

**REGAINING THE PUBLIC TRUST: HOW TRANSPARENCY & ETHICS CAN SAVE THE U.S.
SUPREME COURT FROM ITS LEGITIMACY CRISIS**

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INTRODUCTION

One afternoon my Contracts professor had a memorable Socrates-like moment. For about ten minutes, he probed the class into why judicial decisions have power. The class floated several responses to see which one matched the answer the professor had in mind. After several unsatisfactory responses, he told us that the power of judicial opinions lies in the fact that they are rational. The answer struck me as odd. But on deeper reflection, it started to make sense. Judges explain their decisions to assure litigants, advocates, and the public that they have logically interpreted and applied the law to the facts. However, this notion of a well-written, reasoned decision can also serve as a shorthand for other judicial values such as independence, integrity, impartiality, apoliticality, and consistency.¹ The judiciary’s power does not come from words alone² but also from the judges’ conduct.³

Judicial conduct that adheres to the values of independence, impartiality, and integrity signals to the public that we can trust the courts and have confidence in their decisions.⁴ The

¹ See J. Harvie Wilkinson III, *The Role of Reason in the Rule of Law*, 56 U. CHI. L. REV. 779, 798 (1989) (arguing reason as a primary way to achieve judicial accountability); STRATEGIC PLAN FOR THE FEDERAL JUDICIARY, JUDICIAL CONFERENCE OF THE UNITED STATES 2 (2020) (including reasoned decisions as part of the rule of law, along with continuity, predictability, and coherence, as core values).

² Cf. Gerald Lebovits, Alifya V. Curtin & Lisa Solomon, *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237 (2008) (stating “[t]he judiciary’s power comes from its words alone-judges command no army and control no purse.”).

³ THE CODE OF CONDUCT FOR UNITED STATES JUDGES, CANON 2A CMT.

⁴ See, e.g., Logan Strother & Shana Kushner Gadarian, *Public Perceptions of the Supreme Court: How Policy Disagreement Affects Legitimacy*, 20 THE FORUM 87, 90 (2022) (noting that fairness and impartiality of judicial processes inform public support); Arthur Selwyn Miller, *Public Confidence in the Judiciary: Some Notes and Reflections*, 35 LAW AND CONTEMPORARY PROBLEMS 69, 74 (1970) (“Speaking very broadly, public confidence in American courts involves a belief in the fairness and impartiality of the tribunal, with the judge dispensing speedy decisions in accordance with “the law” considered, as Holmes said, as a set of external standards applied in a neutral way.”).

implication of eroding public trust and confidence in the Supreme Court of the United States (SCOTUS) and its decisions is not so much about the Court's judicial opinions losing rationality or persuasive value. Instead, it concerns how the justices' conduct, conflicts, and compromises undermine their credibility as impartial and ethical decision-makers and threaten the Court's legitimacy. While favorable public opinion of the Court is at a historic low and a legitimacy crisis brews, the Court and Congress can take practical steps to restore public trust in the U.S. Supreme Court.

In this essay, I draw upon theories of legitimacy to argue that while SCOTUS is losing institutional legitimacy, greater transparency in how the justices operate and stringent accountability measures for questionable ethical dealings can help rehabilitate public perception of the Court. This concept of legitimacy partly explains why institutions exercise power and why people feel obligated to accept and abide by their decisions. In the context of SCOTUS, legitimacy lies at the nexus of the people's trust in the Court as an impartial, independent, and trustworthy institution *and* the Court's validation of that public trust by exemplifying these values.⁵

I. REASONS FOR HISTORIC LOW FAVORABLE VIEW OF THE SUPREME COURT

Favorable public opinion of the U.S. Supreme Court is at its lowest. According to Pew Research data, in 2022, only 44% of Americans had a favorable view of the Court compared to 76% in 1987.⁶ While favorable ratings have fluctuated over the last thirty years, the data show a drastic decline from 70% to 44% over the last three years.⁷ The perception of the Court as partisan and unethical plays a significant role in the decrease in favorable public opinion of the Court.

⁵ See Or Bassok, *The Supreme Court's New Source of Legitimacy*, 16 J. CON. L. 153, 188–90 (explaining public confidence legitimization theory, which is a shift from the Court's expertise-based legitimacy to accounting for what the public thinks about the Court's decisions and institutional habits).

⁶ Katy Lin & Carroll Doherty, *Favorable views of Supreme Court fall to historic low*, PEW RES. CTR, July 21, 2023, <https://www.pewresearch.org/short-reads/2023/07/21/favorable-views-of-supreme-court-fall-to-historic-low/>.

⁷ *Id.*

A. Perception of the Court as Partisan

The Supreme Court has had a major ideological shift to the right with the appointment and confirmation of the three Trump-era justices. The public is aware of this ideological shift. In fact, 50% of Americans view the Supreme Court as conservative.⁸ Additionally, a 2022 Gallup survey shows that 42% of Americans believe the Court is too conservative.⁹ The public perception of Court's conservative ideology is part of a broader belief that partisan interest groups had influenced Former President Trump and Congress to engage in conservative court packing.¹⁰ Former President Trump's public statements about appointing justices to execute conservative agendas, such as overturning *Roe v. Wade*, added to the view that the justices act with politically-determined outcomes.¹¹

1. *The Politicized Nature of Appointment and Confirmation*

However, the perception of the Court as a political institution and the justices as partisan political actors starts long before they get to the bench. The public sees the appointment and confirmation process as overly politicized. The drastic decline in favorable public view of the Court coincided with the confirmation of Justice Kavanaugh.¹² This is partly due to the contentious and politicized nature of the confirmation hearing. While politics has always been a part of the confirmation process,¹³ these proceedings have become increasingly polarized over the last few

⁸ Lin & Doherty, *supra* note 6.

⁹ Jeffery Jones, *Supreme Court Trust, Job Approval at Historical Lows*, GALLUP (Sept. 20, 2022), <https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx>.

¹⁰ Maggie Jo Buchanan & Abbey Meller, *Brett Kavanaugh: A Representation of the Damaged U.S. Judiciary*, CTR. FOR AMERICAN PROGRESS (Oct. 1, 2019), <https://www.americanprogress.org/article/brett-kavanaugh-representation-damaged-u-s-judiciary/>.

¹¹ Dan Mangan, *Trump: I'll Appoint Supreme Court Justices To Overturn Roe v. Wade Abortion Case*, CNBC (Oct. 19, 2016), <https://www.cnn.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html>.

¹² See Lin & Doherty, *supra* note 6 for charting of survey results.

¹³ Ilya Shapiro, *The Politics of Supreme Court Confirmations and Recommendations for Reform*, CATO INST. (July 20, 2021), <https://www.cato.org/testimony/perspectives-supreme-court-practitioners-views-confirmation-process> (giving examples of presidents picking justices for political reasons going as far back as John Adams).

years.¹⁴ The social media amplification of the hearings has increased public awareness of how the process can quickly become contentious and divisive. Not only was the Senate bitterly divided on the Kavanaugh confirmation,¹⁵ but the American public was also equally divided.¹⁶ The divide within Congress on the confirmation of justices to the Supreme Court lies squarely in the desire to appoint people who support a particular judicial philosophy. Unfortunately, this approach has caused the public to question whether the justices and the Court can be impartial.

2. Judicial Activism and Partisan-determined Outcomes

Even if one can make the case that the president has no control over a justice's independence once the Senate confirms that candidate to the Supreme Court, recent SCOTUS decisions that seem to fulfill presidential campaign promises bring into question the matter of impartiality. Decisions overturning abortion rights and affirmative action create the perception that the Republican-appointed justices already had a politically determined outcome. Whether this is true or not, the public perceives this as the case. For example, after the *Dobbs* decision, public confidence in the Court plummeted and more people perceived the justices as “politicians in robes.”¹⁷ If the public believes that Court decisions are based on politics rather than law, then the public might feel empowered to disregard certain decisions.

B. Questionable Ethics

Additionally, the view that the Justices operate with questionable ethics contributes significantly to the declining public trust and confidence. A recent Marquette Law School survey

¹⁴ *Id.*

¹⁵ Justice Kavanaugh confirmed by a 50-48 vote. PN2259 — Brett M. Kavanaugh — Supreme Court of the United States, 115th Cong. (2017–2018).

¹⁶ Gallup data shows 46% wanted a yes vote while 45% wanted a no vote. The problem also spilt along party lines, with 84% Republicans supporting the confirmation. Jeffery Jones, *Americans Still Closely Divided on Kavanaugh Confirmation*, GALLUP (Oct. 3, 2018), <https://news.gallup.com/poll/243377/americans-closely-divided-kavanaugh-confirmation.aspx>.

¹⁷ See Matthew Levendusky, *Has the Supreme Court become just another political branch? Public perceptions of court approval and legitimacy in a post-Dobbs world*, SCI ADV., Mar. 8, 2024, at 2.

revealed that 27% of the respondents rated the honesty and ethical standards of U.S. Supreme Court justices as very high or high, 37% said average, and 36% rated their ethical standards as low/very low.¹⁸ The findings are alarming. The judiciary operates with a presumption that judges, lawyers, and all officers of the court conduct themselves with the highest level of professional responsibility and ethics. Yet, a significant percentage of the public views the judges on the highest court in the land as having low or very low ethical standards. A lack of transparency and accountability lies at the heart of the issue.

1. Lack of Transparency

SCOTUS operates in secrecy.¹⁹ Part of this modus operandi is to insulate the Court from public and political interference.²⁰ But, in recent times, secrecy bleeds into a lack of transparency, thereby undermining public confidence in the Court. The Court has never been clear about how the justices resolve their perceived or actual conflicts of interest. While the justices have recused themselves from cases occasionally,²¹ it is hard to determine the standard they use. For example, Justice Brown Jackson recused herself from the *Harvard* case because she had served on Harvard's Board of Overseers. In contrast, Justice Kagan did not recuse herself even though she once served as the law school's dean.²² The issue is not about who is correct but how the public can better

¹⁸ Charles Franklin, *New Marquette Law School Poll National Survey Finds Trump at 51%, Biden At 49% In Head-To-Head Matchup; Each Leads Primary Challenger By More Than 50 Points*, MARQUETT UNIVERSITY LAW SCHOOL POLL (Feb. 21, 2024), <https://law.marquette.edu/poll/category/poll-release/>.

¹⁹ See, e.g., Arthur Selwyn Miller & D.S. Sastri, *Secrecy and the Supreme Court: On the Need for Piercing the Red Velour Curtain*, 22 BUFF. L. REV. 799 (1973) (arguing against the secrecy that envelopes the work of the Supreme Court); Peter Fish, *Secrecy and The Supreme Court: Judicial Indiscretion and Reconstruction Politics*, 8 WM. & MARY L. REV. 225 (1967).

²⁰ *Id.*

²¹ See John Crawley & Kimberly Strawbridge Robinson, *Alito, Kagan Top Justices in Supreme Court Recusal 'Black Box'*, BLOOMBERG LAW (Feb. 13, 2023) <https://news.bloomberglaw.com/us-law-week/alito-kagan-top-justices-in-supreme-court-recusal-black-box-1> (reporting that the recusal rate since 2018 was roughly 3% and in almost every instance, the justices do not give a reason for their recusal).

²² Diane Adame, *Ketanji Brown Jackson's Recusal In Harvard Admissions Case Sparks Lingering Legal Debate*, GBH NEWS (Oct. 31, 2022), <https://www.wgbh.org/news/education-news/2022-10-31/ketanji-brown-jacksons-recusal-in-harvard-admissions-case-sparks-lingering-legal-debate>.

understand the standards dictating their conduct. A more shocking example involves justices who hear cases when the funding for the litigation comes from individuals who are personally connected to them.²³ The prominent rise of the shadow docket is also a transparency issue.²⁴ Public confidence decreases when the Court does not justify its decisions.²⁵ An order without explanation—even in procedural matters and emergency cases—does not assure the public that the Court engaged in balanced and thoughtful deliberation, especially on controversial issues. Stephen Vladeck shows convincingly that even so-called procedural decisions have a substantive impact²⁶—and for that reason, the Court must provide a full opinion to the public so that we can determine how they arrived at their ruling in these emergency cases.

2. Lack of Accountability

Until recently, the Court operated without any binding code of ethics. The absence of a binding code of ethics resulted in little to no accountability for the justices on the U.S. Supreme Court. Impeachment is the only mechanism to hold Supreme Court justices accountable for misdeeds. Congress has impeached a U.S. Supreme Court justice only once, and given the current political climate, it is unlikely to be successful today. A growing concern is that the Supreme Court is accountable to no one. Polling by Hart Research shows that most Americans want to see Congressional action to hold the Court to higher ethical standards.²⁷

²³ E.g., Alison Durkee, *Clarence Thomas: Here Are All The Ethics Scandals Involving The Supreme Court Justice Amid Unpaid RV Loan Revelations*, FORBES (Oct. 6, 2023), <https://www.forbes.com/sites/alisondurkee/2023/09/22/clarence-thomas-here-are-all-the-ethics-scandals-involving-the-supreme-court-justice-amid-koch-network-revelations/?sh=39f455195df7>.

²⁴ STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* (2023); Harry Black & Alicia Bannon, *The Supreme Court 'Shadow Docket': The conservative justices are increasingly using a secretive process to issue consequential decisions*, BRENNAN CTR. FOR JUSTICE (July 19, 2022), <https://www.brennancenter.org/our-work/research-reports/supreme-court-shadow-docket>.

²⁵ *Id.*

²⁶ See generally VLADECK, *supra* note 24.

²⁷ *Survey Reveals Voters Want Higher SCOTUS Ethical Standards*, HART RESEARCH (Aug. 15, 2023), <https://affactioncampaign.org/wp-content/uploads/2023/08/SCOTUS-Ethics-Memo.pdf> (showing 78% of Americans consider it highly important for Congress to act in raising the ethical standards of the Court).

II. A THREE-PART PROPOSAL TO REGAIN PUBLIC TRUST & RE-LEGITIMIZE THE COURT

A. Three Practical Steps

I now offer three practical steps that can help to change the negative image of the Court before discussing the recently adopted judicial code of ethics. My recommendations are not necessarily novel. Various state and federal courts and international tribunals have implemented a combination of these suggestions. However, implementing these recommendations at SCOTUS requires courage and commitment from the justices. Only bold, meaningful ideas can rehabilitate the Court's legitimacy and regain the public's trust.

1. *Public Disclosure of Conflict Checks*

The 2023 Code of Conduct for Justices of the Supreme Court of the United States lists the conditions under which a justice should be disqualified.²⁸ In practice, the justices seldom give a reason for their recusal.²⁹ However, the justices should publicly disclose the reason for their disqualification from hearing a case if they want to restore public trust and confidence in the Court. This information will give the public insight into the nature of a justice's personal, financial, and political ties. The disclosure will allow the public to determine if disqualification is only required in particular cases or if a justice is too personally entangled in a matter that would make their continued service on the Court untenable. For example, recusal may not be sufficient for justices who previously served in the Executive branch if they have already committed to certain political positions. Similarly, recusal in specific cases may be inadequate where a justice has close financial and personal ties to advocacy groups that litigate frequently before the Supreme Court.

²⁸ CODE OF CONDUCT FOR JUSTICES OF THE SUPREME COURT OF THE UNITED STATES (2023).

²⁹ See Crawley & Robinson, *supra* note 21 (reporting justices gave no explanation for their recusal in the more than 750 instances where they recused themselves).

Another aspect of conflict screening is for justices to state on the record that they do not have a conflict of interest in a particular matter. This would require the justices to sign conflict certification statements and post them to the Court’s website or attach them as an addendum to each opinion.³⁰ While the Code presumes the impartiality of a justice,³¹ publicly disclosing the result of the conflict check can further assure the public that the justices are operating with utmost transparency. Some might argue that public disclosures of conflicts and conflict checks police the Court unnecessarily. However, this level of detailed disclosure is necessary given the current negative perception of the Court. Several state courts have already implemented this practice of providing public notice of conflicts of interest.³² Therefore, it is difficult to buy the argument that a similar approach would be too burdensome on the justices and court staff.

2. Public Sessions to Explain Controversial Rulings

Another way to regain the public trust is for the Justices to become more accessible and accountable to the public. A reasonable way to achieve this is for the Chief Justice or the justice who authors the majority opinion to explain in understandable terms how and why the majority ruled in the way it did. The decisions are publicly available for people to read them. The average citizen is highly unlikely to read those opinions and more likely to rely on cable news analysts and social media personalities to interpret the decisions. The upshot of relying on other people to explain the decisions is that many Americans end up hearing partisan explanations or complete misinformation.

³⁰ See, e.g., Guide to Judiciary Policy, vol. 2, § 410.40 Model Conflict Review Certification Statement, <https://www.uscourts.gov/sites/default/files/guide-vol02c-ch04.pdf>.

³¹ CODE OF CONDUCT FOR JUSTICES OF THE SUPREME COURT OF THE UNITED STATES (2023), Canon 1.B(1).

³² See, e.g., *Utah State Courts, Conflict of Interest Notices*, <https://www.utcourts.gov/en/court-records-publications/publications/conflict-of-interest-notices.html#accordion-03641485d0-item-e1d151c785>.

However, if the public hears an explanation from the justices—live-streamed on television and social media—then that can reduce the partisan interpretations. It would create a greater sense of transparency and accountability in the public’s eye. This is particularly important in cases where the public interest is very high, and the Court’s decision is contrary to what the majority of the public expected. Public explanation by the justices may not necessarily abate public anger, but it would signal transparency. The International Court of Justice is a good example of a tribunal that deliberates in camera and then announces its judgment live in a public setting.³³ The approach SCOTUS should adopt would go one step further. In this case, the public (including journalists) would be allowed to ask the justices questions about their decision-making process and how they weighed the issues in the case. The question-and-answer session (or press conference) is not to relitigate anything but to help the public understand. People are more likely to have trust and confidence in the Supreme Court if they believe the justices feel accountable to them. Publicly explaining decisions is also an important part of the Court’s duty to educate the public about its role and operation.

3. An Expanded, Term-limited Rotating Panel of Justices

Polling shows that most Americans want to see term limits for the Supreme Court Justices.³⁴ Most interpreters agree that Article III gives federal judges life tenure to assure federal Courts’ independence.³⁵ The institution of term limits may require a constitutional amendment and, at the very least, an act of Congress. Reasonable term limits would help create diversity on the

³³ Philippe Couvreur, *Upholding the Rule of Law at the International Level: The Role of the International Court of Justice*, U.N. CHRONICLE (Dec. 2012), <https://www.un.org/en/chronicle/article/upholding-rule-law-international-level-role-international-court-justice>.

³⁴ Jessica Gresko & Emily Swanson, *AP-NORC Poll: 2 in 3 in US Favor Term Limits For Justices*, AP (July 25, 2022), <https://apnews.com/article/abortion-ketANJI-brown-jackson-us-supreme-court-government-and-politics-only-on-ap-8adc9a08c9e8001c8ef0455906542a60>.

³⁵ See Shaheen Nouri, *Life Tenure and the Dynamic of Judicial Independence in the Federal System*, 5 STETSON J. ADVOC. & L. 155 (2018).

Court. It would also help to ensure that justices who are out of lockstep with the changing public sentiments on important issues do not become stumbling blocks to process because their term would eventually end. Term limits could also allow more presidents to nominate justices. In addition to term limits, Congress should expand the Court and institute a rotational model, where a panel of Justices hear cases every two years. The panel selection would be random. This approach—currently used by some international tribunals—would minimize public perception of partisanship because of a wider pool of potential Justices and the random selection of Justices to serve on the panels.

B. Is the New Code of Ethics A Gamechanger?

Undoubtedly, the recently announced nonbinding Code of Ethics for SCOTUS is a positive step in restoring public trust and confidence in the Court. Even if we do not see immediate changes in the public perception of the Court, the Code of Ethics is necessary to start fostering accountability among the nine justices. Some observers believe the Code is doomed to failure because it relies on the justices policing themselves.³⁶ I understand the skepticism based on the numerous perceived and actual financial and political conflicts of interest we have seen from the justices over the past few years. However, the Code can make a difference if each justice takes it seriously. The consequences of failing to abide by ethical standards are dire—and the justices know it. Data shows that three in four voters wanted the Court to adopt a Code of Ethics, so at the very least, public confidence should improve over time.³⁷

³⁶ Michael Waldman, *New Supreme Court Ethics Code Is Designed To: The Justices Still Want To Police Themselves*, BRENAN CTR. FOR JUSTICE (Nov. 14, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/new-supreme-court-ethics-code-designed-fail>.

³⁷ Steven Shepherd, *Faith in The Supreme Court Is Down. Voters Now Say They Want Changes*, POLITICO (Sept. 30, 2023), <https://www.politico.com/news/2023/09/30/supreme-court-ethics-poll-00119236>.