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COMMENTARY

Elections Have Consequences: A Conservative U.S. Supreme Court Is Here to Stay

OPED: Unfortunately, the institutions of government are dominated by extremes. The political reality is that we are in for a difficult time in the months and years to come. Can it change over the long haul? Well, elections have consequences.

September 30, 2022 at 12:00 PM

United States Supreme Court

By Julio Mendez | September 30, 2022 at 12:00 PM

The immense power of the U.S. Supreme Court as a co-equal branch of government comes directly from the Constitution. The court has the final say on the meaning of the Constitution. Other than in the appointment of justices, there are very limited checks upon the power of the court. And conservative justices who now dominate the court will be a fact of life for years to come no matter how divided our society may feel about it.

Supreme Court justices have lifetime tenure. There are no term limits and no mandatory retirement age. Justices remain on the bench for life or until they choose to retire. No political balance is required. This is the constitutional structure of judicial independence. Public opinion has little moment. All these factors present significant challenges in a democracy in which we are used to our institutions reflecting the country's divisions and diversity of opinion.

How did we get to this point? It comes down to the fact that elections have consequences. Republican Donald Trump won the 2016 presidential election, and a Republican Congress approved three of his Supreme Court appointments. Now, the 6-3 conservative majority of the Supreme Court has ruled according to a conservative philosophy on reproductive rights, freedom of religion, the 2nd Amendment and the environment, quickly impacting the daily life of Americans.

We are seeing the result of a well-planned and orchestrated political strategy to establish a conservative court majority. The strategy is legal and within the constitutional framework. Conservatives have focused for decades on achieving this result, having a better grasp of how the court functions than liberals. Lacking a similar focus, progressives lost chances to avoid the current makeup of the court. A Democratic president has been in office for 18 of the last 30 years. Yet the court today, and likely for the next 25 years, will remain conservative.

Justice Ruth Bader Ginsburg, one of the greatest Americans of my lifetime, died on the bench, which gave President Trump the opportunity to replace her with Justice Amy Coney Barret. RBG had the opportunity to retire during the Obama presidency to ensure a replacement with similar views, and she did not.

President Trump appointed three relatively young justices with solid conservative credentials during his term, maximizing the impact of the appointments. Justice Neil Gorsuch, 55, Justice Brett Kavanaugh at 57, and Coney-Barrett, 50, will likely remain on the bench for at least a generation. Justices often serve well into their 80s. The other two justices of the core conservative group will do everything they can to time their retirement to ensure conservative continuity.

There is no indication that the new conservative majority will exercise judicial restraint or moderation. The opposite seems to be true, as reflected by the recent sweeping rulings demonstrating a thirst to deliver on conservative issues. Likewise, despite reassurances to the contrary during the appointment process, stare decisis, or respect for precedent, holds little or no weight with the new majority.

The recent decisions and more to come, as has been hinted by Justice Clarence Thomas, reveal the potential to impact many aspects of life in America. In the telescope are LGBTQ rights, same-sex marriage, affirmative action, the exclusionary rule, contraception and perhaps more. The majority has adopted a judicial philosophy based on historical original intent, which provides cover to reach more

conservative constitutional interpretations. Originalism fails to recognize the changing values of the country and an evolving society. So far, the originalism philosophy has endorsed the politically conservative perspective in every case.

The bottom line is that elections have consequences. Whether you like it or not, the Supreme Court's conservative majority is here to stay. Changing the current makeup of the court will be very difficult.

First, Republicans are unlikely to consider any changes to the court; they are in the driver's seat. However, the risk for Republicans is political backlash to an overreaching court issuing rulings outside of the American mainstream. Election results over the next few cycles will likely dictate whether some compromise can be reached, or whether Congress can act on the size of the court or limit the jurisdiction of the court.

The political reality is that expanding the court has very little chance to pass. There have been nine justices for about 150 years. Not even President Franklin Roosevelt, with overwhelming popularity, could increase the size of the court during the New Deal. Any legislative change will likely go nowhere at this time.

Depending on your political view, you either have a sense of great frustration, or are rejoicing with the conservative bent of the court. Any possible options to adjust its structure requires the willingness to compromise and find moderation. Unfortunately, the institutions of government are dominated by extremes. The political reality is that we are in for a difficult time in the months and years to come.

Can it change over the long haul? Well, elections have consequences.

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