The New York Times | https://www.nytimes.com/2022/09/30/opinion/supreme-court-biden.html

OPINION
GUEST ESSAY

The Supreme Court Is Broken. Where's Biden?

By Jeff Shesol
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Sept. 30, 2022

In a recent speech at Independence Hall, President Biden called on Americans to stand against an assault on democracy — the ongoing assault waged by insurrectionists and would-be patriots, by election deniers and other extremists. "We are not powerless in the face of these threats," he insisted. "We are not bystanders."

Yet that role — bystander — is exactly the one Mr. Biden seems to have assigned himself when it comes to the Supreme Court, which is posing a more profound challenge to the American system of self-government than any violent mob has managed. The court's conservative justices have issued a run of rulings that make it harder for many Americans, particularly citizens of color, to vote; make it easier for partisans to grab power by distorting the shape of legislative districts; and make it nearly impossible to counter the corrupting influence of money in politics. This is only a partial list — and is, most likely, only the beginning. In the term that starts on Oct. 3, the conservative bloc, six justices strong and feeling its oats, will decide whether an Alabama congressional map discriminates against Black voters and will consider a novel theory that state legislatures should have a free hand, unconstrained by state courts, in setting rules for federal elections.

After the court, in Dobbs v. Jackson Women's Health Organization, eliminated the constitutional right to abortion, Mr. Biden stood in the White House and decried the decision as "the culmination of a deliberate effort over decades to upset the balance of our law." He hit the same refrain the next week, warning that an "extremist court" was "committed to moving America backwards." Yet he has had little, if anything, to say about other consequential cases. In response to the court's ruling in New York State Rifle & Pistol Association v. Bruen, a death knell for many efforts to keep guns out of public places, Mr. Biden issued a statement that he was "deeply disappointed" — less a protest than a sigh. Likewise for West Virginia v. E.P.A., in which the conservative justices blocked the Environmental Protection Agency from regulating the emission of greenhouse gases. "Another devastating decision," the president observed in a press release. (Since then, he has found other means to keep up the fight against climate change — executive actions and, notably, the provisions of the Inflation Reduction Act.)

It is a strange non-reaction, given the stakes. While Mr. Biden promises to "build back better," the court's majority is a demolition crew, razing or gutting legislative landmarks — the Voting Rights Act, the Clean Air Act — by means of sweeping opinions. The problem is not simply that Mr. Biden says too little about these retrograde rulings, it is that he treats them as discrete events rather than the defining project of the court's conservatives: to lay waste to the welfare state and the administrative state, the civil rights revolution, the underpinnings of an accountable, workable government. He has said little to suggest that the court's majority is dangerously, defiantly out of step with what Chief Justice Charles Evans Hughes, in the 1930s, called "the plainest facts of our national life." And he is silent on the subject of what, if anything, is to be done when justices slip the bonds of self-restraint to chase their ideological dreams.

In Philadelphia and on the hustings, Mr. Biden has begun to acknowledge the tribal warfare that consumes this country. Yet the Roberts court is both a product and a sponsor of that conflict, and the president should say so. He needs to "take the country to school," as Felix Frankfurter, who would later become a Supreme Court justice himself, urged Franklin D. Roosevelt in 1937, when another ideologically driven court had put democracy on the docket.

During the 2020 presidential campaign, Mr. Biden's ambitious agenda invited comparisons to that of F.D.R., and he leaned into the analogy, citing Roosevelt as proof that "we can restore our soul and save our country." That analogy has worn rather poorly, but Mr. Biden would do well to emulate the clarity and energy that Roosevelt brought to the issues of the court and the Constitution.

Roosevelt, like Mr. Biden, briefly practiced law before seeking public office. He was only ever an indifferent lawyer and not remotely a legal scholar, but he loved to talk about the Constitution. He firmly believed, as he dictated for a magazine article, that "the Constitution was never meant to be a 'dead hand' … the founding fathers conceived it as a living force for the expression of the national will with respect to national needs." This wasn't a platitude. It was an indictment — aimed directly at the court's blinkered, backward-looking conservatives. F.D.R.'s Constitution was "a layman's document, not a lawyer's contract," and he felt certain that the public, with his help, could comprehend what the justices were doing and why it was wrong. To that end, he did not deal in abstractions. When the court issued obscurant opinions, cloaked in legal incantations that read like magic spells, Roosevelt translated them into plain, urgent English, spelling out their effects.

And the public responded. On May 27, 1935, the court struck down the National Industrial Recovery Act, the centerpiece of the early New Deal, resting its opinion in part on a preindustrial, 19th-century notion of interstate commerce. Four days later, Roosevelt called reporters into the Oval Office and talked — without notes — for 90 minutes, dissecting the decision and the "perfectly ridiculous and impossible situation" it created. The Great Depression notwithstanding, the court, as Roosevelt put it, had ruled that "the United States government has no control over any national economic problem" and had thrown the nation back to "the horse-and-buggy age."

Roosevelt's remarks drew howls from the conservative press, but it quickly became clear that the president had reshaped the public discussion. A flood of telegrams hit Capitol Hill, many calling for a new commerce clause. Overnight, The New York Times reported, once reluctant senators concluded that amending the Constitution for this purpose "was not such a bad idea." Ultimately, Roosevelt would reach for a blunter instrument. His attempt to pack the court, to increase the number of justices from nine to as many as 15, was the costliest political mistake of his presidency. It wrenched wide the splits in the Democratic Party, re-energized the G.O.P. and stalled his second-term agenda right out of the gate. All the same, by the late 1930s, Roosevelt had helped build a consensus that constitutional interpretation should keep pace with the realities of modern life. That shift in public sentiment would endure for decades.

Absent a vacancy to fill, presidents have little ability to change the direction of the court. That is as it should be. But as Roosevelt showed, they can change the conversation — and with it, over time, public opinion. In a similar spirit, Mr. Biden should view adverse rulings as opportunities to deliver his own dissents — to expose the designs of majority opinions, demystify them, debunk them, show whose interests they serve and whose they do not, and provide a countervailing view of the Constitution.

Take New York State Rifle v. Bruen, the 6-3 decision striking down a century-old requirement of "proper cause" to carry a handgun in public. Instead of expressing disappointment and moving on, Mr. Biden should have identified the central — and novel — contention of Justice Clarence Thomas's opinion: that "history and tradition," rather than public safety, is the principal basis for gun regulations. And speaking of history, Mr. Biden should have challenged the opinion's willful misreading of it, not least its disregard for the tradition, dating back to the nation's founding, of regulating the concealed carriage of firearms. Above all, he should have called out the fallacy that the Second Amendment envisions an individual rather than a collective right to bear arms. He should have said all this even though Justice Stephen Breyer covered much of it in his dissent. Mr. Biden has the bully pulpit. With it comes a greater opportunity and, for that reason, a greater obligation to be heard.

Pablo Delcan

So why is the president sitting this out?

It cannot be indifference. Few can doubt Mr. Biden's empathy for the families who will lose loved ones to gun violence, the women who will be denied lifesaving abortions, the voters who will be purged from the rolls because of this court. Nor can he imagine that Congress will expediently undo what the court has wrought. From time to time, Congress does find the will: In 2009, for example, the Lilly Ledbetter

Fair Pay Act extended the statute of limitations for wage discrimination lawsuits, reversing a narrow-minded 5-4 decision. More than 12 years have passed since Citizens United v. Federal Election Commission opened the floodgates to undisclosed political spending. That decision is still the law of the land. So, nine years on, is Shelby County v. Holder, which hobbled the Voting Rights Act of 1965. A voting rights bill named for the late John Lewis, which passed the House last year but sputtered in the Senate, was one of many failed attempts to reverse the effects of Shelby County. Mr. Biden is all too aware that Congress is rarely roused to act. When the court issued its decision in Dobbs, he urged Congress to "restore the protections of Roe v. Wade as federal law" — and hastened to note how unlikely that was. (A pre-emptive effort had already failed.)

What, then, explains his reserve? Perhaps he is simply afraid of the blowback — whether from Republicans, who would eagerly paint any criticism of the court as "radical leftism," or from moderate Democrats, who share his disdain for decisions like Dobbs but would likely back away from confronting or reforming the court. Senators Joe Manchin and Kyrsten Sinema are already on the record as opponents of court packing, and at a time when Mr. Biden has to beg and barter for their votes, he is surely disinclined to provoke them.

And provocation has never been his style. Mr. Biden has long been taken by the notion of the Senate as a "saucer" in which political passions cool, and appears to see himself in the same light. While he is moved at times with righteous indignation, he seems most comfortable as America's balm, its salve, its anti-inflammatory. It would most likely not offend him to be told he is having a dampening effect on the debate about the court.

Indeed, he has been hostile to the idea of court expansion since at least the 1980s, when he served as chairman of the Senate Committee on the Judiciary. In 1987, in a speech to the American Bar Association, Mr. Biden spoke admiringly of the senators who had stood in the way of Roosevelt's court-packing proposal: "In their minds," he said, "the integrity of the court meant more than the agenda of the president."

In 2020, as a candidate for president himself, Mr. Biden was forceful in his rejection of court packing. If Democrats expanded the number of justices, he said, they would "live to rue [the] day." He painted a picture — just as Roosevelt's critics did — of an endless cycle of retribution, with each round of court packing sparking another by the opposing party until "we begin to lose any credibility the court has at all." It is a reasonable concern. Yet Mr. Biden has made clear his animus extends to other reforms, including term limits for justices. "It's a lifetime appointment," he said in 2020. "I'm not going to attempt to change that at all."

He has been true to his word. Upon taking office, he created a commission to review proposals for court reform and then removed its teeth, asking the group to write a report containing no recommendations. When "staggered term limits" — the idea of setting an 18-year term for justices and mandating that two (and only two) appointments would be made during each four-year presidency — emerged as something close to a consensus solution, Mr. Biden shrugged it off without comment, leaving a bitter taste for many who had dedicated their time and insights to the effort.

Mr. Biden, the explanation goes, is an institutionalist. During his many years on the Judiciary Committee, he spoke of the Supreme Court with respect, even reverence. It has proved a hard habit to break, even as the court's entrenched, amped-up supermajority wages its campaign against the 21st century (and much of the 20th). "His admiration for the court as an institution has been overtaken by reality," Harvard Law School's Laurence Tribe, who also served on the commission, told Politico last summer. "And I think it's time to wake up." Sometimes an institution must be saved from itself.

Popular discontent with the court is growing, for good reason, and will seek outlets for its expression. Mr. Biden might worry that by discussing the court, he will politicize the court. But as Justice Elena Kagan has pointed out, the court itself has already done that. And absent the president's engagement, the loudest, angriest voices will fill the void. He has a window, for now, in which he might set the terms for a productive, not destructive, discussion about remedies — a discussion that will outlast his own time in office. Court reform is a long game. Ending life tenure for justices, for example, would likely require a constitutional amendment — a daunting prospect, but far from impossible if Mr. Biden gets to work in laying the groundwork. "The presidency," Barack Obama has written, "is a relay race."

Consider how we arrived at this moment. The radicalization of the Supreme Court seems to have hit like a sudden storm: In just four years, Donald Trump installed three new justices. But the right's takeover of American law was set in motion in the late 1960s by Richard Nixon, who attacked the "creeping permissiveness" of liberal judges and expounded "strict constructionism." Later Ronald Reagan, an even truer believer, carried the crusade into the 1980s — transforming the judiciary through his appointments and changing public attitudes by insisting that the framers' "original intent" ran unerringly in the direction of smaller government. The path from Nixon to Reagan to Dobbs was half a century long.

"No matter how long the road," Mr. Biden promised in Philadelphia, "progress does come." Yet it will not come unless every American of conscience — including the one in the White House — steps off the sidelines. Until then, the assault on democracy he described will continue. It will be waged in state legislatures and in Congress, and on the first Monday of October it will recommence in the conference room of the Supreme Court.

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