Has the US Supreme Court become too politicised?

Justices must present detailed written verdicts that show how their decisions are based in the Constitution. Judges are not supposed to be like politicians. Whereas politicians are elected on a political platform, judges are appointed to be neutral. During his nomination hearing, Chief Justice John Roberts told the Senators, “Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules; they apply them.” Once the Supreme Court has made a decision, a justice from the majority must write an explanation demonstrating how it relates to the Constitution and previous decisions made by the Supreme Court. This requirement helps to ensure that decisions are based in law, rather than on personal feelings. As Roberts told the Senate, “I will decide every case based on the record, according to the rule of law, without fear or favour, to the best of my ability.”

**However... despite the promises made by judges to be neutral, judicial review is still arguably very political.**

The US Constitution does not contain any guidance or instructions for how its (often vague) language should be interpreted by future generations. Democrats and Republicans tend to have very different judicial philosophies, and, as there is no consensus on what is the ‘correct’ way to interpret the Constitution, this can make judicial review appear more subjective and ideological. Indeed, there have been a number of instances where justices have seemingly been willing to abandon their normal judicial philosophy if it allows them to reach a conclusion more compatible with their political views. Republicans, and conservative justices, like the late Antonin Scalia, tend to favour ‘originalism’, arguing that the Constitution should be interpreted based on how it was understood at the time it was ratified. In *United States v. Lopez* (1994), Scalia argued that it required far too broad and modern a reading of the Commerce Clause, which gives Congress the power to regulate inter-state commerce, to argue that Congress could ban the possession of handguns near schools. However, in *Gonzales v. Raich* (2004), Scalia used a much stricter interpretation of the Commerce Clause to argue that Congress could ban the use of marijuana, even if states wanted to legalise its use within the state, with no marijuana allowed to enter the interstate market. Ultimately, the justices are not robots; they are human beings, and, without a clear, agreed upon set of rules for interpreting the Constitution, it is possible that in difficult cases the personal political views of the justices could impact their judgment.

The increasing number of 5-4 decisions suggests that justices are influenced by their own political views. So far the Roberts Court holds the record for the highest number of decisions that have split the court by 5-4. Around 22% of cases have divided the Roberts Court this way; this compares with the Rehnquist Court from 1986-2005 (20% of cases), the Burger Court from 1969-1986 (17% of cases), and the Warren Court 1953-1969 (12% of cases). In contrast, less than 2% of rulings were 5-4 decisions between 1801 and 1940. These divided opinions undermine public confidence and encourage pressure groups and politicians to dispute the rulings. The ruling upholding most of the ‘Obamacare’ health reforms in *National Federation of Independent Business v. Sebelius* (2013), continues to be challenged because it was decided 5-4. After the Supreme Court ruled 5-4 that same-sex marriage is protected by the 14th Amendment in *Obergefell v Hodges* (2015), a Kentucky county clerk made national news for refusing to issue marriage licenses to same-sex couples. The number of 5-4 decisions is even more troubling because the divisions are so predictable, and give so much power to the court’s swing vote – Justice Kennedy. In 2014, 13 of the 19 cases decided 5-4 had Justice Kennedy give the deciding fifth vote to either the conservative (Roberts, Scalia, Thomas, Alito), or liberal (Ginsberg, Breyer, Sotomayor, Kagan) justices. If the justices were truly able to decide cases as neutral umpires, we might expect more than one ‘unpredictable’ justice.

**However... while there are many high profile 5-4 rulings, the majority of cases are decided more decisively.**

Since 2005, the Court has, on average, decided around 45% of cases unanimously, a further 9% by 8-1 and 14% by 7-2. This suggests that the Court may be less politicised than it might appear. On more routine cases, the justices are able to reach a consensus, and appear to act as neutral umpires. However, this does not change the fact that the most divisive, and arguably most important, cases split the court along predictable lines.

The Supreme Court is clearly treated as a political institution by pressure groups.

Pressure groups seek to influence the decisions of the Supreme Court by providing *amicus curiae* briefs. *Amicus curiae* means ‘friend of the court’, and refers to individuals or organisations who are not directly involved in the case being decided, but who are interested in the decision. For example, the American Civil Liberties Union may prepare an *amicus curiae* brief for cases involving a challenge to constitutional rights. These briefs are legal summaries in which the group supports a particular ruling, including previous court decisions and evidence that they believe supports their argument. Therefore, much like elected representatives, interest groups can also lobby judges.
However... the US Constitution helps to protect the independence of the Supreme Court.

Article 3 Section 1 says that justices "shall hold their Offices during good Behaviour", which has been interpreted to mean that, as long as they are not impeached for a criminal offence, they can serve for their entire lives. It also says that their compensation, or salary, "shall not be diminished during their Continuance in Office". This means that once appointed, the executive and legislative branches cannot apply pressure on the Supreme Court by threatening to dismiss them or lower their salaries. Judges on state supreme courts, many of which are elected, enjoy far less protection. In 20 states judges face re-election at the end of their term, and, in 18 others, judges face ‘retention elections’, where the public votes ‘Yes’ or ‘No’ to whether the judge should keep their position. The fact that state judges can be held accountable by voters, and are under pressure to fundraise, undermines their neutrality and independence. Studies have shown judges to give tougher prison sentences in election years, and more favourable decisions to business interests when receiving sizable donations. After the Iowa Supreme Court legalised gay marriage in *Varnum v. Brien (2010)*, three of the justices, who had been nominated on merit by an independent commission, were voted out of office. The US Supreme Court did not have to worry about such pressures when legalising same-sex marriage in *Obergefell v Hodges (2015)*. Unlike politicians, and state judges, the justices of the US Supreme Court are free to make unpopular, but legally sound and necessary decisions.

The appointments process for the Supreme Court has become increasingly politicised.

The Robert’s Court has had a clear divide between the justices nominated by Republican presidents (Thomas, Alito, Roberts, Scalia) and those nominated by Democrat presidents (Ginsburg, Breyer, Sotomayor, Kagan). Republicans nominate originalists, who favour a narrow reading of the Constitution, leading to smaller government. Democrats appoint loose constructionists, who treat the Constitution as a living document and are more comfortable with broader readings of congressional power. The confirmation process in the Senate is now equally partisan. In 1986, Justice Scalia was approved unanimously in the Senate, but, recently, Sonia Sotomayor only received nine Republican votes, while Kagan had only five. It is unlikely that Republicans considered these nominees, who were rated “well-qualified” by the ABA, to lack sufficient experience or training. Instead, they feared their political views and judicial philosophy. After Justice Scalia died in February 2016, Senate Republicans swiftly announced that they would not even consider President Obama’s eventual nominee. As Scalia was one of the most conservative members of the Supreme Court, President Obama has the opportunity to create the first liberal majority for decades. In March 2016, Obama nominated Merrick Garland, Chief Judge of the US Court of Appeals for the DC Circuit, who has been praised by many Senate Republicans in the past. However, the Senate has insisted that the winner of the 2016 presidential election make the nomination, giving voters the opportunity to influence the appointment. If there was broad agreement on how exactly the US Constitution should be interpreted, and if the nine Justices of the Supreme Court regularly voted unanimously when deciding key constitutional questions, then the appointment process may be less contentious and political.

**However... Presidents cannot always predict how their nominees will behave.**

As political as the appointments process is, it isn’t an election. Supreme Court justices do not run on a platform or set out a manifesto, and it is possible for nominees to behave very differently than expected once appointed. The Republican President Ronald Reagan appointed two Supreme Court justices. While Antonin Scalia proved to be one of the most reliably conservative justices, Anthony Kennedy has been much less predictable, often voting with the more liberal justices. Republican President Eisenhower called his nomination of Earl Warren, “ the biggest damn fool mistake I ever made." Warren was previously a Republican Governor of California, but he went on to lead an activist, liberal court that greatly frustrated Republicans.

**It is arguable that the liberal Warren and Burger Courts were more activist than today’s Supreme Court.**

Both the Warren Court (1953-1969) and Burger Court (1969-1986) saw the Supreme Court as a co-equal branch that should not fear significantly influencing legislation. Famously, Justice Thurgood Marshall, the first African-American justice, who held office from 1967 to 1991, argued that his judicial philosophy was “do what you think is right and let the law catch up”. This summarises his support for judicial activism, the idea that the Supreme Court should be active in challenging laws they consider to be unconstitutional, and his philosophy of loose constructionism, the belief that the Constitution should be treated as a living document that needs to be interpreted and updated so that it applies to the modern day. Republican Presidents sought to address this by appointing conservative justices, who favoured judicial restraint. In 7.1% of the Warren Court’s cases, the justices struck down federal, state or local laws, and in 2.4% of cases they overturned judicial precedent. Many of the conservative justices nominated to the Rehnquist Court (1986-2005) and Roberts Court (2005-present) have claimed to be more reluctant to challenge Congress.
However... even the conservatives on the Rehnquist & Roberts Courts have been activist when it suits them. In 2013, the conservative Justice Antonin Scalia wrote a scathing dissent in the case United States v. Windsor (2013), after the majority ruled 5-4 that the Defence of Marriage Act, which denied same-sex couples from being recognised as married by the federal government, was unconstitutional. Scalia argued "we have no power under the Constitution to invalidate this democratically adopted legislation." However, only the previous day in the case Shelby County v. Holder (2013) he supported the 5-4 decision to strike down a key provision in the Voting Rights Act (1965) that required states with a history of racial discrimination to obtain federal approval before changing their voting procedures. In the case Bush v. Gore the conservative justices even supported the 5-4 decision to stop Florida from recounting votes after the 2000 presidential election, determining the outcome of the election.

Judges are limited by precedent, and can support decisions that conflict with their political views. The justices of the Supreme Court are constrained by precedent and the text of the Constitution and sometimes reach decisions that they do not personally like the outcome of. In the case Texas v. Johnson (1989), the Supreme Court struck down a state ban on burning the American flag. Justice Kennedy does not personally believe that people should burn the American flag, but he argued that the 1st Amendment right to free speech protected it. In his decision, Justice Kennedy wrote, "The hard fact is that sometimes we must make decisions we do no like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result.” Rulings like these suggest that the justices can act like neutral umpires, voting very differently to politicians. However... with the Supreme Court so divided, a single appointment can lead to overturned precedents. In 2003, the Supreme Court largely upheld the Bi-Partisan Campaign Reform Act (2002) in the case McConnell v. FEC. Yet, just seven years later, the court struck down most of that same law in the case Citizens United v. FEC (2010). Normally, the Supreme Court is unwilling to challenge past precedent unless the facts have changed, or if the previous ruling has proven to be unworkable, but neither of these applied to campaign finance regulations. The reason why the law went from constitutional to unconstitutional was that the more moderate Justice Sandra O’Connor retired, and was replaced with the more conservative Justice Samuel Alito. This gave the conservatives on the bench the majority to give the decision they wanted to make in 2003. To critics, this willingness to overturn precedent makes the justices appear much more like elected representatives. Similarly, in 2015, the Supreme Court issued a stay on the EPA’s Clean Power Plan, preventing the regulations from being enforced until they had been reviewed in court. This unprecedented move, opposed by all four liberal justices, was the first time that the Supreme Court had halted federal regulations before a federal appeals court had even begun to review them. Supporters viewed the stay as an important check on executive power, but critics considered it to be yet more evidence of politicisation.

The Supreme Court has proven willing to read additional rights into the Constitution. Loose constructionist readings of the US Constitution have allowed the Supreme Court to greatly expand its influence, and have a much greater impact on US laws. One of the most controversial examples of this is Roe v. Wade (1973), where the Supreme Court ruled that the right to an abortion was protected by the constitutional right to privacy. Confusingly, the right to privacy is not actually mentioned in the US constitution and was established in the court case Griswold v Connecticut, in which the Supreme Court interpreted ‘the right to privacy’ from the 9th and 14th Amendments in order to overturn a ban on contraceptives. Such a loose interpretation of the Constitution means that the Supreme Court has taken on a policy-making role, which should arguably be left to elected representatives. In Obergefell v Hodges (2015), the Supreme Court struck down a number of state marriage laws by ruling that same-sex marriage was protected by the 14th Amendment. Justice Scalia argued, “This is a naked judicial claim to legislative—indeed, super-legislative—power; a claim fundamentally at odds with our system of government.” However... this is arguably essential when considering the Constitution’s age and often vague language. The Constitution can at times be a vague document, and, even if the Supreme Court demonstrated the Constitutional basis for their decision, it can still be seen as judicial activism, influenced by the justices’ own political views. While the Constitution and Bill of Rights protect certain rights, it is up to the justices to interpret them and decide how far those rights extend and how they apply to real situations. While explaining why the 14th Amendment protected same-sex marriage in his majority decision in Obergefell v Hodges (2015), Justice Kennedy argued, “The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to further generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.” Kennedy argued that as the freedom to marry is considered a fundamental liberty, it is inevitable that denying this right to same-sex couples violates the 14th Amendment.