

The Conservative Justices Don't Seem Too Worried About the Court's Legitimacy

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Fears about the Supreme Court's public reputation used to have a moderating influence—but that may not be the case any longer.

By [Mary Ziegler](#)
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About the author: [Mary Ziegler](#) is a professor at the Florida State University College of Law. She is the author of [Abortion and the Law in America: Roe v. Wade to the Present](#).

In recent months, the Supreme Court has stepped into one controversy after another—taking a case that threatens [affirmative-action](#) programs, creating a road map for states looking to copy [Texas's S.B. 8](#) and nullify constitutional rights, and using the shadow docket to signal major changes to [abortion](#) and [voting-rights](#) laws. In a matter of months, the Court seems poised to both dramatically expand [gun rights](#) and overrule [Roe v. Wade](#). Polling demonstrates that the Court's popularity has fallen to an all-time low, driven by perceptions that the justices [are partisan](#). The Court's conservative majority seems remarkably unconcerned about potential damage to its reputation. That may come as no surprise: Supreme Court justices have lifetime tenure unless they are [impeached](#).

What's to stop a runaway Court? Not impeachment—only one justice has ever been impeached, in 1805, and he was ultimately [acquitted](#). Not long ago, political scientists, historians, and legal scholars argued that the Court would self-moderate to preserve its so-called legitimacy. And that seems to have been right—at least then. In those times, the Court's decisions generally reflected popular opinion on major issues of the day. And for good reason: Historically, when the Court ignored a national consensus—and seemed indifferent to arguments about legitimacy—the consequences were serious. Congress stripped the Court of jurisdiction and [manipulated its size](#). States defied the Court, and individuals [ignored it](#). Paying attention to concerns about legitimacy, by contrast, has generally allowed the Court to preserve its authority. Since Franklin D. Roosevelt's plan to pack the Court failed in 1937, resistance to the Court has been more subtle, and the justices have generally tried to avoid decisions that set off a major backlash. At least until recently.

All of this makes it important to understand what we mean when we talk about the legitimacy of the Supreme Court. As the Harvard Law professor Richard Fallon [has shown](#), defining legitimacy takes some work. It can refer to the Court's moral standing—a concern most acutely raised in legal systems, such as those of Nazi Germany, that sanction obvious human-rights

violations. Legitimacy, too, can refer to the perceptions of the legal community—do lawyers, judges, and academics believe that the justices are using reasonable interpretive methods and applying them in good faith? Most often, legitimacy describes the Court’s ability to command the public’s respect and obedience. Whichever definition you use, none seems to have much of a moderating influence on the Court’s conservative majority today.

In the past, the Court has clearly been worried about threats to its legitimacy. In 1992, in declining an invitation to reverse *Roe*, a plurality worried—in plain text, in their written opinion—that undoing abortion rights “under fire” would irreparably damage the Court, proving to the public that the justices were partisan and undermining respect for the Court in the legal community. At oral argument in *Dobbs v. Jackson Women’s Health Organization* in December, the liberal justices tried to raise the specter of damage to the Court that might follow the reversal of *Roe*. Stephen Breyer read passages from *Casey* suggesting that reversing *Roe* would hurt the Court’s reputation. “Will this institution survive the stench that this creates in the public perception that the Constitution and its reading are just political acts?” Sonia Sotomayor asked, implying that damage to the Court’s legitimacy could be long-lasting. But these arguments about legitimacy ring hollow, at least for some.

Part of this is that the legal community has changed since 1992. Then, the Federalist Society, only a decade old at the time, was on its way to creating a conservative legal network with a farm team of prospective judicial nominees, a foothold in elite institutions, and an arsenal of effective legal arguments. Today, the Federalist Society is a giant—responsible for reshaping the Supreme Court—with [tens of thousands of members](#), a large budget, and [impressive political connections](#). If the Court reverses *Roe*, holds affirmative action to be unconstitutional, dramatically expands gun rights, and hamstring the administrative state—and does so quickly—it will damage its own reputation with the broadly defined legal community. But the Republican Party and the Federalist Society have created a parallel community with its own norms and sources of validation. The justices may not worry about losing legitimacy in one elite legal circle when they will be heroes in another.

The justices seem equally unmoved by the thought of damaging the Court’s legitimacy with the public. The reasons for this are clear. Despite progressives’ anger at the Court and their advocacy for reforming the institution—demanding term limits [and the addition of more justices](#), among other things—the structure of the Senate means that none of these possibilities is a live threat to the justices now, or potentially ever. President Joe Biden’s commission to consider Court reforms did not settle on a solution, much less embrace the idea of adding justices. And the Senate would hardly entertain such an idea even if the commission had pushed it to. With Biden battling low poll numbers and the prospect of a traditional midterm slump, Democrats seem unlikely to gain the votes for Court reform this year.

What about other forms of backlash? Many progressives are holding out hope that if the Court issues unpopular blockbuster decisions on abortion and much more, a political backlash will emerge. But that’s far from guaranteed, especially given the deep polarization plaguing the nation, with a growing number of uncompetitive races, laws that make voting harder, and gerrymandering. Besides, the fact that voters may oppose criminalizing abortion or gutting

voting rights does not automatically mean that election results will change. For now, it's impossible to predict whether there will be a backlash, or what difference it would make.

The Court's conservatives, at least, don't seem worried. They are launching a legal revolution, and they don't seem to think that anything will stop them.

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