promotes them as agents of partisan agendas who have impacts on the lives of all Americans.

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