How Far Out of Step is the Supreme Court of the United States?

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—Brian Christopher Jones, Liverpool Hope University

The short answer to the question posed in the title of this piece is: very. This post focuses on three things, some of which Erwin Chemerinsky covered in his recently published monograph, *The Case Against the Supreme Court*, and also that I focused on in my book review of that text for the *Journal of Law and Society*. Yet the main purpose of this essay is to expand on these criticisms, providing a relevant point of comparative analysis. This piece compares the US Supreme Court (SCOTUS) and the relatively new UK Supreme Court (UKSC)—established in 2009.

While it is acknowledged that newly implemented courts will more likely take into consideration modern democratic expectations and problems—including technological innovations—than long-established courts, comparing the two demonstrates how far SCOTUS is from its newly-established peer. Additionally, although the courts may differ in terms of their comprehensive democratic functions,[1] there is no reason as to why long-established high courts cannot innovate to keep up with the times.

SCOTUS' communications are out of touch for a contemporary democracy, and especially for a court that operates so readily in the public eye by deciding such a plethora of highly significant political issues. Both government and private sector information communications now operate on fast-moving, open and accessible content. SCOTUS remains far behind in this regard, leaving other information suppliers attempting to do their job (no wonder, marvel that it is, that a site like SCOTUSblog has gotten so big). There have even been a couple recent instances in which television networks, in a moment of haste, have reported decisions incorrectly. As I argued in my book review: this is not the presses fault, it is the Court's. There is simply no reason why SCOTUS decisions cannot come with a brief and accurate press summary that is easily discernible not only for the press but also for laypeople; and it would be even better if it was sent (embargoed, of course) to members of the press before decisions actually come out.[2] Not doing so displays a noticeable and undeserved distrust of the press. The UKSC has included such press summaries since their inauguration in 2009. Every decision comes with a 'Press Summary' PDF that contains: the justices presiding on the case,[3] a brief background on the appeals, the judgment, and the main reasons for the judgment (for recent examples, see here and here).[4] The 'reasons for the judgment' section always cites specific paragraphs in the decision to make it easier for the reader to follow. The UK Supreme Court is also on Twitter, and has their own YouTube and Flickr channels as well, demonstrating at least an effort on their part for openness and increased public interaction. Suffice it to say SCOTUS has none of these.[5]

The second major issue addressed here is that of cameras in the courtroom. While other constitutional courts, such as Germany, have banned cameras inside their court, the UKSC has embraced it. In fact this May the UKSC even launched a 'video on demand' service that includes recordings of both current and decided cases, and also includes videos of both the hearings and the judgment announcements. Further, UK nightly news reports are not littered with journalists taking Supreme Court decisions out of context. Yet many SCOTUS justices have come out against cameras in the courtroom.[6] Some have cited Orwellian reasons for not doing so, such as that having them would ‘misinform the public rather than inform the public’. Does this imply that the press and others would distort their work? The justices are correct to point out that video clips could then be used by the press and others when covering the Court, and that they themselves would be more widely recognised, but…welcome to democracy. If the complete recording is on SCOTUS' website, then a full context of any comment could be obtained. Other reasons for not doing so, such as that it would create an ‘insidious dynamic’ in the courtroom,[7] makes it seem as if the justices themselves could not handle such a change. And maybe they are right. Given how some of the justices behave at both hearings and decisions (being overly and unapologetically sarcastic,[8] or going years without ever questioning counsel[9]), does not exactly align with the behaviour of judges from other constitutional courts.
The final issue addressed here is judicial selection. In order to maintain 'judicial independence', merit selection of justices—without involving a contentious political process—is how judges should be appointed to any supreme/constitutional court. While merit certainly factors into SCOTUS appointment decisions, it remains a (perhaps distant) second to a much more important factor: ideology. This factor usually rests on how much political capital a President has at the time. Should a president have a good amount, a more ideological candidate can be chosen. If a president has little, then usually moderate candidates are chosen that can more easily pass through the nomination process. Conversely, the UK’s Constitutional Reform Act 2005 ensured that Supreme Court judges were selected on merit. In particular, the Act set up a new body for judicial selection: the Judicial Appointments Commission (composed of lay members, judges, and professionals). The commission provides their recommendations to the Lord Chancellor, who either accepts or rejects them. However, the Lord Chancellor can only reject a submission once.[10] As soon as the Lord Chancellor approves a recommendation, the Prime Minister then recommends the nominee to the Court (the PM cannot reject the nomination of the Lord Chancellor).[11] Ultimately, in terms of merit selection criteria for Supreme Court judges, the UKSC process is more appropriate and less controversial than the US Supreme Court’s, and especially because of its protections regarding judicial independence.

As I argue elsewhere, SCOTUS is currently undergoing the most widespread and sophisticated disparagement in its history, which is severely harming its legitimacy, and potentially its constitutional review authority. If the institution hopes to maintain its power and influence in the American governmental system, it needs to change, and quickly. For ideas, a glance across the pond at their contemporaries would be a good start.


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[1] The major difference between the two is their extent of judicial review powers. Much simplified, SCOTUS has wide jurisdiction in terms of what it can review; the most significant power being that it can strike down federal and state statutes (primary legislation). The UKSC, operating in a system based on parliamentary sovereignty, cannot strike down primary legislation (acts of parliament), but can only offer 'statements of incompatibility' with statutes such as the Human Rights Act 1998.

[2] Some may proclaim that the ‘syllabus’ feature of SCOTUS decisions performs this role. That is far from the truth. Many of such documents are convoluted and do not clearly express who won a case and the main rationales as to why. Also, even the syllabus is not sent to journalists before decisions are rendered.

[3] The court has twelve ‘active’ justices, who do not have term limits, but do have mandatory retirement ages (70 or 75, depending on when they were appointed).


[5] The ‘@scotus’ twitter handle is admittedly ‘a private group’. Available at: https://twitter.com/Scotus.


[7] Ibid.


[10] If the initial recommendation by the commission is rejected, the second recommendation must be accepted.

[11] However, the PM does appoint the Lord Chancellor, making the process not completely free from political
influence.