

THE EDITORIAL BOARD

The Supreme Court Isn't Listening, and It's No Secret Why

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By The Editorial Board

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The Supreme Court's authority within the American political system is both immense and fragile. Somebody has to provide the last word in interpreting the Constitution, and — this is the key — to do so in a way that is seen as fair and legitimate by the people at large.

What happens when a majority of Americans don't see it that way?

A common response to this question is to say the justices shouldn't care. They aren't there to satisfy the majority or to be swayed by the shifting winds of public opinion. That is partly true: The court's most important obligations include safeguarding the constitutional rights of vulnerable minorities who can't always count on protection from the political process and acting independently of political interests.

But in the bigger picture, the court nearly always hews close to where the majority of the American people are. If it does diverge, it should take care to do so in a way that doesn't appear partisan. That is the basis of the trust given to the court by the public.

That trust, in turn, is crucial to the court's ability to exercise the vast power Americans have granted it. The nine justices have no control over money, as Congress does, or force, as the executive branch does. All they have is their black robes and the public trust. A court that does not keep that trust cannot perform its critical role in American government.

And yet as the justices prepare to open a new term on Monday, fewer Americans have confidence in the court than ever before recorded. In a Gallup poll taken in June, before the court overturned *Roe v. Wade* with *Dobbs v. Jackson Women's Health Organization*, only 25 percent of respondents said they had a high degree of confidence in the institution. That number is down from 50 percent in 2001 — just months after the court's hugely controversial 5-to-4 ruling in *Bush v. Gore*, in which a majority consisting only of Republican appointees effectively decided the result of the 2000 election in favor of the Republicans. This widespread lack of confidence and trust in the nation's highest court is a crisis, and rebuilding it is more important than the outcome of any single ruling.

Chief Justice John Roberts recently suggested that the court's low public opinion is nothing more than sour grapes by those on the short end of recent rulings. "Simply because people disagree with an opinion is not a basis for criticizing the legitimacy of the court," he said in remarks at a judicial conference earlier in September.

This is disingenuous. The court's biggest decisions have always angered one group of people or another. Conservatives were upset, for instance, by the rulings in *Brown v. Board of Education*, which barred racial segregation in schools, and *Obergefell v. Hodges*, which established a constitutional right to same-sex marriage. Meanwhile, liberals were infuriated by *Bush v. Gore* and *Citizens United v. Federal Election Commission*, which opened the floodgates to dark money in politics. But overall public confidence in the court remained high until recently.

The actual cause of its historic unpopularity is no secret. Over the past several years, the court has been transformed into a judicial arm of the Republican Party. This project was taking shape more quietly for decades, but it shifted into high gear in 2016, when Justice Antonin Scalia died and Senate Republicans refused to let Barack Obama choose his successor, obliterating the practice of deferring to presidents to fill vacancies on the court. Within four years, the court had a 6-to-3 right-wing supermajority, supercharging the Republican appointees' efforts to discard the traditions and processes that have allowed the court to appear fair and nonpartisan.

As a result, the court's legitimacy has been squandered in the service of partisan victories. The *Dobbs* decision in June, which overturned *Roe v. Wade*, eliminated American women's constitutional right to control their own bodies and was a priority of the Republican Party for decades, is only the most glaring example. In cases involving money in politics, partisan gerrymandering and multiple suits challenging the Voting Rights Act, the court has ruled in ways that make it easier for Republicans and harder for Democrats to win elections. In 2018,

the court ruled that public sector labor unions violated the First Amendment rights of nonmembers by requiring them to pay fees to support the unions' work bargaining on their behalf, after decades of rulings in which the court had found the opposite to be true. That ruling further weakened organized labor, another Republican goal.

For most of the court's history, it was difficult to predict how a case would turn out based on the party of the president who nominated the justices. Even into the 21st century, as the country grew more polarized, the court's rulings remained largely in line with the views of the average American voter. That is no longer the case. The court's rulings are now in line with the views of the average Republican voter.

In the process, the court has unmoored itself from both the Constitution it is sworn to protect and the American people it is privileged to serve. This could not be happening at a worse moment. Election deniers in the Republican Party are undermining the integrity of the American electoral system. Right-wing political violence is a present and growing threat.

It is precisely during times like these that the American people need the Supreme Court to play the role Chief Justice Roberts memorably articulated at his own confirmation hearing — that of an umpire calling balls and strikes, ensuring a fair playing field for all. Instead, the court's right-wingers are calling balls for one team and strikes for the other.

As Justice Elena Kagan said in a talk this month at Northwestern University School of Law, "When courts become extensions of the political process, when people see them as extensions of the political process, when people see them as trying just to impose personal preferences on a society irrespective of the law, that's when there's a problem — and that's when there ought to be a problem."

The way the court went about eliminating the federal right to abortion is a prime example of this misuse of its power. First, the right-wing justices used the court's "shadow docket," which refers to orders issued in response to emergency applications without open hearings or any public explanation, to allow an obviously unconstitutional anti-abortion law in Texas to stand. They also agreed to hear a separate challenge out of Mississippi, *Dobbs v. Jackson Women's Health Organization*, that didn't formally ask them to overturn *Roe v. Wade*. When they chose to do so anyway, the majority opinion, by Justice Samuel Alito, cherry-picked its historical examples and dismissed *Roe* as "egregiously wrong," disdaining the work of earlier justices who had weighed the same constitutional questions carefully for decades.

As the dissent in *Dobbs* noted: "The majority has overruled *Roe* and *Casey* for one and only one reason: because it has always despised them, and now it has the votes to discard them. The majority thereby substitutes a rule by judges for the rule of law."

In the coming months, the court will decide cases on affirmative action, the Voting Rights Act (yet again) and the power of state legislatures to ignore their own constitutions and even their voters. The rulings in these cases could dramatically reshape the country's politics, and Americans should be able to trust that those rulings will be made by an impartial tribunal.

There is no clear solution to this crisis. Legal scholars have put forward many proposals for structural reform — expanding the number of justices, imposing term limits or stripping the court of jurisdiction over certain types of cases — but none are a perfect remedy to the court's politicization.

In the meantime, it is worth remembering that the court heads only one branch of the federal government. Congress has far more power to counteract bad rulings than it generally uses — by doing its job and passing laws. Codifying the right to an abortion would be the most obvious move, but the court has usurped the role of the legislature on a range of issues, including forced arbitration clauses, campaign finance rules and gun laws.

What would such a response look like? Here's an example: On the final day of the last term, the right-wing justices hobbled the Environmental Protection Agency's ability to fight climate change by requiring reductions in carbon dioxide emissions from power plants. Congress responded in August, adding a provision to the Inflation Reduction Act that reinforced the E.P.A.'s authority in this area.

With a few exceptions, the Supreme Court rarely has been at the forefront of making America a more equal place. But we are not consigned to living under the thumb of a reactionary juristocracy. To the contrary, the meaning of the Constitution is far more than what the court decrees; it is the result of an ongoing conversation between the court and the American people. Those who protested the loss of their rights after the *Dobbs* decision, and those who showed their determination to protect those rights, as voters did in Kansas in August, are speaking directly to the court. When the justices stop listening, as they have at other moments in history, the people's voices will eventually become too loud for them to ignore.

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