

How 'Baseless Criticisms of the Court' Weaken Our Judiciary

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Body

The New Jersey Law Journal Young Lawyers Advisory Board recently asserted in a commentary that "the [U.S. Supreme Court]'s decision making seems to have a focus on serving the conservative agenda, in lieu of honoring ***stare decisis***" due to the partisanship surrounding the appointment process. In making this argument, they are asserting essentially that the majorities in Dobbs and the affirmative action cases acted in bad faith and abandoned their role as independent judges. This conclusion is both wholly unsupported and damaging to our legal system as a whole.

As an empirical matter, the court is not inordinately partisan. In the 2022-2023 term, the court decided 58 cases. Of those cases, only five were split six to three along ideological lines. Half of the opinions were unanimous. Even the justices did not vote on purely ideological lines. Chief Justice John Roberts more frequently voted with Justice Elena Kagan than with Justices Neil Gorsuch, Samuel Alito, or Clarence Thomas.

Justice Sonia Sotomayor joined Gorsuch more than Justice Ketanji Brown Jackson.

It is certainly true that the nomination process has become overly partisan, but there is no evidence that the justices have overturned precedent to advance the political agenda of their appointers. Before a candidate is even nominated, presidential administrations pour over their past writings and speeches to glean how they might decide future cases. Presidents select nominees believing that their legal philosophy and preferred mode of constitutional interpretation will move the court's jurisprudence in a direction favored by the administration. For example, Donald Trump repeatedly promised during the 2016 presidential campaign to nominate justices that would overturn *Roe v. Wade*. True to his word, President Trump nominated Gorsuch, Justice Brett Kavanaugh, and Justice Amy Coney Barrett, all of whom joined the majority opinion in Dobbs. Still, this same court also rendered decisions such as *Bostock v. Clayton County*, *Moore v. Harper*, and *Allen v. Milligan* that rankled conservatives as much as Dobbs and the Students for Fair Admissions cases delighted them.

Regardless of the justices' motives, ***stare decisis*** is not sacrosanct. Overturning precedent is certainly rare, but it is not violative of the court's norms, particularly in cases involving constitutional interpretation. Prior to Dobbs, the court had overturned its own precedent more than 230 times. The court had even overturned its own precedent concerning abortion rights before Dobbs in *Planned Parenthood v. Casey*. In that case, the court lowered the burden for abortion regulations and abandoned a fixed trimester framework for a viability standard effectively overruling precedent established in *City of Akron v. Akron Center for Reproductive Health* and *Thornburgh v. American College of Obstetricians and Gynecologists*. Few attorneys bemoan the overruling of precedent in cases like *Plessy v. Ferguson* or *Bowers v. Hardwick* because we only decry the overturning of precedents that we like.

How 'Baseless Criticisms of the Court' Weaken Our Judiciary

Baseless criticisms of the court coming from legal institutions such as law journals and bar associations only serve to harm our legal system. Certainly, criticism of the court's reasoning and holdings is not only valid, but important in shaping future jurisprudence. But impugning the motives of conservative justices because they render conservative decisions based on conservative legal theories only serves to delegitimize the court. This is particularly concerning in an era in which the executive branch has exerted more power than it has at any time in American history. Politicizing the court only diminishes its ability to cabin those excesses. Moreover, it weakens Americans' faith in our legal system. If you cannot get a fair shake in front of the Supreme Court, what chance do you have of obtaining justice in a trial court in New Jersey?

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